IN THE SUPREME COURT OF TEXAS

NO. 09-0005

TRANSCONTINENTAL INSURANCE COMPANY, PETITIONER,

v.

JOYCE CRUMP, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued January 20, 2010

JUSTICE JOHNSON, joined by JUSTICE LEHRMANN, concurring.

Although I agree the trial court erred by giving a definition of "producing cause" that did not include a "but for" element, I respectfully disagree with part of section III of the Court's opinion.

For three reasons, including both procedural and substantive matters, I do not agree with the Court's holding that the producing cause definition in worker's compensation cases must include "substantial factor" language.[1] First, Transcontinental did not request the substantial factor language

[1] The parties agree that Transcontinental had the burden to prove that Charles Crump's injury was not a producing cause of his death. As the Court notes, the trial court asked the jury: "Was Charles Crump's May 9, 2000 injury a producing cause of his death?" The jury instructions required a "No" answer to be based on a preponderance of the evidence, and instructed the jury that if a preponderance of the evidence did not support a "No" answer, then the jury was to answer "Yes."

To the extent the Court's decision results in an increased level of proof for an injury to be proved a producing cause of death or disability, the decision correspondingly decreases the burden on a carrier in the position of Transcontinental to prove that an injury was *not* a producing cause of death or disability. For convenience, I address the issue only from the viewpoint of an injured employee or the employee's beneficiaries.

in the trial court. Second, the causation standard for worker's compensation is statutory and the causation language in the Worker's Compensation Act has not substantively changed since this Court construed it in *Texas Indemnity Insurance Co. v. Staggs*, 134 S.W.2d 1026 (Tex. 1940). In *Staggs*, the Court did not construe the causation language to include a "substantial factor" standard, and the Legislature presumably accepted that construction when it later amended the Act without materially changing the language. Third, the Court departs from the principle that worker's compensation statutes are liberally interpreted in favor of the injured worker. Regardless of what the Court says "substantial factor" means legally, the implication of a cause being substantial to a lay juror is that the cause must be more than minor, even if the minor cause is a concurring cause without which the death or disability would not have occurred.[2]

I. Procedural Disagreement

First, Transcontinental did not procedurally preserve error regarding the "substantial factor" language because it did not request the language in the trial court. It requested the following definition: "'Producing Cause' means that cause which in a natural and continuous sequence,

[2] A further, but more policy-oriented, reason for not changing the standard is the potential for increasing controversy in the dispute resolution process. The "substantial factor" language creates the possibility for disputes over how much a work-related injury contributed to disability or death, as opposed to just disputing whether the injury was a producing cause of the disability or death at all. One of the perceived deficiencies in the system before 1989 was increasing levels of controversy and litigation. *See* JOINT SELECT COMMITTEE ON WORKERS' COMPENSATION INSURANCE, A REPORT TO THE 71ST TEXAS LEGISLATURE 5 (Dec. 9, 1998). The 1989 reformation of the Texas worker's compensation system attempted to minimize controversy and litigation, in part, by instituting a multi-level administrative dispute resolution. The reforms seem to have been successful. Chief Justice Phil Hardberger, *Texas Workers' Compensation: A Ten-Year Survey—Strengths, Weaknesses, and Recommendations*, 32 ST. MARY'S L.J. 1, 42 (2000).

produces death, and without which, the death would not have occurred."[3] Of course, *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), was not decided until after this case was tried, so it is hard to fault Transcontinental for not presenting the issue. Nevertheless, it did not do so. Further, Transcontinental maintained in the court of appeals that "precedent required the [trial] court" to give the instruction it requested.

The Court's desire to deal with the "substantial factor" question is understandable; it is important. Nevertheless, given the record before us, I would not address the issue. *See Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920-21 (Tex. 1993) (appellate argument that maritime law preempted state law was not preserved because of failure to bring issue to trial court's attention, despite assertion that law changed during appellate process).

