No. 25-489

In the Supreme Court of the United States

NORMAN ENGEL,

Petitioner,

v.

TEXAS DEPARTMENT OF INSURANCE
DIVISION OF WORKERS' COMPENSATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Third District

PETITION FOR A WRIT OF CERTIORARI

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October 9, 2025
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QUESTION PRESENTED

Injured workers in Texas have One Year after their date of injury to make a claim for workers' compensation benefits and a Two Year limit to reach medical stability. A secondary law in Texas provides for a 90-Day limit to challenge a medical stability determination at any time after the date of injury and stop entitlement to additional lost time disability benefits allowed for two years.

Engel in this case presents one two part question for review.

Does the 90-Day limit, on its face and as applied to Engel, take away the Fourteenth Amendment's guarantee of substantive due process, equal protection, and property rights when enforced (a) prior to the One Year to claim benefits and (b) prior to the Two Years allowed to reach medical stability?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Norman Engel

Respondents and Defendants-Appellees below

- Texas Department of Insurance, Division of Workers' Compensation
- Division of Workers' Compensation Commissioner Cassie Brown, in her Official Capacity
- State of Texas
- Ken Paxton, Attorney General of the State of Texas, in His Official Capacity
- Illinois National Insurance Company

LIST OF PROCEEDINGS

Supreme Court of Texas

No. 24-1019

Norman Engel v. Texas Department of Insurance-Division of Workers' Compensation and Commissioner Cassie Brown, in her official capacity;
The State of Texas and the Attorney General of the State of Texas by and through Ken Paxton in his official capacity as Attorney General of the State of Texas; and Illinois National Insurance Company

Petition for Review Denied: April 11, 2025

Order Denying Rehearing: July 11, 2025

Texas Court of Appeals, Third District, at Austin

No. 03-23-00077-CV

Norman Engel, *Appellant,* v. Texas Department of Insurance–Division of Workers' Compensation; Commissioner Cassie Brown, in Her Official Capacity; The State of Texas and the Attorney General of the State of Texas by and through Ken Paxton in His Official Capacity as Attorney General of the State of Texas; and Illinois National Insurance Company, *Appellees*

Final Opinion and Judgment: July 17, 2024

Order Denying Rehearing: October 24, 2024

District Court of Travis County,
Texas 53rd Judicial District

Cause No. D-1-GN-19-001342

Norman Engel, *Plaintiff*, v. Texas Department of Insurance–Division of Workers' Compensation; Commissioner Cassie Brown, in Her Official Capacity; The State of Texas and the Attorney General of the State of Texas by and through Ken Paxton in His Official Capacity as Attorney General of the State of Texas; and Illinois National Insurance Company, *Defendants*

Summary Judgment Order: January 10, 2023

Texas Department of Insurance, Division of Workers' Compensation Austin Field Office, Austin, Texas

No. AU-17242548-02-CC-HD49

Norman Engel, *Claimant* v. Illinois National Insurance Company, *Carrier*

Decision: November 14, 2018

Corrected Decision: January 10, 2019

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PETITION FOR A WRIT OF CERTIORARI

Norman Engel respectfully petitions for a writ of certiorari to review the judgment and opinion of the Texas Third Court of Appeals, for which the Texas Supreme Court denied review and denied rehearing.

OPINIONS BELOW

Engel v. Texas Dep't of Ins.-Div. of Workers' Comp. & Illinois Ntl. Ins. Co., No. 03-23-00077-CV, 2024 Tex. App. LEXIS 4980, 2024 WL 3432250 (Tex. App.—Austin July 17, 2024, rehearing denied 10/24/2024); Petition for review denied by *Engel v. Tex. Dep't of Insurance-Division of Workers' Comp.*, No. 24-1019, 2025 Tex. LEXIS 318 (Texas Supreme Court Apr. 11, 2025) and Rehearing Denied on July 11, 2025.

