ORAL ARGUMENT — 3/31/98
97-1005
LUMBERMEN'S MUTUAL V. MANASCO

STROH: We are appealing a decision from the 9th CA in Beaumont, sustaining Respondent Manasco's second point of error allowing the issues of impairment rating and maximum medical improvement to be reopened in all cases brought in a district court.

The 9th CA based its opinion on two separate provisions of the Texas Labor Code: Section 410.301 and 410.307 If this court looks at those provisions it will find that there is no support for the 9th CA decision.

Section 410.169 of the Texas Labor Code is truly determinative of this case. It provides, that a contested case hearing officer's decision becomes final in the absence of a timely appeal. Here there was no appeal from the contested case hearing officer's initial determination of a 7% impairment rating for Respondent Manasco, and that he had reached maximum medical improvement. Instead, Respondent Manasco requested a second set of administrative hearings, a BRC, a contested case hearing and then appealed that to the appeal's panel, and it is that first appeal's panel decision from the second contested case hearing that he appealed to district court.

ABBOTT: Let's assume that the first one had been appealed to the commission. And then from there went on to the TC and was resolved one way or the other. And then six months after that resolution it came about that back surgery was needed. I am changing the facts from your case. Six months later back surgery was needed as a result of what the original injury caused. And as a consequence of that back surgery, the impairment rating changed. It seems that under the argument that you are making and under the interpretation you want us to put onto 410.169 that would mean that even under those altered facts, the new factual scenario that I gave you, that the worker would not be able to obtain a new IR.

STROH: First of all, 410.169 would not apply in that situation because it makes a decision of the contested case hearing officer final in the absence of a timely appeal. Under the facts that you have given me there would have been a timely appeal. But assuming that the hypothetical that you have given me happened, that's true. He would not be entitled to reopen the issues of impairment rating and maximum medical improvement. Under 410.307 or 410.301, on which the 9th CA relied, they simply don't provide authority for reopening decisions at some later date.

ABBOTT: Under the structure that we have under the new worker's comp act what is a worker to do who has maybe just some faint thought that maybe things will be getting worse down the road. What would be your recommendation for them to do, how to proceed under the Act?

STROH: I personally don't have a recommendation. I think where you are going is following up on respondent Manasco's point that the interpretation that petitioner places on the act would encourage all claimants and all carriers to automatically appeal a decision on impairment rating for fear that it would get worse or better and thus preserve their right to present change of condition evidence before the DC. It is just as likely that the claimant's condition will change to the

detriment of the appealing party as it is that it will get worse for the claimant or better for the carrier. So I wouldn't necessarily advise them to automatically appeal every decision. But if they are concerned that their condition is going to get worse they can certainly preserve their appellate remedy and their right to present evidence of a substantial change of condition by appealing the contested case hearing officer's decision to an appeal's panel, and then by bringing that decision to the DC for judicial review.

SPECTOR: But I thought you said that wouldn't have made any difference?

STROH: No, I didn't say that. It wouldn't make any difference in our case because respondent Manasco never appealed from the first contested case hearing decision. I think what I was saying is responding to the question is that it's just as likely that a claimant's condition could change for the better if he automatically appealed it. He could get an improvement and get a lesser impairment rating and the carrier would be entitled to introduce evidence of that change in condition before the DC.

SPECTOR: You're saying there is no remedy for a worker who is injured and has an impairment rating and at a later time that injury causes further impairment, he's just out of luck?

STROH: Under the Act as it's written, yes.

SPECTOR: How about the change of condition section?

STROH: What that section does, is it eliminates a rule of evidence limiting that which may be offered on the issue of impairment before a DC. Section 410.306 says, "Evidence as to the extent of a claimant's impairment is limited to the evidence it produced before the commission." 410.307 says, "That's true unless you have a substantial change of condition and you meet X, Y, Z criteria."

SPECTOR: Within the time of the commission hearing and the appeal?

STROH: That's right.

SPECTOR: But if it's beyond that time there is no remedy?

