ORAL ARGUMENT – 98-1012
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KROGER V. KENG

AKERS: We seek reversal and remand of the CA and the TC because the jury was not permitted to consider the comparative responsibility of respondent Sonya Keng for the action which has brought us all here.

The primary issue in this case relates to whether or not an employee of an employer who has consciously avoided the prescripts of the worker's compensation statute is still nevertheless entitled to its benefits.

O'NEILL: If we were to adopt your interpretation what incentive would employers have to subscribe to the process(?)?

AKERS: The main incentive and the main reason why any employer seeks worker's comp. protection has nothing with all due respect to respondent's petition to this common law defendant's penalty as they describe it. It has everything to do with the fact that there is a limitation under liability. Employers who are worried that for whatever reason they are going to be exposed to "the Sky is a Limit" damage award tend to opt for worker's comp. benefits. And to emphasize my point of how and why the penalty as respondent calls it does not really affect folks like Kroger - the penalty of no contributory negligence - these common law defenses.

Kroger has a plan wherein they do pay folks...

O'NEILL: But if we were to adopt your interpretation, you agree that there would not be as much as an incentive for an employer to subscribe to the worker's comp system?

AKERS: There would be less incentive.

O'NEILL: And what indication do you have the legislature intended that when they passed the Comparative Responsibility statute? Do you think they intended to lessen that incentive?

AKERS: I believe that when the legislature passed the comparative responsibility statute it was their intent to be able to fairly allocate losses among all parties in negligence actions whenever negligence actions existed.

HANKINSON: But a nonsubscriber action underneath the worker's comp. statute is not really a pure negligence action is it? It is in fact a statutory cause of action.

AKERS: The statute refers to this cause of action, but I do not believe that any employee - that that is truly a statutory cause of action.

HANKINSON: Well it has in it specific statutory defenses that an employer may assert that is different than what the common law is. It's a specific set for this particular type of action. It specifically defines what the plaintiff must prove and if the respondent is correct it also precludes the employer from asserting certain defenses. Now underneath it all it may have the underpinnings of a negligence cause of action, but in fact, it is governed by a statute and has limitations and parameters set on how the claim will be pursued and defended doesn't it?

AKERS: The essence of the cause of action I don't believe so. The answer is no.

HANKINSON: So if an employee is hurt on the job and his employer is a nonsubscriber, and he sues, he just goes in and sues under a regular not negligence cause of action and is not subject to the requirements of 406.033?

AKERS: I can't think of a way where a person who would be claiming a cause of action as against his employer relating to an injury in the course and scope of his employment would relate to something other than negligence.

HANKINSON: I understand it relates to negligence. But what I'm saying is you cannot call it a pure negligence cause of action at common law when in fact by statute the legislature has determined that there are parameters to the defenses that may or may not be asserted and has codified it. Don't you agree then that it is not a pure common law action, but in fact, is governed by a statute?

AKERS: There are elements in the statute which obviously relate to it and those that - the only thing that has any significance is the intoxication defense.

HANKINSON: But it's there. I mean there are parameters. So we can't call this just a pure negligence cause of action under the common law?

AKERS: It functions as a pure negligence cause of action.

HANKINSON: So you disagree with me then?

AKERS: Yes.

ABBOTT: More specifically on that point, don't you agree that the cause of action springs from §406.034(d)?

AKERS: Rejection of the act?

ABBOTT: Yeah. And that's where it says the employee who rejects - an employee is automatically encompassed within the act unless the employee rejects the act. And in (d) it says an employee who rejects the act has the right to sue the employer. Doesn't that establish this as a statutory cause of action that relies upon underlying common law principles of negligence but still

is a statutory based cause of action?

AKERS: The rejection of the act's provision relates to circumstances where an employer is a subscriber but the employee has himself or herself consciously rejected the act. So under that scenario that is still something that is guided by the worker's comp. act.

BAKER: Well then would you agree with your opposing counsel's statement in their brief that you can't find support for your viewpoint under that section, because it applies to a subscriber rather than a nonsubscriber, which is what I think you just said? In other words, (d) doesn't support your argument that comparative negligence is a defense because this is a subscriber employee situation and yours is a nonsubscriber employee situation? Well you do agree that .034 what you just said was it's where the employer is a subscriber and the employee elects not to take benefits under the worker's comp. act, rejects it, and then files a common law negligence suit. And that's what (d) says has to happen in that kind of a situation. But your viewpoint is that if it's a nonsubscriber employer, which is Kroger, that the prohibition of the defenses under .033 doesn't take you out of having an opportunity to submit a comparative negligence question? And there is material difference between the two statutes. One involves a subscriber/employer and an employee, and your situation is a nonsubscriber/employee. So (d) doesn't give you any support or solace?

