1993

Workers' Compensation

Tony Korioth

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I. PROCEDURE

A. INTERROGATORIES

ALTHOUGH it was an abuse of discretion when the trial court in *Fullenwider v. American Guarantee & Liab. Ins. Co.*[1] permitted two undisclosed expert witnesses to testify when interrogatories requesting the names of expert witnesses were not supplemented thirty days prior to trial, the appellate court held this was not reversible error, unless it constituted harm to the objecting party.[2] Thus, the claimant was not harmed by expert testimony which merely corroborated the claimant's own statements that she was suffering from general asthmatic or allergic condition, where there was further evidence that she had not inhaled toxic vapors from machinery as she had claimed.[3] The court in *U.S. Fire Ins. Co. v. Pettyjohn*,[4] held that a belated denial of the wage rate constituted good cause enabling plaintiff to supplement answers to his interrogatories on the date of trial to include persons with knowledge of relevant facts, so that a witness could testify as to the employee's wage rate.[5]

The court in *National Union Fire Ins. Co. v. Wyar*[6] found that even though the plaintiff, Wyar, was not named as a witness in the interrogatories by the defendant insurance carrier, it was an abuse of discretion for the trial court not to allow the plaintiff to testify as to whether the claimant had received workers' compensation payments entitling the carrier to an offset since the plaintiff could not be surprised by her own testimony.[7] The court, however, found that the carrier was not entitled to an offset for the medical benefits it already paid, since the carrier failed to meet its burden of proof.[8] Another significant point in this case was the fact that the court allowed the plaintiff's attorney to recover twenty-five percent of the accrued medical benefits.[9]

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* B.A. St. Edwards University; J.D. University of Texas School of Law. Attorney at Law, Law office of Tony Korioth, P.C., Austin, Texas.

1. 821 S.W.2d 658 (Tex. App.—San Antonio 1991, writ denied).
2. *Id.* at 663.
3. *Id.* at 663-65.
4. 816 S.W.2d 839 (Tex. App.—Fort Worth 1991, no writ).
5. *Id.* at 842.
6. 821 S.W.2d 291 (Tex. App.—Houston [1st Dist.] 1991, no writ).
7. *Id.* at 294.
8. *Id.* at 297.
9. *Id.* at 298.

B. REQUEST FOR ADMISSIONS

In *North River Ins. Co. of N.J. v. Greene*,[10] the court held that a diary error by the defense counsel, which caused the delay in filing answers to request for admissions, was a clerical error that was good cause for filing a later answer.[11] There was no indication that the deadline for filing answers was intentionally ignored and failing to answer did not cause delay.[12] Consequently, the court found that it was an abuse of discretion to deny the defendant's motion to permit late filing of answers to request for admissions, since deeming answers admitted resulted in an award of permanent total disability benefits despite the claimant's acknowledgment that he was not totally and permanently disabled.[13]

C. JURISDICTION

In *Specific Indem. Co. v. Liberty Mut. Ins. Co.*,[14] the first workers' compensation carrier paid benefits to the claimant, and then sued the second carrier and the claimant for reimbursement.[15] The court held that the first workers' compensation carrier must first present its claims to the Industrial Accident Board (IAB) and pursue its administrative remedy before the IAB, since trial court jurisdiction attaches only by way of appeal from an IAB decision.[16]

D. DELAY IN FILING CLAIM

The court of appeals reversed and rendered a take nothing judgment in *City of Houston v. G.W. Garrett*[17] when the jury found good cause for a delay in filing a workers' compensation claim.[18] The court found that, as a matter of law, the claimant did not exercise the degree of diligence which a reasonably prudent person would have exercised when the claimant filed his notice of claim two years after his injury and two months after he had consulted an attorney, despite evidence that the claimant relied upon a supervisor's promise to take care of the forms.[19] The court in *Providence Lloyd's Ins. Co. v. Smith*[20] upheld a jury verdict for the claimant, stating that a reasonably prudent person in the position of the employee's wife would have delayed filing a claim for workers' compensation death benefits in reliance upon assurances of a boss or employer, who was also a close personal friend, that "everything would be taken care of" and a statement by another officer responsible for

