For docket see 09-0340

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Supreme Court of Texas.
Insurance Company of the State of Pennsylvania
v.
Carmen Muro.
No. 09-0340.

March 3, 2011.

Appearances:

Robert D. Stokes of Flahive, Ogden & Latson, Attorneys at Law, P.C., for petitioners.

Chad Ruback of The Ruback Law Firm, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in the first matter, 09-0340 Insurance Company of Pennsylvania vs. Muro.

MARSHAL: May it please the court, Mr. Stokes will present argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT D. STOKES ON BEHALF OF THE PETITIONER

ATTORNEY ROBERT STOKES: May it please the court, in this workers' compensation case, the Court is called to address a question involving lifetime income benefits. As the Court is aware, workers' compensation benefits are based upon a no-fault system. The injured employee does not have to prove the negligence of the insurer or the employer in order to recover those benefits. He or she simply has to establish that there was coverage and that they were in the course and scope of employment at the time that they received the injury. In exchange for that removal of the proof, the lowering of the burden of proof, benefits in workers' comp cases are generally more limited than they are in negligence cases. While the employee's entitled to benefits, medical

benefits for as long as the injury requires treatment, the employee's indemnity benefits are generally limited to 401 weeks from the date of the injury. There's a statutory exception to that 401-week limitation. It's found in Section 408.161 and Section 408.161 sets out seven types of injuries for which the employee can recover indemnity benefits for his or her life and those are generally described as lifetime income benefits or LIBs by workers' comp practitioners.

JUSTICE DAVID M. MEDINA: Let's talk about the statute that's up before us here today and the loss of use and whether or not there has to be a direct injury to a certain part of the body for the employee to recover.

ATTORNEY ROBERT STOKES: Yes, Your Honor. In 1962, loss of use was defined by this court in the Seabolt case. And the Seabolt case construed a definition that the court rejected in favor of a definition of a loss of use that the court accepted. And in that definition, the court required that in order to recover for loss of use of hands or feet, and the statute requires the hand injury to be at or above the wrist, the feet injury to be at or above the ankle. The injury itself must be to the hands or the feet.

JUSTICE DAVID M. MEDINA: Where's that in the statute?

ATTORNEY ROBERT STOKES: It's in the statute in the first enumerated by the direct language of the statute, the loss of the hands or the loss of the feet. It is not in the statute for loss of use except to the extent that in Seabolt, the court equated loss of use with the loss of and because loss requires injury to the hands, loss of use similarly the court reasoned in Seabolt requires injury to the hands as well.

JUSTICE EVA GUZMAN: If you injured, for example, your pelvic area and you were unable to stand and unable to use your feet would you urge us to apply the statute the same way?

ATTORNEY ROBERT STOKES: Statute does not permit under those circumstances, we believe, Your Honor, recovery of lifetime income benefits.

JUSTICE EVA GUZMAN: Under your scenario, if you were never able to walk again, never able to use your feet again, still no lifetime income benefits even though the injury that caused that loss of use resulted in a work-related context.

ATTORNEY ROBERT STOKES: That's absolutely correct, Your Honor, and there's a reason for that. The legislature put in the 401-week limitation. That limitation is never effective unless you assume that there are going to be employees who are injured and on the 402nd week and weeks forward after 402 weeks, they're never going to be able to go back to work.

CHIEF JUSTICE WALLACE B. JEFFERSON: What was the policy behind the legislator saying there will be lifetime benefits for loss of feet, for example? Why would the legislature?

ATTORNEY ROBERT STOKES: The legislature did that to recover for certain catastrophic injuries and hands or feet and it really goes back to World War II.

CHIEF JUSTICE WALLACE B. JEFFERSON: It sounds like the hypothetical that Justice Guzman just presented would be a catastrophic injury if you could never walk again, right?

ATTORNEY ROBERT STOKES: It would.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well then, why wouldn't we apply that same sort of thinking to this scenario?

ATTORNEY ROBERT STOKES: Because we're bound by the statutory text, Your Honor, and the legislature

draws the line and creates the enumerated recovery for lifetime income benefits.

JUSTICE DEBRA LEHRMANN: May I ask you how does your construction of the statute square with the mandate that we interpret workers' comp laws liberally, and that's statutory also?

