**ORAL ARGUMENT —** 9/22/99
98-1046
NATIONAL LIABILITY V. ALLEN

**CAIN:** This is an evidence case. We are asking the court to construe an evidence statute. I think it's important to put the case in its broader context. This is an administrative appeal and we're asking the court to construe a statute that in its broadest terms regulates an administrative appeal.

This gets into the nature of the evidence that the TC may consider on that appeal. The court has held before that _____ the standard is a modified trial de novo. It's not a substantial evidence case, where the court would be limited to the agency record itself nor is it a pure trial de novo where everything gets tossed out that the administrative agency did and the parties of course start over.

The court has to decide the same issues that the ____ speaking administrative agency decided, and usually it's going to have to consider the same evidence. In some cases, in an impairment rating case, the court is going to be limited to hearing the exact evidence that the commission considered with a few exceptions.

OWEN: In impairment rating cases does that mean you can't bring the record in, you just have the record of the commission verbatim on the impairment ratings, or do you have to bring the physicians in to testify about the impairment ratings?

CAIN: I have seen it done where the commission record is simply submitted; the doctors' reports are offered, and that's it. I'm sure that the doctors occasionally they do appear. But most of the ones I have seen, the record is used. And there's not been any objection by either side to doing that. Medical records are introduced in regular civil trials, too.

ENOCH: The TC review is not really a substantial evidence deal. It's just some sort of a combination of things. And if that's the case, is the TC responsible for evaluating the credibility of the witnesses and the weight to be given that testimony?

CAIN: Generally speaking, yes. The statute says that the trials will be conducted by a preponderance of the evidence standard. Presumably most issues at least the judge or jury in the DC would have the opportunity to weigh the evidence as it saw fit.

ENOCH: And so there might be a rational basis for evaluating the rules such that the testimony in the administrative hearing would not be admissible in the trial of the case absent a showing that the witness was unavailable. There would be a basis for reading it that way?

CAIN: The court certainly can read it that way. I think the presumption ought to be

the opposite, that evidence before the commission ought to be easier for the commission - evidence that was presented before the commission to be submitted to the TC. The same as the deposition testimony could be in a regular civil case.

HANKINSON: If that's the case, then how do reconcile the provisions of the statute that indicate that conforming to the legal rules of evidence is not required in the proceedings of the commission; and yet, conformity to the rules of evidence is required in a judicial review or trial of the matter?

CAIN: The way to handle that is pretty simple, really. In this case, we have witness testimony, Tom Angers. He testified before the commission contested case hearing.

HANKINSON: So he testified in another proceedings?

CAIN: Yes.

HANKINSON: And what do the rules of evidence - if the rules of evidence apply, then what do they require for you to be able to submit that testimony in a trial in a court?

CAIN: If my reading of §410.306 is not correct, then we would have to prove that he was unavailable with all the requirements that are on that.

HANKINSON: Because that's what the rules of evidence require?

CAIN: That's what the rule of evidence itself says.

HANKINSON: Then how do you read .306 to avoid that requirement?

CAIN: To treat Mr. Anger's testimony before the commission as if it were in essence deposition testimony. If he starts going off on what is hearsay, if he starts quoting some third person about what they said, and the commission let's it in for whatever reason, the trial judge is going to be able to exclude that as hearsay, as if Mr. Angers himself, was exactly as if he were sitting there in front of the jury. He can't testify as to hearsay in the civil court. He might be able to the administrative case, but to the extent his testimony at the commission would have been admissible in a civil case, it would be admissible at the trial of the appeal.

HANKINSON: If it was admissible at the commission?

CAIN: If his testimony _____ with the rules of civil evidence as what was presented at the commission, then that testimony would be permitted at the TC.

HANKINSON: But how are we able to determine that in a proceeding in which the rules of

evidence do not apply, where there would be no obligation on the part of any party to lay proper foundations to testimony, for anyone to make any objections, and for anyone to rule on them. We would have to after the fact then, in the trial ask the trial judge to look back in the absence of a complete record and say whether or not something would have been admissible before the commission. How do we get around that problem?

CAIN: The same way it happens in virtually every civil case. A deposition can be taken. The lawyer may not ask the proper questions to lay the predicate for the witnesses' testimony. It's offered at trial. And the TC can exclude it.