STROH: As long as it's during the dispute resolution process, then that's correct. If it falls at some time after the dispute resolution process, he would not be entitled to present this evidence of substantial change of condition.

SPECTOR: What's troubling I think is (I believe this is a back injury) treatment is continuing and at some point surgery is recommended to improve the condition and results in further impairment. And your view of the statute is, that's res judicata and that's it?

STROH: First of all, it's not necessarily my view of the statute. It's the way the Act is written. It's the way the statute is written. But I would point out to the court that Mr. Manasco's

treating physician certified him at maximum medical improvement. Without that this whole dispute resolution process would never have begun. So his own treating physician found that he was at maximum medical improvement meaning that he would not substantially benefit from surgery, etc. So, I think it would be a little inaccurate to suggest that somehow he was being actively evaluated for surgery by his treating physician, and yet, his physician went on to say that he wouldn't benefit from surgery.

ABBOTT: So absent that certification of MMI by his own physician, they would not have even gone to the benefit review conference?

STROH: That's right.

ABBOTT: And he wouldn't be tied into whatever decision would be made at the contested case hearing or the commission?

STROH: That's correct.

ENOCH: If this were just a car wreck and somebody claimed they were injured they would have two years within which the accident occurred to file their lawsuit. And routinely you get complaints of, "You're pushing me to trial too soon because I really don't know the extent of my injuries." But ultimately you get to a judgment and the jury assesses the injury and what it's worth and has final judgment. And the courts wouldn't permit someone after that period of time and after the appeal to come back and relitigate a substantially changed condition and try and say, "No. My damages were different." And then you have a new lawsuit over that. But unlike that concern in the worker's comp concern, the claimant who has suffered the injury is not put to that type of final decision on what their injury is until their medical evidence says that they've reached their maximum medical improvement. So there is already a threshold determination that their injury has gone as far as it will go?

STROH: That's exactly right.

ENOCH: And once they reach that, then what's being resolved is, what is that injury and you get a judgment on it?

STROH: That's exactly right.

ENOCH: And the point here that is being made is at some point later on down the line Manasco decides my injury is worse than I thought it was when I went to judgment here, and now I want to relitigate the extent of that injury. And if he had been on an active appeal at the time the statute actually would permit him to do something that a car wreck victim wouldn't be able to do on appeal, which is introduce new evidence. But even if the appellate process is over with, then even the worker's comp. injured party is stopped from relitigating the injury?

STROH: That's correct. And I don't want the court to miss the import of section 410.307. What it does is allows the DC to give consideration to evidence that would have come

forward after the time the contested case hearing officer's decision is made. In other words, it prevents the DC from in essence turning a blind eye to evidence that may be out there on the issue of impairment rating. It does not allow a claimant to reopen that issue of impairment rating and maximum medical improvement either in the DC or at the commission by requesting a second set of administrative hearings after a decision on those issues has already become final.

PHILLIPS: Help me with the structure of how the Act works. What kind of pressures are there on a claimant to get an MMI? What benefits is the claimant getting before that stage? Did that make his benefits go up substantially?

STROH: There is no pressure on a claimant to get a certification of maximum medical improvement. Up until the time that he does get a certification of MMI, I believe that he is entitled to get what is called "temporary income benefits." Once he is certified at MMI and receives an impairment rating, he is given impairment income benefits depending on the impairment rating assigned to him.

HECHT: Do they go back to the date of injury?

STROH: No. They would start from the time that he was certified at MMI, and would continue based on the time period during which they would continue based on rating. It's all based on an average weekly wage, and the amount per se does not change. It's the duration that changes. And then for example, if he would be certified at 15% or greater impairment rating, he would be entitled to what are called supplemental income benefits.

OWEN: How long do the temporary benefits last?

STROH: I believe they last for a maximum of 104 weeks, because a claimant is statutorily certified at maximum medical improvement after the expiration of 104 weeks.

OWEN: Is there any mechanism for the carrier to require the worker to be certified at MMI? If his own physician hadn't, could the insurance company have...