ATTORNEY ROBERT STOKES: You are required to construe workers' comp laws liberally, but you cannot construe a workers' comp law liberally to the extent that you write out another portion of the statute. And if you construe the statute as the respondent requests that you construe it and as the court of appeals requests that you construe it, you will never have another situation in which the 401-week cap will every apply and here's why. Assume that you have bilateral hip injuries and the employee cannot go back to work and the employee says I can't go back to work after 401 weeks. By definition, if you can't go back to work because of your hip injuries, you cannot go back to work at a job that requires you to obtain and retain employment requiring the use of your feet or requiring the use of your hands.

JUSTICE DAVID M. MEDINA: There's nothing in the statute that uses the word direct.

ATTORNEY ROBERT STOKES: I'm sorry, Your Honor?

JUSTICE DAVID M. MEDINA: Nothing in the statute uses the word direct.

ATTORNEY ROBERT STOKES: No it does not, Your Honor.

JUSTICE DEBRA LEHRMANN: And doesn't modern medicine tell us today that the body is completely inter-related and you can very easily have an injury that occurs at one part of the body and it perhaps does directly result in something that's an injury that results in a permanent disability, such as the loss of feet.

JUSTICE DALE WAINWRIGHT: For example an injury to the back, a nerve in the back that entirely precludes use of, for example, the right foot, just totally unusable because of an injury to your back. Tie that into Justice Lehrmann's question if you would in answering it.

ATTORNEY ROBERT STOKES: I will, Your Honor, and I'll try to address both of those questions in a single answer. Modern medicine does permit that sort of proof, but there is not that sort of proof in this case. In the Marmolejo case, which is cited in our briefs, this Court deals with how and injury can be extended to and affect another part of the body. And I want to be clear here. Our position is that the injury does not necessarily have to originate with the hands or the feet, but if the injury does not originate with the hands or the feet, it must extend to and affect the--

JUSTICE EVA GUZMAN: Let me ask you a question.

ATTORNEY ROBERT STOKES: Hands or the feet as defined by Marmolejo.

JUSTICE EVA GUZMAN: About that extended to and affect. Since the 1989 amendments, has that language been used in any of the LIB cases, the lifetime income benefit cases?

ATTORNEY ROBERT STOKES: I don't know if it has been used in any of the LIBs cases, Your Honor, but it is certainly a very familiar concept to the 1989 Reform Act as this Court addressed in the Lawton decision.

JUSTICE EVA GUZMAN: Well then, I guess it came up in Marmolejo case?

ATTORNEY ROBERT STOKES: Marmolejo.

JUSTICE EVA GUZMAN: Marmolejo, but it hasn't been used since the 1989 amendments. Shouldn't we con-

sider that in analyzing your argument?

ATTORNEY ROBERT STOKES: I don't think that you could consider it in analyzing the argument directly, Your Honor. I think the better analysis and the way that you should look at it is whether or not extend to and affect is still a modern concept under the new law, what we call this 20-year-old law and it is a concept.

JUSTICE PHIL JOHNSON: On that argument, the jury charge just had two questions and neither one of them dealt with extend to and affect and as I understand the briefs, there was no objection to the submission in that manner. Is extend to and affect, not something that should have been raised in the trial court specifically to the trial judge if we're going to consider it?

ATTORNEY ROBERT STOKES: Had there been some evidence to support extend to and affect, it certainly should have, Your Honor, but on this record, there is no evidence that the injuries to the respondent's neck, shoulder and bilateral hips did extend to and affect, absolutely no evidence. In fact, I believe the record reflects a concession that the injuries are confined to what we, under the old law, referred to as general injury body parts.

JUSTICE EVA GUZMAN: So she had a cervical fusion, a total right hip replacement, a total left hip replacement, a revision of the left hip replacement due to a recall, a reduction of a dislocated left hip, another revision and right shoulder surgery, but and this evidence was introduced, but this evidence didn't support that she could have lost the use of her feet.

ATTORNEY ROBERT STOKES: It does not support that the injuries extended to and affected the feet or the hand, Your Honor. And under Seabolt, it does not support that they resulted in a total loss of use because there was no injury to the hand or to the feet.

JUSTICE DON R. WILLETT: Where you cite Seabolt and I understand why, but you said earlier you're relying on the plain text of the statute, but what text specifically in that statute supports the direct-injury requirement?

ATTORNEY ROBERT STOKES: Well, in the first seven laundry list, statutory requirements very clearly reflect injuries to the bodies. In 1989, the legislature adopted Section 408.161b, which is the loss of use provision. When the legislature adopted 408.161b, the loss of use term, it was well aware of how this Court had defined loss of use in Seabolt and as this Court ruled in Mega Child Care and in the Superior Sbubbing case, when the legislature is aware of a court's construction of a longstanding term and it adopts it without change, the legislature is deemed to have adopted that construction and to have accepted that construction. So what the legislature did in 1989 and then when it recodified the Act in 2003 or 1993 is the legislature embraced this Court's definition of Seabolt from 1962.