JURISDICTION

The Supreme Court of Texas denied rehearing of the petition for review on July 11, 2025. This Court has jurisdiction under 28 U.S. Code § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

U.S. Const., amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Texas Statutory Law Provisions

1. One Year Claim Filing Statute

Texas Labor Code Section 409.003

CLAIM FOR COMPENSATION. An employee or a person acting on the employee's behalf shall file with the division a claim for compensation for an injury not later than one year after the date on which:

(1) the injury occurred; or

(2) if the injury is an occupational disease, the employee knew or should have known that the disease was related to the employee's employment.

2. Two Year Medical Stability Limit Statute

Texas Labor Code Section 401.011(30)

"Maximum medical improvement" means the earlier of:

(A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated;

(B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or

(C) the date determined as provided by Section 408.104.

3. Statutes for Lost Time Disability

Texas Labor Code Section 401.011(16)

"Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.

4. Texas Statute for 90-Day Limit,

Texas Labor Code Section 408.123
(relevant parts):

(e) Except as otherwise provided by this section, an employee's first valid certification of maximum medical improvement and first valid assignment of an impairment rating is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certific-

ation or assignment is provided to the employee and the carrier by verifiable means.

(f) An employee's first certification of maximum medical improvement or assignment of an impairment rating may be disputed after the period described by Subsection (e) if:

(1) compelling medical evidence exists of:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the impairment rating;

(B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid; or

(2) other compelling circumstances exist as prescribed by commissioner rule.

INTRODUCTION

Norman Engel was injured at work underwent surgical repair and returned to work for almost six more months. He re-ruptured his bicep within one year of his original date of injury, and he sought additional lost time disability benefits allowed for two years under Texas law. The Texas state agency enforced a 90-Day limit statute provision because Engel did not

dispute his initial certification of having reached medical stability.

The State of Texas Third Court of Appeals determined that Engel's due process and constitutional rights were not violated by applying the 90-Day limit prior to the One Year claim filing limit and the Two Year medical stability limit. The Texas Supreme Court declined review.

Prior to this matter the Texas Third Court of Appeals determined a 90-Day limit provision only adopted by the administrative agency was invalid for conflicting with the Two Year limit to reach medical stability.

STATEMENT OF THE CASE

A. Factual background

Petitioner Norman Engel resides in Travis County, Texas. He worked as a carpenter for DPR Construction doing blue-collar labor. On March 6, 2017, while in the course and scope of his employment as a carpenter with DPR Construction, the Employer. On March 6, 2017, the Employer had workers' compensation insurance through Illinois National Insurance Company, Insurance Carrier.

Norman Engel underwent undisputed surgery for the stipulated compensable injury of a ruptured right arm biceps tendon on March 24, 2017, to repair the compensable injury of a ruptured biceps tendon in the right arm.

On July 18, 2017, a state agency, Texas Department of Insurance-Division of Workers' Compensation (DWC) selected "designated doctor" examined Norman and certified that he had reached medical stability of maximum medical improvement on July 18, 2017 with a 6% permanent impairment rating. This certification stopped temporary income benefits paid for disability lost time and allowed for 18 weeks of impairment income benefits.

The Insurance Carrier, Illinois National, presented proof that notice of the doctor's certification of medical stability was delivered on July 31, 2017, to an address where Engel was then residing with his father with the notice signed by father's girlfriend. Engel testified that she did not give the notice to him. The 90-Day limit law to dispute the certification ran on October 29, 2017, which was 7 months, 23 days after his date of injury on March 6, 2017.

On February 15, 2018, Engel, who had returned to work, suffered additional lost time disability from a re-rupture of his biceps and underwent a second follow up surgery on March 19, 2018, to repair the re-ruptured biceps tendon compensable injury.

On April 20, 2018, Engel filed a dispute of the July 18, 2017, certification of medical stability, in part because of improper and inadequate treatment evidenced by the subsequent re-rupture of the right distal biceps tendon and the necessity of a second surgical repair med on Mach 19, 2018.