STROH: Sure. There is not a mechanism by which they could have him certified at MMI, but there is a mechanism by which the carrier can have him seen by a doctor and inquire as to whether he has reached MMI by requesting what is known as a "medical examination order."

OWEN: And that would precipitate a contested case hearing?

STROH: It could. If the physician certified him at MMI, and assigned an impairment rating with which the claimant disagreed, he would then ask the commission to appoint a designated doctor or perhaps get some evidence from his treating physician as to whether that MMI and what his proper impairment rating is.

ABBOTT: And the thing that triggers the MMI would be his own treating physician? No other doctor can trigger the MMI?

STROH: That's not true. In this case his treating physician triggered the MMI, but that's not always the case.

ABBOTT: How else can it be triggered?

STROH: It can be triggered by requesting a medical examination by the insurance company if that doctor certifies the claimant at MMI. But the claimant has the safety valve of having the commission designate a neutral doctor.

ABBOTT: You said the insurance company can request a medical examination if that doctor certifies him as MMI. Which doctor is that doctor?

STROH: The doctor that the carrier request pursuant to the medical examination order. Also determinative of this case is §410.251, which requires exhaustion of administrative remedies.

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RESPONDENT

JACOBELLIS: The questions so far have really been on point. The insurance company is under a lot of pressure financially to request findings that lead to MMI, and the worker is not. The worker's benefits are higher when he is not at MMI. He is entitled to 105 weeks of benefits called employee income benefitrs. Those are slightly higher than the impairment income benefits. And in this case they were $30 to $40 a week higher. The worker has no incentive to be at MMI unless he wants to settle his case under some very limited provisions which allow for settlement which never occur. But generally the worker would be inclined to stay on temporary benefits as long as he is off work, otherwise he has no means of support.

The pressure is on the insurance company because once you have some sort of MMI finding that stops the temporary income benefits.

HANKINSON: In this instance, Mr. Manasco's physician certified him far short of the 105 weeks?

JACOBELLIS: Correct.

HANKINSON: Because he was injured in January 1992 and he was certified by Dr. Davis in October 1992?

JACOBELLIS: Correct, but at a 30% rating. And the importance is, Dr. Davis felt that surgery or no surgery this fellow had a very severe injury and it will be 30%. Mr. Manasco was happy with that. As long as it was 30% that would entitle him to enough benefits for what he felt was the nature of his injury.

OWEN: Is that more or less than the temporary benefits with a 30% impairment?

JACOBELLIS: His temporary benefits are 105 weeks at the maximum rate, the 30% would be 90 weeks of benefits at the lower impairment income benefit rates, but one would follow the other. The importance of the 30% is that it would allow Mr. Manasco to continually apply for supplemental benefits at the expiration of the 90 weeks. That's why Mr. Manasco was happy with the 30%.

PHILLIPS: You have to get over 15%?

JACOBELLIS: Correct, because it was over 15. What the statute allows and what the insurance companies frequently do, is they can have their own doctor at any time perform an examination and say: "This gentlemen, is at MMI. They can dispute the treating doctor's higher rating as they did in this case and simply assess a rate." That's what happened here. They assessed a 6% rating. The statute says, "If he's at MMI from the treating doctor they can assess a number." And they assessed 6%.

BAKER: Who is they?

JACOBELLIS: They, is the insurance company.

BAKER: Just arbitrarily?

JACOBELLIS: They are not supposed to be arbitrary. They are supposed to use some sort of recent judgment.

BAKER: Well I got the impression from the record that it was another doctor who examined Mr. Manasco, and reached the conclusion of the 7% impairment?