JUSTICE DALE WAINWRIGHT: Counsel, let's take a further look at Seabolt. I'm not confident that Seabolt is as limited as you say, that it requires loss of that member or part of the body. There's language at 206 in Seabolt that says if a part of the body in a condition "such as to prevent the workmen from procuring and retaining employment requiring the use of the injured member, it may be said that a total loss of use of the member has taken place." That doesn't seem to suggest that the member has to be loss. It says if the condition of the member prevents you from procuring employment requiring the use of that member then it's a total loss. So Seabolt, I'm not sure it's quite as narrow as you're arguing.

ATTORNEY ROBERT STOKES: I believe that it is, Your Honor, and I believe that you said the language and just kind of moved quickly through it that requires it. My poor English teacher from high school, if she were watching this would be embarrassed for me because I'm not sure if it's an adjective or an adverb, but when the court said the loss of use of the injured member and referred.

JUSTICE DALE WAINWRIGHT: That's an adjective.

ATTORNEY ROBERT STOKES: Thank you.

JUSTICE DALE WAINWRIGHT: You're welcome.

ATTORNEY ROBERT STOKES: That is where this Court tied it to the injury must be to the injured member. And that's reflected in Seabolt. It's reflected in pattern jury charges the 1970 version, which was post Seabolt. That's 26.04 and it's reflected in the current version of pattern jury charges 25.05. [inaudible]

JUSTICE EVA GUZMAN: I'm sorry, Judge, go ahead.

JUSTICE DAVID M. MEDINA: Was the provision cause issue raised at the commission hearing?

ATTORNEY ROBERT STOKES: It was, Your Honor. It was raised because the question at the division was whether or not the injury resulted in total loss of use or entitlement to lifetime income benefits. In order to understand how that implicates produce and cause, you have to look back to this Court's decision in Crump. This courts decision in Crump recognizes that the causation standard in workers' comp cases is and always has been a producing-cause standard. At the division level, the division submits their questions or adjudicates questions in a very plain language simple format because many injured workers attend those hearings without the assistance of counsel and they have made the decision not to use what the division would view as a complicated legal term like producing cause. But resulting from and producing cause are the same question and it was the same issue and because comp cases are tried on a modified de novo basis, it was raised again. Causation has always been a question in this case.

JUSTICE DEBRA LEHRMANN: Don't we owe some deference to the TWCC's interpretation of the statute? Aren't we obligated?

ATTORNEY ROBERT STOKES: You do if the DWC got it right. But the DWC in this case is in violation of this Court's decision in Seabolt and you don't defer to the division of workers' comp when they have ignored the rule that is announced in Seabolt and the Seabolt rule is there for a very good reason because if the Seabolt rule does not apply, the 401-week cap cannot apply. There will not be a situation in which an injured worker will not be able to work after 401 weeks and they will not be able to meet the Seabolt test.

JUSTICE DON R. WILLETT: So your view that absent Seabolt, taking Seabolt out of the equation also removes the, your interpretation, the direct injury requirement of the loss-of-use provision? Is it but for Seabolt are you resting, because you say Seabolt, through Seabolt is how we sort of read into the statute this direct-injury requirement.

ATTORNEY ROBERT STOKES: Seabolt rests upon, implicitly rests upon the fact that if you read it out and the answer to your question is yes. I believe you must read Seabolt and rely upon Seabolt, but if you don't, the construction that you reach is going to require you to ignore 408.083, which is the 401-week cap and the consequence of that, Your Honor, is that an employee will ultimately wind up with a system that is unaffordable to employers.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Guzman.

JUSTICE EVA GUZMAN: My question actually related to Seabolt, but I'll ask it on rebuttal. Thank you, Chief Justice.

ATTORNEY ROBERT STOKES: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Stokes. The Court is ready to hear argument

from the respondent.

MARSHAL: May it please the Court, Mr. Ruback will present argument for the respondent.