Engel testified that beginning again on February 15, 2018, that he was unable to work due to the re-rupture of the compensable injury and the surgery on March 19, 2018, and subsequent recovery.

The DWC administrative judge found that the compensable injury was a cause of Engel's "inability to obtain and retain to be unable to employment at wages equivalent to his preinjury wage beginning on February 15, 2018, continuing through the date of the hearing" which was on October 29, 2018, a period of over eight months or at least 36 more weeks of disability weekly payments. This subsequent lost time from work disability determination was not challenged by either party.

However, the DWC administrative judge determined that Engel failed to establish that his initial treatment was "inadequate" and that the 90-Day law limit applied because "No exception to finality under Texas Labor Code § 408.123 was shown to apply."

Because the 90-Day law was applied as of October 29, 2017 or carrying over to October 30, 2017, a Monday, Norman Engel was not entitled to temporary income benefits for his lost time disability even though the DWC administrative judge found he had disability starting again on February 18, 2018, within One Year claim limit of his date of injury and well before the Two Year limit to reach medical stability.

The 90-Day limit led to Engel not being allowed at least an additional 36 weeks of the capped weekly disability benefits allowed for again missing work due to the injury and second surgery.

The Travis County Texas District Court rejected Engel's constitutional challenges of due process and equal protection and property rights. Engel appealed and the Texas Court of Appeals for the Third District in this matter concluded that: "When balanced against the WCA's overall purpose, we cannot say that the added

restriction created by the 90-Day law renders the WCA arbitrary or unreasonable. We hold that the statutory 90-Day law does not violate the Open Courts or Due Course of Law provisions of the Texas Constitution." Engel has continued to disagree with the conflicts with the 90-Day limit unreasonably restricting the One Year claim limit and the Two Year limit for disability benefits including that the 90-Day limit is unreasonable and arbitrary in violation facially and as applied of the U.S. Constitution.

REASONS FOR GRANTING THE PETITION

I. This Court Has Applied the Fourteenth Amendment to State Workers' Compensation Claims

This Court, like state courts including Texas, has found constitutional workers' compensation laws limiting the employer's responsibility for personal injury or death of an employee arising in the course of employment in the public interest, and that no person has a vested right entitling him to have such common law rights if arbitrary and unreasonable changes are excluded when imposing limited statutory liability without fault. *Arizona Employers' Liability Cases*, 250 U.S. 400, 419-20 (1919).

Engel asks that his limited rights to workers' compensation benefits under two constitutional statutory limits of One Year and Two Years be upheld to control over an unreasonable and arbitrary 90-Day limit clearly limiting the two former periods.

If this Court agrees that the 90-Day limit is unreasonable or arbitrary as applied and that Engel's due process is not protected including in violation of the two longer statutory limits, then this Court is asked to remand this matter back to the Texas courts.

In Texas the workers' compensation benefit disputes are generally between the "insurance carrier" (not the employer) and the employee. *See* Texas Labor Code Chapter 410.

If the One Year limit with a generous "good cause" extension to claim workers' compensation benefits is a due process protected law, then how can a 90-Day limit be applied to stop even claiming additional weekly lost time benefits occurring within the first year from a date of injury? Prior Texas state decisions have recognized even pending claims may be amended at any time before final

The Texas Supreme Court in rejecting a workers' compensation "injury claim" (like hear) to be used for extending deadlines on a separate "death claim" explained:

> The cases . . . do recognize the right of an injured employee, once notice of injury and claim for compensation have been timely and properly filed, to amend his claim at any time before the board acts on his original claim, and it has been held that in a suit filed to set aside the award of the board, the claim, so long as it is a claim for general injuries, may be enlarged to include all injuries proximately resulting from the accident.

