

MANDATORY AND JURISDICTIONAL: STATUTORY PREREQUISITES,
ARTICLE V JURISDICTION, AND JUDICIAL REVIEW IN THE
TEXAS WORKERS' COMP SCHEME

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The workers' comp scheme in Texas is like a ladder. When an insurer disputes the compensability of a worker's injury, the insurer and the worker must move up the statutorily-created rungs of the dispute resolution process. The first rung is a non-adversarial benefits review conference within the Workers' Compensation Division; the top rung is Article V review of the Division's decision.¹ To reach that top rung, the worker or the insurer must file suit in an Article V court "not later than the 45th day after the date on which the division mailed the party the decision . . ."² But what happens when a party does not reach the top rung in time?

The forty-five-day filing period is a statutory prerequisite: a mandatory statutory provision that "must be accomplished prior to filing suit" on a statutory cause of action.³ For decades, the law in Texas was that the failure to satisfy a statutory prerequisite destroyed Article V jurisdiction. The Texas Supreme Court's decision in *Dubai Petroleum* changed that. Now, statutory prerequisites are not automatically jurisdictional. The question of when a statutory prerequisite is jurisdictional—and the differing methods for answering that question—has created a split in the intermediate courts of appeals over whether Article V courts have jurisdiction over an untimely-filed suit for judicial review of a final benefits decision. Some courts say

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¹ See TEX. LAB. CODE ANN. §§ 409.021, 410.021, 410.024(a) (West 2015) (requiring initial benefit review conference); *id.* § 410.251 (permitting judicial review of the Division decision after exhaustion of administrative remedies); *see also id.* §§ 410.151(a), 410.168(a)–(b) (procedures for contested case hearing); *id.* § 410.203 (providing appeals panel review of contested case hearing decision). This dispute resolution procedure is exclusive. *Id.* § 408.001.

² *Id.* § 410.252(a).

³ *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 512 (Tex. 2012).

untimely filing destroys Article V jurisdiction; some courts say untimely filing creates an affirmative defense of limitations.

This article addresses that split. Part I discusses the nuances of the analytical framework for determining whether a statutory prerequisite is jurisdictional. Part II presents the split over whether the filing period is jurisdictional. Part III applies the analytical framework and resolves the split, and concludes that a party who reaches the top rung of the workers' comp scheme too late has not invoked Article V jurisdiction. Part VI concludes the article.

I. HOW TO DETERMINE WHETHER A STATUTORY PREREQUISITE IS JURISDICTIONAL

For decades, the rule in Texas—derived from the Texas Supreme Court's 1926 decision in *Mingus v. Wadley*⁴—was easy to apply: non-compliance with a statutory prerequisite deprived Article V courts of jurisdiction to hear the dispute.⁵ Subject to several outlier cases, the *Mingus* rule generally meant that if a statute pre-conditioned filing suit on some act or occurrence then Article V jurisdiction did not trigger until that particular thing happened.⁶

The Texas Supreme Court changed Texas law in 2000 when the court overruled *Mingus* in deciding a wrongful death case brought under Section 71.031 of the Texas Civil Practice and Remedies Code, *Dubai Petroleum Co. v. Kazi*.⁷ The court held that statutory prerequisites were not automatically jurisdictional before concluding that the “equal treaty rights” prerequisite in

⁴285 S.W. 1084, 1087 (Tex. 1926), *overruled by* *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000).

⁵*See, e.g.*, *Dolenz v. Tex. State Bd. of Med. Exam'rs*, 899 S.W.2d 809, 811 (Tex. App.—Austin 1995, no writ) (applying the *Mingus* rule), *aff'd*, 981 S.W.2d 487 (Tex. App.—Austin 1998, no pet.).

⁶*See generally* Tyler Johnson, Comment, *Do Statutory Prerequisites Affect Jurisdiction to Hear Administrative Appeals in Texas After Dubai?*, 3 TEX. TECH J. TEX. ADMIN. L. 157, 162 (2002). The Texas Supreme Court deviated from *Mingus* several times. For example, in two 1983 cases, the court held non-compliance with the mandatory statutory pre-suit notice provisions under the then-Medical Liability and Insurance Improvement Act was not a fatal defect. *See Schepps v. Presbyterian Hosp. of Dall.*, 652 S.W.2d 934, 938 (Tex. 1983); *Hutchinson v. Wood*, 657 S.W.2d 782, 782–83 (Tex. 1983) (per curiam). In 1999, the Texas Supreme Court likewise held the simultaneous filing requirement imposed by Section 410.253 of the Texas Labor Code was a mandatory statutory prerequisite, but non-compliance was not a jurisdictional defect. *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) (per curiam).

⁷12 S.W.3d 71, 76 (Tex. 2000).

Section 71.031 was not jurisdictional.⁸ Unfortunately, the court did not provide any guidance on how to determine whether a statutory prerequisite is jurisdictional.

Over the last eighteen years, the Texas Supreme Court has developed and utilized—to varying degrees—a four-factor test for determining whether a statutory prerequisite is jurisdictional. Some intermediate courts of appeals use it, but not all. The Third District uses a test that emerged in *Dubai*'s infancy, and has stubbornly persisted. The First District uses an amalgamation of the four-factor test and the Third District's analysis. This section discusses those tests and their merits. Ultimately, however, the Texas Supreme Court's four-factor test is the only correct way to answer the jurisdictional question.

A. The General Presumption Against Jurisdictional Construction and the Four-Factor Test

Unremarkably, “[s]tatutory interpretation principles” guide a court in determining whether a statutory prerequisite is jurisdictional.⁹ But this is statutory interpretation with a twist. The analysis begins with the “presumption” that a statutory prerequisite is not jurisdictional.¹⁰ Only a clear expression of legislative intent to the contrary can overcome that presumption.¹¹ To make that determination, the Texas Supreme Court utilizes four canons of construction that, although consistently referenced together,¹² are not exclusive.¹³

The analysis always begins with the plain statutory language,¹⁴ “the largest caliber canon of them all.”¹⁵ This is considered in conjunction with the second canon: whether the Legislature prescribed “specific consequences

⁸ *Id.* at 76–77.

⁹ *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 392 (Tex. 2014).

¹⁰ *Manderscheid v. Laz Parking of Tex., LLC*, 506 S.W.3d 521, 524 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (citing *City of DeSoto v. White*, 288 S.W.3d 389, 393–95 (Tex. 2009)).

¹¹ *Id.*

¹² *E.g.*, *Crosstex Energy Servs.*, 430 S.W.3d at 392.

¹³ *See Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) (applying the canon that workers' compensation statutes are liberally construed to find a mandatory filing period non-jurisdictional).

¹⁴ *E.g.*, *City of DeSoto v. White*, 288 S.W.3d 389, 395 (Tex. 2009).

¹⁵ *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 n.6 (11th Cir. 2001).

for noncompliance.”¹⁶ The court considers both the statutory provision at issue and the statutory scheme as a whole.¹⁷ The absence of a specific consequence for non-compliance weighs against a jurisdictional construction,¹⁸ as does a consequence that is inconsistent with a jurisdictional construction, like the defendant’s ability to waive non-compliance.¹⁹ If the latter is evident, the presumption against jurisdictional construction is not overcome and the analysis appears to end there.²⁰ Arguably, the inverse is also true: an obvious intent to make a prerequisite jurisdictional and jurisdictional-type consequences for non-compliance should be sufficient to stop the analysis and rebut the presumption. Absent an obvious answer either way, however, the analysis should rarely stop with the first two canons.