ORAL ARGUMENT OF CHAD RUBACK ON BEHALF OF THE RESPONDENT

ATTORNEY CHAD RUBACK: As I understand the insurance company's argument, they're relying primarily on the plain language of the statute and the language of the 1964 Seabolt case. I've read the plain language of the statute. It seems pretty clear to me, I've read the Seabolt case. It also seems clear to me. The Seabolt case says that if I sustain an injury directly to my feet that permanently and totally loses the use of my feet, I'm entitled to lifetime income benefits. That's fine. It's what it says, but it doesn't say that's the only way I can get lifetime income benefits. It doesn't say that's the only way to qualify. It would be as if the court in 1964 ruled that all lawyers are human beings. That wouldn't be the same thing as ruling that only lawyers are human beings. It certainly provides that is one way to qualify under the statute, but it never ever has any limiting language in it.

JUSTICE DON R. WILLETT: So you say the description of what total loss can mean, but not a firm declaration of what it has to mean in every case?

ATTORNEY CHAD RUBACK: Yes, Your Honor, that's correct. So let's look to the plain language of the statute.

JUSTICE PHIL JOHNSON: The statute was different back then, though, and you had specific injuries that could totally disable you, but you still only got a certain amount of compensation based upon those specific injuries. Now we've just flip-flopped it. That's what I understand the insurance company's argument to be. Before, you had injury to a specific injury that was limited say maybe to 120 weeks and you wanted to extend it and call it a general injury so you could get the 401 weeks and that was the reason for Seabolt as I understand it.

ATTORNEY CHAD RUBACK: The Seabolt case applies, at the time Seabolt was decided, there were six different factors on which one could extend their benefits. You're right; the extension is for a different time period now than it was back then.

JUSTICE PHIL JOHNSON: It was an attempt to get a greater amount of benefits from a limited injury under the comp act.

ATTORNEY CHAD RUBACK: Yes.

JUSTICE PHIL JOHNSON: And now it seems like that's exactly what the insurance company's arguing here. You have a limited injury under the comp act trying to be extended to lifetime benefits.

ATTORNEY CHAD RUBACK: The statute as the insurance company has acknowledged, the statute has changed quite a bit. Workers' comp law has changed quite a bit since then. I'm not saying Seabolt is irrelevant now. It absolutely is something that the Court should consider, but the Court should also be aware the statute has changed umpteen times since then so why don't we just look at the plain language of the statute itself? The statute never says injury to the member, doesn't say only if, doesn't include any of the sort of limiting language.

JUSTICE EVA GUZMAN: What about the 401-week limitation though. Does the interpretation that you urge sort of eradicate or do away with the policy reasons underlying that 401-week limitation?

ATTORNEY CHAD RUBACK: It doesn't at all. The 401-week limitation is the general rule, but the legislature in its wisdom has decided to create a number of exceptions to that general rule. There are seven specific excep-

tions to that general rule in that statute we're talking about today and Ms. Muro falls squarely within not one, but two of them. One of the exceptions to that general rule, an exception that would allow someone lifetime income benefits is if they totally and permanently lost the use of both of their feet. Ms. Muro did lose totally and permanently the loss of her feet. Another exception is if someone totally and permanently loses the use of one foot and one hand. Again Ms. Muro falls into that exception. She totally and permanently lost the use of one foot and one hand.

CHIEF JUSTICE WALLACE B. JEFFERSON: But what if there's an injury not to the feet or the hands or even not to the structural part of the body, but let's say it's one that deals with respiration so you literally can't walk because you lose your breath and that's going to be the condition you suffer for the rest of your life. Would you say that is a loss of the use of the claimant's feet?

ATTORNEY CHAD RUBACK: I would need to hear the testimony from the individual doctors in that case, but if the uncontroverted evidence from the doctors in that case, like in this case, is that the feet had totally and permanently lost their use then, yes, I would say so.

CHIEF JUSTICE WALLACE B. JEFFERSON: They've lost their use not because they're not functional, if it were surgically possible to put them on someone else that person could walk. It's because they can't breathe. They can't get ten yards without having to stop and rest. So would that be, I'm just trying to understand what the length, where does your argument take you?

CHIEF JUSTICE WALLACE B. JEFFERSON: I would say if someone could walk ten yards, they might have the use of their feet. I don't know exactly where to cut it off. That would be up to the experts to testify at trial, but in this case, the only expert who testified is to loss of use as I understand it, testified that she--

JUSTICE DAVID M. MEDINA: Did that expert talk about producing cause?