American Motorists Ins. Co. v. Villagomez, 398 S.W.2d 742, 743-744, 9 Tex. Sup. J. 185 (Tex. 1966).

The current One Year limit to claim workers' compensation benefits has no limitations in the first year and allows "good cause" to claim benefits after a year. Texas Labor Code § 409.003.

This has been a long-settled issue in workers' compensation. The Fort Worth Court of Appeals following prior Court of Appeals decisions explained that it would not limit how a claimant made or amended a claim "at any time" before final disposition just like many other Courts of Appeal:

> Furthermore, we are of opinion that when a claim is filed in due season, it matters not how the injury may be described, it may be amended at any time before the Board has finally disposed of the claim. *Traders & General Ins. Co. v. Herndon*, Tex. Civ. App., 95 S.W.2d 540, writ dismissed.

Western Casualty Co. v. DeLeon, 148 S.W.2d 446, 448-449 (Tex. Civ. App.—Fort Worth 1941, dism. judg. cor.).

The 90-Day limit on its face and as applied to Engel prevents amendments to workers' compensation claims before the One Year limit to even claim benefits has expired. The 90-Day limit on its face and as applied to Engel also prevents additional weekly disability benefits by not allowing medical stability to be challenged before the Two Year limit to reach medical stability.

This case also involves important statutory and conflicts under the Texas Workers' Compensation Act, specifically Tex. Lab. Code § 401.011(30) (Two Year medical stability or recovery limit of 104 weeks to reach maximum medical improvement) Tex. Lab. Code § 409.003 (One Year to file a claim and good cause to extend), The 90-Day limit under Tex. Lab.

Code § 408.123 and DWC Rule 130.12, 28 Tex. Admin. Code § 130.12, prematurely limits an injured worker's benefits under the WC Act both before the One Year claim limit and the Two Year medical stability limit.

The date of maximum medical improvement or medical stability under the Texas Workers' Compensation Act means, Tex. Lab. Code § 401.011(30).:

> "Maximum medical improvement" means the earlier of:
>
> (A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated;
>
> (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or
>
> (C) the date determined as provided by Section 408.104 [extending the 104 week limit for certain spinal surgeries].

The Texas Workers' Compensation Act requires maximum medical improvement, MMI or medical stability, to be determined and certified that based upon a reasonable medical probability and an exam by a doctor that further material recovery can no longer reasonably be anticipated. Tex. Lab. Code § 408.123 (doctor certifying exam for medical stability to cut off disability benefits if before two years is reached).

The statutory law of the 90-Day limit is contained in Texas Labor Code Section 408.123:

> (e) Except as otherwise provided by this section, an employee's first valid certification of maximum medical improvement and first

valid assignment of an impairment rating is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means.

(f) An employee's first certification of maximum medical improvement or assignment of an impairment rating may be disputed after the period described by Subsection (e) if:

(1) compelling medical evidence exists of:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the impairment rating;

(B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid; or

(2) other compelling circumstances exist as prescribed by commissioner rule.

A. "Adequate" Treatment is Not an Exception to the 90-Day Limit But "Inadequate" Treatment Is

If a worker's medical treatment is determined adequate, even if more treatment is later needed and approved and paid for by the insurance carrier, such is not a statutory exception. The 90-Day limit statute

does not contain an exception for "adequate" treatment. Engel did argue that his treatment was "inadequate" when on April 20, 2018, he filed an administrative dispute of the July 18, 2017, certification, in part because of improper and inadequate treatment evidenced by the subsequent re-rupture of the right distal biceps tendon and the necessity of a second surgical repair on Mach 19, 2018. However, the final agency decision upheld in this matter determined that Engel failed to establish that his initial treatment was inadequate" and that: "No exception to finality under Texas Labor Code § 408.123 was shown to apply."