The third canon requires the court consider the “purpose of the statute.”²¹ This factor has been applied inconsistently. In one case, the Texas Supreme Court did not refer to this factor even though the Legislature included a purpose statement in the statute.²² And in another case, the court said the statutory purpose factor is of “little assistance” when the Legislature does not include a purpose statement.²³ In yet another case, the court determined a statute’s purpose by analogy to case law construing similar statutes.²⁴ Statutory purposes have also been inferred from the statutory scheme itself,²⁵

¹⁶ *Crosstex Energy Servs.*, 430 S.W.3d at 392 (quoting *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001)).

¹⁷ *See Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998) (“[T]he legislative intent should be determined from the entire act, and not simply from isolated portions.” (citation omitted)); *see also In re Dep’t of Family & Protective Servs.*, 273 S.W.3d 637, 642 (Tex. 2009) (finding a mandatory statutory provision non-jurisdictional after considering surrounding statutes).

¹⁸ *See Albertson’s*, 984 S.W.2d at 962 (“[T]hat [S]ection 410.253 does not dictate the consequence of noncompliance is significant when considering the entire statute.”).

¹⁹ *In re Dep’t of Family & Protective Servs.*, 273 S.W.3d at 642.

²⁰ *See id.* at 642 n.5 (“The applicable language of the statute does not make the dismissal dates jurisdictional and we need not look further than the language itself.”).

²¹ *Crosstex Energy Servs.*, 430 S.W.3d at 392.

²² *See City of DeSoto v. White*, 288 S.W.3d 389, 395–97 (Tex. 2009) (interpreting TEX. LOC. GOV’T CODE ANN. § 143.057(a) (West 2008)); TEX. LOC. GOV’T CODE ANN. § 143.001 (West 2008).

²³ *Crosstex Energy Servs.*, 430 S.W.3d at 392.

²⁴ *Albertson’s, Inc. v. Sinclair*, 984 S.W.2d 958, 961–62 (Tex. 1999).

²⁵ *See, e.g., Manderscheid v. Laz Parking of Tex., LLC*, 506 S.W.3d 521, 525–26 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

and from a statute's chapter title.²⁶ Legislative history has also been used.²⁷ Considering these different treatments, this factor appears to be almost a pure point of advocacy for practitioners and a flexible standard for the judiciary.

Finally, the court considers “the consequences that result” from construing the prerequisite as jurisdictional or non-jurisdictional.²⁸ The court appears to be applying a twist on the canon against absurd results: given the consequences of such a construction, does a jurisdictional interpretation “lead to absurd results[?]”²⁹ However, instead of applying the absurd results canon as it is traditionally used—to avoid otherwise unambiguous statutory language³⁰—the court uses the canon to show why a particular construction is incorrect.³¹ Because the absurd results canon is already a very limited exception to the judiciary's goal of giving effect to plain statutory language, the result is unclear if a non-jurisdictional construction leads to absurd results, yet the first three factors support a non-jurisdictional construction.³² In that case, the presumption that the Legislature intended a statute to produce a “just and reasonable result” butts heads with the presumption against jurisdictional construction.³³ Ultimately, the court appears to be asking whether a jurisdictional interpretation has “troubling” public policy implications.³⁴

²⁶ See, e.g., *Park v. Escalera Ranch Owners' Ass'n*, 457 S.W.3d 571, 589 (Tex. App.—Austin 2015, no pet.).

²⁷ See, e.g., *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001) (citing H. Comm. on Agric. & Livestock, B. Analysis, Tex. S.B. 64, 71st Leg., R.S. (1989)).

²⁸ *Crosstex Energy Servs.*, 430 S.W.3d at 392.

²⁹ Compare *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 196 (Tex. 2004) (“With regard to [S]ection 2001.171, we have no basis to conclude that the interpretation supported by its plain language would lead to absurd results.”), with *Helena Chem. Co.*, 47 S.W.3d at 495 (“Because the Board's arbitration is nonbinding and the trial court is not required to consider the Board's findings, we conclude that Helena's jurisdictional interpretation of [S]ection 64.006's timing requirement leads to an absurd result.”).

³⁰ E.g., *Gilmore v. Waples*, 188 S.W. 1037, 1039 (Tex. 1916).

³¹ See *Helena Chem. Co.*, 47 S.W.3d at 495 (“Helena's jurisdictional interpretation . . . leads to an absurd result.”).

³² See Adele Hedges & Garret Gibson, “*Taking the Legislature at Its Word*”: *The Role of Legislative History in Statutory Construction in Texas*, 71 *ADVOCATE* 13, 13 (2015) (discussing the plain language canon).

³³ TEX. GOV'T CODE ANN. § 311.021(3) (West 2013).

³⁴ *City of DeSoto v. White*, 288 S.W.3d 389, 396–97 (Tex. 2009); see also *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 310 (Tex. 2010) (“If [the Texas Commission on Human Rights Act's] limitations period [was] jurisdictional, trial courts that have denied summary judgment motions based on the failure to satisfy that requirement would forever have their judgments open to

B. The Third District's Sierra Club Test

The Third District Court of Appeals is the first court to distill a consistent rule from *Dubai*.³⁵ A statutory prerequisite is jurisdictional under the Third District's *Sierra Club* test when it "define[s], enlarge[s], or restrict[s] the class of causes the court may decide or the relief that may be awarded."³⁶ Those are the types of prerequisites that, according to the Third District, are "traditionally and undoubtedly" jurisdictional.³⁷

Dicta from the Third District suggests the *Sierra Club* test is intended to be categorical. For example, the Administrative Procedure Act's prerequisite of a "final decision in a contested case" would be jurisdictional because it restricts the "*kind of cause*" an Article V court could decide.³⁸ But the APA prerequisite requiring "the record of agency proceedings be filed with the clerk of the court" is "distinctly different" because it does not define, enlarge, or restrict Article V power.³⁹ Two holdings from the Third District highlight this dichotomy: the APA's statutory service provision is not jurisdictional,⁴⁰ but the timely filing of a motion for rehearing is jurisdictional.⁴¹

This approach is fundamentally flawed because it shifts the focus away from legislative intent. The goal of statutory construction is to "ascertain[] and giv[e] effect to the Legislature's intent as expressed by the plain and common meaning of the statute's words."⁴² That is not what the *Sierra Club*

reconsideration. Conversely, those courts that granted such motions would have had no power to do so, nor would appellate courts have had the power to affirm the judgments.").

³⁵For several months after *Dubai*, intermediate courts interpreted the decision as making all statutory prerequisites non-jurisdictional. *See, e.g.*, Hous. Cmty. Coll. Sys. v. Schneider, 67 S.W.3d 241, 243 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (rejecting an argument that a workers' compensation appeal was jurisdictionally defective for non-compliance with a statutory prerequisite because "the Texas Supreme Court recently abrogated this holding of *Saida* and held that a plaintiff's failure to establish a statutory prerequisite is not 'jurisdictional.'" (citation omitted) (quoting *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75–76 (Tex. 2000))).

³⁶*Sierra Club v. Tex. Nat. Res. Conservation Comm'n*, 26 S.W.3d 684, 688 (Tex. App.—Austin 2000), *aff'd on other grounds*, 70 S.W.3d 809 (Tex. 2002).

³⁷*Id.* at 687.

³⁸*Id.* at 688 (quoting TEX. GOV'T CODE ANN. § 2001.171 (West 2013)).