ATTORNEY CHAD RUBACK: Yes, Dr. Crane did testify producing cause. He also offered a written report as to producing cause. There was no controverting evidence whatsoever as to producing cause. The carrier did attempt to offer into evidence that Ms. Muro suffered some other medical issues, such as fibromyalgia, I'm sure I'm mispronouncing that, but never attempted to offer any evidence at all as to whether that might have been the producing cause. And as is this Court is aware, the labor code provides that the party that did not prevail, the losing party, if you will, before the workers' comp commission has the burden in the trial court and so in this case because the administrative law judge, because the appeals panel found in favor of Ms. Muro, the carrier, the insurance carrier had the burden of the trial court. That would include the burden to offer proof as to producing cause. But the carrier didn't even attempt to offer any evidence that this work accident was not the producing cause. I'm sorry I'm using double negatives here, but that's actually the burden. The carrier had the burden at trial to prove that Ms. Muro's injuries were not the producing cause. I'm, were not the producing cause. They did not attempt to offer any evidence of that whatsoever. Even if the trial court had admitted evidence that Ms. Muro did have fibromyalgia and some other medical issues, the carrier didn't attempt to offer any evidence that those were the producing cause, that those caused the loss of use of feet and hand. And Dr. Crane did testify and his expert report, which was admitted into evidence, did show that the injuries Ms. Muro sustained at work was the producing cause. So the carrier had the burden. The carrier didn't offer any evidence at all as to that burden as to producing cause. Furthermore, I believe one of the justices asked the insurance carrier's counsel as to whether this issue was raised before the commission. And the record doesn't show it one way or the other. I wasn't there and I don't know, but it is my understanding that the carrier as the appellant is required to bring forth a record showing everything that it's seeking reversal on. The carrier did not bring forth a record to the court of appeals or to this Court showing that producing cause was raised before the commission and if an issue is not raised before the commission, the labor code provides it may not be considered by the trial court and subsequently the court of appeals. So let's see. They had the burden to show there was no producing cause. They didn't offer any evidence whatsoever that there was no producing cause. They didn't bring forth a record show-

ing, that even discussed even producing cause in the comp commission, which they were required to do. Ms. Muro did have evidence of producing cause. It was uncontroverted evidence in writing and by expert testimony. I don't think the producing cause is really an issue in this case. As best I can tell, this case turns on the construction of the plain language of the statute as to whether Ms. Muro falls into one of those seven categories, one or more, and it seems to me that the plain language of the statute requires her to, indicates that she falls in under not one, but two of those categories. The legislature certainly could have used limiting language in the statute as to injury to feet or injury to hand. The legislature certainly knows how to do so, didn't do so.

JUSTICE DON R. WILLETT: Mr. Stokes says you've got to read the plain language through the prism of Seabolt.

ATTORNEY CHAD RUBACK: Seeing as the statutes have changed so many times since Seabolt, I don't know if that's necessarily true, but even if it were true, Seabolt doesn't provide that that's the only way to have an injury. As I said earlier, Seabolt absolutely positively says that that is one way to have an injury. Nowhere in Seabolt does it say that that's the only way to have an injury that's compensable.

JUSTICE DALE WAINWRIGHT: The facts of Seabolt were also involving a direct injury to a hand. So Seabolt addressed the facts that were presented, direct injury to the member. Seabolt does not purport to address injuries to other parts of the body that then affect what you argue and claim to be a total loss in use of foot and hand. So Seabolt says what it says, but it's limited to the facts that it was addressing and related cases. I'm wondering, however, about the limits of your argument. You answered the Chief's question that helped illuminate that a little bit. Clearly, the legislature wanted to provide some benefits to persons who suffered a total loss of use of specified parts of the body. The legislature didn't intend for everybody who suffers a major injury to get lifetime benefits. Somewhere between those two, we've got to figure out what the legislature intended with its statute. Take another example that will help me understand the limits of the reasoning of your argument. If someone at work pricks their finger in the course and scope and it's something unusual such that medically, it results in the total loss of the right foot, some nerve injury. In your opinion, does the statute provide for lifetime, LIBs, lifetime income benefits in that situation?

ATTORNEY CHAD RUBACK: I believe that according to plain language of statute, anytime you totally and permanently lose the use of say both feet as in that analogy, you would be entitled to the benefits. That's the plain language of the statute. As Mr. Stokes said, we need to follow the plain language of the statute. If legislature crafted the statute in such a way that it expands benefits much broader than had been granted before, well then that's what the legislature is there to do, to decide what the laws of the state of Texas are. It is the judiciary's function, as I understand it, to attempt to apply the plain language of the statute. The statute here doesn't appear at all ambiguous and as one of the justices indicated earlier, I believe that to the extent that there is an ambiguity in the statute and I don't believer there is. But to the extent that there is, it should be construed in the worker's favor as this Court is head before. Anytime there is an ambiguity in a statute, it should be construed in favor of the worker. I don't think that there is an ambiguity here. In fact, the legislature in two of the seven different means of finding total and permanent loss of use did include the words injury too. Specifically in one of the sections, the legislature referred to injury to the spine. In another one, the legislature referred to injury to the brain. So the legislature clearly knew how to say injury to a body part if it wanted it and the fact that the legislature did include those two limits in situations for injury directly to the brain and injury directly to the spine, that indicates that the legislature purposely chose not to include those words injury to for the other five.