AKERS: I think (d) in the rejection section is relevant to any consideration that we have here. This is an entirely different scenario.

BAKER: But your brief says, "we find support in our viewpoint that comparative negligence should be submitted on our behalf in .034(d). But that's contrary to what you just argued.

AKERS: And the only significance to that is that the - in that scenario, which is clearly guided by the worker's comp. statute, the legislature has chosen to refer specifically to statutes as common law and statutes.

GONZALES: If we find that this is a statutory cause of action what is the result? How do you argue change or effective if that's our finding? Does it make a difference?

AKERS: I don't believe so. And the reason is because the statute does not proscribe the application of the comparative responsibility statute. It only proscribes the application of common law contributory negligence.

HANKINSON: How do you get - isn't a finding of contributory negligence by the jury or the fact finder, if it's a nonjury trial, isn't a finding of contributory negligence on the part of the plaintiff a predicate to being able to submit to the jury a comparative responsibility issue?

AKERS: The finding - what we have to do is to - in order for me to answer that question effectively, we have to understand the context of common law contributory negligence.

HANKINSON: If you are the defendant in a negligence action and you want to put the plaintiff's conduct at issue, you have to plead their negligence, which is commonly known as contributory negligence, isn't it?

AKERS: Yes.

HANKINSON: And you have to have finding on contributory negligence in order for the comparative responsibility question to go to the jury?

AKERS: Yes.

HANKINSON: So isn't a plausible reading of the statute that you are prohibited from putting that conduct at issue and getting a fact finding which would mean regardless of what the comparative responsibility statute says, you will never have the findings that would entitle you to the issue?

AKERS: I don't believe so.

HANKINSON: Why not?

AKERS: Because in context the genesis of that provision, the statute relates to common law contributory negligence, which was we all know once upon a time an absolute bar. That language has never changed. The legislature continued to engraft that same language in the new act. One of the things that they likewise included in the new act was the doctrine of assumption of risk. We know that the assumption of risk doctrine doesn't exist. They talk about something and specifically list assumption of risk knowing that it does not exist at law. Likewise, they listed contributory negligence in my judgment in the same breath.

HANKINSON: But they say that if it's not a defense that the employee was guilty of contributory negligence, isn't that what the finding would be in a current negligence in an action under current law in Texas that you would actually ask, you know, was the plaintiff negligent, and was that negligence the proximate cause of harm?

AKERS: No, because the character of the common law contributory negligence scheme is fundamentally different from the comparative responsibility.

HANKINSON: But this reads that it's not a defense if the employee was guilty of, which makes it read like the focus is on the conduct and putting the conduct of the employee at issue.

AKERS: I don't believe that you could read one without keeping it in context with the common law.

O'NEILL: Would you agree that at best the statutory language would be ambiguous? It clearly says contributory negligence. You are saying that means one thing. There's an argument that

that's a threshold for a submission of comparative responsibility. At best could you say the statutory language is ambiguous?

AKERS: Surely I would be silly not to admit that.

O'NEILL: If it's ambiguous then aren't we required to construe it in favor of the worker?

AKERS: I don't think so. There's a long list of cases prior to the new act which talk about construing things in favor of the injured employee.

O'NEILL: Are you saying that doesn't apply to the new act?

AKERS: I'm saying that it would be helpful for this court or some other court to tell us whether or not the new act requires that. In its policy making status, I don't think that this court needs to do that. The reason is because the new act carries with it such a tight bureaucratic system that interpreting the act to construe it favorably to the employee, I don't believe is any longer necessary. I don't have any authority for that.

O'NEILL: If it were necessary though if that carried over that would work against your position?

AKERS: And again, I don't believe so because what this court needs to do is to give plain meaning to its statutes.

O'NEILL: The term "contributory negligence" we're arguing about what the plain meaning that
is. You're trying to tie it to an old, old concept of contributory negligence. By the same token it's necessary for a comparative submission. So again at best it's ambiguous and that gets us right back into the circle doesn't it?

AKERS: Only to the extent and point that you have to ignore the comparative responsibility statute, which requires submission of comparative fault.

ENOCH: Is it possible that the jury could award a certain percentage to the plaintiff that would then mean that they would have a take nothing judgment - something less than 100%? Could the jury say 52% was the negligence of the plaintiff and would the plaintiff then not be able to have a judgment for any amount against the employer?