10. 824 S.W.2d 697 (Tex. App.—El Paso 1992, writ denied).
11. *Id.* at 701.
12. *Id.*
13. *Id.*
14. 834 S.W.2d 91 (Tex. App.—Austin 1992, no writ).
15. *Id.* at 92.
16. *Id.* at 92-94.
17. 816 S.W.2d 800 (Tex. App.—Houston [14th Dist.] 1991, writ denied).
18. *Id.* at 801.
19. *Id.* at 802-03.
20. 828 S.W.2d 328 (Tex. App.—Austin 1992, writ denied).

workers' compensation that he had filed the claim.[21] The court found this was evidence that the delay was reasonable, despite evidence that she had received notice and claims forms from the insurer and employed an attorney to investigate potential workers' compensation claim two and one-half months before the claim was filed.[22]

E. COLLATERAL SOURCE RULE

The decedent in *Jones v. Red Arrow Heavy Hauling, Inc.*[23] was a self-employed truck driver who contracted with the defendant to drive its trucks.[24] The decedent's surviving widow sued for breach of contract because the defendant withheld sums from the decedent's paycheck for the purpose of obtaining workers' compensation insurance.[25] The defendant admitted that it never obtained such insurance.[26] Without pleading offset as an affirmative defense, the defendant introduced evidence at trial that the plaintiff settled a workers' compensation claim with the defendant's carrier, Protective Ins. Co.[27] The $72,000 settlement with Protective Ins. Co., however, reflected the fact that the decedent was an independent contractor not covered under the policy which covers only the defendant's employees.[28] Since the defendant was not a party to this settlement, the court of appeals reversed the trial court's judgment for the defendant and remanded based upon the fact that the plaintiff's settlement with defendant's workers' compensation carrier was a collateral source and should not have been admitted into evidence before the jury.[29]

F. NOTICE OF APPEAL

The court in *Taylor v. Argonaut Southwest Ins. Co.*[30] affirmed the dismissal of a workers' compensation action, since the notice of appeal was not timely filed with the Industrial Accident Board when it was mailed on the twenty-first day, which was the day after Memorial Day, and received on the twenty-third day after the board's ruling.[31]

II. GROSS NEGLIGENCE DEATH CASE[32]

The court in *Granite Constr. Co. v. Mendoza*[33] found the evidence factu-

21. *Id.* at 330.
22. *Id.* at 331.
23. 816 S.W.2d 134 (Tex. App.—Beaumont 1991, writ denied).
24. *Id.* at 135.
25. *Id.*
26. *Id.*
27. *Id.* at 136.
28. *Id.* at 137.
29. *Id.*
30. 817 S.W.2d 722 (Tex. App.—Amarillo 1991, writ denied).
31. *Id.* at 723-24 (referring to TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1990)).
32. *See also* Godinet v. Thomas, M.D., 824 S.W.2d 632 (Tex. App.—Houston [14th Dist.] 1991, writ denied), *infra* under subheading "Emotional Distress and Fellow Employee."
33. 816 S.W.2d 756 (Tex. App.—Dallas 1991, writ requested).

ally sufficient[34] to support a finding that the employer was grossly negligent when evidence showed that the employer knew about the peril of having workers perform labor near traffic but failed to provide adequate work-zone safety.[35] The evidence included testimony by a co-worker that the employer refused to provide orange safety vests and failed to close off the nearest lane of traffic with flagmen or barrels.[36] The court, however, found that an award of pre-judgment interest was improper since the petition was filed before the effective date of the statute allowing for pre-judgment interest.[37]

III. TOTAL & PERMANENT INCAPACITY

The court in *National Union Fire Ins. Co. v. Soto*[38] reversed the judgment for the employee because the finding of total and permanent incapacity was against the overwhelming weight of the evidence.[39] In that case, following the injury and convalescence, the employee was able to obtain and retain employment over a considerable period of time at a higher wage than he had been getting at the time of the injury.[40] Also, there was no evidence that his work was substandard or that he was given special treatment as far as his duties were concerned.[41]

In *Texas Gen. Indem. Co. v. Martin*,[42] a claimant, who suffered severe burns over upper half of his body and had tendons and nerves removed from both of his lower extremities in an attempt to restore function to his right hand, suffered total incapacity and total loss of use of his right leg above the ankle.[43] The court, in awarding life time benefits for these injuries, held that victims of injuries having the same or similar effect as injuries listed in the workers' compensation statute should be accorded the same benefits.[44]

