

No. 03-07-00007-CV

**In the
Third Court of Appeals
at Austin, Texas**

HCA HEALTHCARE CORPORATION, *ET AL.*,
Appellants,

v.

TEXAS DEPARTMENT OF INSURANCE; ALBERT BETTS, JR.;
AND TEXAS DEPARTMENT OF WORKERS' COMPENSATION,
Appellees.

On Appeal from the
201st District Court of Travis County

STATE DEFENDANTS' APPELLANTS' BRIEF

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The list of hospitals and their counsel is incorporated from Tab H of this brief, which is a copy of the five-page list that they attached to their notice of appeal. See Tab H (attaching 8.CR.2196-2201).

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STATEMENT OF THE CASE

- Nature of the Case:* Declaratory judgment action challenging a provision of the Texas Labor Code as facially unconstitutional
- Trial Court:* The Honorable Steven Yelenosky
201st District Court, Travis County, Texas
- Course of Proceedings:* The case was resolved on cross-motions for summary judgment. 8.CR.2184-86 (Tab A).
- Trial Court Disposition:* In its final judgment, the court made a single declaration that Texas Labor Code §413.031(k) was facially unconstitutional for specified reasons. 8.CR.2185 (Tab A). It also dismissed the plaintiffs' challenge to 1,406 specific fee determinations for want of jurisdiction. 8.CR.2185-86. The trial court denied all other relief. 8.CR.2186.

ISSUES PRESENTED

The district court declared §413.031(k) of the Texas Labor Code to be facially unconstitutional “because it fails to afford parties to a medical dispute . . . an opportunity for a hearing in which witnesses are sworn and the parties can rebut adverse evidence and cross-examine adverse witnesses before a final order is issued.” 8.CR.2185.

1. To be facially unconstitutional, a statute must be invalid in every possible application. Under the district court’s holding, a full-blown evidentiary hearing (including cross-examination of witnesses) must be offered even when there are no live fact questions or when a party fails to make its initial burden of proof. Did the district court err in holding the statute to be facially unconstitutional?
2. Constitutional due process recognizes a property interest when a person has a legitimate claim of entitlement under state law. The hospitals assert an “entitlement” to be paid more by the insurers and the insurers assert an “entitlement” not to pay more to the hospitals.
 - a. Have either side’s interests yet solidified into “legitimate claims of entitlement”?
 - b. The fee statute includes factors beyond the hospitals and insurers’ control and others involving the discretion of the Division. Do the parties have a “legitimate claim of entitlement” to a particular outcome?
3. When there is a constitutional property interest, due process requires procedures tailored to reducing the risk of an erroneous deprivation of that property interest. These medical disputes turn on methodology and similar economic factors. Does the Constitution require live testimony and cross-examination in these circumstances?

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STATE DEFENDANTS' APPELLANTS' BRIEF

TO THE HONORABLE THIRD COURT OF APPEALS:

In its single declaration, the district court held §413.031(k) of the Texas Labor Code to be facially unconstitutional. 8.CR.2184-86 (Tab A). That holding is insupportable. The statute is certainly not *facially* unconstitutional—there are many situations in which a full-blown hearing with cross-examination of live witnesses would not be necessary to meet the constitutional minimum. That demands reversal of the judgment. Moreover, there is no need for any remand to consider a possible “as-applied” challenge because these hospitals and insurance companies do not have a *constitutional* property interest at stake here. And the process offered meets the constitutional

minimum for this type of dispute, in which live testimony is more apt to lead to delays and settlement pressures than to reach a more accurate determination of issues that are far more efficiently (and no less accurately) addressed on the paper record so common in many administrative arenas.

STATEMENT OF FACTS¹

A. Background

The Court has been a major player in the history of this case. In 1995, the Court invalidated a rule that the Texas Workers' Compensation Commission (TWCC) had issued in 1992 (the 1992 Fee Guideline). *Tex. Hosp. Ass'n v. Tex. Workers' Compensation Comm'n*, 911 S.W.2d 884, 888 (Tex. App.—Austin 1995, writ denied). The invalidated 1992 Fee Guideline had been issued to implement Texas Labor Code §413.011(d), the statute that provides that compensation must be “fair and reasonable,” among other statutory factors. *Id.* at 886. The *Texas Hospital Association* Court held that the 1992 Fee Guideline had been issued without a “reasoned justification” and thus was invalid. *Id.* at 888.

As a result, more than 20,000 claims were filed by medical-service providers that sought retroactive increases in the fees for services they had provided (and for which they had already been paid) between the invalid rule being issued in 1992 and the time that a replacement rule was implemented in 1997. *Hosps. & Hosp. Sys. v. Cont'l Cas. Co.*, 109

¹ Because this appeal arises after cross-motions for summary judgment, the appellate record consists of the submissions of the parties attaching affidavits and other written evidence. *See* TEX. R. CIV. P. 166a.