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Hill v. Bd. of Trs.*, 40 S.W.3d 676, 679 (Tex. App.—Austin 2001, no pet.).

⁴²*F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007) (citation omitted).

test does.⁴³ *Sierra Club* does not ask “what did the Legislature intend?”; it asks “does this peg fit in the round hole or the square hole?” Not only is this categorical approach seemingly at odds with *Dubai*,⁴⁴ but it is inexplicably inconsistent with basic statutory construction principles.⁴⁵ There is no basis in *Dubai* for such an arbitrary distinction. Indeed, the Texas Supreme Court’s post-*Dubai* cases suggest the contrary: the jurisdictional analysis is firmly rooted in legislative intent, not artificial categories.⁴⁶

This is not to suggest that the Third District’s test is useless, or even that it is necessarily bad. The “workable distinction”⁴⁷ it provides is helpful in informing the Legislature’s intent for a statute. But it is not the best test: standing alone, *Sierra Club* leads to odd results.⁴⁸ And it seems to ignore the post-*Dubai* presumption against a jurisdictional construction. Most importantly, the *Sierra Club* test forces legislative intent to take a back seat to other considerations. Courts approaching the jurisdictional question should focus instead on the four factors relied on by the Texas Supreme Court.

C. The First District Twist

The First District applies a combination of the four-factor and *Sierra Club* tests. In a very recent decision, the First District applied this four-factor test: the statutory language, the statute’s purpose, the consequences of a jurisdictional versus non-jurisdictional interpretation, and whether the prerequisite defined, enlarged, or restricted the class of causes the court could decide or the relief it could award.⁴⁹ The First District omitted explicit

⁴³ See *Heart Hosp. IV, L.P. v. King*, 116 S.W.3d 831, 834–35 (Tex. App.—Austin 2003, pet. denied) (citations omitted) (applying *Sierra Club*).

⁴⁴ *Dubai* is rooted in the principle that hard and fast categorizations lead to undesirable results. See *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (“We have repeatedly reaffirmed this dichotomy between common-law and statutory actions. . . . But while conceptualizing subject-matter jurisdiction in this way has an initial appeal, the resulting practical difficulties suggest underlying logical flaws.” (citations omitted)).

⁴⁵ See *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 461 (Tex. 2012) (Jefferson, C.J., dissenting) (“The touchstone . . . as in all statutory interpretation, is legislative intent.”).

⁴⁶ See *infra* notes 47–73 and accompanying text.

⁴⁷ *Harris Cty. Emergency Servs. Dist. No. 1 v. Miller*, 122 S.W.3d 218, 223 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (en banc).

⁴⁸ *Id.* at 223–25 (holding that the failure to exhaust administrative remedies under the Labor Code was not a jurisdictional defect).

⁴⁹ *Chicas v. Tex. Mut. Ins. Co.*, 522 S.W.3d 67, 72 (Tex. App.—Houston [1st Dist.] 2017, pet. pending).

consideration of the presence or absence of jurisdictional consequences for non-compliance.⁵⁰

Courts should refrain from applying this test for a simple reason: substituting the *Sierra Club* test as the fourth factor turns a four-factor test into a three-factor test. Because the First District believed the statutory prerequisite at issue was non-jurisdictional, the prerequisite did not define, enlarge, or restrict the class of cases the court could hear.⁵¹ This “factor” is apparently only relevant in the First District’s analysis if the first three factors indicate the prerequisite is jurisdictional, in which case the third factor is itself the answer to the “is it jurisdictional?” question. On the other hand, it is irrelevant when the first three factors point the other way.

D. The Sovereign Immunity Exception

There is an exception to the general presumption against construing statutory prerequisites as jurisdictional. In 2004, applying *Dubai*, the Texas Supreme Court held that the failure to provide a governmental entity notice of a claim under the Texas Tort Claims Act was not a jurisdictional defect.⁵² Hoping to preserve the time and fiscal benefits of pleas to the jurisdiction,⁵³ the Legislature amended Section 311.034 of the Texas Government Code almost immediately.⁵⁴ That section of the Code Construction Act instructs courts that all “[s]tatutory prerequisites to a suit . . . are jurisdictional requirements” in suits against the government.⁵⁵ Because it has “long been” the judiciary’s job to say what a statute means,⁵⁶ this provision is only an interpretive aid for the courts.⁵⁷ Nonetheless, Texas courts have adopted it as an established canon of construction.⁵⁸

⁵⁰ *Id.*

⁵¹ *Id.* at 74.

⁵² *Univ. of Tex. Sw. Med. Ctr. at Dall. v. Loutzenhiser*, 140 S.W.3d 351, 365 (Tex. 2004), *superseded by statute*, Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783, 3783 (codified at TEX. GOV’T CODE ANN. § 311.034 (West 2013)), *as recognized in* *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 511–12 (Tex. 2012).

⁵³ H. Comm. on Civ. Practices, B. Analysis, Tex. H.B. 2988, 79th Leg., R.S. (2005).

⁵⁴ Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783, 3783 (codified at TEX. GOV’T CODE ANN. § 311.034 (West 2013)).

⁵⁵ TEX. GOV’T CODE ANN. § 311.034 (West 2013).

⁵⁶ Hedges & Gibson, *supra* note 32.

⁵⁷ Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 361–62 (2012).

⁵⁸ *E.g.*, *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 512–14 (Tex. 2012).

The law has clearly “reverted” back to the *Mingus* rule in suits involving sovereign immunity.⁵⁹ Thus, even mandatory statutory prerequisites that are not expressly jurisdictional by their own statutory language are made jurisdictional by Section 311.034.⁶⁰ This creates a potential trap for practitioners. For example, while the Texas Supreme Court has held Texas’s statutory tolling provision⁶¹ can apply to statutory causes of action,⁶² several lower courts have held that untimely-filed statutory suits against the government are unsalvageable.⁶³ Dicta from the Texas Supreme Court suggests equitable tolling doctrines are also unavailable for jurisdictional statutory prerequisites.⁶⁴ Appellate courts have likewise not generally adopted federal equitable tolling doctrines for Texas state statutory causes of action filed outside the filing period.⁶⁵ In at least one court of appeals, however, when a statute requires filing and service within a specific period, the relation-back doctrine can save an untimely-served suit if it is timely filed.⁶⁶

II. SECTION 410.252(A)’S CURRENT CONSTRUCTION IN THE COURTS OF APPEALS

The Texas Supreme Court has not directly addressed Section 410.252(a)’s jurisdictional effect post-*Dubai*.⁶⁷ In its most recent on-point

⁵⁹ *Id.* at 512.

⁶⁰ See TEX. GOV’T CODE ANN. § 311.034 (West 2013) (“Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.”).

⁶¹ TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 (West 2015).

⁶² *In re United Servs. Auto. Ass’n*, 307 S.W.3d 299, 311 (Tex. 2010).

⁶³ *E.g.*, *Little v. Tex. Bd. of Law Exam’rs*, 334 S.W.3d 860, 863–64 (Tex. App.—Austin 2011, no pet.).

⁶⁴ See *In re United Servs. Auto. Ass’n*, 307 S.W.3d at 311 (“[Equitable tolling is a] court-created doctrine . . . that may not apply if a statutory requirement is deemed jurisdictional . . .”).

⁶⁵ See *Goss v. City of Hous.*, 391 S.W.3d 168, 174 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (“Goss does not cite to any case law showing that Texas has adopted his [federal] equitable tolling arguments . . .”).