AKERS: The plaintiff under that scenario would be...

ENOCH: So that finding would be a bar to the plaintiff's recovery?

AKERS: Yes.

ENOCH: And if you define contributory negligence as the effect of the finding being a bar from recovery, then don't you even lose on your own interpretation of comparative? If you say contributory negligence simply means that the plaintiff is barred from recovery against a negligent employer, then the fact that a comparative negligence can lead to that result under your definition isn't that still potentially contributory negligence?

AKERS: That makes it a logical sense obviously. However, I don't believe that you can eliminate and forget about comparative responsibility and talk about it in the same breath as the bar of the common law negligence. Because they are two different species. And when there is no longer a common law negligence cause of action and there is no longer a common law negligence bar it has no more effect than does the legislature talking about consumption of the risk.

HANKINSON: Why would the legislature have included (1) and (2) if in fact they didn't exist under the law and there weren't available to anyone under any circumstances? What's the point? I mean aren't we supposed to give some meaning to those words?

AKERS: There is no meaning to assumption of the risk. There can be. And it's listed at the same place as contributory negligence. My assessment is that the only explanation is that, other than just not thinking about it, is that the legislature was worried that perhaps at some later point in time since they tend to change the way they do things relative to comparative responsibility every few years, that this would always be present. If there is any indication about that, the filing in the last legislature of the bill to eliminate comparative responsibility as a defense in worker's comp. ought to stand as some evidence to this court that the legislature is concerned about.

HANKINSON: Or perhaps the legislature has acknowledged that this is a statutory cause of action and despite what the law may be under the common law was making clear what defenses were and were not available in this statutory cause of action. Is that a plausible interpretation?

AKERS: Of the filing of the bill?

HANKINSON: No, of this particular provision that would make these provisions necessary?

AKERS: Not to me. I don't believe so.

ABBOTT: We've been focusing on what is not a defense in 406.033. The legislature also made clear specifically what is a defense in that same section. And it listed two specific things under 406.033(c), that the act of the employee intended to bring about the injury; or that while the employee was in a state of intoxication. And it didn't say including those defenses. It made it seem like it was limited to exclusively those two defenses. What is your argument that that is not a strict complete limitation of what the employer's defenses are?

AKERS: We know that if the employee is a sole cause of his own injury, then that is a bar as well. And that wasn't listed either. So I don't think that that's necessarily an exclusive list.

ABBOTT: If the employee was the sole cause that would by definition mean that the employer was not negligent, so the employer couldn't be found to be negligent. So that one doesn't really count. The legislature was clear in what the defenses are with specific, all inclusive in part(c). Why do you consider that not to be an exclusive list?

AKERS: I don't have a good answer to that.

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RESPONDENT

GONZALES: Is your client suing to recover worker's comp. benefits?

ZIMMER: She has sued to and has recovered for damages.

GONZALES: Is she suing to recover worker's comp. benefits?

ZIMMER: If you by that question referring to the exclusion language in the comparative statute, I believe that her cause of action does fall within that exclusion.

GONZALES: How?

ZIMMER: The exclusion specifically refers to subtitle A, Title 5. Subtitle A, Title 5 includes §406.033, which is the cause of action which she sued under. Secondly, that exclusion's applicability paragraph could only apply to §406.033. And the reason for that is because in an action to collect worker's comp benefits, the comparative negligence or negligence of the plaintiff is totally irrelevant. The only time it becomes relevant is if you're bringing a cause of action for common law negligence.

HANKINSON: Isn't worker's comp. benefits a defined term in the comp statute?

ZIMMER: It is.

HANKINSON: And it would include all the various types of things as opposed to damages that your client has sued to recover. How do you get around that?

ZIMMER: There are only two actions to collect worker's comp benefits, and that is a judicial review of a final determination made by the worker's comp commission and both are in §410 of the Labor Code. 410.255 and 410.301. And that is a worker's attempt to reverse a decision that you are not entitled to benefits. The second action to collect benefits would be under 410.208, which is: I like your determination worker's comp commission, now I'm going to sue the insurance carrier to enforce that decision. Those are the only two attempts to collect worker's comp. benefits in the Labor Code and neither is relevant whether there's comparative negligence. The legislature - if you don't include 406.033 then that exclusion language is a complete nullity and has no meaning

whatsoever.

