



ADVISORY NO. 461

TOPIC: SUPREME COURT ISSUES IMPORTANT DECISION REGARDING CLAIMANTS' ATTORNEYS' FEES, EXPERT WITNESS QUALIFICATIONS AND A NEW DEFINITION OF "PRODUCING CAUSE"

Attorneys' Fees: Today, in *Transcontinental Ins. Co. v. Crump*, the Texas Supreme Court resolved the issue of whether the reasonableness of attorney fees may be an issue for the jury (rather than the trial court) where the carrier is liable for a claimant's attorney fees. There were actually two sub-issues regarding attorneys' fees.

The first sub-issue was whether a carrier is entitled to a jury trial over the reasonableness of the attorney fees. The Court answers in the affirmative.

The second was whether the claimant's attorney could obtain attorney fees for his pursuit of attorney fees. It declined to answer the question, deferring it to another day.

At the same time, however, the Court denied the petition for review in *Tate v. Discover Property & Cas. Ins. Co.*, where the court of appeals held that attorney fees on attorney fees are not permitted. By denying the petition for review in *Tate*, the Court has given an indication that the San Antonio court of appeals was correct in refusing to allow attorney fees on attorney fees.

Expert Opinion Qualifications: The Court rejects the court of appeal's determination that workers' compensation cases are exempt from the requirement an expert's opinion must be reliable. The Court holds the reliability requirements apply to all expert evidence.

Citing the U.S. Supreme Court, the Texas Court agrees that a medical causation expert need not disprove or discredit every possible cause other than the one espoused by that expert. Nevertheless, if the evidence presents "other plausible causes of the injury or condition that *could* be negated, the [proponent of the testimony] *must* offer evidence excluding those causes with reasonable certainty."

"Producing Cause": Although "the Texas Workers' Compensation Act does not use the phrase 'producing cause,' this has been the standard for proving causation in workers' compensation

claims for more than eighty years.” Rejecting the concurring opinion’s reliance upon the “liberal construction” doctrine, the Court holds “that producing cause in workers’ compensation cases is defined as a substantial factor in bringing about an injury or death, and without which the injury or death would not have occurred.”

There are two important issues addressed by this holding. First is that the failure to include the latter clause of this definition (which has never previously been recognized by the Appeals Panel) is reversible error.

Second is the inclusion of the phrase “substantial factor”. The previous standard was simply “a producing cause” which placed no real minimum limitation on the compensable cause. The Court now states that “the cause must be more than one of the countless ubiquitous and insignificant causes that in some remote sense may have contributed to a given effect as, for example, simply getting up in the morning.”