⁶⁶ *Zamora v. Tarrant Cty. Hosp. Dist.*, 510 S.W.3d 584, 590–91 (Tex. App.—El Paso 2016, pet. denied).

⁶⁷ The Texas Supreme Court’s most recent case involving Section 410.252(a) was *Flour Bluff Indep. Sch. Dist. v. Bass*, a 2004 per curiam decision. 133 S.W.3d 272 (Tex. 2004). *Flour Bluff* was an equitable tolling case, and the Texas Supreme Court never directly addressed whether the filing period was jurisdictional. See *id.* at 274 (“Bass therefore was required to sue Flour Bluff within the limitations period and serve Flour Bluff with process within a reasonable time thereafter.”).

case—decided in 1983—the court said that the filing period was a “general statute of limitations,” and timely filing was “necessary” to invoke Article V jurisdiction.⁶⁸ *Dubai* cast doubt on the validity of that statement.⁶⁹

The intermediate courts of appeals are divided into several different camps. In the Third District, the procedural posture of the case before the court required the court to presume the filing period was jurisdictional. Many other courts have relied on pre-*Dubai* intermediate court case law to find the filing period is jurisdictional. The Second District Court of Appeals has held the filing period is jurisdictional in spite of *Dubai*. In the First and Tenth District Courts of Appeals, timely filing is not a jurisdictional prerequisite. Finally, several courts have not addressed the issue at all since *Dubai*. This section addresses each of these camps in turn.

A. *The Third District Presumption*

The Third District Court of Appeals has presumed Section 410.252(a) is jurisdictional.⁷⁰ In *Baldwin*, the defendant, a workers’ comp carrier, raised untimely filing at the trial court through a plea to the jurisdiction, the trial court granted the plea, and the only issue the injured worker raised on appeal was timely filing, not the use of the plea to the jurisdiction.⁷¹ Because the plea to the jurisdiction was not challenged, the court decided timely filing in the context of the plea to the jurisdiction.⁷²

⁶⁸ *Ealey v. Ins. Co. of N. Am.*, 660 S.W.2d 50, 52 (Tex. 1983).

⁶⁹ See *Chicas v. Tex. Mut. Ins. Co.*, 522 S.W.3d 67, 71 (Tex. App.—Houston [1st Dist.] 2017, pet. pending) (“Since [*Dubai*], the appellate courts have been inconsistent in their holdings regarding whether [S]ection 410.252(a) is jurisdictional . . .”).

⁷⁰ *Baldwin v. Zurich Am. Ins. Co.*, No. 03-14-00457-CV, 2016 WL 2907939, at *3 (Tex. App.—Austin May 10, 2016, pet. denied) (mem. op.). The First District was also in this camp until its recent *Chicas* decision. *Chicas*, 522 S.W.3d at 71.

⁷¹ *Baldwin*, 2016 WL 2907939, at *3.

⁷² *Id.*

B. The Pre-Dubai Courts

The Fourth,⁷³ Fifth,⁷⁴ Sixth,⁷⁵ Seventh,⁷⁶ and Thirteenth District Courts of Appeals⁷⁷ have held timely filing under Section 410.252(a) is a mandatory and jurisdictional prerequisite to suit. They do so without referencing *Dubai*.⁷⁸ Of these courts and cases, the Thirteenth District's approach is notable. Although the court found itself bound to find the filing period jurisdictional by its "own precedent and the consistent holdings of [its] sister courts[,]” the Thirteenth District did note that the Texas Supreme Court's *Albertson's* decision⁷⁹ strongly suggested the filing period should not be construed as jurisdictional.⁸⁰

C. The Second District's Disregard of Dubai

The Second District Court of Appeals is the only intermediate court that has interpreted Section 410.252(a) in light of *Dubai* and found timely filing was a jurisdictional prerequisite to suit. The court correctly noted that an untimely-appealed division decision becomes final.⁸¹ But the court then said that *Dubai* did not apply to the filing period.⁸² In doing so, the court fell back on *Mingus* and its progeny—namely, the Texas Supreme Court's decision in *Ealey v. Insurance Company of North America*—and stated that the filing period was mandatory and jurisdictional.⁸³

⁷³ *Fire & Cas. Ins. Co. of Conn. v. Miranda*, 293 S.W.3d 620, 624–25 (Tex. App.—San Antonio 2009, no pet.).

⁷⁴ *Johnson v. United Parcel Serv.*, 36 S.W.3d 918, 921 (Tex. App.—Dallas 2001, pet. denied).

⁷⁵ *Argonaut Sw. Ins. Co. v. Walker*, 64 S.W.3d 654, 654, 657 (Tex. App.—Texarkana 2001, pet. denied).

⁷⁶ *Davis v. Am. Cas. Co. of Reading, Pa.*, 408 S.W.3d 1, 6–7 (Tex. App.—Amarillo 2012, pet. denied).

⁷⁷ *LeBlanc v. Everest Nat. Ins. Co.*, 98 S.W.3d 786, 787 (Tex. App.—Corpus Christi 2003, no pet.).

⁷⁸ See, e.g., *Fire & Cas. Ins. Co. of Conn.*, 293 S.W.3d at 624–25 (citing the Fifth District's *Johnson* decision and its own pre-*Dubai* case law).

⁷⁹ See *supra* note 6.

⁸⁰ See *LeBlanc*, 98 S.W.3d at 788.

⁸¹ *Tex. Mun. League Intergovernmental Risk Pool v. Burns*, 209 S.W.3d 806, 812 (Tex. App.—Fort Worth 2006, no pet.).

⁸² *Id.* at 812 n.9.

⁸³ *Id.* at 812.

The court reached the right answer, but it used bad math.⁸⁴ *Dubai* was not a workers' comp case, but *Mingus* was. And the supreme court did not limit *Dubai* to any specific statutory prerequisites;⁸⁵ indeed, interpreting *Dubai* so narrowly appears to contravene the policy underlying the *Dubai* decision.⁸⁶ Finally, the Second District mischaracterized *Ealey*. According to the Second District, the *Ealey* court held the filing period was jurisdictional.⁸⁷ The *Ealey* court did no such thing. The *Ealey* court held the filing period was equitably tolled and therefore reversed the trial court's dismissal for lack of subject matter jurisdiction.⁸⁸ The supreme court did not hold the filing period was itself jurisdictional.⁸⁹

D. The First and Tenth Districts

Two courts have addressed Section 410.252(a) post-*Dubai* and held the filing period was not jurisdictional: the First and Tenth Courts of Appeals. As discussed above, the First District reached its answer by applying an amalgamation of the supreme court's four-factor test and the Third District's *Sierra Club* test.⁹⁰ The First District ultimately concluded the statutory language did not overcome the presumption against jurisdictional construction.⁹¹

Besides the issues created by its amalgamated test, there are two problems with the First District's analysis. First, the court put a disproportionate amount of weight on what other rules and statutes said, rather than on the language of the workers' comp statutes. The court cited the Texas Rules of

⁸⁴ See *infra* Section IV.

⁸⁵ See *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (“[*Mingus*] wrongly assumes that a court exercising its common-law authority would never be ‘willing to introduce new procedures, new remedies, and new substantive rules,’ and that ‘something is functionally different about a non-common law proceeding, and that, therefore, courts are justified in regarding such proceedings in a harsher light.’” (quoting Dan Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEX. L. REV. 854, 878–79 (1965))).

⁸⁶ See *id.* (“When, as here, it is difficult to tell whether or not the parties have satisfied the requisites of a particular statute, it seems perverse to treat a judgment as perpetually void merely because the court or the parties made a good-faith mistake in interpreting the law.”).