S.W.3d 96, 98 (Tex. App.—Austin 2003, pet. denied). Most of those claims were filed more than one year after the medical services had been performed. *Id.* Although TWCC had a rule prohibiting such late claims (rule 133.305(a)), it agreed to process the hospitals' claims. *Id.* In 2003, this Court eventually held that the one-year rule applied and had neither been waived nor tolled. *Id.* at 102-104.

Also in 2003, this Court confronted the question of what substantive standard governed these fee disputes after the 1992 Fee Guideline had been invalidated. *All Saints Health Sys. v. Tex. Workers' Compensation Comm'n*, 125 S.W.3d 96 (Tex. App.—Austin 2003, pet. denied). The Court held that, after invalidation of a rule issued under the APA, the rules revert to the last validly adopted legal standard. *Id.* at 103. The Court held the governing standard to be Rule 134.1, which calls for a case-by-case determination of whether fees were “fair and reasonable.” *Id.* at 103-104. The Court also explained that, in making that determination, TWCC’s “reimbursement decisions must take into account all of the statutory factors, guaranteeing both cost control and quality of care” and “keeping in mind that . . . the managed care contracts . . . do not as a matter of law set a ceiling on reimbursement.” *Id.* at 105.

In 2005, the Legislature abolished TWCC and transferred authority over workers' compensation to the Division of Workers' Compensation (DWC) of the Texas Department of Insurance. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 265, art. I, 2005 Tex. Gen. Laws 469. At that time, only a few hundred of the backlogged claims from the 1992 to 1997 period had been sent to the State Office of Administrative Hearings (SOAH) for what was, under the prior statute, the next step in the decision-making

process. SOAH had not yet had a hearing on even the claims referred to it. It instead engaged in protracted pretrial proceedings that it explained were designed to create “test cases” to facilitate settlement. *E.g.*, 3.CR.666-671. Thousands of claims were still pending before TWCC that had not been referred to SOAH.

In its 2005 Regular Session, the Legislature enacted comprehensive workers’ compensation reform that abolished TWCC and made other changes to the dispute-resolution process. Act of May 30, 2005, 79th Leg., R.S., ch. 265, art. I, 2005 Tex. Gen. Laws 469; *see also* TEX. LAB. CODE ch. 413.031 [Tab B]. As part of that reform, the Legislature transferred jurisdiction over the pending claims to DWC. Act of May 30, 2005, 79th Leg., R.S., ch. 265, §1.003, 2005 Tex. Gen. Laws 469, 470. Accordingly, on September 1, 2005, jurisdiction over the claims was transferred to DWC by operation of law and those claims that had not yet been sent to SOAH were governed by the new version of Texas Labor Code §413.031(k), which no longer required a SOAH hearing as a prerequisite to the provided substantial-evidence review.² *See* Tab B.

B. DWC Begins To Process the Backlog of Claims, Beginning With Those Lacking Sufficient Evidence To Meet the Claimant’s Initial Burden of Production

In November 2005, DWC began to process the backlog of these long-pending claims that had now been placed under its authority. In deciding how to proceed, the

² The enactment provides: “Effective September 1, 2005, the State Office of Administrative Hearings may not accept for hearing a medical dispute that remains unresolved pursuant to Section 413.031, Labor Code. A medical dispute that is not pending for a hearing by the State Office of Administrative Hearings on or before August 31, 2005, is subject to Subsection (k), Section 413.031, Labor Code, as amended by this Act, and is not subject to a hearing before the State Office of Administrative Hearings.” Act of May 30, 2005, 79th Leg., R.S., ch. 265, §8.013, 2005 Tex. Gen. Laws 469, 610.

director of the Medical Review Division relied in part on “doubt[s]” about “the efficiency of the test case process used at SOAH because of the non-binding nature of SOAH decisions, and [that] the test cases in these dockets had not helped to move the matter forward.” 6.CR.1647, ¶3(c) (McDonald Aff.) [Tab C]. Moreover, “[b]y November 2005, the 1992 hospital fee disputes were the second-largest category of pending fee disputes, and applying resources to this area would result in the most efficient reduction in the backlog of pending cases.” *Id.* ¶3(e). To begin the process, the director “instructed [the] staff to issue decisions for the 1992 hospital fee disputes only in those cases in which the hospital plaintiffs had failed to provide sufficient documentation to justify additional payments. We had provided guidance to the providers and carriers on what type of evidence would be sufficient in TWCC Advisory 98-01,³ and it was my understanding from the legal opinions on this matter that sufficient evidence was necessary for entitlement to supplemental reimbursement.” 6.CR.1648, ¶6. Pursuant to those instructions, DWC resolved 1,406 cases between November 2005 and January 2006. *See* 6.CR.1630-34 (McDonald Deposition) [Tab E]. Each disposition was a denial of additional reimbursement for failure to submit the required evidence under Rule 134.1.

