

No. 09-0005

IN THE
SUPREME COURT
OF TEXAS

TRANSCONTINENTAL INSURANCE COMPANY,

Petitioner

v.

JOYCE CRUMP,

Respondent

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas

BRIEF OF *AMICUS CURIAE* INSURANCE COUNCIL OF TEXAS

Wade C. Crosnoe
State Bar No. 00783903
Albert Betts, Jr.
State Bar No. 02268850
THOMPSON, COE, COUSINS & IRONS, L.L.P.
701 Brazos Street, Suite 1500
Austin, Texas 78701
Telephone: (512) 703-5078
Facsimile: (512) 708-8777

Counsel for *Amicus Curiae* Insurance Council
of Texas

TABLE OF CONTENTS

TABLE OF CONTENTS	i
INDEX OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	6
I. The Court of Appeals Applied a Lesser Standard for Evaluating the Reliability of Expert Testimony in Workers’ Compensation Cases	6
A. <i>The Texas Workers’ Compensation Act States That Evidence in Judicial Review Proceedings Shall Be Adduced as in Other Civil Trials</i>	6
B. <i>The Court of Appeals Erroneously Disregarded the Robinson Factors</i>	6
C. <i>The Court of Appeals Erred in Holding That Dr. Daller Was Not Required to Consider and Exclude Other Possible Causes of Crump’s Death</i>	9
D. <i>An Opinion Derived From a Differential Diagnosis Is Not Presumptively Valid and Does Not Establish General Causation</i>	10
II. The Court of Appeals Approved a Definition of “Producing Cause” That Conflicts With This Court’s Decision in <i>Ledesma</i>	13
III. This Case Is Important to Carriers and Employers in Texas.....	15
CONCLUSION	16
CERTIFICATE OF SERVICE	18

INDEX OF AUTHORITIES

Cases

<i>Abilene Indep. Sch. Dist. v. Marks</i> , 261 S.W.3d 262 (Tex. App.—Eastland 2008, no pet.)	8
<i>Astec Indus., Inc. v. Suarez</i> , 921 S.W.2d 794 (Tex. App.—Fort Worth 1996, no writ)	14
<i>Coastal Tankships, U.S.A., Inc. v. Anderson</i> , 87 S.W.3d 591 (Tex. App.—Houston [1 st Dist.] 2002, pet. denied)	11, 12, 13
<i>E.I. du Pont de Nemours and Co. v. Robinson</i> , 923 S.W.2d 549 (Tex. 1995)	6, 7, 8, 10, 12
<i>Ford Motor Co. v. Ledesma</i> , 242 S.W.3d 32 (Tex. 2007)	9, 13, 14, 15
<i>Gammill v. Jack Williams Chevrolet, Inc.</i> , 972 S.W.2d 713 (Tex. 1998)	7, 12
<i>Transcon. Ins. Co. v. Crump</i> , 274 S.W.3d 86 (Tex. App.—Houston [14 th Dist.] 2008, pet. filed)	2, 3, 7, 9, 11, 13, 14
<i>Merrell Dow Pharms. v. Havner</i> , 953 S.W.2d 706 (Tex. 1997)	8, 10, 12
<i>Parker v. Employers Mut. Liab. Ins. Co.</i> , 440 S.W.2d 43 (Tex. 1969)	10
<i>State Farm Fire and Cas. Co. v. Gandy</i> , 925 S.W.2d 696 (Tex. 1996)	14
<i>State Office of Risk Mgmt. v. Larkins</i> , 258 S.W.3d 686 (Tex. App.—Waco 2008, no pet.)	8
<i>State Office of Risk Mgmt. v. Lawton</i> , __ S.W.3d __, No. 08-0363, 2009 WL 2667360 (Tex. Aug. 28, 2009)	15
<i>Taylor v. Am. Fabritech, Inc.</i> , 132 S.W.3d 613 (Tex. App.—Houston [14th Dist] 2004, pet. denied)	7
<i>Tex. Workers' Comp. Ins. Fund v. Lopez</i> , 21 S.W.3d 358 (Tex. App.—San Antonio 2000, pet. denied)	8