⁸⁷ *Burns*, 209 S.W.3d at 812 n.9.

⁸⁸ See *Ealey v. Ins. Co. of N. Am.*, 660 S.W.2d 50, 53 (Tex. 1983) (“We therefore hold that the filing of the original petition tolled the running of the limitation period against Pacific’s appeal.”).

⁸⁹ *Id.*

⁹⁰ See *supra* Section I.C.

⁹¹ *Chicas v. Tex. Mut. Ins. Co.*, 522 S.W.3d 67, 74 (Tex. App.—Houston [1st Dist.] 2017, pet. filed).

Appellate Procedure, the Federal Harbor and Workers' Compensation Act, and the Texas Commission on Human Rights Act and compared those to Section 410.252(a)'s statutory language.⁹² The court spent almost no time on the workers' comp scheme's actual language; the only workers' comp statute the court cited is Section 410.252(a).⁹³ In focusing so heavily on what other statutes and rules said, the First District committed one of the cardinal sins of statutory construction: it only read Section 410.252(a) in isolation, without regard for the rest of the statutory scheme.⁹⁴

The First District's first error caused its second error. The court agreed with the injured worker that construing the filing deadline as jurisdictional posed a "great[] threat to [the] finality" of a workers' comp decision because it would leave trial court judgments perpetually open to collateral attack.⁹⁵ Because the court apparently did not analyze the entire statutory scheme, it failed to consider the fact that a judgment rendered on an untimely-filed appeal is automatically void.⁹⁶

The Tenth District's analysis in *Texas Department of Transportation v. Beckner* is much easier to discuss. The court decided *Beckner* using the *Sierra Club* test.⁹⁷ Applying that standard, the court concluded Section 410.252(a)'s filing period was a "limitations period, not a jurisdictional requirement."⁹⁸ The court did not explain why.⁹⁹

E. The Four Undecideds

Four courts of appeals have not directly addressed the jurisdictional effect of untimely filing post-*Dubai*: the Eighth, Ninth, Twelfth, and Fourteenth District Courts of Appeals.

Dictum from the Eighth District suggests that the court would construe the filing period as jurisdictional if properly presented. In a 2003 decision, the court stated that untimely filing a suit for judicial review of a workers'

⁹² *Id.* at 72–73.

⁹³ *See id.* at 72 (citing TEX. LAB. CODE ANN. § 410.252(a) (West 2015)).

⁹⁴ *See* *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) (“[W]e look at the entire act, and not a single section in isolation.”)

⁹⁵ *Chicas*, 522 S.W.3d at 74.

⁹⁶ *See infra* Section IV.A.3.

⁹⁷ *Tex. Dep’t of Transp. v. Beckner*, 74 S.W.3d 98, 103 (Tex. App.—Waco 2002, no pet.).

⁹⁸ *Id.* (footnote omitted).

⁹⁹ The court's lack of analysis may be because the Texas Department of Transportation agreed in its brief that the filing period was a limitations period. *See id.* at 103 n.9.

comp decision “would deprive the trial court of jurisdiction[.]”¹⁰⁰ The court did not rule on the issue because the injured worker timely filed suit.¹⁰¹ However, more recent case law involving statutory prerequisites arguably indicates the court is not entrenched in its 2003 statement.¹⁰²

The Ninth District seems likely to hold the filing period is not jurisdictional. In a 2003 case construing the venue provision in Section 410.252(b), the court addressed the filing period in dicta and suggested the filing period was not jurisdictional.¹⁰³ Other cases from the Ninth District dealing with Section 410.252(a) also suggest the court would be receptive to arguments that the filing period is non-jurisdictional.¹⁰⁴

The Twelfth District is likely to follow the Ninth District. Like the Ninth District, the Twelfth District has discussed Section 410.252 post-*Dubai* in the context of the mandatory venue provision in subsection (b).¹⁰⁵ And, like the Ninth District, the court spoke broadly in holding the mandatory venue provision was not jurisdictional.¹⁰⁶ Although the court has not dealt with Section 410.252 since its 2005 decision, the Ninth District’s dictum strongly suggests it would also find subsection (a) non-jurisdictional.

The Fourteenth District’s stance is harder to predict. Pre-*Dubai*, the court held the filing period was jurisdictional.¹⁰⁷ Post-*Dubai*, the court seems open to construing the filing period as non-jurisdictional. It initially construed

¹⁰⁰Cervantes v. Tyson Foods, Inc., 130 S.W.3d 152, 155 (Tex. App.—El Paso 2003, pet. denied).

¹⁰¹*Id.*

¹⁰²See Tex. Dep’t of Aging & Disability Servs. v. DeLong, 441 S.W.3d 538, 541 (Tex. App.—El Paso 2014, pet. denied) (“[It is] presume[d] the district courts of this state possess subject-matter jurisdiction over a claim absent supervening statutory authority to the contrary.”) (citing Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76 (Tex. 2000)).

¹⁰³Mayberry v. Am. Home Assur. Co., 122 S.W.3d 455, 458 (Tex. App.—Beaumont 2003, no pet.).

¹⁰⁴See Beaumont Indep. Sch. Dist. v. Parkerson, 105 S.W.3d 761, 762 n.1 (Tex. App.—Beaumont 2003, no pet.) (stating in dicta that it is “questionable” whether the filing period is jurisdictional after *Dubai*). *But see* Vette Holdings, L.L.C. v. Tex. Workforce Comm’n, No. 09–14–00161–CV, 2015 WL 2125002, at *1–2 (Tex. App.—Beaumont May 7, 2015, no pet.) (mem. op.) (affirming grant of plea to jurisdiction for an untimely-filed claim under TEX. LAB. CODE ANN. § 212.201 (West 2015)).

¹⁰⁵Ins. Co. of Penn. v. King, No. 12-04-00117-CV, 2005 WL 1351579, at *2 (Tex. App.—Tyler June 8, 2005, no pet.) (mem. op.).

¹⁰⁶*Id.* (citations omitted).

¹⁰⁷Charter Oak Fire Ins. Co. v. Gorman, 693 S.W.2d 686, 687 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).

Dubai very narrowly and was “not persuaded” *Dubai* applied to purely statutory causes of action.¹⁰⁸ Within the last decade, though, the court has cited *Dubai* as “revers[ing] a long line of cases holding statutory prerequisites ‘jurisdictional,’ noting the serious and long-lasting consequences of such a categorization[.]”¹⁰⁹ The court has also applied *Dubai* and its progeny in the administrative law context.¹¹⁰ Unfortunately, the First District’s recent decision provides little guidance on how the Fourteenth District will act.¹¹¹

III. AN UNTIMELY-FILED SUIT FOR JUDICIAL REVIEW UNDER SECTION 410.252(A) IS JURISDICTIONALLY DEFECTIVE

The analytical framework has been established. The question now is one of application: is Section 410.252(a)’s filing period jurisdictional? This analysis begins with the presumption that the filing period is not jurisdictional. Further, the Workers’ Compensation Act is liberally construed in favor of the injured worker:¹¹² ambiguities are resolved in favor of “compensating injured workers.”¹¹³ These principles are applied to the four-factor test below, and, as this section discusses, the statutory language in the workers’ comp scheme ultimately rebuts the presumption against

¹⁰⁸Czerwinski v. Univ. of Tex. Health Sci. Cent. at Hous. Sch. of Nursing, 116 S.W.3d 119, 122 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). *But cf.* Univ. of Tex. Med. Branch at Galveston v. Barrett, 112 S.W.3d 815, 818 (Tex. App.—Houston [14th Dist.] 2003) (“Like mandatory notice requirements in the Texas Deceptive Trade Practices Act and the Medical Liability and Insurance Improvement Act article 4590i, noncompliance with the Whistleblower Act’s 60-day waiting period requires abatement instead of dismissal if a claimant jumps the gun.” (footnotes omitted)), *aff’d*, 159 S.W.3d 631 (Tex. 2005).