JACOBELLIS: That's the designated doctor. Before that occurred, the carrier assessed a 6%. If the carrier had not assessed a 6%, this never would be in litigation. Mr. Manasco would have just stayed with the 30% and that would have been paid out and the case would have been over. Because the carrier assessed a 6%, Mr. Manasco had to either agree to stop getting benefits at the expiration of 18 weeks, or request a designated doctor, or in this case, the dispute and the assessment of 6% automatically triggers the designated doctor. So, it's sort of on auto pilot. Once somebody complains about a rating ________________________. And that's the important fact in this case, is the designated doctor was not really free to say not MMI. The first time he saw Mr. Manasco he said, "No. This fella is not at MMI, he needs to see somebody - I recommend Dr. Holmes." The record shows that his report was amended on July 30, where he said, "After repeated request for MMI, and it looks like you're not going to do the surgery, you're not going to have __________________, it's going to be 7%." That's the problem. So, Mr. Manasco has the dilemma now, "Do I appeal this when everyone at the commission tells me that I have no medical evidence, or do I sit back and take it and hope that the substantial change of condition will allow me to bring it up when it becomes relevant." And that's the dilemma in this case.

OWEN: Why didn't he get the surgery sooner?

JACOBELLIS: Because the insurance company and the record reflect would not approve the referral to Dr. Heilman. And it takes that much time to go from your treating doctor, from this case was Dr. Davis, to another doctor who is not your "treating doctor" under the statute. So it took time to get him to Dr. Heilman and the insurance company would pay for.

PHILLIPS: The designated doctor recommended a referral to Dr. Heilman, and the insurance company would not approve it?

JACOBELLIS: Not immediately. It took some time but it was done.

OWEN: Under your view of the statute how long do you have if you're a worker to come back into DC and say, "There's been a substantial change in condition?"

JACOBELLIS: I don't have any particular time. I would guess reasonable time.

OWEN: Could it be two years, three years, five years?

JACOBELLIS: After a certain period of time it's in ________ because all of the benefits would have expired. It's a very limited amount of benefits you get.

ABBOTT: What is the total length of time?

JACOBELLIS: 401 weeks that you can get benefits - 7½ years. But if you're appealing a finding of impairment rating that is based on the percentage times the number of weeks. So for example, if the dispute is between 10 and 30%, it's a question of 30 weeks verses 90 weeks. And three years later it's not going to do you a whole lot of good to come back and fight for the limited period of benefits, which you could never come back 10 years later and try to get 10 years worth of benefits. The most you could do, is 10 years in the future go back and get your additional weeks or 30 weeks, whatever weeks you are fighting for.

ABBOTT: Under the process, the way it is working now, do insurance companies ever challenge the IR ratings saying that a worker's situation has improved, the condition has changed in a way it has improved, and the insurance company wants to come back in and challenge the IR rating?

JACOBELLIS: No, and the reason they practically don't do that is because by then the benefits have been paid and they have no recourse. So there is no financial incentive for them to challenge it. They cannot get the benefits back accept through the second injury fund, which I understand have no assets, and the benefits have to be paid when they're ordered even during an appeal.

ENOCH: It seems to me, if I understand the record, you have a dispute between the doctors as to the severity of this injury, the impairment or the improvement rating, and the commission decides against Mr. Manasco on that, and that doesn't get appealed and it becomes final. It turns out that one doctor was more accurate than the other doctor. Now if this was a car accident

where there is a dispute in the medical testimony about damages, there would be no question that whether it was on appeal or not on appeal the parties would not be permitted to relitigate the damages issue in that case -- it's final. What is it about this statute that indicates to you that unlike in any other claim for injury if it's a worker covered under comp. they would be able to do something that no other injured person would be able to do, which is, at some point in the future relitigate an issue of damages under a statute that actually permits them to relitigate if it's actively on appeal, which other people would not be able to do?

JACOBELLIS: By using your analogy what we are arguing in this case is that at the trial of this case, which would be like a trial of the auto case, he would get to present evidence of his surgery regardless of what happened at the pretrial hearing. Where in your analogy at a pretrial hearing in a car wreck case two years before the trial the judge says, "Well as a pretrial matter I am closing all discovery, you can't present any further evidence in this case; if you want to appeal my decision about closing the discovery do it now or you are barred." And the plaintiff in the car wreck case would not challenge the pretrial ruling. And then comes time for the trial, the question could be, Could you bring that evidence in? And the way I read 307, the one case time you get to get to the jury in the DC it should be permissible. You should be able to bring in that evidence regardless of the pretrial or prehearing matters that went on before the commission.