C. This Lawsuit

On January 17, 2006, a number of hospitals filed suit challenging the new system on due-process grounds. 1.CR.2-18. That same day, they obtained a temporary restraining order that prevented DWC from resolving any additional cases. 1.CR.94-99.

³ *See* 6.CR.1667-69 (TWCC Advisory 98-01) [Tab D].

After other parties (including other hospitals and insurance companies) intervened in the action, the district court ultimately rendered a declaratory judgment that Texas Labor Code §413.031(k)—the new provision providing for substantial-evidence review of DWC’s decision without the necessity of a SOAH proceeding—was facially unconstitutional “because it fails to afford parties to a medical dispute . . . an opportunity for a hearing in which witnesses are sworn and the parties can rebut adverse evidence and cross-examine adverse witnesses before a final order is issued.” 8.CR.2185 [Tab A]. The order also dismissed the hospitals’ challenges to the 1,406 already-issued decisions of DWC for want of jurisdiction because those decisions had not been appealed within the 30-day window. 8.CR.2185-86. And it denied all other relief. 8.CR.2186. The State Defendants filed this appeal challenging the adverse portions of the judgment. 8.CR.2208-11 (notice of appeal) [Tab G]. The hospitals have also filed an appeal from the judgment. 8.CR.2193-2202.

SUMMARY OF THE ARGUMENT

This is a one-declaration case. The district court declared that §413.031(k) of the Texas Labor Code was “facially unconstitutional because it fails to afford parties to a medical dispute . . . an opportunity for a hearing in which witnesses are sworn and the parties can rebut adverse evidence and cross-examine adverse witnesses before a final order is issued.” 8.CR.2185. That declaration should be reversed.

Under the standards for facial invalidity, the district court’s conclusion is insupportable. For a statute to be facially invalid, it must be invalid in every possible application. And there are many situations in which the Constitution would not compel

the sort of live testimony and cross-examination mandated by the district court. Analogous situations happen every day in the civil litigation context, as cases are resolved on motions to dismiss and—as this case was—through motions for summary judgment (under which live testimony is not permitted). The same is true in the administrative process, as when a hospital fails to file a claim within the one-year limit or when it fails to submit sufficient evidence to meet its initial burden of production. If even one application of the statute is constitutional, the statute cannot be struck down on grounds of facial invalidity.

But, in any event, the hospitals and insurance companies have failed to make out a due-process claim because the interests that they assert are mere expectancies and not—certainly not until *after* a determination is made that a given level of reimbursement is “fair and reasonable”—the sort of entitlement that might constitute a property interest.

Lost in the district court’s ruling is that the State stands as an arbiter between the hospitals and insurance companies, assisting them in resolving their dispute over a proper level of reimbursement for this treatment. Although each asserts what they call a “legitimate claim of entitlement,” they assert them against each other. One says it has an “entitlement” to receive payment; the other says it has an “entitlement” *not* to pay. Both cannot be right. Any given proceeding might favor the hospital or it might favor the insurance carrier. But until then, neither of them has what might be called a “legitimate claim of entitlement.” Rather, each has a mere expectancy of prevailing against the other. Moreover, the factors that the statute requires in making fee determinations—such as “effective cost containment” and ensuring “quality of medical care”—are beyond the

control of individual claimants and, instead, enter the zone of discretion held by the Division. Neither party is “entitled” to have that discretion exercised in a particular way.

And even so, the process offered by the State meets the constitutional minimum. Due process does not prescribe rigid levels of procedure but instead balances the interest at stake, the probative value of the procedure sought, and the public’s interests in speedy and efficient adjudication of the dispute. These medical-fee disputes decide whether additional funds should change hands between hospitals and insurance companies for treatment that has already occurred. They turn on paper records and methodology rather than credibility contests typically aided by cross-examination. For this type of administrative dispute, a paper record—in which either side can introduce and respond to evidence—meets the constitutional minimum. The declaratory judgment should be reversed and judgment rendered in favor of the State Defendants.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THE STATUTE FACIALLY UNCONSTITUTIONAL WHEN IT HAS INDISPUTABLY VALID APPLICATIONS.

Facial invalidity, outside the special First Amendment context, is reserved for statutes that lack any valid applications; if the challenged statute has even one valid application, it is not *facially* unconstitutional. “To sustain a facial challenge, the challenging party must establish that the statute, by its terms, always operates unconstitutionally.” *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 627 (Tex. 1996) (citing *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995)). A facial challenge must contend “that the Act will, under

all circumstances, deprive them of their property rights” *Id.*; see also *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid.”).

Neither the hospitals nor the insurance companies carried that heavy burden, and, for that reason, the declaration of facial invalidity is error. And, because the record demonstrates at least *some* valid applications of the statute, the district court should have instead rendered judgment upholding the statute’s facial validity.