The State of Texas, I believe, is the only state in the union that has no mandatory worker's comp. statute, that includes the District of Columbia. All that Texas has is a stick, and that is §406.033, the penalty provision which removes the common law defenses from the defendant.

ENOCH: If the worker's comp. statute - the idea is the particular employee might not recover as much as he or she might under common law negligence. He or she would recover more quickly because there is an administrative process rather than having to go through the protracted litigation side of it. And it seemed to me when the comp statute was created to encourage employers to do that to get involved in it and to take away from the employees their common law right to sue for damages, that the statute said the employers could no longer use contributory negligence or assumption of risk which at the time that the statute was created originally were complete bars to recovery. So there just was not a balance. If the employee was even the slightest negligent, the employer paid nothing. And so to take all this back and put it in the pot, the employee wasn't going to get quite as much as if they hit the big time in court against their employer, but they are going to get something; whereas the likelihood of them getting anything was pretty insignificant when all you had to do was show a little bit of negligence and they were barred altogether. Now how does that work in today's scheme of comparative negligence where you are weighing the negligence of the employee against the employer and only in the circumstance the employee was really the most negligent of the two, the employee would still get some recovery. What is the rationale there where you are actually going to balance the damages verses the negligence or saying that a nonsubscriber just doesn't even get the benefit of proportioning these damages?

ZIMMER: Mrs. Keng's position is that it doesn't fit, that the whole point of the worker's comp. system was to create a no fault system so that it didn't matter who was at fault, whether it was the employer or the employee. In exchange there is also immunization for the employer - cannot be sued under 408 of the Labor Code. In exchange, the employee gets quick remuneration for injuries not as much as they might get in a court of law, but then again, they don't have to suffer a comparative finding. The whole point of the system and as this court held in *Reed Tool v. Copelin* was that it's an effort to spread the risk and allow the protecting - the cost of protecting workers to be associated with the cost of doing business, that to protect workers from on-the-job injuries and the cost of that would be taken by the employers. But the employers in exchange they cannot be sued and their exposure is limited to their premiums. And in order for the system to work there has to be at least a body of employers that are paying these premiums so that these insurance entities can fund these - some of them are lifetime compensations.

Also there are statutes in the code that in effect tax insurers to maintain the worker's comp. commission. Those taxes are 2% or less of the premiums taken in by the worker's comp. carriers. There is a tax on certified self-insurers and there is a tax on commercial insurers in section 403 and 407 of the Labor Code.

This has been the law - the penalty provisions have been in the law for 87 years. And really what Kroger and some of the friends of the court have suggested is that - in fact this is no longer the law and that it changed 27 years ago. Well none of those analyses comport with proper statutory construction. For one thing a statute enacted later in times presume to control. So even if there was a conflict, and it's Mrs. Keng's position there is no conflict between the labor code and the comparative statute, that it would be the labor code §406.033 which was recodified and rewritten in 1989. So it would be our position that that labor code provision would in fact control.

The sections for worker's comp and the fact that the worker's comp. commission is subsidized by all subscribers is §403.022 and 407.103 for self insurers.

I would like to address the *Bouchet* case if necessary. Technically §451, which is not within subtitle A of the labor code is not part of the worker's comp. act. The *Bouchet* case therefore really does not attack the issues that we have here. It doesn't really even address them. It primarily addresses whether employees can or cannot sue a nonsubscribing employer. The *Bouchet* case held that it does not control nonsubscribing employers. And Kroger's position has been that no part of the Texas worker's comp act could possibly apply to nonsubscribing employers. And they cite the *Bouchet* cases as evidence of that. But in fact the *Bouchet* case does not even address the section which is the part of the workers comp. act. It's our position that necessarily §406 applies to the nonsubscribing employers.

Additionally, I would like to answer the question about the predicate. Necessarily, you have to have a finding of contributory negligence in order to even submit a comparative issue. Otherwise, the comparative issue would be immaterial. And this has been found - this was found originally in the *Yelvoe(?)* case, which is the case which is directly on point but addressed the earlier versions of the law. And the *Yelvoe(?)* case it also found that the only comparative finding that would matter would be employee 100% negligent. But there is an instruction in the charge which takes care of that so that it's not necessary to provide a comparative.

HANKINSON: So what this really would mean in terms of the trial of one of these cases is that the employee's conduct can be put at issue because it goes to the causation question and the appropriate procedural device at the end of the trial is an instruction on sole proximate cause in an effort to get the jury to find that the employer was not negligent?

ZIMMER: Actually the inverse of that is true. And that is that if the employee does not put on evidence of the employer's negligence, then automatically that employee loses.