HANKINSON: We have the first set of hearings that were occurred before the BRC and then it went no further?

JACOBELLIS: No. There was a CCH.

HANKINSON: And at that point in time, we have a decision that according to statute went final?

JACOBELLIS: Correct.

HANKINSON: Then he comes back in a second time. If I understand correctly then, the linchpin of your argument is that the court would have to apply 401.307 to the pretrial phase as you just called it, and let that be the mechanism for reopening the issue before the commission?

JACOBELLIS: Correct.

HANKINSON: What is your argument that makes that particular provision of the statute applicable to proceedings before the commission as opposed to being limited to a mechanism that just applies to the judicial review phase?

JACOBELLIS: I've lost that argument below, and I didn't preserve that for appeal. So I am not making that argument here.

HANKINSON: If we're not going to make that argument, then how does a claimant reopen before the commission absent the use of 401.307?

JACOBELLIS: He doesn't. He has to do it the way we did it here, which is bring a proceeding challenging the substantial change, require an appeal's panel decision saying, "You can't reopen it," and then he's in DC...

HANKINSON: Where in the statute does it say that a claimant can reopen claiming substantial change of condition?

JACOBELLIS: It doesn't. It says that a claimant can bring any issue to the benefit review conference, and when he's exhausted his remedies he can bring to the DC where he may.

HANKINSON: Then how, if that's the circumstance, if you are just relying on the provisions that talk about him bringing up an issue, then how does he avoid the implication and effect of 410.169, which is the finality provision that says, "Once you've completed the process, the decision on the issues is final?"

JACOBELLIS: It's inconsistent with 307, and that's the only way I can address that.

HANKINSON: But 307 only applies to judicial review.

JACOBELLIS: Correct. But why would the legislature say, "That in judicial review you can bring up these matters," if they didn't mean for that to be considered by the trier of fact.

HANKINSON: Well it seems to me that there is a big difference between at the point in time it would be brought up as part of the judicial review or a substantial change evidence could be considered by the court, at that point in time the decision has not become final, isn't that the distinction?

JACOBELLIS: No, because 301 is the key statute. The 301 statute says, "Proceedings regarding the amount of benefits are governed by this subsection." And that's where 307 is located.

HANKINSON: And it says judicial review of a final decision of a commission's appeals panel regarding so on and so forth shall be conducted. If in fact the earlier administrative part of the proceeding has gone final because no appeal has been pursued, then how do you find a mechanism in the statute that lets you go back and relitigate issues in the administrative phase? I can't find any authority in the statute for that.

JACOBELLIS: There's none in the statute that allow it. There's none in the statute that prohibit bringing a new claim or a new set of dispute resolution proceedings challenging the impairment rating so that you can get to the judicial review process. It's just a conflict between 169, which says "finality," and 301 and 307, which say that you can bring this new evidence in.

HANKINSON: But if 301 and 307 are part of subchapter G, which concerns judicial review, and the judicial review is tagged onto the administrative process, correct?

JACOBELLIS: Correct.

HANKINSON: Then why is there an inconsistency allowing the administrative proceeding to go final if the claimant chooses not to appeal? What's the inconsistency?

JACOBELLIS: Because you have a final decision of an earlier appeal's panel of the case hearing officer being reviewed by a court that is allowed to hear new evidence. That's the inconsistency.

HANKINSON: But what you have though wouldn't it require a continuation of the process from the administrative review to the judicial review in order to invoke the substantial change of condition rule in the judicial review section of the statute?

JACOBELLIS: I don't think it does and the statute doesn't say that it does.

HANKINSON: What about the finality provision?

JACOBELLIS: The finality provision is inconsistent with it, but why would the legislature put 307 in for all cases if it didn't mean that?

ABBOTT: But it doesn't say that it's for all cases.

JACOBELLIS: It doesn't say that it's not.

