

# NO. 09-0005

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IN THE SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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TRANSCONTINENTAL INSURANCE COMPANY,  
PETITIONER,

v.

JOYCE CRUMP,  
RESPONDENT.

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RESPONDENT'S POSTSUBMISSION AUTHORITIES

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**TO THE HONORABLE SUPREME COURT OF TEXAS:**

Respondent Joyce Crump files these postsubmission authorities to briefly address matters raised during oral argument.

**ARGUMENT**

**I. TIC has presented no reversible error with respect to the jury charge.**

**A. TIC did not preserve error, if any, with respect to the jury charge.**

**1. TIC did not preserve error, if any, in the trial court.**

In reliance on *Ledesma*--which was decided after the trial of this case--TIC has asserted to this court that the jury charge's definition of "producing cause" is erroneous. This is the entirety of the portion of the formal charge conference relating to that definition:

Mr. Brenner: My second objection is the Court's instruction on producing cause. I believe the Court's instruction provides the jury with the wrong standard for producing cause. The case law in worker's compensation cases provides that the appropriate standard for producing cause provides an instruction that producing cause means that cause which, in a natural and continuous sequence, produces death and without which the death would not have occurred. And I am presenting a proposed instruction to the Court.

The Court: That request is likewise refused.

Mr. Brenner: And those conclude my objections to the charge.

RR 8:212-13. TIC failed to preserve error on two grounds. First, to the extent the *Ledesma* language is substantially correct in a workers compensation case, TIC did not request it. See TEX. R. CIV. P. 278; *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21

(Tex. 1987). Second, TIC's objection is too vague and generalized to clearly identify the error and explain the grounds for its complaint. *See* TEX. R. CIV. P. 274; *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986); *see, e.g., City of Brenham v. Honerkamp*, 950 S.W.2d 760, 766 (Tex. App.--Austin 1997, writ denied).

**2. TIC did not preserve error on appeal.**

As discussed at oral argument, TIC's briefing on this issue was very vague and generalized; just like it did in the trial court, TIC failed to specifically identify what was incorrect or deficient about the definition as submitted. Merely stating that a different, or even a better, definition is available should not be sufficient to establish that the instruction as submitted is erroneous or reversible. *See* TEX. R. APP. P. 38.1(i); *see, e.g., Fredonia State Bank v. Gen'l Am. Life Ins. Co.*, 881 S.W.2d 279, 284-85 (Tex. 1994).

**B. Error, if any, was harmless.**

In its brief, and even at oral argument, TIC never explained how harm resulted from using the different definition of "producing cause." TIC thus did not meet its burden of showing that the purported error was harmful; accordingly, it has given the shown the court no reason to reverse. *See generally Lone Star Gas Co. v. Lemond*, 897 S.W.2d 755, 756-57 (Tex. 1995).

**C. "Substantial factor" does not belong in a workers compensation jury charge.**

The phrase "substantial factor" did not appear in this litigation until the oral argument before this court. Under well-accepted waiver principles, this court cannot

reverse in TIC's favor because TIC has never argued that "substantial factor" should be included in the definition of "producing cause."

Should the court be inclined to reprise what it did in *Ledesma*--modernize the definition of "producing cause," but only prospectively--the court should avoid using the "substantial factor" qualification.<sup>1/</sup> That qualification is not consonant with the Legislature's intent to make worker's compensation benefits liberally available. The Legislature of course did not prescribe a jury charge question or instruction, but it did provide these definitions:

"compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle.

TEX. LABOR CODE § 401.011(10). And:

"Injury" means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease.

TEX. LABOR CODE § 401.011(26). These are definitions are broad enough to suggest that the jury is not to perform a comparative or relativistic analysis of an injury's producing causes. This point is buttressed by the Legislature's special attention to the compensability of heart attacks:

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<sup>1/</sup>If the court does include "substantial factor" or a similar term in a new definition of "producing cause," this court should follow the lead of the Supreme Court of Maine and clarify that "substantial" in this context means "real or actual rather than important or predominant." *Brackett v. A.C. Lawrence Leather Co.*, 559 A. 2d 776, 777 (Me. 1989). Using the term without such clarification will import "unnecessary confusion into the analysis of causation issues in compensation cases." *Id.*, quoting *Smith v. Dexter Oil Co.*, 408 A.2d 1014, 1016 n.2 (Me. 1979); see *Roy v. Bath Iron Works*, 952 A.2d 965, 969 (Me. 2008).

A heart attack is a compensable injury under this subtitle only if:

- (1) the attack can be identified as:
  - (A) occurring at a definite time and place; and
  - (B) caused by a specific event occurring in the course and scope of the employee's employment;
- (2) the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a **substantial contributing factor** of the attack;<sup>2/</sup> and
- (3) the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

TEX. LABOR CODE § 408.008 (emphasis added). It is with respect to heart attacks, *and only with respect to heart attacks*, that the Legislature requires that the employee's work be a substantial contributing factor of the compensable injury. Had the Legislature intended that qualification to apply to all compensable injuries, it would have included it in the appropriate definition.