HANKINSON: Would the employer be allowed to put on evidence of the employee's negligence to show that it was the sole proximate cause of the injury? I know that's really not at issue here, but I'm asking in terms of the implications of this decision.

ZIMMER: No. I think what evidence they would be entitled to put on is that they were not negligent. That does not necessarily mean that they would have to be able to put on or would

need to put on evidence that the employee was negligent.

HECHT: What's the point of a sole cause defense?

ZIMMER: The point of the sole cause defense is to prevent the penalty provision from automatically granting employees a summary judgment in their favor.

HECHT: If the employee's negligence was the sole cause of his injury, right? How are you going to present that defense if you don't put on evidence of the employee's negligence?

ZIMMER: You could put on evidence that it was someone's elses negligence.

HECHT: But not the employees?

ZIMMER: You could put on evidence that you met your burden, that you did not breach a duty, or that you did not have a duty, or that you did not cause the injury.

HECHT: That's not sole cause. Sole cause is somebody else did it.

ZIMMER: If it's necessary to - even if it is necessary for an employer to put on evidence that the employee's negligence was a partial cause of the injury, then they would still not be entitled to a submission of a comparative issue nor would they be entitled to a contributory negligence issue.

HECHT: The question was, can they put on evidence of the employee's negligence to show that that was the cause of the accident, and the answer is yes or no?

ZIMMER: The answer appears to be yes.

ABBOTT: Along those lines sole cause would be a defense to the claim correct?

ZIMMER: Correct.

ABBOTT: So would you agree with Mr. Akers that an employer can assert more defenses than the two that are set out in 406.033(c), which are that the act of the employee intended to bring about the injury, and that the employee was under a state of intoxication?

ZIMMER: Actually I believe that subsection (a) also provides an additional defense, but I believe that all defenses available would only be in that section. So I would disagree with Mr. Akers, but I would add one more defense and that is course and scope. It requires that the employee be found _____ course and scope. If there is evidence that they were not, that wouldn't be a defense.

ABBOTT: Help me understand this the way it intentionally could play out. You have an

employee whose primary job is to drive a vehicle for the employer and the employee has an accident while driving and sues the employer claiming something about it was a defective vehicle or something like that when in reality the cause for the accident clearly and unequivocally is the fact that the employee ran a red light. No questions asked about that. Can the employer put on evidence that the employee ran a red light, and that was the sole cause of the accident?

ZIMMER: Yes. The employer would have to be able to put on evidence that 100% of the accident was caused by the employee in order for them to take advantage of the sole cause provision in 406.033. But there would not be a contributory negligence issue.

ABBOTT: Going along those lines, you know what's going to happen in reality, and that is, that defendants are going to file an affirmative defense of sole cause either there may or may not be actually sole cause and put on evidence of it, and the jury will nevertheless weigh it even though they will not be given an issue if we decide in your favor. Do you see what I am saying?

ZIMMER: Yes.

ABBOTT: So it's in reality going to be an issue that's going to be subject to jury determination. It's just they are not going to be able to compare it, but in their own minds they will be perhaps adjusting down perhaps what the employer should pay because by golly it sure looks like the plaintiff was negligent.

ZIMMER: The plaintiff must prove the negligence of the employer or of an agent or servant of the employer acting within the general scope of the agent or servant's employment. That sounds like the sole cause really is the - it's not couched as sole cause in the statute. It's couched as burden of proof that this is a burden that the plaintiff must meet. Once the plaintiff establishes the negligence of the employer, then it's no longer possible for an employer to exculpate itself by sole cause defense.

ABBOTT: Let's direct it to this case. In this case the plaintiff was injured because some pie boxes fell on her?

ZIMMER: Yes.

ABBOTT: At trial why couldn't they put on evidence saying, Look the reason the pie boxes fell on her is because she negligently backed up into them, and that's the only reason why they fell on her?

ZIMMER: There was already evidence that contradicted that.

BAKER: But what if the jury believes Kroger and not your client?

ZIMMER: Then my client will lose the case.

BAKER: You put on evidence of negligence and they put on evidence of sole cause, they lose. You can't say that because a jury can judge one way or the other on a credibility basis can't they?

ZIMMER: Actually though the statute says that since there is no contributory negligence they do not get that defense, so they do not get evidence to support that. Once there is evidence that the employer is negligent, then I do not believe that the employer...

BAKER: But implicit in that statement is is that whoever is the fact finder believes it?