IV. HEART ATTACK

In *National Union Fire Ins. Co. v. Engelke*,[45] the court held that a circumstantial showing that the employee suffered a heart attack while at work and that his duties normally involved strenuous labor was not enough to prove that an accidental injury occurred for the purpose of recovering death benefits under the Workers' Compensation Act.[46]

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34. *Id.* at 759 (finding that the defendant had waived its right to challenge the legal sufficiency of the evidence to support a finding of gross negligence).
35. *Id.* at 764.
36. *Id.* at 763.
37. *Id.* at 766 (referring to TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6(a) (Vernon Supp. 1991) which is effective September 1, 1986, while this case was filed on April 16, 1987).
38. 819 S.W.2d 619 (Tex. App.—El Paso 1991, writ denied).
39. *Id.* at 621-23.
40. *Id.* at 622.
41. *Id.*
42. 836 S.W.2d 636 (Tex. App.—Tyler 1992, n.w.h.).
43. *Id.* at 637.
44. *Id.* at 638 (construing TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10(b), 11a (Vernon 1967) (repealed)).
45. 828 S.W.2d 323 (Tex. App.—Austin 1992, writ denied).
46. *Id.* at 325.

V. EMOTIONAL DISTRESS AND FELLOW EMPLOYEE

The court in *Godinet v. Thomas, M.D.*[47] held that the exclusive remedy provision of the Workers' Compensation Act barred a claim for negligent infliction of emotional distress against the physician who treated a fellow hospital employee for work-related injuries.[48] The court also barred a claim for an alleged violation of civil rights brought under 42 U.S.C. §§ 1983, 1988.[49]

In *Horton v. Montgomery Ward & Co., Inc.*,[50] the court held that an employee's tort claim against the employer arising out of an assault by a co-worker who threw a paper wad at the employee did not fall within the exception to the exclusivity provision of the Texas Workers' Compensation Law for intentional injury.[51] The employee, however, admitted that her employer did not request or otherwise direct the co-worker to assault her.[52] Even assuming the employer was negligent or grossly negligent in failing to further reprimand the employee for earlier incidents or supervise his behavior, such negligence or gross negligence could not rise to the level of intentional injury.[53]

VI. COMMON LAW MARRIAGE IN KENTUCKY

The court in *Texas Employers' Ins. Ass'n v. Borum*[54] held that a widow receiving workers' compensation benefits under Texas law is entitled to continue receiving those benefits even though she began living in a common law relationship with a man in Kentucky.[55] Kentucky law does not recognize common law marriages.[56] The validity of a marriage is generally determined by the law and the place where it is celebrated rather than the law and the place where the suit is filed.[57]

VII. REFUSAL OF EMPLOYMENT

In *St. Paul Fire & Marine Ins. Co. v. Bjornson*,[58] the court held that an injured employee who unjustifiably refuses employment suited to his incapacity and physical condition, which was made available to him at the location where he was injured, is not entitled to workers' compensation for disability during the period of refusal.[59]

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47. 824 S.W.2d 632 (Tex. App.—Houston [14th Dist.] 1991, writ denied).
48. *Id.* at 632.
49. *Id.* at 633 (construing TEX. CIV. STAT. ANN. art. 8309d, § 6 (Vernon 1986)).
50. 827 S.W.2d 361 (Tex. App.—San Antonio 1992, writ denied).
51. *Id.* at 364-65.
52. *Id.* at 365.
53. *Id.* at 370.
54. 834 S.W.2d 395 (Tex. App.—San Antonio 1992, writ denied).
55. *Id.* at 399-400.
56. *Id.* at 399.
57. *Id.*
58. 831 S.W.2d 366 (Tex. App.—Tyler 1992, n.w.h.).
59. *Id.* at 371 (construing TEX. REV. CIV. STAT. ANN. art. 8306, § 12a (Vernon 1967) (repealed)).