A. The Judgment of Facial Invalidity Was Error Because the Constitution Does Not Always Require a Full-Blown Hearing Featuring Live Testimony and Cross-Examination of Witnesses for Every Medical Dispute, No Matter How Weak.

The district court held that §413.031(k) is facially invalid “because it fails to afford parties to a medical dispute . . . an opportunity for a hearing in which witnesses are sworn and the parties can rebut adverse evidence and cross-examine adverse witnesses before a final order is issued.” 8.CR.2185 (Tab A).

Because this is a judgment of *facial* invalidity, the challengers to the statute must establish an absolute—that the statute *always* operates unconstitutionally. *Barshop*, 925 S.W.2d at 627. In other words, the supposed deficiencies in the statute must *always* be constitutionally required. The statute can only be *facially* unconstitutional on that ground if there are no situations in which such “live testimony” or “cross-examination” would not be a constitutional command.⁴

⁴ Not even the civil litigation system always gives participants the right to put on witnesses. The

There are. To take a few examples:

- Many disputes were resolved for failure to comply with rules requiring a claim to be filed within one year of the medical service. *See also Hosps. & Hosp. Sys.*, 109 S.W.3d at 103 (holding that the rule was not tolled during earlier litigation). With procedural errors such as failure to meet filing deadlines, the Constitution surely does not require a full-blown hearing with live cross-examination of witnesses. *Cf. Bell v. Tex. Workers Compensation Comm’n*, 102 S.W.3d 299, 305 (Tex. App.—Austin 2003, no pet.) (“Implying the right to a full-blown hearing would not be of benefit considering the mandatory nature of [the rule].”).
- In other disputes—including the 1,406 disputes mentioned in the hospitals’ pleadings and that are the subject of their appeal—a party fails to meet its initial burden to produce sufficient evidence to continue. *See* 6.CR.1630-34 [Tab E]; 6.CR.1648, ¶6 [Tab C]. When a party fails to meet that burden, they are in the same position as a party who fails to present sufficient evidence to survive a motion to dismiss or for summary judgment. In neither case is live testimony permitted, *see* TEX. R. CIV. P. 166a(c) (“No oral testimony shall be received at the hearing”), or constitutionally required.⁵

rules of civil procedure are well-stocked with tools to narrow issues and weed out meritless claims. The summary-judgment rule that led to the final judgment below prohibits the very sort of live testimony to which plaintiffs now claim a constitutional entitlement. *See* TEX. R. CIV. P. 166a(c) (“No oral testimony shall be received at the hearing.”).

⁵ Although the hospitals might have disputed whether they had, in fact, submitted sufficient evidence, that disagreement would properly be handled through a suit for judicial review of the disposition. *See* TEX. LAB. CODE §413.031(k); *cf. All Saints*, 125 S.W.3d at 104 (“We cannot evaluate the merits of the Hospitals’ claims until they have exhausted their administrative

- In still other disputes there may not be a genuinely disputed question of material fact. When there is no disputed question of fact, the Constitution does not require the parties to go through the formality of a hearing. *Codd v. Volger*, 429 U.S. 624, 627 (1977) (per curiam). After all, the purpose of a hearing is to prevent an *erroneous* deprivation of property, and additional process is not required if it would not tend to reduce the likelihood of error.
- And these disputes—which turn on a statute that asks the agency to make decisions about “cost containment” and “quality” of care—do not involve the kinds of credibility determinations particularly aided by cross-examination. To the contrary, the disputes here involve methodology and billing and payment documents, as well as questions of statutory interpretation and policy.

* * * * *

The remainder of this brief discusses specific flaws in the due-process arguments made against §413.031(k). Not only do those flaws demonstrate why judgment should ultimately be rendered that the statute is constitutional even as-applied to these plaintiffs, *see* Parts II & III, *infra*, but each flaw also shows why the facial judgment was error. If §413.031(k) could constitutionally be applied to any possible situation, the facial judgment must be reversed.

remedies . . .”). To reverse this *facial* judgment, it is sufficient to note that, if a party does fail to meet that burden, it would be constitutional to curtail further process.

**B. The Trial Court’s Judgment Does Not Increase the Amount of Process—
Rather, It Seems To Remove an Avenue for Judicial Review.**

The district court struck down a provision of the statute that, by its terms, provides additional process rather than limiting the process available. It struck down §413.031(k), which by its terms authorizes judicial review of agency decisions:

(k) Except as provided by Subsection (l), a party to a medical dispute that remains unresolved after a review of the medical service under this section may seek judicial review of the decision. The division and the department are not considered to be parties to the medical dispute for purposes of this subsection. Judicial review under this subsection shall be conducted in the manner provided for judicial review of contested cases under Subchapter G, Chapter 2001, Government Code.

TEX. LAB. CODE §413.031(k). Quite strangely, in striking down that provision, the district court seemed to remove an avenue for judicial review of agency decisions. It is difficult to see how *lessening* procedural protections might be compelled by constitutional due process. The declaration of facial invalidity cannot be defended on due-process grounds.