Statutes

TEX. LAB. CODE § 406.031(a)	16
TEX. LAB. CODE § 410.301(a)	6

TEX. LAB. CODE § 410.302(a) 6

TEX. LAB. CODE § 410.306(a) 6

TEX. LAB. CODE § 410.306(b)..... 6

Rules

TEX. R. EVID. 702..... 6, 7

Other Authorities

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE PJC 2.4 (2008)..... 9

TEXAS DEPARTMENT OF INSURANCE, SETTING THE STANDARD: AN ANALYSIS OF THE IMPACT OF THE 2005 LEGISLATIVE REFORMS ON THE TEXAS WORKERS’ COMPENSATION SYSTEM, 2008 RESULTS (2008), <http://www.tdi.state.tx.us/reports/report9.html> 15

To the Honorable Supreme Court of Texas:

STATEMENT OF INTEREST

The Insurance Council of Texas (ICT) is a nonprofit trade association of over 500 property and casualty insurers writing business in Texas. In 2008, ICT's members represented 64% of the workers' compensation insurance market in Texas, with \$1.65 billion in premiums written. Among other functions, ICT reports to its members on important legislative initiatives and changes in insurance law, provides a mechanism through which members can collectively represent their interests in the regulatory process, hosts a widely-attended annual conference on workers' compensation insurance, presents continuing education seminars on workers' compensation insurance, and publishes the "Texas Workers' Compensation Update" and related bulletins.

ICT also submits amicus briefs in important court cases that are of widespread interest to its members. This is one of those cases. The court of appeals' decision weakens the standards for admitting expert testimony and proving causation in workers' compensation cases. For instance, the court applied a less stringent standard in reviewing the reliability of expert testimony in workers' compensation cases than the standard that applies in other cases. The court of appeals also approved the trial court's definition of "producing cause" for workers' compensation cases even though this Court recently disapproved of a virtually-identical definition for all cases. To ensure that the Court is fully-informed about these problems and the important issues presented by this appeal, ICT is paying the cost of preparing this amicus brief.

STATEMENT OF FACTS

The issue in this workers' compensation case is whether a knee contusion that an employee suffered at work was a producing cause of his death when he had a history of other serious health problems. According to the court of appeals' opinion, Charles Crump received a kidney transplant in 1975 and was thereafter prescribed immunosuppression drugs to prevent his body from rejecting the kidney. *Transcon. Ins. Co. v. Crump*, 274 S.W.3d 86, 90 (Tex. App.—Houston [14th Dist.] 2008, pet. filed). He subsequently contracted meningitis in 1978 and his gallbladder was removed in 1994. *Id.* Although apparently unknown to Crump, he also had chronic liver disease before the accident at issue here. *Id.* at 91-92.

In May 2000, Crump struck his right knee on a tape machine at his job in the packaging department of Frito-Lay. *Id.* at 90-91. He did not seek medical treatment until six days later. *Id.* at 91. Crump's physician diagnosed him with a knee contusion and a large hematoma, and prescribed him analgesics and antibiotics. *Id.* Over the next several months, Crump saw a series of doctors and was treated for cellulitis of both legs (a skin inflammatory infectious disease), hepatitis C and hemochromatosis (liver diseases), sepsis, a yeast infection, histoplasmosis (an infection caused by an airborne fungus), and renal insufficiency. *Id.* at 91-92. Crump died in January 2001, more than eight months after his knee injury at work. *Id.* at 93.

The medical examiner performed an autopsy and found that propoxyphene (a component of the pain-killer Darvocet) toxicity was the cause of death. *Id.* at 93. The medical examiner also made findings of atherosclerotic cardiovascular disease, chronic

renal failure, and liver fibrosis. *Id.* at 93. The death certificate listed the cause of death as cardiorespiratory arrest with cirrhosis and ileus (a blockage of the intestine). *Id.* at 93-94. The death certificate did not include a finding that the death resulted from a work-related injury. *Id.* at 96.