JUSTICE DAVID M. MEDINA: Help me out here. Is there an issue on attorney's fees as well or?

ATTORNEY CHAD RUBACK: There is an issue as to attorney's fees. That's a bit interesting, Your Honor, because this Court decided, I believe, last August, the Crump case, which is on all fours with this one. I respectfully disagree with the Court's holding in the Crump's case. I know that that case has a motion for rehearing that has been pending before this Court for a number of months and has not been ruled on. The motion for rehearing I like.

JUSTICE DAVID M. MEDINA: Was that a commentary?

ATTORNEY CHAD RUBACK: Yes, Your Honor.

JUSTICE PAUL W. GREEN: Well assuming Crump is the law, does that require this case to go back?

ATTORNEY CHAD RUBACK: If Crump is the law, it would require this case to be reversed and remanded for a new trial on the limited issue of attorney's fees.

JUSTICE PAUL W. GREEN: Okay, but not include the remainder of the case?

ATTORNEY CHAD RUBACK: Would not at all. It would require reverse and remand for the issue of attorney's fees. The Crump case I, I did note that a couple things in the motion for rehearing that I particularly like and yes, Justice Medina, this is commentary.

JUSTICE PAUL W. GREEN: It is in form of an Amicus here?

ATTORNEY CHAD RUBACK: Yes sure. It certainly could be an oral Amicus. A couple things that were in there that I really liked was it suggested the court considered the workers' comp statutes, statutes as a whole. And the opinion the Crump case didn't much consider the rest of the statutes in the workers' comp code, in the labor code rather. In the other parts of the labor code, it refers to court when it meant court and refers to jury when it meant jury. The cases relied upon the court in deciding Crump were not workers' comp cases, were not labor code cases and they certainly did not indicate one way or the other whether the labor code context would require this Court to consider jury as jury in court is scored. There's several sections in the labor code that specifically say court when they mean court, jury when they mean jury and this Court acknowledged that in a 1970's holding in which it say the attorney's fee should always be decided by the court, by the judge rather than by the jury in workers' comp cases. I don't believe that the court recognized that 1970's Texas Supreme Court holding in Crump. So the couple things I have to say about the Crump opinion are didn't consider the workers' comp statutes as a whole referring to court when it meant court slash judge and jury when it means jury slash jury and also didn't acknowledge the 1970's [inaudible] case in which the court considered a very similar workers' comp statute and said it says what it says. Court means the court decides, jury means the jury decides. But to the extent the court does not grant rehearing the Crump case, it would absolutely be binding in this Court and this Court would need to reverse on that ground.

JUSTICE DALE WAINWRIGHT: Taking your textural argument in the oral Amicus for the Crump case.

ATTORNEY CHAD RUBACK: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: Let me ask you about that in this case. You've said several times that we need to interpret the plain language of the statute and apply it in this case.

ATTORNEY CHAD RUBACK: Yes, Your Honor, that's something we all agree on.

JUSTICE DALE WAINWRIGHT: 408.161a subsection 4 says lifetime income benefits are paid for "loss of one foot at or above the ankle." Just a surface reading of that, someone might say means you have to lose the foot. Doesn't say loss of use. It says loss of one foot at or above the ankle and specifies at what point the foot has to be lost, suggesting perhaps that it be severed or something narrower someone might argue then your reading of that statute. Looking at the plain language here, how do you reconcile the absence of the word use or the absence of the word indirect injury with your interpretation of this case?
ATTORNEY CHAD RUBACK: If one is to just look at section A, that's absolutely, positively what it says but in 408.161b, it says for the purpose of subsection A, the total and permanent loss of use of a body part is the

loss of that body part. Subsection B says any time in A it says loss of body part, you can read it as loss of use of body part. If subsection B were not there, I would agree. You actually have to have that body part amputated. But subsection B says the loss of use of is equivalent to, for the purpose of this statute as loss of itself.
JUSTICE PHIL JOHNSON: Counsel, in regard of the extend to and affect argument that the insurance company makes, is it your position there if that question were in number one, would it have to be raised somehow in the trial court or is their position correct that no evidence allows them to raise it after on appeal?