**II. NOR DO THESE PARTICULAR HOSPITALS OR INSURANCE COMPANIES HAVE
VALID DUE PROCESS CHALLENGES.**

Whether an interest is protected by constitutional due process is a matter of characterization, not degree. Thus, “to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972). And property interests are built on a true legal “entitlement”: “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must

have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Id.* at 577.

A. That Both Sides Assert an “Entitlement” to Opposite Things Shows That Neither Is Yet Entitled to a Particular Outcome.

Oddly, the hospitals and insurance companies assert *opposing* “entitlements” that cannot both be true. The hospitals assert that they are entitled to additional payments from the insurance companies. *See* 8.CR.2039 (“The Hospitals obviously have a legitimate claim of entitlement to the amounts of reimbursement owed as fair and reasonable payment under the Texas Labor Code”). Meanwhile, the insurance companies assert that they have the opposite entitlement—*not to pay* the very same claims. *See* 3.CR.869-70 (“TMIC has vested property rights in the funds it may be ordered to pay under decisions made by DWC Due process requires that the government not deprive TMIC of its money without a proceeding in which the rudiments of fair play are observed.”).

Much like two litigants squaring off in court, the hospital and insurer do not yet have a legitimate claim of entitlement to enforce their desired outcome. Until it is settled which of them holds the “*legitimate claim*,” *Roth*, 408 U.S. at 577-78 (emphasis added), each has at most a unilateral expectation of winning the dispute.

And that still-uncertain claim is not even against the government—making this case fundamentally different than the usual due-process case, in which a party seeks to receive a direct government benefit. Here, the parties are seeking to enforce a claim

*against each other.*⁶ The two sets of parties are adverse to one another and, as some hospitals described it, are the “real parties in interest” in the underlying administrative proceedings. *See* 8.CR.2031 (referring to the hospitals and insurers are those “real parties”). Recognizing that underlying economic reality, the statute provides that the Division is not a proper party to the eventual judicial review of its decisions. TEX. LAB. CODE §413.031(k). The Division’s role is to ensure that the statute’s goals are met, *see Tex. Hosp. Ass’n*, 911 S.W.2d at 887 (“The Labor Code charges the Commission with a very important and difficult task: quality medical care at fair prices with emphasis on cost containment”), but it has no stake in individual outcomes.

Under the Legislature’s design, a party to a medical-fee dispute “is entitled to a review” under specified circumstances. TEX. LAB. CODE §413.031(a). The Division’s role in such a dispute is clear: “In resolving disputes over the amount of payment due for services determined to be medically necessary and appropriate for treatment of a compensable injury, the role of the division is to adjudicate the payment given the relevant statutory provisions and commissioner rules.” *Id.* §413.031(c). The Division is to publish its decisions, *id.* §413.031(c), presumably to permit parties to cite those decisions in future proceedings. The statute also offers some procedures designed to assist hospitals and insurers in resolving their claims. *See id.* §413.031(k) (providing for a decision by the Division and judicial review); *id.* §413.031(n) (authorizing the creation

⁶ This posture, in which the Division is acting much like a court, is very different than the usual due-process case, in which the government is doling out a particular benefit or directly providing a service. In those situations, the citizen may well have a legitimate claim from the outset, depending on the particular statutory provisions involved.

of alternative dispute resolution procedures); *see also id.* §413.031(d) (authorizing certain types of issues to be sent to independent review organizations).

But these procedures do not bootstrap the parties' expectations into being "legitimate claims of entitlement." An expectation does not become a constitutional property interest merely because the government establishes some procedures for its protection: "[T]he entitlement to procedure alone does not create a property interest."⁷ *County of Dallas v. Wiland*, 50 Tex. Sup. Ct. J. 425, 430, 2007 WL 489983, at *5 (Tex. Feb. 16, 2007) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)). The dueling expectancies of the hospitals and insurance companies are not yet sufficiently firm to be constitutionally protected as property rights.

B. Until the Parties Establish That an Additional Fee Is “Fair and Reasonable,” They Do Not Have a Property Interest.

Under Chapter 413, a hospital does not become “entitled” to additional fees on top of the payments they have already received simply by asking for them. Instead, it must (in addition to other requirements) show that an additional payment is “fair and reasonable and designed to ensure the quality of medical care and to achieve medical cost

⁷ *See also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764 (2005) (stating that “the seeking of an arrest warrant would be an entitlement to nothing but procedure — which we have held inadequate even to support standing; much less can it be the basis for a property interest” (citation omitted); *id.* at 771-72 (Souter, J., concurring) (“Just as a State cannot diminish a property right, once conferred, by attaching less than generous procedure to its deprivation . . . neither does a State create a property right merely by ordaining beneficial procedure unconnected to some articulable substantive guarantee. This is not to say that state rules of executive procedure may not provide significant reasons to infer an articulable property right meant to be protected; but it is to say that we have not identified property with procedure as such. State rules of executive procedure, however important, may be nothing more than rules of executive procedure.”)).