GONZALEZ: It says "judicial review."

JACOBELLIS: Yeah. It says, "All cases where compensability or the amount or the entitlement to impaired benefits is an issue shall be conducted under this section." And then 307 says, "that substantial change in condition you can bring new evidence."

HANKINSON: Why doesn't a party lose the right to judicial review if they let the administrative end of the procedure go final and choose not to pursue at that point? Why isn't the right to judicial review at that point in time gone?

JACOBELLIS: Because the legislature enacted 301 and 307 permitting it.

HANKINSON: In the event of a timely proceeding, correct?

JACOBELLIS: It doesn't say that. All it says is that if you're appealing an appeal's panel decision, which Mr. Manasco did, on the issue of impairment benefits, then you have a right to bring in this evidence of substantial change in condition. I agree that it's inconsistency in the statute. Something I'm sure that no one thought of when they wrote it. The way the statute is written it expressly permits DCs to entertain this evidence. Now your argument may be, "Well they can entertain it but they can't do anything because it's final." Then the question is, "why would they put it in the statute if the courts couldn't act on it?"

ABBOTT: Because they can act on it in the course of regular IR appeal all the way up

through the system, and that's the purpose of having it in here. And of course had the worker in this case appealed the CCH on up to the commission and then on to the DC, the DC hearing would have been taking place after the surgery in this particular instance, and then 307 could have been utilized to demonstrate a change in condition. That obviously is one clear application of 307.

JACOBELLIS: Yes. And I believe that's what the legislature was thinking when they wrote it. I just think they didn't consider other situations like this. And the way they've worded the statute leaves it open to raise the issue in an appeal of another type of appeal's panel decision. And the bottom line is, the only way under the state as written by the legislature as Justice Abbott just construed it, is 1) if you make an improper appeal; or 2) if there is some other mistake. And it just makes no sense to only let a change of condition become relevant if the commission has somehow made another mistake or if the claimant improperly appeals it.

HANKINSON: I don't understand that argument. Would you explain that again.

JACOBELLIS: If the commissioner and the petitioner are right, the only way you can get substantial change in condition is if you've got an appeal. And the only way you can appeal it is if there is a mistake or if there is no mistake if you improperly appeal it.

PHILLIPS: What do you mean by mistake?

JACOBELLIS: Somebody made an error in the commission proceedings below.

ABBOTT: You're talking about the statutory grounds for appeal from the commission?

JACOBELLIS: Right.

PHILLIPS: But you can complain about the rating. The mistake encompasses the amount of disability that you're ________.

JACOBELLIS: Under some circumstances that may be, but some circumstances may not present that.

PHILLIPS: Are you telling us that your client had no grounds for an appeal? I thought you said he just didn't have the medical evidence in his opinion based on what he was told?

JACOBELLIS: Yes, he could have appealed it. He could have said, "I'm going to appeal it based on Dr. Davis' finding of 30%, and that should be applied as opposed to the designated doctor of 7%." He could have appealed it. But according to the commission rules, the designated doctor has presumptive weight and he was told he had no grounds to appeal it. So he could have appealed it without any evidence at all just saying, "Well I believe that this was a mistake."

PHILLIPS: And how fast is that appeal or how slow?

JACOBELLIS: It's 100 days. He's got 100 days, and it's got to be in DC or it's barred. He's

got to act on it very quickly.

SPECTOR: In this case though whether he had appealed or not, if his condition had not changed at that point, there would have been the same result, is that correct?

JACOBELLIS: Correct. If he had appealed and his condition had not changed, he would have had a jury trial on which impairment rating was correct.

SPECTOR: Between the 7 and the 30?

JACOBELLIS: Correct.

SPECTOR: What concerns me is the later surgery. Or it could be you have an impairment rating based on your taking a certain medicine that after taking it for one year you become drowsy, and so you are taken off the medicine and you're in worse condition than at the time of the impairment rating. It seems to me that what the insurance company is arguing is that there is nothing in the Act that allows further benefits for a change of condition that comes either without an appeal or at some time after the appeal has been decided.