O'NEILL: But objections are made at that part. You are required to object in the depositions. Isn't the whole purpose of the commission proceeding not having the rules apply to allow it to be a quick, easy administrative hearing that's not constrained by the rules of evidence as you are in a deposition?

CAIN: I think any objections are in fact preserved at the time of the trial. Questions as to form I think. I don't know that you have to object to a predicate being laid. Some objections have to be made in deposition, but not all.

O'NEILL: Well but you're making the analogy to a deposition. You can still make those objections at trial. Here you would say, you can't.

CAIN: I would say you can make those objections at trial. If the testimony before the commission doesn't meet whatever rule, if it's double hearsay or if it's irrelevant, the TC can exclude it.

HANKINSON: If the documents are put into evidence at the commission and a proper predicate is not laid to it, then that document does not automatically go into evidence in the trial; and in fact, an objection could be made and the TC would have to rule on whether or not that document is in evidence in the trial?

CAIN: If the evidence is not tendered showing that it's the proper predicate, that's correct.

HANKINSON: So then, you don't disagree with the CA's decision in this case that the evidence that comes in at the trial that follows the administrative proceeding must comport in each instance with the rules of evidence? Proper foundations have to be laid to admit documents. Hearsay is not admitted, and so on and so forth. You agree with the CA to that extent and to the FT Worth CA in its comparable decision?

CAIN: I would agree. And what I'm not going to agree is that before you can even offer it, you've got to get pass an initial hearsay objection. Anything before the commission is

automatically hearsay. You've got to get past that hearsay hurdle first.

HANKINSON: This is with respect to testimony?

CAIN: Yes.

HANKINSON: In other words you're quarrel with the CA's decision as in this instance, is that the testimony from the commission should have been treated as testimony in the same proceeding as a deposition would be, so that the requirements associated with testimony from a different proceeding would not apply?

CAIN: Yes.

HANKINSON: So your quarrel is not with the application of the rules of evidence, but the manner in which the court in this instance applied them?

CAIN: I think so. If the court will remember, I think that in a sense this is the same proceeding. It's a different level of the same case. The same issues are supposed to be decided. I think courts ought to make it easier to present that same evidence again hoping to minimize the time, expense, delay of trial of these cases.

HANKINSON: Was the TC ever apprized in this case of your position that this in fact was testimony from the same proceeding and therefore didn't have to be treated under the rules of evidence associated with testimony from a different proceeding? Did you ever apprize the TC of that?

CAIN: I don't believe that the statute was cited. The TC was aware of the nature of the testimony, that it was in fact from the...

HANKINSON: But was the TC ever told that your basis for trying to admit it was that it was testimony from the same proceeding, so that under the rules of evidence it should have been used just like a deposition was and was not subject to the unavailability requirement of testimony from a different proceeding?

CAIN: I do not believe that was said to the TC.

HANKINSON: Was it raised in the CA?

CAIN: Yes.

BAKER: Mr. Allen says, even if you're right, that it was improperly excluded, it's harmless because it's cumulative of exhibit 8, which was admitted and in the record which contained

Mr. Anger's testimony almost verbatim.

CAIN: I would disagree that it was almost verbatim. It was a short, one paragraph summary, as much a commentary as it was a summary.

HANKINSON: What was missing from the summary that was critical to the testimony that you wanted the jury to hear?

CAIN: I believe that - I cannot point to a specific statement that was missing. But it's as much of a gloss on his testimony as it was just a restatement or summary. That also gets to another issue though and a broader question: If the commission's decision is going to be admitted, commission decision routinely recites all the testimony. If that argument of cumulativeness is any good at all, then certainly the court ought to let the jury hear the direct evidence that the administrative law judge hearing's officer heard not just the appeals panel's resuscitation on ___-_____ _____.

O'NEILL: Doesn't that indicate that the legislature knew how to write the statute and they clearly did not provide for that. They clearly said that facts in evidence are admissible to the extent allowed under the rules of civil evidence.

CAIN: Rules of evidence do not have to be implied(?) with the administrative agency itself. But courts want legislation to say that evidence can come. But that same evidence has got to meet the standards that it would have to meet AS IT WAS originally offered at the TC. That is, under the rules of evidence, as adopted by this court.