control.” TEX. LAB. CODE §431.011(d); *see also All Saints*, 125 S.W.3d at 105. The hospitals have not done so.⁸

The United States Supreme Court has confronted a similar situation. In *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40 (1999), the Court addressed whether an employee had a property interest under Pennsylvania’s workers’ compensation system to certain medical benefits. The Court sharply distinguished its earlier cases in which “an individual’s entitlement to benefits had been established.” *Id.* at 60 (citing *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). Under that workers’ compensation system, the Court held,

Respondents’ property interest in this case, however, is fundamentally different. Under Pennsylvania law, an employee is not entitled to payment for *all* medical treatment once the employer’s initial liability is established, as respondents’ argument assumes. Instead, the law expressly limits an employee’s entitlement to ‘reasonable’ and ‘necessary’ medical treatment, and requires that disputes over the reasonableness and necessity of particular treatment must be resolved before an employer’s obligation to pay—and an employee’s entitlement to benefits—arise.

Sullivan, 526 U.S. at 60. “Thus, for an employee’s property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary. *Only then does the employee’s interest parallel that of the beneficiary of welfare assistance in*

⁸ The reasoning in this section and the next apply equally to the insurance companies’ desire *not* to pay these fees.

Goldberg *and the recipient of disability benefits in Mathews.*” *Id.* at 60-61 (emphasis added).

There was no dispute in *Sullivan* about whether the employer was liable for a workplace-related injury. *Id.* at 60-61. Instead, the open question was whether the particular medical treatment was reasonable and necessary. *Id.* at 61. The Court held that—until that was established—there was not a constitutionally protected property interest: “[The claimants] have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary. Consequently, they do not have a property interest—under the logic of their own argument—in having their providers paid for treatment that has yet to be found reasonable and necessary.” *Id.*

The same logic applies here. Until the parties establish the fee that is “fair and reasonable,” they lack a constitutionally protected property interest in receiving those additional fees. Until then, they have an “abstract . . . desire” or “unilateral expectation” of more money, not a “legitimate claim of entitlement.” *Roth*, 408 U.S. at 577.

C. And Because This Statute Brings Into Play Administrative Discretion, There Is No Legal Entitlement to a Particular Outcome.

This Court has recognized that the statute “charges the Commission with a very important and difficult task: quality medical care at fair prices with emphasis on cost containment.” *Tex. Hosp. Ass’n*, 911 S.W.2d at 887. Achieving that balance involves more than tallying up hospital bills and looking at contracts:

Thus, to be ‘fair and reasonable’ within the meaning of 413.011(d), the Commission’s reimbursement decisions must take into account all of the statutory factors, guaranteeing both cost control and quality of care. . . . [A]ny reimbursement decision made by the Commission under Rule 134.1

must take into account all of the statutory factors, keeping in mind that although the managed care contracts may be evidence of the amount that would otherwise have been charged, they do not as a matter of law set a ceiling on reimbursement.

All Saints, 125 S.W.3d at 105.

The statute confirms that the inquiry goes beyond the economics of a transaction for one particular hospital or insurance company. *See* TEX. LAB. CODE §413.011(d). Two factors—difficult to balance—are “quality of medical care” and “effective medical cost control.” *Id.* Another is that compensation cannot exceed “the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual”—a factor that may involve benchmarking against third parties to the particular fee dispute. *Id.* The statute suggests that another factor should be the “increased security of payment” afforded by the system. *Id.* Each fee dispute thus goes beyond simply applying settled rules to the facts. *See All Saints*, 125 S.W.3d at 105 (holding that the determination must weigh all the statutory factors).

This sort of inquiry is not conducive to a legal entitlement. “An entitlement must stand on the application of rules to facts. ‘To the extent a request appeals to discretion rather than to rules, there is no property.’” *Shrieve v. Tex. Parks & Wildlife Dep’t*, 2005 WL 1034086, at *5 (Tex. App.—Austin 2005, no pet.) (mem. op.). Thus, when a party’s interests may turn on administrative discretion, there is not yet “the type of right or property interest that gives rise to a due process interest.” *Id.* at *6 (finding no entitlement where discretion remained over the total number of permits to be issued). When a party seeks a benefit contingent on as-yet-unfulfilled conditions, it has merely an

expectancy, not a property interest. *ElderCare Props., Inc. v. Tex. Dep't of Human Servs.*, 63 S.W.3d 551, 556 (Tex. App.—Austin 2001, pet. denied).