ATTORNEY CHAD RUBACK: Well, first it wasn't raised in the trial court at all and I believe that it definitely should have been raised. Second is this affected to, affected and extended to language is applying a part of the statute that is a repeal. It's not just applying the old statute; it's applying the last paragraph of this section, which is the only paragraph that was completely eliminated.

JUSTICE PHIL JOHNSON: Okay, but let's get past the statutory interpretation if for somehow we do get to it. Number one, would you say there's been a procedural default and number two, if not, is there any evidence that the injury extended to the feet and the hand?

ATTORNEY CHAD RUBACK: I would say that there would, in fact, be procedural default because it was not preserved in the trial courts.

JUSTICE PHIL JOHNSON: Okay how about the extended to and affects?

ATTORNEY CHAD RUBACK: The extended to and affect language, frankly, Your Honor, I don't know what that means. If I had an injury--

JUSTICE PHIL JOHNSON: Well, they've been arguing it. Do you have a position on whether the injury in this case extended to and affected the feet and the hand? Do you have a position one way or the other?

ATTORNEY CHAD RUBACK: I would say it certainly affected the feet. She had such a severe injury of her thighs, she could not use her feet.

JUSTICE PHIL JOHNSON: How about extended to?

ATTORNEY CHAD RUBACK: Did it extend to?

JUSTICE PHIL JOHNSON: Is there any evidence that the injury extended to the feet?

ATTORNEY CHAD RUBACK: I'm not certain that there is, Your Honor.

JUSTICE PHIL JOHNSON: How about the hand?

ATTORNEY CHAD RUBACK: I don't believe that there is, Your Honor. I frankly have gone over everything that I had intended to cover. I would love to have some more questions.

JUSTICE DEBRA LEHRMANN: And what is the effect of your answer to the last question?

ATTORNEY CHAD RUBACK: The effect of my answer to the last question. Well, the effect of my answer is that if we were going by the 1964 version of the statute, I would probably lose, probably need to lose, but the legislature amended that statute long, long ago. In 1989, the legislature eliminated all of the language that the Marmolejo court relied upon in coming up with this extended and affected language. And as Mr. Stokes candidly acknowledged, there has not been a case since 1989 that either of us has been able to find that applied the extended to and affected language and that's because the extended to and affected language is not just covering a

statute that's been modified a few times since then although it has been modified a few times since then. It's specifically applying a sentence in that statute, which has been completely eliminated. The statute back in the 1960's, 1964 when Marmolejo was decided went over a number of specified types of injuries. Back then there were six, now there's seven, the legislature has since added something about burns, but the six that were there are still there now, the injury to both feet, the injury to foot and the hand, but also had a last paragraph at the very end. It's since been eliminated. That last paragraph says okay even if you don't fit into these six specified means of getting extra benefits, you will be entitled to those benefits if you can prove total disability, total incapacity, but the burden is on the worker. They are to prove all of that. So it's not surprising this Court in 1964 said okay, well under that you know extra paragraph that's since been removed in 1989, the worker does have a much higher burden. The worker has a much higher burden if she can't prove that both of her feet were totally and permanently lost of use. That a foot and hand were totally permanently lost to use. If she can't fall in any of the current seven categories or any of the six categories back then, it had this big catch-all at the end, which has since been eliminated that says well even if she doesn't fall into any of these categories at all, something we haven't even thought of, well she then still could get extra benefits, but would need to carry a really heavy burden there, that heavy burden being she'd have to prove total incapacity.

CHIEF JUSTICE WALLACE B. JEFFERSON: There was that catch-all then and there is not now so you would concede that there are going to be cases in which a worker is essentially permanently disabled from working, but without an injury to the hand or foot is limited to 401 weeks, correct?

ATTORNEY CHAD RUBACK: I wouldn't say injury to hand or foot, Your Honor, but I would say loss of use of hands or foot.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay so a worker could have the loss of the use of hand or foot, but be as incapacitated from working as one who does and yet still be limited to 401 weeks.

ATTORNEY CHAD RUBACK: Under the plain language of the statute, yes. If someone does not fall under one of those seven categories, the seven categories that the legislature has spelled out very clearly, then that's correct that worker would unfortunately be out of luck. The legislature's only given us seven categories to extend from the 401 weeks. If there were someone who did not fall under one of those seven categories, that worker would unfortunately not be able to collect because the legislature has eliminated that catch-all provision that Marmolejo relied on for the extended and affected language.