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DECKARD: I work for the AG's office, and I represent the Worker's Comp. Commission. We filed an intervention in this case. Really our position is somewhat different. A lot of questions were raised concerning the admissibility of the commission record. Our position is that the court should support a position that makes the record easily admissible in these trials. Because once again this is a limited trial, a modified trial de novo. But the focus should be that the trier of fact should be given as much information relating to what happened before the commission in order to determine if the commission's decision should be upheld.

Our concern is, that the focus of the CA in this case was on rule 803 and whether or not the declarant was unavailable, and whether or not the carrier met the criteria for getting the record in that way. When really the focus should have been on whether it was admissible under rule 803 as a governmental record. I think that's what the legislature was looking at. But if a party wants to get the commission record in, they should get it in under rule 803, paragraph a.

HANKINSON: So 803 applies to everything that occurs in the commission proceeding. And

once it's authenticated under 803 everything comes in and no other objections can be made and no other determinations need to be made on admissibility?

DECKARD: No, I am not saying that. What I'm saying is that there is a presumption of admissibility under rule 803. My research shows that once again 803 is patterned after the federal rule 803, and the cases in the federal system support admissibility. And the test for admissibility in those cases is whether or not the information, the documents, the statements are trustworthy or not.

HANKINSON: What if there is hearsay in the testimony?

DECKARD: If the statement itself is simply a hearsay statement, then under rule 803 it should come in. But the question becomes when you examine the statement is there hearsay within hearsay, is it prejudicial...

HANKINSON: That's what I am talking about. If there's a question in that testimony that calls for hearsay, and it would be properly excluded under the Texas Rules of Evidence, under your proposed rule that 803 governs everything, how is that to be handled?

DECKARD: I think that once the document is offered under rule 803, then there has to be an examination made of the statement or the document itself and determine if once again if a proper objection has been made.

HANKINSON: Well there wouldn't have been a proper objection though because there is no objection required in the proceedings before the commission.

DECKARD: I'm saying at the TC level. In other words, if an objection was made at the TC level relating to admissibility of the evidence on whatever basis, then at that point in time the TC should properly evaluate whether or not it's admissible.

BAKER: If I understand what you're saying under 803 and your interpretation, do you just get the record marked and say, We offered under 803, and it's in. And then if I understand what you're saying, the other side has to go through it and start making objections to the parts they think would be excluded for some reason under the rules of evidence, which now apply in the TC, which seems to me to be a situation of a long-drawn out procedure under those circumstances in the trial of the case which doesn't promote efficiency in getting the case over, or do you do it as we see in the *Esis* case and here are parts offered and the other side has the opportunity to make whatever objections they think are good and let the TC rule on them without having to do everything?

DECKARD: I certainly would not condone wholesale admission of the commission record in, and then say we would like to tender this, and then have the record...

BAKER: But on the other hand, in a substantial evidence case, that's exactly what

happens.

DECKARD: That's exactly right. There's a difference.

BAKER: And so the legislature obviously knew when they said, We are not going to do substantial evidence in these kind of cases, we're going to have a preponderance of the evidence, and we are going to require that the evidence at the trial level be subject to the Texas Rules of Evidence. Isn't that a clear, plain meaning and reading of the scheme that we have here?

DECKARD: I see the court's concern. Hopefully what should happen is that the parties would be able to, in order to promote an orderly trial, get together, go through the commission record and make these decisions beforehand. Or, the proffering party should come in, had picked out the documents that they believe are necessary to support their position in the case, and then...

BAKER: But this is not a document in this case. This is a recording of a particular witness's testimony.

DECKARD: Well it's a transcription of testimony...

BAKER: It only becomes a document because it's transcribed. We understand that.

DECKARD: That's correct. But again that is a document. Once it becomes transcribed and my view and the commission's view is if you have transcribed testimony or other statements that were admitted at the contested case hearing, and you can overcome, and if it meets the other evidentiary test, then it should clearly be admissible.

HANKINSON: I'm having a hard time understanding your argument. I don't understand the overlay of 803 applying to everything. If what really has to happen is the Texas Rules of Evidence applies, so with respect to the pieces of the record, the appropriate foundations for prerequisites have to be laid to admit the pieces because appropriate objections wouldn't be made under rules specific to the type of evidence offered. What's the purpose of the 803 overlay then?