If anything, the hospitals' interest is far weaker than the claimants in either *ElderCare* or *Shrieve*. Under Chapter 413, fee determinations consider a range of factors beyond the control of the claimant. If the district court were correct that the hospitals had an "entitlement" to a particular result, that would mean that the Division acted beyond its substantive discretion in denying additional fees to the hospitals. But, under *All Saints* and the controlling statute, it is the Division's task to determine what fee level is "fair and reasonable," subject only to later judicial review under a substantial-evidence standard. The Court should reject the hospitals' attempt to undermine the system of substantial-evidence review established by the Texas Legislature.

III. A PAPER PROCESS MEETS THE CONSTITUTIONAL MINIMUM FOR THE SORT OF DISPUTES COVERED BY THIS STATUTE—AND CERTAINLY FOR CLAIMS FOR WHICH THE HOSPITAL FAILED TO MEET ITS INITIAL BURDEN OF PROOF.

In these circumstances, the Constitution does not require a full-blown evidentiary hearing, complete with live testimony and cross-examination of witnesses. For that reason, the district court's judgment should be reversed.

A. A Paper Process Meets the Constitutional Minimum for These Types of Fee Disputes.

Absent a constitutionally protected interest, debates about how the government should fine-tune its procedures do not rise to a constitutional level. *Best & Co. v. Tex. State Bd. of Plumbing Ex'mrs*, 927 S.W.2d 306, 310 (Tex. App.—Austin 1996, writ denied) ("Procedural due process protects only what actually belongs to the individual,

rather than recognizing that unfairness exists in the very act of disposing of an individual's situation without allowing the individual to participate in some meaningful way.”). Because the parties do not have a constitutional property interest, *see* Part II, *supra*, there is no occasion for the Court to analyze the procedures offered under Chapter 413.

But if the Court does find there to be a protected interest, it should nonetheless reverse because the procedures are constitutionally sufficient. The Constitution's protection of due process is flexible, not rigid: “The very nature of due process negates any concept of inflexible procedures universally applicable to every intangible situation.”⁹ *Univ. of Tex. Med. Ctr. v. Than*, 901 S.W.2d 926, 931 (Tex. 1995). The level of process that the Constitution requires turns on a three-factor test. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Than*, 901 S.W.2d at 930. The factors are: (1) “the private interest that will be affected by the official action”; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government's interest, including the function involved and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at

⁹ The government commonly chooses to deal with this shifting constitutional floor by choosing to provide a level of process that far exceeds the minimum. For example, former §413.031(k) offered parties an essentially unfettered right to a SOAH hearing for these disputes. *See* TEX. LAB. CODE §413.031(k) (replaced 2005). But when the costs of that process—in time, money, and inefficiency—became starkly apparent, the Legislature was free to reassess and implement process that was a better fit to the situation, so long as that new process also met due process.

335. In these circumstances, live testimony and cross-examination of witnesses is not constitutionally mandated.

1. The first *Mathews* factor is at most neutral; it does not weigh in favor of heightened levels of process.

The first *Mathews* factor considers the private interest at stake. *Mathews*, 424 U.S. at 335. The private interest here is each side's desire to receive (or not to pay) additional payments for medical services that have already been rendered to patients. The hospitals have already been paid some amount by the insurance companies; the question is whether some additional, incremental amount is owed. Within the realm of possible due-process interests, this claim for an adjustment in a bill is among the more pedestrian; no one's liberty, health, life, or livelihood is at stake. While due process certainly protects property interests of a financial nature, there is less need to go to extraordinary lengths to avoid or reduce the risk of an erroneous decision than in a proceeding in which those other, more transcendent interests are at stake. The first *Mathews* factor does not weigh in favor of extraordinary process.

2. The second *Mathews* factor weighs against requiring live testimony and cross-examination because they would do little, if anything, to reduce the risk of an erroneous deprivation.

The second *Mathews* factor examines how the additional, requested process might improve the accuracy of the proceedings, if at all. *Mathews*, 424 U.S. at 335. And it weighs heavily against the district court's judgment, because adding live testimony and cross-examination of witnesses would do little, if anything, to reduce the risk of an erroneous award based on the factors set out in §413.011(d).

These medical fee disputes between hospitals and insurers turn on whether a particular fee is “fair and reasonable,” a determination unlikely to center on the witness credibility with which cross-examination is so often helpful. Instead, the disputes are more likely to turn on the type of facts that in federal administrative law are characterized as “legislative facts”—“general facts that help the tribunal decide questions of law and policy and discretion.” 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §9.5 (2002); *see also Tarrant Cty. v. Ashmore*, 635 S.W.2d 417, 423 (Tex. App.—Austin 1982) (discussing a distinction between “legislative” and “adjudicative” facts), *aff’d*, 635 S.W.2d 417 (Tex. 1982).

Agencies can resolve those legislative facts without offering live testimony and cross-examination. The United States Supreme Court addressed this in *United States v. Florida Eastern Coast Railway*, 410 U.S. 224 (1973). The factors at issue in that case somewhat echo those in §413.011(d):

We know of no reason to think that an administrative agency in reaching a decision cannot accord consideration to factors such as those set forth in the 1966 amendment [*i.e.*, “The Commission shall give consideration to the national level of ownership of such type of freight car and to other actors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed. . .”] by means other than a trial-type hearing or the presentation of oral argument by the affected parties.

