SUPREME COURT OF TEXAS UPDATE

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I. SCOPE OF THIS PAPER

This paper surveys cases that were decided by the Supreme Court of Texas from June 1, 2020 through May 31, 2021. Petitions granted but not yet decided are also included.

The summaries do not constitute the Court's official descriptions or statements. Readers are encouraged to review the Court's official opinions for specifics regarding each case. The Court appreciates suggestions and corrections, which may be sent via email to kelly.canavan@txcourts.gov.

II. DECIDED CASES

A. ADMINISTRATIVE LAW

1. Judicial Review

a) Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n, 616 S.W.3d 558 (Tex. Jan. 29, 2021) [18-1223]

At issue in this case was whether rules issued by the Texas Board of Chiropractic Examiners defining the terms "musculoskeletal system" and "subluxation complex" and authorizing chiropractors to perform a type of eye-movement test known by the acronym "VONT" exceed the scope of practice in the Texas Chiropractic Act. The Texas Medical Association (TMA) sued the Board under the Administrative Procedure Act for a declaration that the challenged rules are invalid. TMA argued that references to nerves in the definitions have the effect of authorizing chiropractors to perform medical neurology and that VONT should only be performed by a physician. After a bench trial, the trial court concluded that the challenged rules exceed the scope of chiropractic and rendered judgment for TMA. The court of appeals affirmed that part of the trial court's judgment.

The Supreme Court reversed the part of the court of appeals' judgment declaring the rules invalid and rendered judgment that they are valid. The Court first addressed the threshold issue of whether TMA had demonstrated its right to proceed under section 2001.038(a) of the Administrative Procedure Act, which authorizes a challenge to the validity of a legal rule when "it is alleged that the rule . . . threatens to interfere with or impair[] a legal right or privilege of the plaintiff." The Court held that TMA's allegation that the challenged rules diminish the value of a physician's medical license satisfied the statutory test and distinguished the statutory prerequisite in section 2001.038(a) for bringing suit from the constitutional requirement of standing.

The Court then turned to the court's role in a section 2001.038(a) suit for judicial review of an agency rule. The lower courts' judgments relied on testimony by TMA witnesses regarding the appropriate line between medicine and chiropractic, and neither court had given any deference to the Board's rules. The Court reaffirmed that administrative agency rules are presumed valid and that the court's analysis in a section 2001.038(a) suit for judicial review is limited to the legal question whether the challenged rule contravenes the governing statute's text or purpose. Applying that standard to the rules challenged by TMA, the Court held that all three were valid.

Justice Bland issued a dissenting opinion that was joined by Justice Boyd. The dissenting justices would have held that the Board rule authorizing VONT exceeds the statutory scope of chiropractic because the Chiropractic Act authorizes chiropractors to diagnose and treat problems of the spine and musculoskeletal system, while VONT is intended to diagnose neurological problems in the inner ear.

2. Public Utility Commission

a) Pub. Util. Comm'n of Tex. v. Tex. Indus. Energy Consumers,— S.W.3d—, 2021 WL — (Tex. Mar. 26, 2021) [18-1061]

This case presented three issues: first, whether the court of appeals applied the correct standard in reviewing the Public Utility Commission's conclusion that construction of a power plant was "prudent"; second, whether substantial evidence supported the Commission's conclusion; and third, whether the Commission erred in permitting the utility to include financing costs that exceeded the project's initial cap on capital costs in its rate base.

In 2008, the Commission allowed Southwestern Electric Power Company (SWEPCO) to begin construction of a coal-fired power plant, but it capped the costs that could be passed on to Texas consumers. In 2012, before the plant went into service, SWEPCO filed an application with the Commission to increase its rate base to include the plant's construction costs. Several parties objected to inclusion of the full construction costs in the rate base. They argued that SWEPCO did not prudently monitor economic and regulatory conditions and that SWEPCO should have abandoned construction by June 2010.

In its final order, the Commission concluded that although SWEPCO had no contemporaneous evidence to support its decision-making process, continued construction was prudent based on SWEPCO's after-the-fact justifications. The Commission further determined that the disputed financing costs (i.e., allowance for funds used during construction) were not included in the cap on capital costs. The trial court affirmed.

The court of appeals reversed, opining that the Commission had set a standard that required SWEPCO to present "independent, retrospective analyses" of the project. Because SWEPCO did not produce independent expert testimony, the court held, the Commission's decision was arbitrary and capricious. The court of appeals did not address whether the financing costs were included in the cap.

The Supreme Court reversed on the first issue. It held that the Commission did not act arbitrarily in objectively evaluating whether a reasonably prudent utility manager could have decided, as SWEPCO did, to complete construction of the plant. The Court explained that the Commission had applied the prudence standard it squarely articulated: "The standard for determining prudence is the exercise of that judgment or the choosing of one of a select range of options which a reasonable utility manager would exercise or choose in the same or similar circumstances given the information or alternatives available at the point in time such judgment is exercised or option chosen." The standard did not require

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