JACOBELLIS: That is what they are arguing. And I wouldn't use the word "benefits." It's right to dispute resolution. Benefits follow the dispute resolution. And the insurance company's argument is, once an insurance company has you nailed down to an MMI date and the percentage rating, either you appeal it or you live with it.

SPECTOR: It just concerns me that at that point there may not be any medical evidence that your condition is going to worsen six months out.

JACOBELLIS: That's correct, and that's the dilemma, is because by definition substantial change in condition is evidence that you could not have discovered. So by definition, he didn't have a right to appeal it.

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REBUTTAL

STROH: If you pay close attention to respondent Manasco's argument, you will see what a stretch it is he tries to make of §410.307.

PHILLIPS: Isn't he arguing not the literal language of this statute, but just the overall scheme, which is kind of what courts are for, is to try to define the overall scheme?

STROH: I think you are right. I think he is not arguing the literal language of the statute and he is arguing more of the overall scheme of caring for an injured worker, etc. But his argument is that you cannot reopen the issues before the commission. He has conceded here in oral argument that you can't reopen impairment rating and maximum medical improvement before the commission. So what you have is a claimant has a decision on impairment rating, a maximum medical

improvement that becomes final. He requests a second set of administrative hearings. Because those issues cannot be reopened before the administrative board, the benefit review officer says, "I'm sorry." The contested case hearing officer says, "I'm sorry." The appeal's panel says, "I'm sorry, you're out of luck." But then, because this is technically an appeal from an appeal's panel decision, he becomes entitled to reopen these issues in DC under 410.307. That's an absurd result. And it's not one intended by the legislature and it's not one encompassed by 410.307.

ENOCH: How do you get to the conclusion that you want to reach? Ordinarily if this was not a worker's comp. issue, this was just strictly an appellate review of what happened in the administrative hearing, the appellate court would be limited to just those issues presented to the administrative body. And the issue presented to the administrative body would be an issue, "Can we reopen based on substantially changed condition?" So it comes up to the appellate court and the appellate court would look at that issue and say, "Yes or no, you can either reopen it or you can't reopen it." But this statute says if that comes to you even on that question can you reopen or not reopen based on a substantial change of condition. The appellate court in this instance is given the authority to reopen to hear substantial change condition. On what basis does the appellate court not exercise that authority? Is it based on a res judicata claim, although the appellate court is given the authority to reissue? Or is it based on some sort of lack of jurisdiction? This is simply an appellate review of what happens in the lower court hearing. Since they didn't have the authority to do that, the appellate can't reach that question. But here the statute gives the appellate court the authority to reach a question that the administrative body was not entitled to reach. How does the appellate court come and reach your conclusion that, we can't reach that question? It can't be because of the statute, the statute says you can. It must be something as a threshold that had to be considered in the first hearing. What is it? Is that a lack of jurisdiction? Is it a res judicata claim? What is it that the appellate court says is the reason they can't consider the change of condition?

STROH: By appellate court, do you mean the reviewing DC?

ENOCH: The reviewing DC that's sitting in a review of what happened in the administrative proceeding?

STROH: The DC cannot employ 410.307 to reopen issues of impairment rating and maximum medical improvement because they simply don't apply to a review of the question, "Can these issues be reopened?" 410.307 and the entirety of subchapter (g) is limited to issues on compensability income benefits and death benefits. Subchapter (f), which is the proceeding chapter, pertains to judicial review of all other issues. So (g) would apply to the initial appeal had there been one from the contested case hearing officer's decision to the appeal's panel to the DC. But it doesn't apply here where the issue is, can you reopen these issues? In that instance it's (f) that applies, which did not contain a section like 410.307.

I understand from the questions that are coming to the court that there is a concern for an injured worker, an injured worker who at some later point discovers that he has a change in his condition to his detriment, and is not entitled to reopen those issues. While there may be inequity, I think there is inequity inherent in any statutory scheme and inequities should not concern this court unless it equates with unconstitutionality, and this statute is constitutional