ZIMMER: Yes.

BAKER: So even if it's there and they don't believe it and the employer puts on "sole cause" testimony they can believe that.

HANKINSON: When one of these nonsubscriber cases is tried, is the issue negligence and proximate cause, or is it just the negligence of the employer and then absolute liability?

BAKER: It's proximately so all of the elements are necessary. Which brings me to the point I meant to address earlier about the statute. This is a statute which is married to a common law remedy. Once that marriage was effectuated by the legislature it became a hybrid, a hybrid which is a statutory cause of action. When a statute marries the common law it becomes statutory. So that's why I think that it became a little difficult to fathom at first. It says that an action against the employer does not _____. It starts off describing a typical common law negligence action.

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REBUTTAL

AKERS: I respectfully disagree that sole cause doesn't count. And I think that the common law - the defenses that are listed here in 406.033(c) cannot be exclusive.

O'NEILL: But doesn't (d) contain the sole cause? Doesn't that take care of the sole cause issue, so therefore, if you take (c) and (d) those are the exclusive remedies in the statute?

AKERS: Sole cause is by its nature a defense. It has to be affirmatively pled.

HANKINSON: But you don't get an issue on sole cause. It's not an affirmative defense in terms of being able to get an issue on it. It's part and partial of negligence isn't it?

AKERS: It is an element of negligence when it is pled and proven and you're entitled to an instruction.

HANKINSON: But it's not an affirmative defense that you get an issue on?

AKERS: No, but it is one upon which you would have burdens.

O'NEILL: Which would explain why they didn't include it as subset 3 of (c) and included it by inference in (d).

AKERS: I don't read it that way. I think that it's no less a defense than...

O'NEILL: Why is that not - do you disagree that 406.033(d) sort of subsumes the sole cause issue?

AKERS: Yes a plaintiff must prove negligence on the employer. The converse of that is that if the employee is solely responsible for his or her own action if there is no negligence there.

O'NEILL: I take that as a yes?

AKERS: There is a however. And however is in order to be able to get the evidence in, you have to plead sole cause. In order to be able to even talk about the negligence of the employee, that's why it becomes an affirmative responsibility and a separate defense.

ENOCH: All this discussion about sole cause really isn't it seems to me on point. If there is a determination of sole cause, that's tantamount to saying that nothing the employer did caused the injury. And so the employee has failed on the burden the employee would have in a nonsubscriber case to prove that the employer's negligence caused him injury. And that's all sole cause does. That's a different deal than comparative or contributory negligence where it's conceded the employer's negligence contributed. We're now talking about whether or not an employee should be barred because they were negligent as well, or should have their damages reduced to the extent that their negligence was a part of their injury. That inquires a totally different deal in sole cause.

AKERS: It's a different analysis. The only significance is that the sole cause is there, is not specifically mentioned in the statute. It's implicit within the manner in which we will do things.

ENOCH: But that goes to the foundation of the employee's claim under the nonsubscriber view, which is the employee has the burden of proof that defendant's negligence caused harm. And sole cause is simply a rebuttal to that that the employer's negligence didn't cause harm.

HANKINSON: Would you respond to Mr. Zimmer's argument that under 33.002(c)(1), the parenthetical that after workman's compensation benefits under the law references subtitle A, Title 5 Labor Code and\ that if you go to the law that by putting that in there the only thing it could conceivably apply to is a nonsubscriber claim. It would not apply to a claim against a subscriber.

AKERS: The statute of comparative responsibility where the CA for instance has to talk about definitions of benefits, I think that you need to instead look at what the benefits mean, because it also talks about worker's comp. benefits as a compensable claim.

HANKINSON: I understand that that's your argument, that those are the words we should focus on. But he says we should focus on some other words and if you look at those words - I mean it sounds to me like there's an ambiguity. You say if you look to these words you go one direction. He says if you look to some other words you get a different result. And I just want to know if you agree or disagree with his interpretation of the parenthetical actually being a reference to the nonsubscriber claims as opposed to claims against a subscriber?

AKERS: I disagree.

HANKINSON: And why?

AKERS: Because it produces an absurd result, because to say that a nonsubscriber cause of action constitutes a benefit, a benefit is an entitlement. A benefit is something that you are entitled to pursuant to, but the statute also says a compensable claim. And negligence action within a nonsubscriber setting provides for damages which are reimbursing.

HANKINSON: But if we look at subtitle A, Title 5, is that going to make us focus on nonsubscriber verses subscriber claims?

AKERS: No.