The phrase "inadequate treatment" is not defined. Is this not unreasonable and arbitrary to exclude the opposing word of "adequate" treatment from the 90-Day exceptions, before even reaching the conflicts with the One Year and Two Year limits? Workers, like Engel, who go back to work after adequate treatment but need more even surgical treatment are deprived of disability benefits. How is this not arbitrary and unreasonable to have assessed "adequate" medical treatment at the time that does not prevent future disability, but forecloses after 90-Days the full two year period for disability?

The Texas Supreme Court recognized in *Garcia* in upholding the constitutionality of the Act, that the Two Year medical recovery period as important reasonable period protecting the major benefit of lost time benefits. *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 524 (Tex. 1995). In *Garcia* at 524, 525, the Texas Supreme Court determined two years was not unreasonable explaining:

> Under the Act, a claimant is deemed to reach "maximum medical improvement," signaling

> an end to temporary benefits, no later than two years after those benefits begin to accrue, regardless of whether the claimant's condition has actually stabilized. Tex. Lab. Code §§ 401.011(30), 408.102(a). Plaintiffs contend that this presumption denies equal protection by creating an arbitrary classification. We disagree.
>
> First, it is not apparent that the Act's definition of "maximum medical improvement" creates any classification, as it merely establishes what is in essence a two year cap on temporary income benefits for all claimants. Second, even if it could be viewed as creating a cognizable class, it is not [**54] irrational. The Legislature could have concluded that some absolute limit on temporary income benefits—which constitute a major benefit under the Act—was a necessary component of an efficient compensation system. Two years is not an arbitrary place to draw the line, as there was medical testimony at trial that most injured workers will actually reach maximum medical recovery within that time period.

Here, Engel clearly re-ruptured his bicep injury less than one year from his date of injury, and he sought and received additional surgical treatment for his compensable right biceps injury well within the 104 week period. In fact, a third surgery was recommended within the two year period. But because his treatment was determined "adequate" at the time versus "inadequate" he did not meet the arbitrary exceptions to the arbitrary 90-Day limit law.

A worker, who does not make a claim, or does not have his claim rushed to a doctor for medical stability determination, will not have to contend with a potential 90-Day limit. This not only raises due process concerns but equal protection under the 14th Amendment by forcing the 90-Day provisions early on workers who submit to examinations before the One Year claim filing and Two Year limit to reach medical stability.

State workers' compensation laws, which are a tort reform balance to provide some economic protection to workers and employers, have long been considered valid exercises of a state's police powers. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 239-40 (1917); *Mattson v. Department of Labor and Industries*, 293 U.S. 151, 154, 79 L. Ed. 251, 55 S. Ct. 14 (1934). The question here is whether the limited weekly disability payment protections afforded to workers will be enforced.

B. Three Years after Settlement is Reasonable, but how is 90-Days Reasonable Before the One Year limit to Claim Benefits and the Two Year limit to Reach Medical Stability

In *Mattson*, this Court upheld the reasonableness of a three year limitation period on the reopening of a "settled" workers' compensation claim after benefits had been terminated as agreed by the parties. This Court explained that the three years on the ground that his condition had become aggravated due to the injury. The clear difference here is the 90-Day limit stopping disability benefits is applied before the One Year limit to claim benefits including disability benefits and a lack of medical stabilization. *Mattson v. Depart-*

ment of Labor and Industries, 293 U.S. 151, 154, 79 L. Ed. 251, 55 S. Ct. 14 (1934)

In *Mattson*, this Court concluded that a state may impose reasonable limitations in a manner that a three year limit for seeking additional compensation on a settled claim is not unreasonable, arbitrary, or oppressive. Mattson did not concern conflicting due process provisions of state law, and Mattson only applied to a claim that had been settled by both parties.

Here, the 90-Day limit is unreasonable and arbitrary in actually stopping benefits in less than one year from the date of injury.