DECKARD: I have two responses. First, I would like to ask leave of the court to brief this issue, because again our original focus was the *Sinclair* issue. My second response is, my reading of the cases, and again there is a Texas case that interprets the way that the federal view, the courts tend to favor admissibility of these types of records even though it contains these defects that we've been talking about. The federal case involved a plane crash. And the issue is whether or not the investigation of the crash came in. And the investigation report contained all kinds of problems under the rules of evidence. The US SC said, It's still comes in. The Texas case I'm thinking about involved a similar situation. It was a helicopter crash. The parties wanted to get an army report in relating to the helicopter crash. Once again, the army's report contained all kinds of hearsay problems, conclusions, opinions. The Amarillo CA said, It comes in. Based on the same arguments

that were raised in the federal case.

Most of the other cases in Texas have to do with drivers license revocation errors. Those are civil proceedings. And in most of those cases they involve situations where a policeman comes and observes the drunk driver; makes all kinds of opinions and statements in the report. Every case that record comes in. And that's really I think the similar situation or at least in most cases.

BAKER: I have a question about the judicial notice issue that was raised by your co-petitioner. As I understand the record, the commission was the one that offered this document into the CA under judicial notice, is that right?

DECKARD: That's correct.

BAKER: I can't tell right away was your co-petitioner with you on that at the time? Did they object to it?

DECKARD: The best response would be to ask him. I think he was, because at that point in time, our concern was whether or not...

BAKER: I understand what your concern was, because you thought you had a document that showed it was too late. But it was looked at for a different purpose. So are you stuck with what you offered and wanted the court to put into the record whether it turned out good or bad?

DECKARD: I would be hard pressed to argue that the document is not accurate. So we are stuck with that.

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RESPONDENT

WALKER: Mr. Allen's arguments regarding the evidentiary issue are based primarily on the well-recognized rule that when construing a statute, the court will assume that the legislature said what it meant, and meant what it said, and applied the plain language of the statute. The plain language of the statute says that the facts in evidence that are contained within the TWCC record are admissible at trial to the extent allowed by the Texas Rules of Evidence. Because the statute plainly said that, when Mr. Anger's prior testimony at the administrative hearing was offered, Mr. Allen objected that because it was not a deposition but was instead former testimony, that the proponent had the burden to prove that the witness was unavailable under rule 804.

OWEN: It doesn't say the transcript though does it? It says the facts in evidence.

WALKER: That's a very good point. And frankly that is not one that I had raised

previously. Mr. Allen has never taken the position, I have to honestly confess, that this was not part of the record that is subject to rule 410.306b in the Labor Code. But that's an excellent point. Whether a transcript is even considered part of the facts in evidence is I suppose a question that must be addressed before we even get to the issue of whether 410.306b would mandate the admissibility of this type of evidence. And that's really what the dispute boils down to because there's no real dispute between National Liability and Mr. Allen that if we apply the rules of evidence to the TC proceeding this was clearly hearsay because the proponent, National Liability, did not prove declarant's unavailability at trial.

HECHT: Is it equally clear that if the rules had applied at the commission proceeding, this would have been admissible under the rules of evidence before the commission?

WALKER: Sure. Would the hearing officer have admitted it? I believe it is. I searched through the bill of exception to try to find some objectionable portion so that I could argue, Well, it was objectionable on this basis, and I couldn't. So if the rules of evidence had been applied before the commission, then the commission officer would have admitted it, it would have been admissible testimony because Mr. Angers was there and he testified live. They weren't trying to put in some statement that he had made elsewhere.

Allen's position is though, that rule 410.306b does not make everything that came in before the commission automatically admissible in the TC. We believe that rule 410.306b is a rule designed to ensure that the rules of evidence are applied to evidence that's contained in the commission record. In other words, the commission record evidence is not automatically admissible just because it's in the commission record. But neither is it automatically inadmissible just because it was part of this administrative process.

In the briefing Mr. Cain offers his theory of why the legislature included the clause, To the extent allowed by the Texas Rules of Evidence, in the statute.