¹⁰⁹Madeksho v. Abraham, Watkins, Nichols & Friend, 112 S.W.3d 679, 686 (Tex. App.—Houston [14th Dist.], no pet.). *See also* Concerned Cmty. Involved Dev., Inc. v. City of Hous., 209 S.W.3d 666, 673–74 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (“[T]he failure to comply in all respects with statutory requirements may defeat a claimant’s right to relief but, again, it does not deprive the trial court of subject matter jurisdiction”) (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76–77 (Tex. 2000)).

¹¹⁰*See* Tex. Dep’t of Transp. v. Esters, 343 S.W.3d 226, 231 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (“Even after *Dubai* . . . and *In re United Servs. Auto. Ass’n* . . . failure to timely file an administrative complaint under [S]ection 21.201 of the Texas Labor Code deprives a court of subject-matter jurisdiction . . .” (citations omitted)).

¹¹¹*See* Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 150 (2015) (surveying thirty-two former judges from Houston’s courts of appeals and receiving a unanimous response that all would only adopt a rule from the other Houston court if they believed it was the best legal rule).

¹¹²*Miears v. Indus. Acc. Bd.*, 232 S.W.2d 671, 675 (Tex. 1950).

¹¹³*Albertson’s, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999).

jurisdictional construction. When the Legislature drafted Section 410.252(a), it intended to make timely filing jurisdictional.

A. The Plain Statutory Language and the Consequences of Non-Compliance Support a Jurisdictional Construction

1. Reading Section 410.252(a) in Isolation

Read in isolation,¹¹⁴ nothing in Section 410.252(a)'s text suggests timely filing is jurisdictional.¹¹⁵ The provision merely requires a party seeking judicial review of the benefits decision to file suit “not later than the 45th day after the date on which the Division mailed the party the decision of the appeals panel.”¹¹⁶ The Legislature did not include explicitly jurisdictional language as it did for suits against the government.¹¹⁷ That arguably reinforces the presumption that the Legislature did not intend the filing period to be jurisdictional.¹¹⁸

Comparing Section 410.252(a) with the general statute of limitations in the Civil Practice and Remedies Code emphasizes the absence of explicitly jurisdictional language in Section 410.252(a). Section 410.252(a) provides a time to file suit and an accrual date.¹¹⁹ The Civil Practice and Remedies Code does the exact same thing: “a person must bring suit . . . not later than two years after the day the cause of action accrues.”¹²⁰ An Article V court is not

¹¹⁴See *City of DeSoto v. White*, 288 S.W.3d 389, 395 (Tex. 2009) (“We consider a number of factors in determining whether the Legislature intended that a provision be jurisdictional. But, as with any statute, we begin with the text.” (citations omitted)).

¹¹⁵*Cf.* TEX. TAX CODE ANN. § 42.21(a) (West 2015) (“Failure to timely file a petition bars any appeal under this chapter.”).

¹¹⁶TEX. LAB. CODE ANN. § 410.252(a) (West 2015).

¹¹⁷See *In re United Servs. Auto. Ass’n*, 307 S.W.3d 299, 308 (Tex. 2002) (construing a separate Labor Code filing deadline).

¹¹⁸See *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002) (“[W]e believe every word excluded from a statute must also be presumed to have been excluded for a purpose.”). However, the specificity of Section 410.252(a) and the generality of the sovereign immunity exception reduces the significance of their differing language. See TEX. GOV’T CODE ANN. § 311.023(4) (West 2013) (“In construing a statute . . . a court may consider . . . common law or former statutory provisions, including laws on the *same or similar* subjects . . .” (emphasis added)).

¹¹⁹TEX. LAB. CODE ANN. § 410.252(a) (“A party may seek judicial review by filing suit not later than the 45th day after the date on which the division mailed the party the decision of the appeals panel. For purposes of this section, the mailing date is considered to be the fifth day after the date the decision of the appeals panel was filed with the division.”).

¹²⁰TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West 2017).

deprived of jurisdiction over a tort suit filed “later than two years” after it accrues.¹²¹ A suit for judicial review filed “later than the 45th day” after it accrues should likewise not affect Article V jurisdiction.¹²² Thus, read in isolation, it appears the Legislature did not intend the filing period to be jurisdictional.

2. Reading Section 410.252 As a Whole

A pulled-back view of Section 410.252 as a whole¹²³ supports the conclusion from the isolated analysis of subsection (a) that timely filing is not a jurisdictional prerequisite. The Legislature designated two possible venues for suit in Section 410.252(b): “the county where the employee resided at the time of the injury or death, if the employee is deceased; or in the case of an occupational disease, in the county where the employee resided on the date disability began or any county agreed to by the parties.”¹²⁴ If a party files suit in a different venue, that court, “on determining that it does not have jurisdiction to render judgment on the merits of the suit,” must transfer the suit to a proper venue.¹²⁵ Consistent with the Texas Constitution,¹²⁶ the two statutory mandatory venues are the only venues with jurisdiction to rule on the merits of the appeal.¹²⁷ By referencing jurisdiction for venue and not for untimely filing, a fair reading of the statute is that the Legislature did not intend to make the filing period a jurisdictional prerequisite.¹²⁸

¹²¹ See, e.g., *Dall. Cty. v. Hughes*, 189 S.W.3d 886, 888 (Tex. App.—Dallas 2006, pet. denied) (“[L]imitations is a defensive issue, not a jurisdictional issue . . .”); see also TEX. R. CIV. P. 94 (“[A] party shall set forth affirmatively . . . statute of limitations . . .”).

¹²² See *Colo. Cty. v. Staff*, 510 S.W.3d 435, 452 (Tex. 2017) (“Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense. . . .” (footnote omitted)).

¹²³ See *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998) (“[W]e must read the statute as a whole and interpret it to give effect to every part.”).

¹²⁴ TEX. LAB. CODE ANN. § 410.252(b).

¹²⁵ *Id.* § 410.252(c).

¹²⁶ TEX. CONST. art. V, § 8.

¹²⁷ James E. Wren & Cody L. Hill, *Resolving the Quandary of Conflicting, Mandatory-Venue Statutes in Texas*, 68 BAYLOR L. REV. 85, 186–87 (2016).

¹²⁸ See *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002) (“[W]e believe every word excluded from a statute must also be presumed to have been excluded for a purpose.”).

The closest Section 410.252 itself comes to suggesting jurisdictional implications for untimely filing is subsection (d). If a suit is timely filed in the wrong venue, it is considered timely when it is transferred to the proper venue.¹²⁹ The Legislature provided relation-back for timely filing in an improper venue, implying that an untimely-filed claim in the proper venue is a jurisdictional defect. This implication, however, is too strained to rebut the presumption against jurisdictional construction. Read as a whole, then, Section 410.252 supports a non-jurisdictional construction of subsection (a).