II. Substantive Disagreement

A. Background

Worker's compensation claims are contractual in nature. *See Maryland Cas. Co. v. Hendrick Mem'l Hosp.*, 169 S.W.2d 969, 973 (Tex. 1943) ("[A] contractual relation arises under the Workmen's Compensation Law in which the employer, the employee and the insurer are the principal parties."). The terms of worker's compensation insurance policies include provisions of the worker's compensation statutes. *Id.* ("The provisions of the Workmen's Compensation Law become part of the contracts executed pursuant to it by those who bring themselves within the scope

[3] In contrast, in *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45 (Tex. 2007), Ford objected to the definition the trial court gave and requested "producing cause" be defined as "that cause which, in a natural sequence, was a substantial factor in bringing about an event, and without which the event would not have occurred. There may be more than one producing cause."

of its operation."). If an employee is covered by worker's compensation insurance, then those benefits are the exclusive remedy of the employee and the employee's beneficiaries against the employer if a work-related injury causes the employee disability or death, except a claim for exemplary damages is available if death is caused by the employer's intentional act or omission or gross negligence. TEX. LABOR CODE § 408.001(a), (b). Because employees covered by worker's compensation are denied their common law right to sue their employers for work-related injuries, the worker's compensation statutes are construed liberally in favor of the worker. *E.g.*, *Payne v. Galen Hosp. Corp.*, 28 S.W.3d 15, 17 (Tex. 2000); *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) ("[W]e liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents."); *Lujan v. Houston Gen. Ins. Co.*, 756 S.W.2d 295, 297 (Tex. 1988) ("[W]e have warned that the provisions of the Act 'should not be hedged about with strict construction, but should be given a liberal construction to carry out its evident purpose.'" (quoting *Yeldell v. Holiday Hills Ret. & Nursing Ctr.*, 701 S.W.2d 243, 245 (Tex. 1985))); *Hargrove v. Trinity Universal Ins. Co.*, 256 S.W.2d 73, 75 (Tex. 1953) ("Since the workman coming under the terms of the Act is denied his common law rights it is held that the Act should be liberally construed in his favor. A liberal interpretation will award him the greatest benefits the nature of his injuries will sustain.") (citations omitted); *Lumberman's Reciprocal Ass'n v. Behnken*, 246 S.W. 72, 74 (Tex. 1922).

When the first worker's compensation laws were enacted in 1913, they provided as to death claims:

> If death should result from the injury, the association hereinafter created shall pay to the legal beneficiary of the deceased employee a weekly payment . . . .

Act of March 29, 1913, 33d Leg., R.S., ch. 179, § 8, 1913 Tex. Gen. Laws 429. The Legislature re-enacted this provision without substantive change when it adopted the Workman's Compensation Act in 1917. Act approved March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 269. When the Court interpreted that statutory causation language in three death cases it noted—and implicitly approved—a causation instruction substantively the same as the instruction requested in this case by Transcontinental. *See Tex. Emp. Ins. Ass'n v. Burnett*, 105 S.W.2d 200 (Tex. 1937); *Tex. Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026 (Tex. 1940); *Jones v. Traders & Gen. Ins. Co.*, 169 S.W.2d 160 (Tex. 1943).

In *Burnett*, the worker died over a year after he suffered a head injury while on the job. 105 S.W.2d at 200. He died from typhoid fever that he contracted shortly before he died. *Id.* at 201. Burnett's beneficiaries did not contend that the typhoid fever was related to his injury, nor that his death resulted from the injury. *See id.* Rather, they contended the injury lowered his resistance and the lowered resistance was a producing cause of death. *Id.* The jury found for Burnett's beneficiaries based on the instruction that "'producing cause' is [a cause] such as naturally resulted in the death of said J.W. Burnett." *Id.* The court of civil appeals reversed for a different charge error and remanded for a new trial. *Id.* In doing so, however, it suggested how the trial court should define producing cause:

> [We] suggest that on another trial the court define "producing cause" as that term is used in the purview of our Workmen's Compensation Act, as that cause which, in a natural and continuous sequence, produces the death (or disability) in issue, and without which the death (or disability) would not have occurred.