In this matter, the lower court even conceded to Engel that the 90-Day limit, *Engel v. Texas Dep't of Ins.-Div. of Workers' Comp.*, No. 03-23-00077-CV, 2024 Tex. App. LEXIS 4980, 2024 WL 3432250, at *4 (Tex. App.—Austin July 17, 2024, pet. denied):

> He points out that there is no testimony in the present case supporting a 90-Day deadline to dispute an MMI.
>
> It does appear that the selection of 90days was somewhat arbitrary. We do not believe, however, that the absence of testimony—medical or otherwise—supporting the 90-Day deadline is dispositive.

Before the 90-Day limit was a state law and just an agency rule, the Texas Third Court of Appeals in *Fulton*, the opinion declared "that the 90-Day Rule is invalid because the Commission has imposed a burden on the injured worker contrary to the language and objectives of the Act." *Fulton v. Associated Indem. Corp.*, 46 S.W.3d 364, 368 (Tex. App.-Austin 2001, pet.

denied). The Third Court looked at the Texas Supreme Court's decision in *Garcia* upholding the constitutionality of and the purposes behind the WC Act, and explained, emphasis added:

> The *Garcia* court next rejected a constitutional challenge to the Act's definition of MMI that terminates temporary medical benefits after two years, regardless of whether the claimant's condition has actually stabilized. *Garcia*, 893 S.W.2d at 525. The supreme court noted that temporary income benefits are "a major benefit" under the Act, and restricting those benefits to a two-year period was only justified by medical testimony that most workers' conditions stabilize within that time frame. *Id.* Under this rationale, a rule that cuts off temporary income benefits *before* the worker's condition has had two years to stabilize might be deemed arbitrary and might call into question the adequacy of the entire statutory quid pro quo approved in *Garcia*.

Fulton at 370.

The Texas Third Court of Appeals previously determined that the Two Year limit to medically stabilize was very important and not arbitrary based on medical testimony, which led the Third Court to conclude that when the 90-Day limit rule, if allowed to be used, would cut off the two years allowed for disability benefits and call into question the entire WC Acts adequacy.

Yet, the Texas Third Court did not enforce this conflict when the 90-Day limit with undefined exceptions was made a state law after being thrown out as a rule, and Texas has failed protect the two year "major

benefit" for Engel that workers are allowed to receive temporary income benefits for periods of disability within the first two years after an injury.

The Third Court in *Fulton* concluded that the prior 90-Day limit agency *rule* was: "A rule that imposes a ninety-day time limit for a claimant's MMI assessment to become final is at odds with the constitutionally significant 104-week time period under the Act as recognized in *Garcia. Id.*; Tex. Lab. Code Ann. § 401.011(30)." *Fulton v. Associated Indem. Corp.*, 46 S.W.3d 364, 368 (Tex. App.-Austin 2001, pet. denied).

Here, Engel challenged the incorporation of a 90-Day limitation statutorily is also clearly at odds with both the Two Year limit or 104 week period from disability beginning to become medically stable in addition to the One Year to file a claim for workers' compensation benefits not addressed in the 90-Day rule rejection decision in *Fulton*.

This Court is asked to allow full briefing to address the subsequent placing of a 90-Day limit in the statute being in clear conflict with the controlling One Year limit to file a claim with "good cause" allowing claims for compensation beyond a year. Tex. Lab. Code § 409.003. Futher, this Court is asked to allow full briefing as to changing the arbitrary and unreasonable 90-Day limit from an agency rule to a state statutory law cannot make such constitutional and enforceable with the due process guaranteed by the reasonable One Year and Two Year limitation periods.

C. Procedural Due Process and State Workers' Comp

In looking at federal disability benefits, this Court recognized that the Fourteenth Amendment, like the Fifth, imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests under the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976).

In every due process challenge, the first inquiry is whether the person has been deprived of a protected interest in "property" or "liberty." *See* U.S. Const., Amdt. 14 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process. *Id.*, at 332.