The statute's title is also instructive.¹³⁰ The title, "Time for Filing Petition; Venue[.]" makes no mention of jurisdiction.¹³¹ While not determinative,¹³² it does reinforce a non-jurisdictional construction of Section 410.252(a).¹³³

3. Reading Section 410.252(a) Within the Context of the Workers' Comp Judicial Review Scheme

Up to this point, the plain language analysis strongly suggests Section 410.252(a) is non-jurisdictional: there are no consequences for untimely filing within Section 410.252, and there is no explicitly jurisdictional language. But the final step in the plain language analysis—considering Section 410.252(a) within the context of the judicial review scheme¹³⁴—requires the filing period be jurisdictional.

Two statutory requirements necessitate this construction. First, while the appeals panel's decision is "binding" during the pendency of an appeal,¹³⁵ its decision is "final" if not timely appealed.¹³⁶ In other words, the appeals

¹²⁹TEX. LAB. CODE ANN. § 410.252(d).

¹³⁰See *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 307–08 (Tex. 2010) ("The Legislature titled the provision 'Statute of Limitations,' and while such a heading cannot limit or expand the statute's meaning, the heading 'gives some indication of the Legislature's intent.'" (citations omitted)).

¹³¹TEX. LAB. CODE ANN. § 410.252(a).

¹³²TEX. GOV'T CODE ANN. § 311.024 (West 2013).

¹³³See *In re United Servs. Auto. Ass'n*, 307 S.W.3d at 308.

¹³⁴See *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) ("[W]e look at the entire act, and not a single section in isolation."); see also Beal, *supra* note 57, at 374 ("[A] court very well begins, and most assuredly completes, its analysis of an ambiguity by making sure its resolution is consistent with or in context with the entire statute.").

¹³⁵TEX. LAB. CODE ANN § 410.205(b).

¹³⁶*Id.* § 410.205(a).

panel's decision cannot be "altered or undone"¹³⁷ after the filing period runs out. Construing the filing period as jurisdictional is the only way to give effect to the finality provision.¹³⁸ A jurisdictional construction means, consistent with the finality provision, that once the forty-five-day period expires, the appeals panel's decision cannot be affected by Article V review. If the filing period is a limitations period, however, an Article V court would be able to rummage around a finalized agency decision. Since limitations is waivable by definition,¹³⁹ construing the filing period as a limitations period means no untimely-filed suit for judicial review would ever be final.

The second statutory requirement that necessitates a jurisdictional construction is not specific to the filing period. When an Article V court enters judgment on a suit for judicial review, its judgment must "comply with all appropriate provisions of the law[;]"¹⁴⁰ otherwise, the judgment is "void."¹⁴¹ To comply with all appropriate provisions of the law, the judgment "must stick closely to the Code provisions that are particularly pertinent" to judgments on suits for judicial review.¹⁴² By prescribing when suits must be brought, the filing period is particularly pertinent to suits for judicial review.¹⁴³ So too is the provision making appeals panel judgments final if untimely appealed.¹⁴⁴ Thus, an Article V court cannot enter judgment on an untimely-filed appeal because the appeals panel decision is already final. If an Article V court does enter judgment on an untimely-filed suit, the

¹³⁷ *Final*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/final> (last visited Dec. 1, 2017).

¹³⁸ *See Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987) ("We will give effect to all the words of a statute and not treat any statutory language as surplusage if possible.").

¹³⁹ *See* TEX. R. CIV. P. 94 ("[A] party shall set forth affirmatively . . . statute of limitations . . .").

¹⁴⁰ TEX. LAB. CODE ANN. § 410.257(a) (West 2015).

¹⁴¹ *Id.* § 410.257(f).

¹⁴² *Tex. Dep't of Ins. v. Jones*, 498 S.W.3d 610, 615 (Tex. 2016). The court construed the phrase "adhere[] to all appropriate provisions of the law" found in TEX. LAB. CODE § 410.256, which governs settlements. TEX. LAB. CODE ANN. § 410.256(b)(2) (West 2015); *Jones*, 498 S.W.3d at 615. While the language is slightly different, the definition is still applicable here. *Compare Jones*, 498 S.W.3d at 615 ("The verb 'to adhere' means 'to bind oneself to observance.'") with *Comply*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/comply> (last visited Dec. 1, 2017) (defining "comply" as "to conform, submit, or adapt").

¹⁴³ *Cf. Jones*, 498 S.W.3d at 615 ("The Legislature's detailed and precise formula that governs the calculation of the amount of SIBs to which injured workers are entitled is a particularly 'appropriate' provision of law. Further, a court can only approve a SIBs award made in accordance with Subchapter H of the Code—the very subchapter that contains the formula.").

¹⁴⁴ *Id.*

judgment would be void on its face for failure to comply with an appropriate provision of the law, making the judgment susceptible to collateral attack.¹⁴⁵

The serious consequences for non-compliance prescribed by the plain statutory language require the filing period to be a jurisdictional prerequisite to suit.¹⁴⁶ Indeed, a non-jurisdictional construction upturns the judicial review scheme. The plain language analysis reveals severe consequences for non-compliance and shows that a non-jurisdictional construction of the filing period is at odds with the judicial review scheme as a whole.

B. The Filing Period's Purpose is Not Contrary to a Jurisdictional Construction

There is no specifically stated statutory purpose for Section 410.252(a). The Legislature did, however, provide some “basic goals” for the workers’ comp scheme.¹⁴⁷ Several goals seem relevant to the filing period: giving injured employees “access to a fair and accessible dispute resolution process,”¹⁴⁸ with the intent of resolving disputes “promptly and fairly.”¹⁴⁹ Unfortunately, these general platitudes do not provide any real insight into the filing period’s purpose beyond the obvious observation that the Legislature intended for disputes to resolve quickly.

Section 410.252(a)’s placement in the judicial review scheme is more instructive. The first section in Subchapter F, “Judicial Review—General Provisions[,]” provides that “[a] party that has exhausted its administrative remedies under this subtitle and that is aggrieved by a final decision of the appeals panel may seek judicial review under this subchapter”¹⁵⁰ One possible purpose for the filing period, then, is to serve only as a procedural

¹⁴⁵ See *York v. State*, 373 S.W.3d 32, 41 (Tex. 2012) (“A judgment void on its face is subject to collateral attack”).

¹⁴⁶ Cf. *In re Dep’t of Family & Protective Servs.*, 273 S.W.3d 637, 642 (Tex. 2009) (“[S]ection 263.402 provides that a party may waive its right to dismissal if the party ‘fails to make a timely motion to dismiss the suit or to make a motion requesting the court to render a final order before the deadline for dismissal.’ Subject-matter jurisdiction, however, cannot be waived. Thus, if the Legislature intended for the deadlines to be jurisdictional, it would not have expressly permitted them to be waived.” (citations omitted)).

¹⁴⁷ TEX. LAB. CODE ANN. § 402.021(a).

¹⁴⁸ *Id.* § 402.021(a)(2).

¹⁴⁹ *Id.* § 402.021(b)(5).