Crump's wife sought workers' compensation benefits from Frito-Lay's workers' compensation carrier, Transcontinental Insurance Company. *Id.* at 94. A hearing officer of the Texas Workers Compensation Commission (now the Division of Workers' Compensation at the Texas Department of Insurance) found that Crump's work-related knee injury was a producing cause of his death. *Id.* at 94. A commission appeals panel subsequently affirmed that decision. *Id.* Transcontinental then sought judicial review of the appeals panel decision in district court. *Id.*

At trial in the district court, only two medical experts testified. *Id.* Crump's transplant surgeon, Dr. Daller, testified that Crump's knee injury at work was a producing cause of his death because it triggered an infection that he was unable to defeat because of the effects of his immunosuppressant drug therapy. *Id.* On the other hand, Transcontinental's medical expert, Dr. Hunt, testified that Crump's death was caused by his chronic health issues, including hepatitis C, rather than his knee injury. *Id.*

The jury found that Crump's knee injury in May 2000 was a producing cause of his death and the trial court entered judgment for Crump. *Id.* at 95. Transcontinental Insurance Company appealed and challenged, among other things, the reliability of Dr. Daller's expert testimony and the jury charge's definition of "producing cause." *Id.* at 96. The court of appeals affirmed the trial court's judgment. *Id.* at 96-104.

SUMMARY OF THE ARGUMENT

A mistaken assumption runs throughout the court of appeals' decision. The assumption is that workers' compensation cases are somehow fundamentally different than other types of civil cases and, accordingly, this Court's decisions governing the admissibility of expert testimony and the meaning of "producing cause" do not apply. The court of appeals is wrong. The same standards should apply unless the Texas Workers' Compensation Act (the Act) says otherwise.

The provisions of the Act governing judicial review of workers' compensation administrative decisions do not provide a different standard for admitting evidence in workers' compensation cases. To the contrary, the Act expressly states that evidence shall be adduced as in other civil cases and leaves no doubt that the Texas Rules of Evidence apply. Nevertheless, the court of appeals distinguished this Court's decisions governing how courts should analyze the reliability of expert testimony because they did not involve workers' compensation cases. Based on the erroneous assumption that workers' compensation cases are different, the court of appeals disregarded the *Robinson* factors for reviewing the reliability of expert testimony as well as *Havner's* requirement that experts must exclude other plausible causes of injury with reasonable certainty. Those errors set the stage for the court to presume that the differential diagnosis of Crump's medical expert was reliable without any scrutiny of the information and assumptions on which that diagnosis was based.

The court of appeals also approved a jury-charge definition of "producing cause" that is substantively-identical to a definition which this Court recently disapproved in

Ford Motor Company v. Ledesma. Again, the court of appeals' reasoning was that this is a workers' compensation case. But *Ledesma* created no exception for workers' compensation cases. And it would be unworkable to have two different definitions of the same term. The definition of "producing cause" must be the same no matter what the case; the definition must necessarily be the one approved by this Court. The court of appeals erred in approving a materially different definition.

The court of appeals' decision conflicts with various decisions of this Court and other Texas courts, as well as the provision of the Act requiring that evidence be adduced as in other civil cases. This Court should grant review to resolve these conflicts and to address the fundamentally important question of whether the standards for admitting expert testimony and proving causation are somehow different in workers' compensation cases. Additionally, ICT's members are concerned that the weakened standards created by the court of appeals will increase costs in the workers' compensation system by transforming carriers into insurers of the general health of employees rather than insurers of the risk carriers are paid to assume: the risk of workplace injuries. That is a serious concern for both carriers doing business in this state and the employers across the state who pay for workers' compensation insurance.

ARGUMENT

I. The Court of Appeals Applied a Lesser Standard for Evaluating the Reliability of Expert Testimony in Workers' Compensation Cases

A. The Texas Workers' Compensation Act States That Evidence in Judicial Review Proceedings Shall Be Adduced as in Other Civil Trials

The Act provides for judicial review of certain final decisions of the Workers' Compensation Division appeals panels, including decisions regarding compensability. *See* TEX. LAB. CODE § 410.301(a). Although judicial review of appeals panel decisions is in some respects different than other civil cases, the Act says that the presentation of evidence is the same. Specifically, the Act states: "Evidence shall be adduced as in other civil trials." *Id.* § 410.306(a). Other provisions of the Act confirm that the Texas Rules of Evidence apply in judicial review proceedings. *See id.* § 410.302(a) (stating that the records from a contested case hearing are admissible at trial "in accordance with the Texas Rules of Evidence"); *id.* § 410.306(b) (providing that all facts and evidence in the commission's record are admissible "to the extent allowed under the Texas Rules of Evidence").