VIII. DATE OF INJURY OR DATE OF INCAPACITY

A. 401 FROM DATE OF INJURY

The court in *Maryland Cas. Co. v. Duke*[60] held that permanent disability benefits may be awarded for a full 401 weeks only if the date of injury and the date of the incapacity are the same.[61] Where incapacity arises after the date of injury, benefits are measured from the date incapacity commences and extend a maximum of 401 weeks from the date of injury.[62]

B. DATE OF INJURY EQUALS DATE OF INCAPACITY

In contrast to the *Duke* decision, the court in *Fidelity & Cas. Co. of N. Y. v. Stephens*[63] held that the date of injury for commencement of workers' compensation benefits was properly determined as the actual day the total incapacity began rather than the date of the accident several years earlier.[64] The court stated that, based on the definition of injury submitted to the jury, the "date of injury" would include subsequent precipitation, acceleration, or aggravation of any type of disease, infirmity, or condition, either previously or subsequently existing by reason of any damage or harm to the physical structure of the body.[65]

IX. ELECTION OF REMEDIES

The court in *Texas Gen. Indem. Co. v. Hearn*[66] held that the election of remedies doctrine is a viable defense.[67] The exclusion of evidence offered to prove an election of remedies is reversible error.[68]

X. COURSE AND SCOPE

In *Duncan v. Employers' Cas. Co.*,[69] the court found that mental distress or trauma and any resulting injury caused by a reprimand and demotion is not an injury connected with the furtherance of the employer's business and, therefore, is not compensable under the Texas Workers' Compensation Act.[70] As a result, the court did not need to reach the question of whether the trauma and injury were traceable to a definite time, place, and cause.[71]

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60. 825 S.W.2d 232 (Tex. App.—Texarkana 1992, writ denied).
61. *Id.* at 235 (construing TEX. REV. CIV. STAT. ANN. art. 8306, §§ 6, 10(b) (Vernon 1967) (repealed)).
62. *Id.*
63. 832 S.W.2d 68 (Tex. App.—Beaumont 1992, n.w.h.).
64. *Id.* at 70-71 (stating that "the workers' compensation act should be construed liberally to effect and bring about legitimate ends.").
65. *Id.* (noting that the carrier made no objection to the definitions of injury submitted to the jury).
66. 830 S.W.2d 257 (Tex. App.—Beaumont 1992, n.w.h.).
67. *Id.* at 258.
68. *Id.* at 259.
69. 823 S.W.2d 722 (Tex. App.—El Paso 1992, n.w.h.).
70. *Id.* at 724-25 (construing TEX. REV. CIV. STAT. ANN. art. 8306, §§ 1, 20; art. 8309, § 1 (Vernon 1967) (repealed)).
71. *Id.*

The employee in *Employers' Cas. Co. v. Bratcher*[72] suffered a ruptured aneurysm while using the bathroom.[73] According to the personal comfort doctrine, the employee did not go outside the scope of his employment when he entered the bathroom.[74] Under the positional risks test, which is also known as the "but for" test, however, an injury must have a causal connection to the employment.[75] Since the employee would have confronted the risk of a ruptured aneurysm irrespective of any type of employment, the injury was not compensable.[76]

XI. TO AND FROM WORK

The court in *Highlands Ins. Co. v. Youngblood*[77] held that an employee who was killed in an automobile collision while traveling back to the plant after the close of his normal work day to solve a serious operational problem was in the course and scope of his employment when the employee's position guide required him to be available for call at all times.[78]

In *Poole v. Westchester Fire Ins. Co.*,[79] the court reversed a summary judgment in favor of the workers' compensation carrier, holding that a genuine issue of material fact existed about whether or not the employee received the use of a company car as a integral part of his contract of employment, as well as whether or not the employee, at the time of his injury, was in furtherance of the employer's business.[80] The mere assertion by an employer that transportation provided by the workers' compensation claimant was an accommodation, without more, was insufficient to support a summary judgment on the issue of whether the employee's transportation was furnished or paid for by the employer and, thus, fell within one of the three exceptions to the coming and going rule which makes injuries sustained by employees traveling to and from work compensable.[81] There was evidence that the manager used the company vehicle with the advertising logo to make deliveries before and after normal business hours.[82]

The court in *Tramel v. State Farm Fire & Cas. Co.*[83] affirmed a summary judgment in favor of the workers' compensation carrier.[84] It stated that if an employee travelling to work was on a "special mission" at the time of the accident, the employee would not be entitled to workers' compensation when the accident occurred at a point in the route where employee would

72. 823 S.W.2d 719 (Tex. App.—El Paso 1992, writ denied).
73. *Id.* at 720.
74. *Id.* at 721.
75. *Id.*
76. *Id.* at 722.
77. 820 S.W.2d 242 (Tex. App.—Beaumont 1991, writ denied).
78. *Id.* at 243-46.
79. 830 S.W.2d 183 (Tex. App.—San Antonio 1992, writ denied).
80. *Id.* at 187 (applying the two-part test set out in *Rose v. Odiorne*, 795 S.W.2d 210 (Tex. App.—Austin 1990, writ denied)).
81. *Id.* at 186.
82. *Id.*
83. 830 S.W.2d 754 (Tex. App.—Fort Worth 1992, writ denied).
84. *Id.* at 755.