Id. On further appeal, this Court rendered judgment for the carrier because

> [t]here was no positive testimony that Burnett's resistance was lowered by reason of the injury, and no positive proof that such reduced resistance, if any, materially contributed to his death. The testimony tending to prove each of these factual conclusions was entirely conjectural. . . . By whatever term we may attempt to define the causal connection between the injury and the death, in the absence of a disease or infection which is the natural result of the injury, there must be shown a direct causal connection between the injury and the death, with no efficient intervening agency, with sufficient certainty that it may be reasonably concluded that death would have resulted from the injury, notwithstanding the subsequently intervening disease.

Id. at 202. The Court reversed for legal insufficiency of the evidence. *Id.* So even though it specifically stated that the trial court's submission of the causation question was improper, it did not address the definition the court of civil appeals suggested be given on retrial. *Id.*

Certain statements in *Burnett* could have left some question about the required causal connection. For example, the following could be read as requiring proof that death would have resulted from the injury absent any intervening cause in order to be compensable: "[T]he injury and the death [must be related], with no efficient intervening agency, with sufficient certainty that it may be reasonably concluded that death would have resulted from the injury, notwithstanding the subsequently intervening disease." *Id.* And the following could be read to require that the injury must have been more than a minor concurring cause of death: "There was . . . no positive proof that such reduced resistance, if any, *materially contributed* to his death." *Id.* (emphasis added). The Court also made the statement that

> Our statute in one or more instances uses in substance the expression "if death results from the injury," . . . . It is thus seen that the statute specifically provides that the death must be the result of the injury itself; or conversely, *the injury must be the primary, active and efficient cause of the death.*

Id. (emphasis added).

Any question about the causal connection, however, was resolved in *Staggs*. *See* 134 S.W.2d 1026. H.T. Staggs was employed by Skelly Oil Company. *Id.* at 1027. He and his family lived on company property a short distance from the Skelly plant where he maintained the company machinery on a 24-hour-a-day basis. *Id.* His death occurred after he had worked nearly all night to repair an engine in the plant. *Id.* Early in the morning, he took a meal break and returned to the house where he and his family lived. *Id.* When he was leaving the house to return to work, he fell and hit his head on a concrete block, but still went to work where he later collapsed and died. *Id.* An autopsy showed Staggs had severe sclerosis of his carotid artery, degenerative brain tissue surrounding the artery, and death was caused by a cerebral hemorrhage following rupture of the carotid artery due to high blood pressure. *Id.* Staggs's beneficiaries contended, and the jury found, that both his head injury and an injury from inhaling carbon monoxide gas in Skelly's pumping station were in the course of his employment, they were producing causes of his death, and his death was not caused solely by disease. *Id.* at 1027-28. This Court noted, without comment, that the trial court defined producing cause in the language suggested by the court of civil appeals in *Burnett* and substantively the same as that requested by Transcontinental in the case now before us:

> In submitting the special issues the court thus instructed the jury as to the meaning of "producing cause": "You are instructed that the term 'producing cause' as used in this charge, is that cause which, in a natural and continuous sequence, produces the death in issue, and without which the death would not have occurred."

134 S.W.2d at 1028. The appellate court held, and Staggs's beneficiaries conceded, there was no evidence carbon monoxide injured Staggs. *Id.* This Court determined that there was sufficient

evidence to support the jury findings as to the head injury and those findings were sufficient to support awarding death benefits to Staggs's beneficiaries. *Id*. at 1030. The Court specifically addressed the causal relationship required for a death to be compensable:

> There is nothing in the compensation law indicating that an injury suffered by an employee in the course of his employment, to be compensable, must be the sole cause of disability or death *or that compensation is to be denied when an injury in the course of the employment causes disability or death not of itself but concurrently with another injury or cause*. . . .
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> . . . *Recovery is authorized if a causal connection is established between the injury and the disability or death.* "Producing cause" is the term most frequently used in compensation cases. . . .
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> In actions at common law to enforce liability for negligence the act or omission to be the proximate cause need not be the sole cause. It may be a concurrent or contributing cause. The same principle is given effect in compensation cases which hold that when injury is sustained by an employee in the course of his employment which results in his disability or death, compensation therefor will not be denied, although the injury may be aggravated or enhanced by the effect of disease existing at the time or afterwards occurring.
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> . . . .
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> In the cases last cited the diseased condition of the employee was a concurring or contributing cause of the disability or death, but *compensation was awarded because the injury received in the course of employment concurred with the disease in causing the disability or death and was therefore a producing cause*.

Id. at 1028-29 (emphasis added) (citations omitted).

Three years after *Staggs*, the Court again addressed whether a worker's death resulted from a work-related injury. The evidence in *Jones* showed that Tom Jones stepped on a nail at work and his wound became infected and intensely painful. 169 S.W.2d at 161. Six months after the injury he committed suicide by drinking a mixture of concentrated lye, cleaning fluid, and insect poison. *Id.* Jones's beneficiaries claimed his death was caused by the injury because he took his life while in a delirium resulting from constant and intense pain his injury caused. *Id.* A jury found that the

injury was a producing cause of Jones's death; the injury caused him to become mentally unbalanced to the extent he did not understand the consequences of his act in taking his own life; his mental condition was the producing cause of death; and Jones did not willfully intend to injure himself by taking poison. *Id.*

The court of civil appeals reversed and rendered judgment for the carrier, holding suicide was a new and independent agency that broke the chain of causation between Jones's injury and death because the evidence was insufficient to show his injury caused Jones to take his life "through an uncontrollable impulse or in a delirium of frenzy without conscious volition." *Traders & Gen. Ins. Co. v. Jones*, 160 S.W.2d 569, 571 (Tex. Civ. App.—Fort Worth 1942), *aff'd* 169 S.W.2d 160 (Tex. 1943). In affirming the judgment of the court of civil appeals, the Court again noted the definition of producing cause that was mentioned in *Burnett* and *Staggs* and requested by Transcontinental in this case. *Jones*, 169 S.W.2d at 162. The Court also relied on *Burnett* in holding that Jones's death was not compensable because it was caused by an independent cause unrelated to his injury:

> The injury must be the producing cause of the death, and producing cause has been defined as "that cause which, in a natural and continuous sequence, produces the death * * * in issue, and without which the death * * * would not have occurred." In the Burnett case it was held that the injury was not the producing cause of the death, *because the employee died as the result of typhoid fever which was in no way produced or caused by the injury, there being thus an independent intervening agency to which the death was directly due.*

Id. at 162 (emphasis added) (citations omitted).

After clarifying in *Staggs* that the causation standard was concurring cause, this Court has not interpreted the worker's compensation law to require any different level of causation in order for an injured employee's disability or death resulting from a work-related injury to be compensable.

B. Legislative Acceptance

The Court notes that the causation element in worker's compensation cases and the proximate cause element in negligence cases have been identified as being "in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness." *Staggs*, 134 S.W.2d at 1028-29 (citations omitted). In *Staggs*, the Court relied on the concurrent cause aspect of negligence law to hold that compensation was recoverable for a work-related injury if it was a concurrent or contributing cause of disability or death. *See id.* at 1029. But that reliance did not inextricably tie worker's compensation and negligence claims together insofar as their causation elements are defined. Negligence is a common law cause of action; worker's compensation is not. Because a worker's compensation claim is based on provisions of the Worker's Compensation Act, the causation standard is established by the Act.