B. The Court of Appeals Erroneously Disregarded the Robinson Factors

In *E.I. du Pont de Nemours and Co. v. Robinson*, this Court held that the proponent of expert testimony must show that the expert is qualified and that the expert's testimony is relevant and is based on a reliable foundation. 923 S.W.2d 549, 556 (Tex. 1995) (citing TEX. R. EVID. 702). The Court also announced a nonexclusive list of factors that a trial court may consider in ruling on the reliability of expert testimony:

1. the extent to which the theory has been or can be tested;

2. the extent to which the technique relies upon the subjective 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.

Id. at 557 (internal citations omitted).

The court of appeals rejected Transcontinental's argument that the *Robinson* factors applied to the testimony of Crump's treating physician, Dr. Daller. *Transcon. Ins. Co. v. Crump*, 274 S.W.3d 86, 96-97 (Tex. App.—Houston [14th Dist.] 2008, pet. filed). The court reasoned that those factors did not apply because Dr. Daller's opinions were based on his experience and training. *Id.* at 97 (citing *Taylor v. Am. Fabritech, Inc.*, 132 S.W.3d 613, 619 (Tex. App.—Houston [14th Dist] 2004, pet. denied) and *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998)).

Granted, this Court did say in *Gammill* that the *Robinson* factors for assessing the reliability of scientific evidence cannot always be used with other kinds of expert testimony. *Gammill*, 972 S.W.2d at 726-27. The Court agreed that the *Robinson* factors did not apply to the opinions of plaintiff's mechanical engineering expert, although the Court emphasized that the plaintiff still had to satisfy Rule 702's reliability requirement. *Id.* at 727. The Court ultimately affirmed the trial court's decision to exclude the expert's testimony because there was an analytical gap between his observations and conclusions. *Id.* at 727-28.

Gammill is distinguishable on the question of whether the *Robinson* factors apply because the expert testimony in that case was based on the expert's training and experience. In contrast, this case involves medical expert testimony and the question of whether a knee contusion that Crump suffered at work caused an infection that triggered a series of events which ultimately caused his death. This case is therefore more analogous to cases such as *Havner*, in which this Court applied the *Robinson* factors to expert medical testimony that attempted to establish a causal link between a prescription drug taken by pregnant women and birth defects in their children. See *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997); see also *Robinson*, 923 S.W.2d at 557-60 (applying factors in assessing reliability of horticulture expert's testimony concerning an alleged link between fungicide and damage to orchard).

Indeed, another Texas court has applied the *Robinson* factors when assessing the reliability of expert medical testimony in workers' compensation cases. See *Tex. Workers' Comp. Ins. Fund v. Lopez*, 21 S.W.3d 358, 364-66 (Tex. App.—San Antonio 2000, pet. denied). And other Texas courts have referred to those factors in assessing the reliability of expert medical testimony in workers' compensation cases. See *Abilene Indep. Sch. Dist. v. Marks*, 261 S.W.3d 262, 269 (Tex. App.—Eastland 2008, no pet.); *State Office of Risk Mgmt. v. Larkins*, 258 S.W.3d 686, 692 (Tex. App.—Waco 2008, no pet.).

The court of appeals erred in declining to apply the *Robinson* factors to the expert medical testimony in this case. At the very least, the court of appeals' opinion creates a split of authority among the courts of appeals concerning whether the *Robinson* factors

apply to expert medical testimony in workers' compensation cases. It is this Court's role to resolve such conflicts.