have travelled regardless of whether she was going to her place of employment or to the bank before proceeding to work.[85]

XII. CONTRIBUTION

In *Carey v. American Gen. Fire & Cas. Co.*,[86] the court held that, in order to reduce workers' compensation recovery because of a previous specific injury, the insurance carrier must prove that the previous injury was compensable.[87]

Furthermore, the court in *Wilson v. Klein Indep. School Dist.*[88] held that expert testimony fixing the percentage rate by which prior injuries contributed to disability is required to support a reduction of benefits.[89] In the absence of such medical testimony, the claimant was entitled to total and permanent disability benefits and appropriate prejudgment interest.[90] The Supreme Court, however, reversed and remanded in *Klein Indep. School Dist. v. Wilson*[91] and held "that expert medical evidence of a specified range or percentage by which the prior injury or condition contributed to the disability is not required, provided there is detailed evidence which shows in reasonable medical probability the cause of the injury and which concerns how the prior injury contributed or probably contributed to the present disability."[92]

XIII. BORROWED EMPLOYEE

The court in *Zavala-Nava v. A.C. Employment, Inc.*[93] held that an employee's common law personal injury cause of action against a non-subscribing borrowing employer was not barred by the workers' compensation statute, even though the lending employer was covered by workers' compensation insurance.[94]

In *Marshall v. Toys-R-Us NYTEX, Inc.*,[95] however, the court held that all that was required for the borrowing employer to be a subscriber was that it paid the premiums on the workers' compensation insurance.[96] In this case, the cost of such insurance was included in the fee paid to the lending em-

85. *Id.* at 757 (construing TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967) (repealed)).
86. 827 S.W.2d 631 (Tex. App.—Beaumont 1992, writ denied).
87. *Id.* at 632-33 (construing TEX. REV. CIV. STAT. ANN. art. 8306 § 12c (Vernon 1967) (repealed)).
88. 817 S.W.2d 371 (Tex. App.—Houston [1st Dist.] 1991, writ granted), *rev'd*, Klein Indep. School Dist. v. Wilson, 834 S.W.2d 3 (Tex. 1992).
89. *Id.* at 375 (construing TEX. REV. CIV. STAT. ANN. art. 8306 § 12c (Vernon 1967) (repealed)).
90. *Id.* at 377.
91. 834 S.W.2d 3 (Tex. 1992).
92. *Id.* at 4.
93. 820 S.W.2d 14 (Tex. App.—Eastland 1991, writ denied).
94. *Id.* at 16 (construing TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967) (repealed) but stating that the result would be the same under the new law).
95. 825 S.W.2d 193 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
96. *Id.* at 197 (construing TEX. REV. CIV. STAT. ANN. art. 8309 (Vernon Supp. 1989) (repealed)).

ployer, who was the actual policy holder of the workers' compensation insurance.[97]

The court in *Watson v. Nortex Wholesale Nursery, Inc.*[98] held that the employer and a company related to the employer cannot elect which company is the employer for purposes of workers' compensation claims.[99]

XIV. MANDATORY COMPENSATION

In *Wallace v. City of Midland*,[100] a case of first impression, the court held that although a city had the discretion as to how it would fulfill its workers' compensation requirement as a self-insurer either by purchasing insurance or by entering into interlocal agreements with other political subdivisions providing for self-insurance, it did not have the discretion not to cover its employees one way or another.[101]

XV. ATTORNEY FEES & ADVANCES[102]

The court stated in *Heard v. Liberty Mut. Fire Ins. Co.*[103] that although a client had a written obligation to reimburse his attorney for advances during workers' compensation litigation and the court could enter a judgment for that amount, the court could not order that the amount be paid out of the exempt workers' compensation funds.[104]

The court in *Twin City Fire Ins. Co. v. Jones*[105] held that the trial court did not abuse its discretion by awarding the claimant's attorney twenty-eight percent of a workers' compensation carrier's lien for services rendered in obtaining the lien, even though the carrier had retained its own counsel.[106] The claimant's attorney actively pursued the third party action which resulted in a judgment against which the carrier was able to assert its lien.[107]