This Court in rejecting 14th Amendment protections for medical benefits under a state workers' compensation system explained that such medical treatment must first be determined to be reasonable and necessary. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999).

In *Sullivan*, this Court rejected the property rights argument explaining that while the workers "indeed have established their initial eligibility for medical treatment, they have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary."

Engel established another 36 weeks of disability after the application of the 90-Day limit. Further, unlike *Sullivan*, a final state agency determination

was made, albeit adverse to Engel. *Sullivan* could have been viewed differently if the workers medical treatment rights were determined unreachable due to a 90-Day limit to seek approval by the state agency. Engel has shown that as applied, not just the facial challenge, the 90-Day limit clearly prevented him from recovering at least 36 more weeks of disability income benefits.

Disability, the inability to work or only work at a lower wage than the preinjury wage because of the compensable injury, is a fluid concept in Texas which an injured worker can go in and out of for temporary income benefits entitlement during the two years, 104 weeks, to reach maximum medical improvement with statutory extension allowed for certain spinal surgeries to go beyond the Two Year limit. *See* Texas Labor Code § 401.011(16)(defining disability), and Texas Labor Code § 401.011(30) (defining "maximum medical improvement" and allowing two years with extensions beyond for spinal surgery).

Unlike in *Sullivan*, Engel was stopped by the state enforcing the 90-Day limit from being allowed to pursue additional lost time weekly disability benefits when he re-ruptured his bicep. The state agency enforced the 90-Day limit law while determining that Engel did miss at least another 36 weeks beginning within one year of his date of injury and well within the Two Year limit allowed under Texas Labor Code § 401.011(30).

The WC Act of the Texas Labor Code defines disability as under Texas Labor Code Section 401.011(16):

> (16) "Disability" means the inability because of a compensable injury to obtain and retain

employment at wages equivalent to the pre-injury wage.

As applied in fact here, Engel went back into undisputed disability on February 18, 2018, within a year of his date of injury, with the re-rupture of his biceps requiring additional surgery and he was unable to work at wages equivalent to his preinjury wages from February 18, 2018, through at least October 29, 2018, the date of the administrative hearing. This fluid disability concept up until maximum medical improvement benefits all parties by allowing workers to try to return to work. This saves the insurance company from paying disability benefits while allowing for the employer to provide light or restricted work or even full work at the preinjury wage, but when the injury reoccurs or additional surgery and off work recovery period is needed during the first two years a worker can again get disability weekly payments. For example, this would apply disability off and on to a firefighter undergoing work injury inpatient cancer treatments off and on during the first two years after initial loss of time.

Engel, who initially returned to work in good faith but re-ruptured his bicep needing more surgery, has been denied the at least 36 weeks of additional weekly disability benefits by the unreasonable and arbitrary application of a 90-Day limit because his treatment was deemed "adequate" before the re-rupture months after the 90-Day limit.

II. This Case Is an Excellent Opportunity to Adress Constitutionality of State Workers' Compensation Procedural Limits Which Deny Longer Constitutional Limits

Why should any worker be punished by foreclosing future disability benefits allowed for two years when for over 90 days, the worker has returned to work and has no factual reason to dispute a prior medical stability determination? A worker, as the facts as applied to Engel, should be allowed to go in and out of disability and continue to get disability benefits for the full two year period allowed statutorily. The 14th Amendment should provide protection as a matter of substantive due process and for otherwise vested property rights.

What happened to Norman Engel was wrong in unreasonably and arbitrarily applying a 90-Day limit to foreclose his statutory rights to at least an additional period of at least 36 weeks of disability. Because the secondary procedural limitation is arbitrary and unreasonable and clearly conflicts with reasonable statutory limits of One Year to claim benefits and Two Years to reach medical stability, this Court can reject the 90-Day law and protect the constitutionality of the Texas Workers' Compensation Act to provide the limited substantive disability benefits allowed off and on for up to two years.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and full briefing requested.

Respectfully submitted,

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