C. *The Court of Appeals Erred in Holding That Dr. Daller Was Not Required to Consider and Exclude Other Possible Causes of Crump's Death*

The court of appeals also rejected Transcontinental's argument that Dr. Daller was required to exclude other possible causes of Crump's death with reasonable certainty. *Crump*, 274 S.W.3d at 96-97 n.11. The court of appeals distinguished Transcontinental's supporting authorities, including *Havner*, as involving toxic torts. *Id.* The court also observed that there can be more than one producing cause of a compensable injury or death in workers' compensation cases. *Id.*

The significance of the court of appeals' observation that there can be more than one producing cause in workers' compensation cases is unclear. After all, there can be more than one proximate cause of injury in toxic tort cases such as *Havner* too. Indeed, the Texas Pattern Jury Charge definition of "proximate cause" expressly states that there can be more than one proximate cause. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE PJC 2.4 (2008). Similarly, the jury charge's definition of "producing cause" in this case stated in part: "There may be more than one producing cause." *Crump*, 274 S.W.3d at 100. The court of appeals held that this definition accurately stated the law. *Id.*; *see also Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45 (Tex. 2007) (agreeing that there can be more than one producing cause of an event). *Havner* cannot be distinguished on the basis that there can

be more than one producing cause in workers' compensation cases when the same thing is true for proximate cause in tort cases.

Furthermore, in holding that an expert witness on causation must exclude other plausible causes of injury with reasonable certainty in *Havner*, 953 S.W.2d at 720, this Court cited its decisions in *Robinson* and *Parker v. Employers Mutual Liability Insurance Co.*, 440 S.W.2d 43 (Tex. 1969). The *Havner* court's reliance on *Parker* for this proposition is notable because *Parker* is a workers' compensation case. In *Parker* this Court upheld a take-nothing judgment against a workers' compensation claimant based on the absence of evidence that his exposure to radiation at work caused his cancer. *Parker*, 440 S.W.2d at 48. In doing so, this Court observed that other possible causes of the cancer had not been designated improbable by either the expert testimony or the circumstances surrounding the cancer. *Id.*

Thus, *Havner* cannot be distinguished on the basis that it was a toxic tort case rather than a workers' compensation case. *Havner's* requirement that an expert exclude other plausible causes of injury with reasonable certainty applies to all cases, including this workers' compensation case. The court of appeals erred in holding otherwise.

D. An Opinion Derived From a Differential Diagnosis Is Not Presumptively Valid and Does Not Establish General Causation

After concluding that it was not required to follow this Court's decisions in *Robinson* and *Havner*, the court of appeals held that Dr. Daller's opinion was reliable because it was based on his differential diagnosis—a clinical process in which a doctor determines which of several possible diseases or injuries is causing a patient's symptoms

by ruling out possible causes. *Crump*, 274 S.W.3d at 97 (citing *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591, 604 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)). The court of appeals cited *Coastal Tankships* for the proposition that a differential diagnosis is the basic method of internal medicine and, when properly conducted and explained, is not “junk science.” *Crump*, 274 S.W.3d at 97 (citing *Coastal Tankships, U.S.A., Inc.*, 87 S.W.3d at 604).

It is ICT’s understanding that Transcontinental Insurance Company disputes whether Dr. Daller performed a differential diagnosis to begin with. Even assuming that he did, however, a physician’s claim that he performed a differential diagnosis can hardly be the end of the inquiry as to whether an opinion derived from the diagnosis is reliable. Indeed, the court of appeals appeared to recognize that at least some level of further scrutiny is required by stating: “A *properly conducted and explained* differential diagnosis is not ‘junk science.’” *Crump*, 274 S.W.3d at 97 (emphasis added; citing *Coastal Tankships, U.S.A., Inc.*, 87 S.W.3d at 604). Yet the court’s opinion simply accepts Dr. Daller’s differential diagnosis as reliable with no analysis—none—of whether he properly conducted and explained that diagnosis. *Id.*

Notably, Justice Brister, the concurring justice in the decision that the court of appeals relied on, *Coastal Tankships*, criticized the majority’s reasoning concerning the differential diagnosis at issue there. *Coastal Tankships, U.S.A., Inc.*, 87 S.W.3d at 615-16 (Brister, J., concurring). Justice Brister observed that the court’s new standard for determining the admissibility of a differential diagnosis—whether it is “properly conducted and explained” or “properly relie[d] upon and/or utilize[d]”—was

insubstantial and subjective, in contrast to the objective standards mandated by *Daubert* and *Havner*. *Id.* at 615. He noted that the information provided by the patient may or may not be reliable depending on the accompanying moral or legal baggage, and that the context of a diagnosis (whether it is made for treatment or litigation) also impact its reliability. *Id.* at 616. Justice Brister also criticized the majority’s opinion for treating differential diagnoses as “presumptively reliable.” *Id.* at 616.