XVI. SUBROGATION

The court in *Southwestern Bell Tel. Co. v. Los Fresnos Consol. Indep. School Dist.*[108] held that a carrier's right to subrogation[109] accrues in a workers' compensation case when benefits have been paid or assumed and the

97. *Id.*
98. 830 S.W.2d 747 (Tex. App.—Tyler 1992, writ denied).
99. *Id.* at 750.
100. 836 S.W.2d 641 (Tex. App.—El Paso 1992, writ denied).
101. *Id.* at 642 (interpreting TEX. REV. CIV. STAT. ANN. art. 8309h, § 2a (Vernon Pamph. 1992)).
102. *See also* Diaz v. Attorney General of State of Tex., 827 S.W.2d 19 (Tex. App.—Corpus Christi 1992, no writ), *infra* under subheading "Subrogation."
103. 828 S.W.2d 457 (Tex. App.—El Paso 1992, writ denied).
104. *Id.* at 459-60 (stating that TEX. REV. CIV. STAT. ANN. art. 8308-10.03(a) (Vernon Supp. Pamph. 1992), prohibits an attorney from lending money to a claimant during the pendency of a compensation claim, but this law was not effective at the time of the suit).
105. 834 S.W.2d 114 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
106. *Id.* at 119.
107. *Id.*
108. 829 S.W.2d 916 (Tex. App.—Corpus Christi 1992, no writ).
109. *Id.* at 918 (referring to TEX. REV. CIV. STAT. ANN. art. 8307, § 6(a) (Vernon Pamph. 1992) (repealed)).

carrier assumes to pay benefits when it makes an initial payment and continues to make periodic payments thereafter.[110]

The court in *Durish v. Dancer*[111] interpreted the Property and Casualty Insurance Guaranty Act,[112] as it relates to the workers' compensation carrier's right of subrogation, against a third-party tortfeasor.[113] The workers' compensation carrier intervened in the suit to pursue its $46,587 subrogation claim, and the employee later joined the receiver for the insolvent liability insurance carrier.[114] After receiving a favorable jury verdict for $165,750, the trial court authorized the employee to collect from the receiver the sum of $100,000, which is the maximum allowed under the Guaranty Act.[115] The judgment, however, specifically directed that the workers' compensation carrier's subrogation claim could not be asserted against the $100,000 and, instead, must be pursued against the insolvent insurance carrier's receivership estate from the funds over and above the $100,000.[116] The appellate court affirmed this decision finding that it comported with the "exhaustion requirement" and the "nonduplication of recovery" provision of Section 12 of the Guaranty Act.[117]

Steenbergen v. Ford Motor Co.[118] involves a wrongful death action where the workers' compensation carrier intervened to enforce its statutory right to reimbursement for compensation benefits paid to a decedent in the event the plaintiffs recovered at trial.[119] The court held that the workers' compensation carrier was not liable for costs incurred by an automobile manufacturer, which actually prevailed at trial, since the Workers' Compensation Act was silent as to the cost where no recovery has been had.[120]

In *Diaz v. Attorney Gen. of State of Tex.*,[121] the Attorney General failed to properly intervene in the workers' compensation case in order to seek back child support payments from the workers' compensation proceeds where he merely appeared at a hearing on the allocation of the proceeds and asserted a claim.[122] The court held that an intervention filed after judgment is rendered is barred as a matter of law.[123] The absolute minimum procedural requirement for a petition to initiate a lawsuit for affirmative relief is not

110. *Id.* (relying on Hix v. Guillot, 812 S.W.2d 400, 402 (Tex. App.—Houston [14th Dist.] 1991, writ granted); the court, however, was not unmindful of the fact that the writ of error had been granted, stating that "until the Texas Supreme Court provides further guidance, the rule announced in *Hix* is the only workable rule for determining when the cause of action for subrogation accrues).

111. 819 S.W.2d 258 (Tex. App.—Austin 1991, writ denied).

112. TEX. INS. CODE ANN. art. 21.-28-C (Vernon 1981 & Supp. 1991) ("Guaranty Act").

113. Durish, 819 S.W.2d at 259.

114. *Id.* at 260.

115. *Id.*

116. *Id.*

117. *Id.* at 261-62.

118. 814 S.W.2d 755 (Tex. App.—Dallas 1991, writ denied), *cert. denied*, 113 S. Ct. 97 (1992).