**II. The written reports of Dr. Hunt, TIC's paid expert, also provide more than a scintilla of evidence to support the jury's verdict.**

With respect to TIC's second issue presented, the purported error in the admission of Dr. Daller's expert testimony, oral argument touched on the Dr. Hunt's

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<sup>2/</sup>At oral argument, counsel misremembered this clause as including the modifier "primary." That gaffe underscores Crump's waiver point: the "substantial factor" issue had not been raised at the trial court, in the court of appeals, or in either party's briefing, and thus was not properly before the court.

equivocal testimony about whether Crump's workplace injury played a role in his death. In addition to his testimony, the jury was also presented with Dr. Hunt's two reports, dated March 20, 2001, and November 12, 2001. *See* Def. Exs. 18 & 19. As with his oral testimony, Dr. Hunt's written report equivocates, supplying more than a scintilla of evidence to support the jury's verdict. Further, Dr. Hunt's conclusion answer the wrong conclusion--he conclusorily states that Crump's knee injury was not **the** cause of his death. The relevant question is whether the knee injury was a cause of death.

The reports state in pertinent part:

It would be my presumption that what seemingly was a minor injury became more serious because of his coagulopathy caused by his abnormal liver function.

Def. Ex. 18 at 5-6.

Certainly, the chronic infectious illness that the claimant suffered from led to a very debilitated state and played a role in his overall demise, but was not, in my view, **the** cause of death in the claimant.

*Id.* at 6 (emphasis added).

**The claimant did have a contusion to his right medial thigh in May, 2000, and it is conceivable that a hematoma from this contusion was seeded hematogenously with histoplasmosis.** However, it was adequately treated and not, in my view, **the** cause of the claimant's death.

*Id.* at 7 (emphasis added).

As stated in my original report, I think the wound infection certainly contributed to the claimant's overall illness, but the basic problem was that he was chronically immunosuppressed and had a number of immunosuppressed complications that was the ultimate cause of his downhill course.

Def. Ex. 19 at 2.

### **III. TIC is not entitled to a jury trial on attorney fees.**

Due to time limitations, the parties did not address at oral argument the question of whether TIC is entitled to a jury question on the amount of Crump's attorney fees for which it is liable. After submission, though, amicus curiae Texas Mutual Insurance Company ("TMIC") submitted a letter brief addressing--again--that issue. TMIC states

A judicial review trial is a jury trial. It is tried to a jury under a "modified de novo standard, different from other jury trials only in that the administrative decision comes into evidence, and the party appealing that decision has the burden of proof.

See Letter Brief dated Jan. 29, 2010 at 1. TMIC seems to be referring to Texas Labor Code § 410.302(a) and 303, but misstates the law by misconstruing §410.302(a) and utterly ignoring § 410.302(b). Under subsection (a), *all* the records of a contested case hearing--not just the administrative decision--can come into evidence. TMIC's elision of subsection (b), though, is more important to the case at bar. That subsection provides:

A trial under this subchapter is limited to issues decided by the appeals panel and on which judicial review is sought.

TEX. LABOR CODE § 410.302(b). Regardless of whether § 408.221's reference to "the court" can be read to encompass "the jury," TIC and TMIC simply cannot get around this limitation on the issues that are to be heard at trial. In judicial review cases, the appeals panel does not decide the attorney fee issue, so that issue cannot be tried. Instead, the issue is decided by the court, on written evidence submitted to it. No other reading of the statute gives meaning to all its parts.

TMIC's misleading equation of judicial review cases with "other jury trials" can distort this court's analysis of the question of the statute's constitutionality. The judicial review proceeding is a statutory extension of the worker's compensation administrative process, and not an opportunity for the parties to assert causes of action against each other. An agency's enabling legislation determines the procedures for obtaining review of an agency decision. *Harris County Emerg. Servs. Dist. 1 v. Miller*, 122 S.W.3d 218, 222 (Tex. App.--Houston [1st Dist.] 2003, no pet.), *citing Tex. Natural Res. Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 811 (Tex. 2002). Parties have no absolute right to challenge an administrative order; the right of judicial review arises only when 1) a statute creates it, 2) the order adversely affects a vested property right, or 3) the order otherwise violates a constitutional right. *Id.* Here, the Labor Code confers upon TIC the right to appeal the agency decision. The right is not unlimited, or absolute--it is constrained by the proviso that should TIC appeal and lose, it is liable for Crump's attorney fees. Section 408.221©, then, is best read as a limitation on the statutorily-created right to appeal an agency decision, in keeping

with the worker's compensation act's general goal of limited benefits, liberally afforded.

#### **CONCLUSION AND PRAYER**

TIC has presented no grievous or reversible error, nor any issue of importance to the jurisprudence of the state. Mrs. Crump's husband died nine years ago; it is time to put this litigation to bed by affirming the judgments of the trial court and the court of appeals. Crump prays for such other and further relief to which she may be entitled.

Respectfully submitted,

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