OWEN: It doesn't say the record is admissible to the extent allowed under the Texas Rules of Evidence. It says, the facts in evidence the record contains are admissible. So, if there are facts in the record, why aren't they admissible if they are admissible under the Texas Rules of Evidence?

WALKER: I certainly believe that under the plain language of the statute any facts contained in the record that are admissible at trial under the Texas Rules of Evidence would be admissible at trial.

HECHT: Like what?

WALKER: Let's suppose that National Liability had brought evidence before the TC that Mr. Angers from the time of the TWCC hearing until today had been out of the state, not subject to

subpoena, that they had made reasonable efforts to depose him, and were unable to do so, and, therefore, he was unavailable. At that point his testimony before the TWCC would have been admissible. They just didn't comply with that. Or, let's suppose that Mr. Allen - there was a letter that Mr. Allen had written to a friend and he had said, Guess what? I'm really going to put one over on the company. I didn't really suffer an injury. And then that work contained within the commission record. Well, that would be admissible because it was an admission of a party opponent. Those are the type - any fact or evidence that was there that is admissible under the rules of evidence would be admissible. Our only contention is that a CA did not err and neither did the TC because this particular evidence or testimony that was offered at trial was inadmissible under the rules of evidence...

OWEN: What about testifying physicians who testified about impairment ratings. Can you just tender into the TC record their testimony before the commission, or do you have to bring the doctor back live?

WALKER: I have to confess that I'm not as familiar with the different standard of review that applies to impairment ratings. I understand that it is different from the standard of review that applies to...

OWEN: What's that got to do with what's admissible in the TC?

WALKER: Because I believe that §410.306b, which is the rule that talks about the admissibility of facts in evidence before the commission, is in the section of the statute that applies to this modified de novo review of issues of compensability and eligibility for benefits. Now I don't want to say that absolutely because I'm not 100% sure of that. Assuming though that the standard of review doesn't impact this, that 410.306b would apply in any type of proceeding, then Mr. Allen's argument has to be that if that evidence is hearsay, which I think it would be, that you would have to bring the testifying physician before the court, or perhaps Mr. Deckard's argument that it is a record contained in a public document or something might be another method of getting it admissible under the rules of evidence. But I don't believe that when the legislature said that that evidence is admissible to the extent allowed by the Texas Rules of Evidence, I don't think that we should look past that plain language of that statute in order to facilitate an easier trial of the case.

HECHT: But in your view though, the facts in evidence in any record are admissible in a proceeding to the extent allowed by the Texas Rules of Evidence.

WALKER: That's true.

HECHT: The facts in evidence in an Afghanistan record are admissible as you apply the Texas Rules of Evidence?

WALKER: That's absolutely right.

HECHT: So all this statement says is that nothing that happens before the commission is admissible in a subsequent trial just because it happened before the commission, that's your view?

WALKER: I think that it says that, and I think that it says the converse: Nothing that happens is inadmissible in a subsequent trial just because it happened before the commission. And I've talked about this briefly in my brief. There are some old cases that talk about the IAB award being inadmissible in a trial, a de novo. And I know that at least one trial lawyer I'm aware of has always used those cases to argue that anything that happened before the IAB should be inadmissible because this is a trial de novo and what they did doesn't matter, and the jury is supposed to determine it on their own. Whether that argument was right or wrong, I think it's logical to believe that the legislature may have been trying to foreclose that argument in new law cases. We don't have pure de novo review anymore. And the jury is entitled to know what the TWCC thought, so we don't have anymore in argument that, Well anything that happened before the TWCC should be inadmissible because this is a de novo trial.

BAKER: It seems from the way the statute is written that the TC's required to in the charge by instruction the question of whenever to tell the jury what the commission did. And in each one of those issues that were contested in the DC trial, they have to do that. Do you actually introduce the opinion and the judgment itself into the record and send it to the jury room to satisfy that requirement, or does it just go by an instruction in the charge?

WALKER: I think certainly the *Esis* case said that it's permissible to admit the opinion. I don't know that admitting the opinion into evidence would satisfy that requirement because I believe that the requirement is that the court is to apprize the jury in the charge. So I don't think that just admitting it into evidence but saying nothing about it in the charge would satisfy the requirement.

