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SUPREME COURT
OF TEXAS

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March 26, 2009

BLAKE HAWTHORNE, Clerk
BY _____ Deputy

09-0005

The Supreme Court of Texas
201 West 14th Street, Room 104
P.O. Box 12248
Austin, Texas 78701

Austin
Dallas
Houston
Saint Paul

Re: Transcontinental Insurance Company, Petitioner v Joyce Crump, Respondent
On Petition for Review From the Fourteenth Court of Appeals, Houston
No. 14-06-00905-CV.

Clerk, Supreme Court:

This amicus letter is presented in the above-styled cause of action on behalf of the Insurance Council of Texas (ICT) urging the court to grant review as requested by the Petitioner, Transcontinental Insurance Company. ICT is a non-profit trade association of property and casualty insurers writing business in Texas, many of who write workers' compensation coverage. This case is of interest because of the potential costs to the workers' compensation if the lesser evidentiary standard, followed by the 14th Court of Appeals in the above-styled case, is adopted by this Court and followed in future workers' compensation cases.

Background

This case arose out of a 2000 work related knee injury suffered by the respondent's spouse and centers on whether other additional injuries and conditions complained of by the respondent are a result of the work related injury or related to numerous other health conditions and issues that respondent suffered from irrespective of the knee injury at work. The 14th Court of Appeals ruled that the claimant's knee injury at work was a producing cause of the respondent's subsequent death in 2001 despite significant evidence regarding the respondent's pre-existing

health conditions and numerous other health issues, which caused the death. Further, the appellate court erroneously applied a differential diagnosis test in determining the admissibility of the respondent's expert testimony. We believe prior court decisions have made it clear that the standard for admissibility of expert testimony in this matter should be governed by the Supreme Court's decision in E.I. du Pont de Nemours and Company, Inc. v Robinson, 923 S.W.2d 549, 557 (Tex. 1995).

Evidentiary Standard for Expert Testimony

The Robinson court outlined the factors a court may consider in determining the admissibility of expert testimony under Texas Rule of Civil Evidence, Rule 702. A court can consider 1) the extent to which the theory has been or can be tested; 2) the extent to which the technique relies upon the substantive interpretation of the expert; 3) whether the theory has been subjected to peer review and/or publication; 4) the technique's potential rate of error; 5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and, 6) the non-judicial uses which have been made of the theory or technique. The Robinson court went on to opine that courts may consider other factors which are helpful in determining reliability of scientific evidence, and factors court will find helpful in determining whether underlying theories and techniques of proffered evidence are scientifically reliable will differ with each particular case.

The 14th Court appears to have rejected the Robinson standard as it applies to a workers' compensation case in regards to causation evidence. The court appears to limit the Robinson standard to toxic tort cases but we are unaware of any such limitation in Texas law. The appellate court instead considered whether there was "an analytical gap" between the expert's opinion and the bases(sic) on which the opinion was founded (citing Taylor v. American Fabritech, Inc., 132 S.W.3d 613, 619 (Tex.App.-Houston [14th Dist.] 2004)). The respondent's expert used a "differential diagnosis" to determine causation and cited Coastal Tankships, U.S.A., Inc v Anderson, 87 S.W.3d 591, 604 in support of this as a basis for determining the expert testimony was based on a reliable foundation and admissible.

Nonetheless, the court still should consider the reliability of the testimony. The court in Coastal Tankships, at 606 went on to discuss “whether a differential diagnosis without more can reliably show both specific and general causation under *Daubert* in a toxic-tort context.” The court noted that some federal courts also require some type of “hard science” on the issue of general causation. See Coastal Tankship at 607. Finally, the court in Coastal Tankship at 611 commented that it was the appellee’s burden to provide expert testimony linking the evidentiary pieces through the lens of *Daubert/Robinson/Jordan*.

Our concern is that failure to apply the Robinson standard in favor of a lesser evidentiary standard, as adopted by the 14th Court, will likely result in future decisions attributing non-work related conditions and illnesses to the original work related injury. Such rulings would mean unnecessary costs to the workers’ compensation carriers and system, and allow plaintiff’s to further blur the line between work related illnesses and injuries and non-work related illnesses and injuries, as well as make it more difficult to distinguish between legitimate workers’ compensation claims and injuries.

Workers’ compensation cases often involve complex questions about medical causation and relatedness of pre-existing conditions to the injury originally complained of. The Workers’ Compensation Act (the “Act”), Texas Labor Code section 406.031, states in part, that an insurance carrier is only liable for an employee’s injury if the injury arises out of and in course and scope of employment. Further, the Act defines an injury as “damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm.” Texas Labor Code section 401.011(26). In order to ensure that the workers’ compensation system is not erroneously made to pay for non-work related conditions and injuries, we believe the courts should follow the standard for expert testimony and evidence as announced in Robinson.

Summary

The workers' compensation industry in Texas pays approximately one and one-half billion dollars each year in workers' compensation benefits. We want to ensure that the industry only pays for those claims that are legitimately related to the work accident. By diminishing the standard for admissibility of expert testimony and evidence, the industry faces the potential for exposure to and liability for non-work related conditions or pre-existing health conditions. We urge this court to grant the petition submitted by the Petitioner and to reverse the 14th Court of Appeal's decision to disregard well established precedent on the evidentiary standard for expert witness testimony and evidence.

The Insurance Council of Texas appreciates the opportunity to provide input to the court on this important matter and request your favorable consideration of the Petitioner's Petition for Review.

Sincerely,



Albert Betts, Jr.

Cc: Rick Gentry, Insurance Council of Texas
David Brenner, Burns Anderson Jury and Brenner, L.L.P.