¹⁵⁰ *Id.* § 410.251.

mechanism once the threshold judicial review prerequisites of exhaustion and finality are met.¹⁵¹

This procedural purpose has support in the historic differences between exhaustion of administrative remedies and finality on the one hand, and limitations on the other. Finality and exhaustion create a right to jurisdiction at a specific time.¹⁵² In contrast, limitations periods provide a time for exercising that right.¹⁵³

This implicit procedural purpose is reinforced by the Third District's construction of the Whistleblower Act. Aggrieved employees must bring suit under the Whistleblower Act "not later than the 90th day after the date" the violation occurred or was discovered.¹⁵⁴ Before all statutory prerequisites to suit against the government became jurisdictional, the failure to file within that ninety-day period gave "rise to the affirmative defense of limitations," but was not a jurisdictional defect.¹⁵⁵ But the failure to exhaust administrative remedies before filing suit was a jurisdictional defect.¹⁵⁶ As the Third District reasoned, "the limitations provision in no way affects a governmental agency's ability to resolve a dispute through its own internal dispute resolution procedures."¹⁵⁷

Yet, a procedural purpose is not contrary to a jurisdictional construction. As *Dubai* shows, historical categorizations are not immutable. It is consistent for the Legislature to provide a procedural mechanism governing the exercise of jurisdiction while making that mechanism the shut-off for that same right.¹⁵⁸ The filing period is forty-five days regardless of whether it is

¹⁵¹ See *Tex. Dept. of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 196 (Tex. 2004) ("[T]he plain language of section 2001.171 of the APA creates an independent right to judicial review for those who satisfy the section's threshold requirements."). Section 410.252 is the analogue of the general APA provision, which provides that "[a] person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." TEX. GOV'T CODE ANN. § 2001.171 (West 2016).

¹⁵² *Tex. Air Control Bd. v. Travis Cty.*, 502 S.W.2d 213, 215 (Tex. Civ. App.—Austin 1973, no writ).

¹⁵³ *City of New Braunfels v. Allen*, 132 S.W.3d 157, 166 (Tex. App.—Austin 2004, no pet.).

¹⁵⁴ TEX. GOV'T CODE ANN. § 554.005 (West 2012).

¹⁵⁵ *Tex. Dep't of Mental Health & Mental Retardation v. Olofsson*, 59 S.W.3d 831, 833 (Tex. App.—Austin 2001, no pet.).

¹⁵⁶ *Allen*, 132 S.W.3d at 166.

¹⁵⁷ *Id.*

¹⁵⁸ The legislative history from Section 410.252(a)'s latest amendment suggests that is exactly what the legislature intended to do. See H. Research Org., Bill Analysis, Tex. H.B. 4545, 81st Leg.,

jurisdictional or non-jurisdictional. Thus, the strong jurisdictional legislative intent revealed by the first two factors is not weakened by the third factor.

C. The Consequences of a Jurisdictional Versus Non-Jurisdictional Construction Are Largely the Same

This is a case where the consequences of either construction are largely the same. First, recall that the Texas Supreme Court's goal in *Dubai* was to reduce the vulnerability of final judgments to collateral attack merely because the parties and the court overlooked a statutory prerequisite. The Legislature did the opposite with the workers' comp scheme. A judgment on a suit for judicial review that does not comply with all appropriate provisions of the law is void. If the filing period is jurisdictional and a lawsuit is untimely filed, the judgment on that suit is void. And if the filing period is not jurisdictional and a lawsuit is untimely filed, the judgment on that suit is void. The public policy concerns that drove *Dubai* are simply inapplicable to Section 410.252(a) because, however construed, a judgment on an untimely-filed suit will be subject to collateral attack.¹⁵⁹

Second, it is important to recognize how unlikely it is that an untimely-filed claim would reach final judgment without someone catching the mistake. The Workers' Compensation Division has an absolute right to notice of the suit¹⁶⁰ and a right to intervene,¹⁶¹ and a right to notice of any proposed settlement or judgment.¹⁶² The division would hopefully intervene if the proposed judgment does not comply with the law.¹⁶³ And even if the division does not intervene, the trial court has an obligation to ensure a proposed judgment or settlement complies with all applicable law¹⁶⁴ which, as

R.S. (2009) (“[E]ither an injured worker or an insurance company may file a lawsuit to challenge the decision of an administrative appeals panel . . . as long as the legal action is brought within 40 days The bill [extending the time to 45 days] would provide a reasonable extension and a clear deadline of seeking further legal remedies.”).

¹⁵⁹In holding the filing period was not jurisdictional, the First District wrote that a jurisdictional construction posed a “great[] threat” to the finality of workers comp decisions because of the risk of perpetual voidability. *Chicas v. Tex. Mut. Ins. Co.*, 522 S.W.3d 67, 74 (Tex. App.—Houston [1st Dist.] 2017, pet. filed). The court never addressed whether a judgment would be void anyway under the statutory language in TEX. LAB. CODE ANN. § 410.258.

¹⁶⁰TEX. LAB. CODE ANN. § 410.253 (West 2015).

¹⁶¹*Id.* § 410.254.

¹⁶²*Id.* § 410.258(a).

¹⁶³*Id.* § 410.258(e).

¹⁶⁴*Id.* § 410.258(d).

discussed earlier, includes timely filing. It is difficult to conceive a situation where all of these check-offs would miss something as typically obvious as untimely filing.

Finally, and most importantly, neither construction jeopardizes injured workers. Whether the filing period is jurisdictional or non-jurisdictional, during the pendency of the suit for judicial review the appeals panel decision is binding.¹⁶⁵ If an injured employee receives a favorable appeals panel ruling, the employee cannot be stripped of those benefits by an untimely-filed suit. Conversely, if the appeals panel decision is adverse to the employee, the employee cannot temporarily change the outcome by bringing suit after the filing period has expired.

There is one situation, however, where a jurisdictional versus non-jurisdictional construction may have an impact: the availability of statutory¹⁶⁶ and equitable tolling¹⁶⁷ provisions. The Texas Supreme Court has found statutory tolling can apply to statutory filing periods,¹⁶⁸ and dictum from the court suggests there is no reason to distinguish between statutory and common law filing periods for purposes of equitable tolling.¹⁶⁹ But equitable tolling may not apply to jurisdictional statutory prerequisites.¹⁷⁰ It is also unclear, in the context of Section 410.252, whether general statutory tolling is available. Because Section 410.252(d) provides for relation back when a suit is timely filed in the wrong venue,¹⁷¹ the more general tolling provision is arguably inapplicable because the more specific provision in Section 410.252(d) traditionally controls over the more general statutory tolling period.¹⁷²

¹⁶⁵ *Id.* § 410.205(b).

¹⁶⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 (West 2015).

¹⁶⁷ *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (“We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”).

¹⁶⁸ *In re* United Servs. Auto. Ass’n, 307 S.W.3d 299, 310–11 (Tex. 2010).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ TEX. LAB. CODE ANN. § 410.252(d) (West 2015).

¹⁷² *See* Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 901 (Tex. 2000) (“This conclusion is consistent with the traditional statutory construction principle that the more specific statute controls over the more general.”). *But see* TEX. GOV’T CODE ANN. § 311.026(a) (West 2013) (“If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.”).

With limited exception, the consequences of one construction over another are not that different. Injured workers are afforded the same protections under either interpretation, and the effect of either interpretation on a judgment's voidability are the same. This factor is simply a wash.

IV. CONCLUSION

A party who reaches the top rung of the workers' comp ladder too late has a serious problem. The Legislature predicated Article V jurisdiction on either the worker or the insurer filing suit within that forty-five-day window. An untimely-filed suit is fatally defective: there is no Article V jurisdiction.

The only way to properly reach that answer is by applying the four-factor test the Texas Supreme Court has articulated in so many cases. As this article demonstrates, the test is not always clear-cut: analyzing any statutory prerequisite under the four-factor test requires a careful parsing of the entire statutory scheme. Anything less can lead to wrong answers. The Texas Supreme Court needs to clarify this peculiar area of statutory construction and state that its four-factor test—subject to other established canons of construction—is the only way to answer the jurisdictional question.