BAKER: One of your arguments in this particular case is, that exhibit 8 is exactly what that is; and I assume that it went to the jury based on your argument.

WALKER: It did.

BAKER: Therefore, this evidence that they are saying was improperly pleaded was already there, so it's cumulative and the harmless error?

WALKER: That's correct. Not because the court informed the jury and the charge of what the TWCC had done, but because it actually admitted a copy. And it didn't recite question and answer. What it did was it was a summary - a one paragraph summary. But the important part of the bill of exception was that Mr. Angers said, Remember we had a conversation, I don't remember Mr. Allen ever telling me that he had a work-related injury; and I think I would have remembered that if he had said that. That's the important part of the bill of exception, and that's all stated in the appeal's panel's decision.

Now Mr. Cain raises a good point: Well, yes, but the appeal's panel sort of indicated that that wasn't very credible or didn't contradict what Mr. Allen said, because Mr. Angers repeatedly said, I can't remember what happened over a year ago. But just as you pointed out, in these new modified de novo reviews, the jury is supposed to know what the appeal's panel's interpretation of the evidence was. So while that may have been a good argument in an old law case where the jury is not supposed to be influenced by what the IAB did, in a new law case the jury is supposed to at least understand what the TWCC's interpretation is.

BAKER: But couldn't the TC satisfy the statutory requirement in this case by saying, I instruct you that the appeal's panel found that Mr. Allen did not give timely notice that this was work-related; and that's all they have to say. And then the jury can take and say, Well we think different because of what we've heard here?

WALKER: Absolutely.

HECHT: Wouldn't you want to show that the reason the IAB found as it did was because of this testimony, or this testimony, or this fact? If the IAB had found that the claimant had not given notice and that was based on testimony that was rather obviously in the record incredible wouldn't you want to put that on in the TC, and say this is what they were relying on?

WALKER: Assuming I represent Mr. Allen - in other words, what I want to say, Here was the testimony that the IAB heard, you haven't heard that testimony, that's why your decision is going to be different from this?

HECHT: Yes.

WALKER: Okay. Well yes that would be.

HECHT: But you couldn't do it?

WALKER: Probably not, because the employee who testified that way was a Champion International employee, not a National Liability Ins. Co. employee. So it's not a statement of a party opponent. So yes, I believe I probably would have been precluded from...

HECHT: That puts the parties at a disadvantage because the jury is going to be sitting there listening to an argument I dare say, from somebody that says, You should do what the commission did. There are reasonable people. They are paid to make these decisions all the time. And if you don't know why they did it differently, that's a pretty compelling argument.

WALKER: Yes, it is judge. And I would think that if that were something that the advocates foresaw as we should, as you have, we would go to whatever links we needed to go to in order to present that testimony in admissible form. Every time we have trial there is something that

we want to tell the jury, and we think, Well is it going to admissible, what do we need to do to get it admissible, do I need to take this fellow's deposition or can I rely on this affidavit that we have. And we go to the books and we figure out whether it's admissible or not. And I think that the legislature when it adopted this rule that said, Fact in evidence contained in the commission's record are admissible to the extent allowed by the Texas Rules of Evidence was telling advocates make sure that your evidence is in admissible form. It's not going to be admissible just because it's contained in the record.

HANKINSON: Your opponent says that we should treat this testimony more like a deposition that could be used regardless of the unavailability of the witness. Would you respond to that argument?

WALKER: I have to fall back on the plain language. The rules of court differentiate between depositions and former testimony. This is not a deposition. It's former testimony. I think to say, Well we should treat it like a deposition, even though it isn't, because that way we could get the evidence in, it flies in the face of the plain language of the rules.

My response is, this is not a deposition and it should be treated for what it is, not what they would like it to be.

HANKINSON: Is there any way you can reasonably interpret this in that way in order to facilitate the fact that this is really a continuation of the same proceeding and given the modified trial de novo atmosphere? I hear your opponent saying, that's a reasonable way to apply the rule because of the unique nature of this being a judicial review, an administrative proceeding. And so as I think the AG's office has said, it should be a little bit easier to admit.