Id. at 235. By the same token, the factors in §413.011(d)—such as “effective cost control” and the “quality of care,” along with other market-driven factors—should be amenable to resolution “by means other than a trial-type hearing or the presentation of oral argument.” *Id.*

In *Than*, the Texas Supreme Court examined a case in which there was “a significant risk of error because the controlling facts are in dispute”—the dispute concerned the veracity of the plaintiff about whether he was cheating and disputed evidence about how cheating might have occurred in the exam room—and where the process the plaintiff sought (the opportunity to provide testimony controverting a particular piece of evidence) was material to the ultimate decision. 901 S.W.2d at 931-32. Here, the hospitals have not identified what evidence they would seek to introduce or how it would advance their cause. Absent that, they have not shown any substantial deprivation of rights. *City of Corpus Christi v. Pub. Util. Comm’n*, 51 S.W.3d 231, 263 (Tex. 2003).

It is also telling that, rather than *additional* process such as was sought in *Than*, the hospitals actually sought to have *less* process—to have things frozen in the Division to later be settled without the trouble of formal proceedings.¹⁰ They asserted that even being offered judicial review—as §413.031(k) provides—*was itself a violation of due process* because it was simply too much trouble to bother going to court over these individual claims. The hospitals contended, “The astronomical cost alone of filing 1,400 lawsuits in less than two months is alone prohibitive of any semblance of due process In fact, it would have been impossible for Plaintiffs’ counsel to file this many individual

¹⁰ The hospitals explained that they wanted to freeze these 1,406 cases, among others, so that a mass settlement could later be reached: “The Defendants would not have been harmed in any way if the *status quo* had been maintained, as previously agreed, and the Defendants’ continued the suspension of further decisions until SOAH and Judge Card issued proper decisions after a full contested case hearing.” 3.CR.654-55.

lawsuits in such a short time.” 3.CR.652. The hospitals thus claim that they were given *too much* process by being offered the opportunity to review the Division’s determination. The hospitals’ argument suggests the futility of adding more layers of process onto these fee disputes. After all, if they find it overly burdensome to even file the paperwork for a judicial review, how much more burdensome would it be to prepare live witnesses and cross-examination for those thousand cases? Because that added layer of process is likely to add little or nothing to the accuracy of these proceedings focused on the statutory factors in §413.011(d), the second *Mathews* factor weighs against requiring live testimony and cross-examination.

3. The third *Mathews* factor also weighs against added process.

Requiring full-blown hearings with live testimony and cross-examination would—as the past decade’s experience with these very types of claims so vividly demonstrates—impose costs on the public far exceeding any gain in accuracy. When the disputes turn on legal questions and fact questions that can be answered on a paper record, a blanket rule requiring live testimony and cross-examination of witnesses can have several detrimental effects. If the hearings *are* held, then each of the thousands of hearings imposes significant costs on the public. *See, e.g.,* 7.CR.1680 (hearing time costs \$90 per hour). And perhaps worse, if the hearings are *not* held, the backlog of cases that plagued TWCC before its dissolution will persist, extending fee disputes that have now been pending for more than ten years. This delay has spillover effects on the public, such as the increased insurance reserves tied up until the resolution of these claims. *See* 6.CR.1648, ¶3(g) (“[t]he longer the Disputes were pending, the longer insurance

company reserves would be unavailable for more productive uses”) (McDonald Aff.). In part because of the important public function of workers’ compensation, the Constitution does not impose mechanical due-process requirements that are not flexibly tailored to actually reducing the risk of error. The district court’s judgment of facial invalidity should be reversed.

B. No Additional Process Was Required When a Hospital Fails To Meet Its Initial Burden of Proof.

Finally, additional process is not required for these claims because the hospitals failed to meet their initial burden to proceed. The record demonstrates that the fee disputes the Division has actually resolved under new §413.031(k)—the 1,406 disputes resolved between November 2005 and January 2006—were based on the Division’s conclusion that the claimant had failed to meet an initial burden of producing sufficient evidence. *See* 6.CR.1647, ¶6 (Tab C). The hospitals certainly could not support an as-applied challenge when the examples that they raise are ones in which no further process was constitutionally due. And each of those resolutions also demonstrates that the statute is not *facially* unconstitutional. *Barshop*, 925 S.W.2d at 627.

PRAYER

The judgment of the district court should be reversed to the extent it holds the statute to be unconstitutional and judgment should be rendered in favor of its constitutionality.

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CERTIFICATE OF SERVICE

I certify that on March 13, 2007 a copy of the **State Defendants' Appellants' Brief** was served by certified U.S. mail, return receipt requested, on appellate counsel for all parties.

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