Similarly, this Court has said that an expert’s bald assurance of validity is not sufficient to make the expert’s opinion reliable. *See Havner*, 953 S.W.2d at 712 (citing *Robinson*, 923 S.W.2d at 559). The Court has also cautioned against admitting opinion evidence that is connected to the underlying data only by the expert’s *ipse dixit*. *Gammill*, 972 S.W.2d at 727. The lesson of those opinions is that courts should not accept an expert’s opinions at face value; courts must instead analyze the data and assumptions underlying those opinions. The court of appeals failed to heed that lesson when it rubber-stamped Dr. Daller’s causation opinion merely because it was purportedly based on a differential diagnosis.

Of course, opinions based on a differential diagnosis *can* be reliable. But they are not always reliable. Courts must still analyze the data and assumptions underlying the diagnosis to determine whether they support the diagnosis. The court of appeals erred in presuming that Dr. Daller’s diagnosis was reliable without scrutinizing the underlying basis for that diagnosis.

Moreover, although the court of appeals followed the *Coastal Tankships* decision in part, the court ignored a crucial part of that decision. The *Coastal Tankships* court

held that although the medical expert's differential diagnosis was reliable and sufficient to establish specific causation, a differential diagnosis cannot establish the other component of causation: general causation. *Coastal Tankships, U.S.A., Inc.*, 87 S.W.3d at 604-10. The absence of evidence of general causation led the *Coastal Tankships* court to reverse the judgment for the plaintiff and render judgment that she take nothing. *Id.* In this case, the court of appeals never addressed the issue of general causation or explained how Dr. Daller's differential diagnosis could be reliable evidence of general causation.

In short, the court of appeals failed to follow this Court's decisions governing the admissibility of expert testimony and created a weaker standard for analyzing the reliability of such testimony in workers' compensation cases. The court of appeals compounded that error by simply presuming that Dr. Daller's differential diagnosis was reliable evidence of causation (both specific and general) without scrutinizing his underlying assumptions and data.

II. The Court of Appeals Approved a Definition of "Producing Cause" That Conflicts With This Court's Decision in *Ledesma*

The jury charge in this case defined "producing cause" in relevant part as "an efficient, exciting, or contributing cause that, in a natural sequence, produces the death in question." *Crump*, 274 S.W.3d at 100. This Court recently disapproved of a substantively-identical definition of "producing cause." *See Ford Motor Co. v. Ledesma*,

242 S.W.3d 32, 35, 45-46 (Tex. 2007).¹ The Court reasoned that the definition was incomplete because it did not incorporate the requirement that the cause be a substantial factor in bringing about an event, and that the definition provided little concrete guidance to the jury. *Id.* at 45-46.

Consistent with the court of appeals' ruling on the expert issues, the court distinguished *Ledesma* because it was a products liability case rather than a workers' compensation case. But this Court did not limit its holding in *Ledesma* to products liability cases. The Court held that the frequently-submitted definition of "producing cause" at issue there, which is virtually the same as the definition in this case, "should no longer be used." *Id.* at 35.² Moreover, it would be unworkable in the extreme to have a different definition for "producing cause" depending on what type of case is involved. The definition must be the same. If for any reason this Court believes a different causation standard should apply, it is free to say so. But an intermediate court of appeals should not be allowed to create different causation standards for the same term.

The court of appeals also justified the trial court's definition of "producing cause" because there can be more than one producing cause of an injury or death in workers' compensation cases. As this Court's decision in *Ledesma* confirms, however, there can

¹ The only difference was that the definition in *Ledesma* used the word "injury" in place of "death." *Id.* at 45.