WALKER The legislature is the one that has set up the system. They decided what rules would apply and what rules wouldn't. And they did not see fit to include any rule that says, The transcription of oral testimony before the hearing panel will be considered a deposition. They didn't include a rule that says, It is admissible regardless of the rules of hearsay. They didn't take any efforts whatsoever to facilitate that. It may be a better rule. It may make things easier on everyone. But I would respectfully suggest that that's something for the legislature to correct.

BAKER: A different scenario, that Mr. Anger's deposition was taken before the panel had its hearing, and that was offered into evidence. Then of course, no objection is made. And here they come for the trial before the DC and they offer the deposition, not the record. Where are we?

WALKER: I'm embarrassed. You're giving me a test on evidence law. I can't recall. I believe that if it were a deposition that were taken and I think this would be considered the same proceeding, because our argument's not based on whether it's the same or different proceeding, our argument is based on the fact that it's not a deposition, but if it were a deposition that were admissible under the rules of evidence, then it would be fine.

BAKER: It's been a long time since I was in a deposition. Do you still say something like, To be used in any trial proceeding involving this controversy, whatever. It's not just the first time you ever try it but any trial?

WALKER: I think that the rules provide a way for a deposition to be used in multiple proceedings, although quite honestly in all candor, I can't tell you chapter and verse exactly what the rules say about that.

BAKER: So the specific application here is the difference between the deposition and how the rules of evidence treat that, and the fact that this is testimony from a former proceeding even though they argue it's the same proceeding?

WALKER: That's right. The distinction is that this is not a deposition. And that's always been Mr. Allen's position. And it's testimony from a former proceeding. Whether it would be more efficient or fair to treat it as a deposition, again we would respectfully suggest that that's something the legislature could have done and chose not to.

HECHT: Why? Can you suggest a reason why they might?

WALKER: Why they would have elected not to do that?

HECHT: Yes. Why should it be harder rather than easier to get the commission record before the court? It looks like that helps claimants for one thing.

WALKER: As a practical matter let's look at what happened in this case. Mr. Allen did not have a lawyer before the commission. The administrative proceedings are set up to sort of be a quick, less formalistic thing. So Mr. Angers testifies - Mr. Allen in his own way, he's a pipefitter - he actually did a pretty good job of cross-examining Mr. Angers. But he didn't have a lawyer there. They could have called Mr. Angers to testify, but then a trial lawyer would have been cross-examining him. So instead, they try to use his testimony when he was cross-examined by Mr. Allen, and introduced it instead. I think the very reasons that we have hearsay rules and so forth, and what one of the justices pointed out earlier that in this type of a proceeding the jury is going to determine the credibility and the demeanor of the witnesses. And so I think that maybe the legislature was thinking, Look, we shouldn't let somebody testify at the commission when the claimant doesn't have a lawyer. And then rather than calling them live so that he gets cross-examined by a lawyer, we will use his commission testimony.

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REBUTTAL

CAIN: I was asked at the first part of my argument if I could point to a part of the testimony of Mr. Angers that was not discussed in the commission's _____ of his testimony. I

would refer the court to on page 264 of the Reporter's Record. It's attached to our brief under Tab 5. Mr. Angers is talking about a letter from Mr. Allen's doctor. He says, Don brought this letter in, and he handed it to me, and I looked at it and read it. And at that time he told me that Dr. _____ had told him that his injury was from this letter you know and that's the first time I was aware of it. And I immediately informed my supervisor.

I don't think that's reflected in the commission's summary. It's pretty direct testimony that he got this letter, that was the first time he knew that Donald Allen claimed this his injury was work-related.

ENOCH: Do you attend a lot of these commission hearings?

CAIN: No.

ENOCH: You don't really know what goes on in a commission hearing?

CAIN: Not first hand. Some of my partners do quite frequently. I would also like to point the court to subparagraph (a) of the section we've been talking about: paragraph (A) of section 410.306. It says, Evidence shall be adduced as in other civil trials. I think if the sole purpose of the statute we're talking about was to make the rules of evidence apply, the legislature would already have done that in the previous paragraph. It doesn't seem like there's a whole lot to be added. That was the sole purpose. I think that it's best looked at as a limiting on what part of the commission records can come in that it's got to comply. Once you get past the initial and hearsay and aspect of the commission record itself, the substance of it has to comply with the rules of evidence.