Once this Court has construed a statute and the Legislature re-enacts the statute without substantial change, it is presumed the Legislature has adopted our interpretation. *See Tex. Dept. of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004) ("If an ambiguous statute that has been interpreted by a court of last resort or given a longstanding construction by a proper administrative officer is re-enacted without substantial change, the Legislature is presumed to have been familiar with that interpretation and to have adopted it."). *See also Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000) ("It is a firmly established statutory construction rule that once appellate courts construe a statute and the Legislature re-enacts or codifies that statute without substantial change, we presume that the Legislature has adopted the judicial interpretation."); *Am. Transitional Care Ctrs. of Tex., Inc. v.*

Palacios, 46 S.W.3d 873, 877 (Tex. 2001) (noting that courts presume the Legislature is aware of the existing state of the law and court decisions when it enacts statutes); *Tex. Emp. Ins. Ass'n v. Holmes*, 196 S.W.2d 390, 396 (Tex. 1946) ("The construction given an original Act should be regarded as having been brought forward in amendments to the Act, if the amendments have not obviously changed such construction, and the construction to be given a re-enacted statute should be the same as that given to the original Act, and a different construction will be given only for impelling reasons."). Therefore, we should presume that our interpretation of the Act in *Staggs* has been adopted by the Legislature if it has re-enacted the statute without substantial change. And it has.

Through multiple amendments, the substance of the Act's causation standard has not changed since the Act was construed in *Burnett*, *Staggs*, and *Jones*. In 1973, the Act was amended to provide:

> If death results from the injury, the association shall pay the legal beneficiaries of the deceased employee a weekly payment . . . .

Former TEX. REV. CIV. STAT. art. 8306 § 8.[4] In 1989, the Act was again amended, after which it provided:

> The insurance carrier shall pay death benefits to the legal beneficiary of the employee if the compensable injury results in death.

Id. art. 8308–4.41.[5] And in 1993, the Act was amended to the current version that applies in this case:

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[4] Act of May 10, 1973, 63d Leg., R.S., ch. 88, § 4, 1973 Tex. Gen. Laws 188.

[5] Act of Dec. 11, 1989, 71st Leg., 2d C.S., ch. 1, § 4.10, 1989 Tex. Gen. Laws 44.

> An insurance carrier shall pay death benefits to the legal beneficiary if a compensable injury to the employee results in death.

TEX. LABOR CODE § 408.181(a).[6] As can be seen, the substance of the causation standard has remained the same since 1913: death benefits have been and are payable if "death should result from the injury," "death results from the injury," the "injury results in death," or "a compensable injury to the employee results in death."

Consistency in the law is important, and applying the same definition of "producing cause" in all types of cases where it is part of the causation element will simplify certain matters, including the task of preparing jury charges.[7] Nevertheless, I would not change the causation standard in the worker's compensation system by judicially engrafting the substantial factor language into it. I would leave such a change to the Legislature.

C. Liberal Construction

Further, inclusion of the substantial factor language cannot but change the causation requirement from what it has been for seventy years. If it did not, there would be no need to include it. And in my view, including the language makes it possible a death will be determined non-compensable even though the work-related injury concurred with other injuries to cause death and the death would not have occurred but for the injury. Some deaths that would have been compensable under the *Staggs* standard may be non-compensable under the definition the Court

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[6] Act of May 12, 1993, 73d Leg., R.S., ch. 269, 1993 Tex. Gen. Laws 1189.

[7] For example, Crump requested the definition the trial court gave by citing to the court of appeals decision in *Ledesma*, a products liability case, and by urging that the definition was practically the same as "the definition used that was upheld by the Texas Supreme Court" in *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995). *Bowser Bouldin* involved a Deceptive Trade Act claim.

adopts because the injury was not a great-enough cause to be a "substantial" cause in the eye of the factfinder. The change does not conform to the rule previously followed by this Court that worker's compensation statutes are to be construed liberally in favor of the worker. *See, e.g.*, *Albertson's, Inc.*, 984 S.W.2d at 961; *Hargrove*, 256 S.W.2d at 75.

III. Conclusion

I would not require inclusion of the "substantial factor" term in the definition of producing cause in worker's compensation cases. Otherwise, I join the Court's opinion and holding.

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Phil Johnson
Justice

OPINION DELIVERED: August 27, 2010