² Although Crump's brief on the merits notes that *Ledesma* was not decided until after the trial and entry of judgment in this case, that does not matter. As a rule, decisions of this court apply retrospectively. *See State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 719-20 (Tex. 1996). If the Court does not intend that one of its decisions apply retrospectively, it typically says so. *See id.* Unless this Court's decision says otherwise, lower courts should apply it retrospectively. *See Astec Indus., Inc. v. Suarez*, 921 S.W.2d 794, 797 n.5 (Tex. App.—Fort Worth 1996, no writ). Additionally, as noted in *Ledesma*, this Court has defined producing cause to include a substantial-factor requirement in decisions dating back to 1995. *Ledesma*, 242 S.W.3d at 45-46 n.47.

be more than one producing cause of injury or death in other types of cases as well. *See Ledesma*, 242 S.W.3d at 45. Thus, the fact that there can be more than one producing cause of injury or death in workers' compensation cases does not distinguish such cases from any other case where the "producing cause" standard applies.

III. This Case Is Important to Carriers and Employers in Texas

Although workers' compensation coverage is not mandatory in Texas, approximately two-thirds of the employers in Texas are workers' compensation subscribers and approximately three-fourths of the workers in Texas are covered by workers' compensation insurance.³ Thus, reported decisions involving workers' compensation insurance necessarily have widespread impact. The court of appeals' decision here is no exception. Unfortunately, the court of appeals' decision weakens the standards for admitting expert testimony and proving causation in workers' compensation cases.

Employees who suffer injuries at work often have other medical conditions that independently cause other serious medical problems and disabilities. One recent example is *State Office of Risk Management v. Lawton*, ___ S.W.3d ___, No. 08-0363, 2009 WL 2667360 (Tex. Aug. 28, 2009). There, an employee suffered a knee contusion and strain at work and then sought to have the carrier pay for surgery necessitated by a degenerative condition in her knee. *Id.* at *1. Under the Act, however, carriers are liable to pay

³ TEXAS DEPARTMENT OF INSURANCE, SETTING THE STANDARD: AN ANALYSIS OF THE IMPACT OF THE 2005 LEGISLATIVE REFORMS ON THE TEXAS WORKERS' COMPENSATION SYSTEM, 2008 RESULTS at 69 (2008), <http://www.tdi.state.tx.us/reports/report9.html>.

benefits only for injuries to covered employees arising out of and in the course and scope of their employment. *See* TEX. LAB. CODE § 406.031(a).

Given this statutory limitation on a carrier's obligation to pay benefits, the enforcement of standards for admitting expert testimony and proving causation is just as essential in workers compensation cases as in other cases, if not more so. Otherwise, workers' compensation carriers will be transformed into insurers of the general health of workers rather than insurers of the risk carriers are paid to assume: the risk of injuries to employees in the course and scope of their employment. Workers' compensation carriers already pay approximately \$1.5 billion in workers' compensation benefits every year. Requiring payment of benefits for noncompensable injuries drives up costs for both the carriers that provide workers' compensation insurance in Texas and the businesses across the state that buy it.

Even more troubling than those unnecessary costs, however, is the notion that lesser evidentiary and causation standards should apply in workers' compensation cases. Of course, to the extent that the Act alters the rules which apply to other civil cases, the Act must control. But when, as here, the Act expressly provides that evidence shall be adduced as in other civil cases, the court of appeals was not free to create a different standard.

CONCLUSION

The court of appeals' decision creates weaker evidentiary and causation standards for workers' compensation cases than other civil cases. In doing so, the court of appeals' decision conflicts with decisions of this Court, other Texas courts, and the Act itself.

This Court should grant review to resolve those conflicts and clarify whether different rules should apply in workers' compensation cases. After granting review, the Court should rule that the standards are the same.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

By: _____
Wade C. Crosnoe
State Bar No. 00783903
Albert Betts, Jr.
State Bar No. 02268850

701 Brazos, Suite 1500
Austin, Texas 78701
Telephone: (512) 703-5078
Telecopy: (512) 708-8777

Counsel for *Amicus Curiae* Insurance Council of
Texas

CERTIFICATE OF SERVICE

I certify that on October 15, 2009, a true and correct copy of this brief was served by certified mail, return receipt requested, on the following counsel of record:

David Brenner
Burns Anderson Jury & Brenner, LLP
P. O. Box 26300
Austin, Texas 78755-6300
Counsel for Petitioner

Peter M. Kelly
Law Office of Peter M. Kelly, P.C.
1005 Heights Boulevard
Houston, Texas 77008
Counsel for Respondent

Wade Crosnoe