JUSTICE DALE WAINWRIGHT: Just very briefly, Counsel. Your position is not contingent on the Navarette case extending Seabolt. No, absolutely the Navarette case didn't extend Seabolt. It clarified it possibly.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions. Thank you, Counsel.

ATTORNEY CHAD RUBACK: Thank you Your Honor.

REBUTTAL ARGUMENT OF ROBERT D. STOKES ON BEHALF OF PETITIONER

ATTORNEY ROBERT STOKES: May it please the Court, the Chief Justice has put his finger on the problem in this case. The problem in this case is under the definition of loss of use as it was submitted to the Court in this case, if under the definition of loss of use as it was submitted to the court in this case, if you have an employee who cannot go back to work, you will always have an employee who has the inability to obtain and retain employment requiring the use of both feet or requiring the use of both hands. If you can't go back to work, you can't go back to work using your feet or using your hands. And so there must be something that defines people who 408.063 apply to, or 083 apply to, the 401-week limitation and people it does not apply to. And what we have in this case is seven statutory laundry lists plus an equivalent, a loss of use that is the equivalent to the total loss of. And in this case, you cannot have a total loss of use of feet or hands when you have evidence

such as this.

JUSTICE EVA GUZMAN: Does that invite us though to sort of read in a place of injury requirement into the statute? It says loss of use.

ATTORNEY ROBERT STOKES: It doesn't, Your Honor, it doesn't because what it ties into and I think where respondent misses the boat in this case is they fail to understand that comp ties into the definition of injury itself and that definition has never changed from old law to new law. Injury is defined as damage or harm to the physical structure of the body in such diseases or infections as naturally result therefrom. That's what many, many workers' comp disputes have always been about, those old extend to and affect cases where you were trying to get from a hand or a foot into the general injury to recover more. In the Lawton case under the new law, parties often tried to extend and injury from one body part to another because they're seeking medical care to the other body part or they're seeking a higher impairment rating or they're seeking disability that arises from that additional body part. And you cannot have a case where you are attempting to extend to an affect an injury without having that damage or harm to the physical structure of the body.

JUSTICE DALE WAINWRIGHT: Counsel, the textural argument from respondent or one of them is that in 408.161a subsections 5 and 6, the legislature said specifically injury to the body part and 5 it's the spine and 6 injury to the brain. Subsections 2 and 4 just say loss of one foot; they don't say injury to the member. What's your response to that argument?

ATTORNEY ROBERT STOKES: Response to that, Your Honor, is that it goes farther than the respondent says. Loss of is the amputation of, that is historically what loss of means and if you go back into the old subsequent injury fund cases, which is where most of these LIBs cases have been decided at this Court and we've cited a number of them in our brief, they're talking about amputations. They're talking about loss of.

JUSTICE DALE WAINWRIGHT: And he says subsection B regarding loss of use modifies that language in section 4, do you agree?

ATTORNEY ROBERT STOKES: I do not agree, Your Honor, because subsection B says you must have or the total and permanent loss of use of a body part is the loss of that body part, refers back to hands and feet at or above the wrist or at or above the ankle. You must have the loss of use of the hands at or above the wrist, the loss of use of the feet at or above the ankle. Otherwise, it doesn't refer back properly and they're not equivalent and that's clearly what the legislature intended to do with subsection B is to make them equivalent. I will say this Court, the oral Amicus was interesting, but this Court overruled the motion for rehearing in Crump last week. Crump is the law and the last thing that I would say is that my client, respectfully, requests that this Court reverse the judgment of the trial court, render judgment that respondent is not entitled to lifetime income benefits or in the alternative, reverse the judgment and remand the case for new trial.

JUSTICE PHIL JOHNSON: If we do that in reverse that they're not and render not entitled to lifetime benefits, what is the result of that, 401 weeks?

ATTORNEY ROBERT STOKES: It is, 401 weeks as the statutory scheme of recovery is set out, temporary income benefits, impairment income benefits, supplemental income benefits.

CHIEF JUSTICE WALLACE B. JEFFERSON: How many weeks have been paid to date?

ATTORNEY ROBERT STOKES: The benefits have been paid fully beyond 401 weeks.

CHIEF JUSTICE WALLACE B. JEFFERSON: So would it require or would you be seeking that money back beyond 401 weeks?

ATTORNEY ROBERT STOKES: There's no way to recover that money from the injured worker, Your Honor. That's her money.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

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