119. *Id.* at 762.

120. *Id.* (interpreting TEX. CIV. STAT. ANN. art. 8306 et seq. (Vernon 1967) (repealed)).

121. 827 S.W.2d 19 (Tex. App.—Corpus Christi 1992, no writ).

122. *Id.* at 21.

123. *Id.*

waivable.[124] Furthermore, the court held that an attorney is not entitled to attorney's fees for his efforts to recover his fees under the contract, unless he alleges and proves presentment of the claim.[125]

In *City of Austin v. Janowski*,[126] the court found that it was not an abuse of discretion to award the full one third of a subrogated employer's recovery to the plaintiff's attorney, even when the employer's attorney actively participated.[127] Liability was not disputed, and the plaintiff's attorney handled the discovery and the settlement negotiations.[128] The employer's attorney did little more than file a plea in intervention and attend the deposition.[129]

The court in *Massey v. Galvan*[130] held that the workers' compensation statute sets out the maximum attorney fees to be awarded, however, the trial court was not bound by a minimum amount.[131] Therefore, it was not an abuse of discretion for the trial court to award less than the thirty-three and one-third percent maximum.[132]

In *General Motors Corp. v. Saenz*,[133] the court held that, although there is an exception to the rule making information concerning workers' compensation benefits inadmissible in a suit against a third-party tort-feasor for impeachment purposes, where the witness gives testimony inconsistent with the receipt of benefits, a general statement about financial need is not inconsistent with the receipt of benefits.[134]

XVII. ARTICLE 21.21

After filing two workers' compensation claims, the plaintiff in *Crawford & Co. v. Garcia*[135] was fired by her employer for failure to comply with the company and union work rules.[136] After reaching a settlement with her employer, she sued the insurance carrier and adjuster.[137] She claimed that their alleged false, misleading, and deceptive act or practice in the insurance business was a producing cause of her termination.[138] The court, however, reversed the judgment in favor of the plaintiff stating that there was no evidence to support this finding.[139] Neither the insurance carrier nor its adjuster recommended that her employer fire the plaintiff; nor did they have

124. *Id.* at 22.
125. *Id.* at 23 (construing TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(1) and (8) (Vernon 1990)).
126. 825 S.W.2d 786 (Tex. App.-Austin 1992, no writ).
127. *Id.* at 788-91.
128. *Id.*
129. *Id.*
130. 822 S.W.2d 309 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
131. *Id.* at 320 (interpreting TEX. REV. CIV. STAT. ANN. art. 8307, § 6a(b) (Vernon 1967) (repealed 1989)).
132. *Id.*
133. 829 S.W.2d 230 (Tex. App.—Corpus Christi 1991, writ granted).
134. *Id.* at 242-43.
135. 817 S.W.2d 98 (Tex. App.—El Paso 1991, writ denied).
136. *Id.* at 100.
137. *Id.*
138. *Id.*
139. *Id.* at 102.

any authority with regard to the decision made by her employer.[140] The court also found there was no evidence that the defendants interfered with the plaintiff's sole right to select or choose a doctor, and consequently, their acts did not constitute an unfair and deceptive act or practice in violation of Article 21.21, Section 3 of the Texas Insurance Code.[141]

XVIII. ARTICLE 8307c

The court held in *Williams v. Fort Worth Indep. School Dist.*[142] that the school bus driver who brought an action against the school district under Article 8307c was not required to comply with the notice provisions of the Texas Torts Claims Act.[143]

In *Investment Properties Mgt., Inc. v. De Montes*,[144] the court held that a terminated employee has the burden of establishing a causal link between the firing and the employee's claim for workers' compensation benefits.[145] She does not, however, need to prove that the discharge was caused solely by her filing a workers' compensation claim.[146] Once an employee establishes a link, it is the employer's burden to rebut the alleged discrimination by showing that there is a legitimate reason behind the discharge.[147]

The court in *Worsham Steel Co. v. Arias*[148] held that an injured employee, who had orally informed his employer of his injury prior to being terminated, could maintain an 8307c action for wrongful discharge in retaliation for filing a workers' compensation claim, even though the actual filing of the claim was after the discharge occurred.[149] The court further held, however, that testimony as to the plaintiff being "sad" or even being "very sad," standing alone, is insufficient to support a claim for mental anguish.[150]

In *Klein Indep. School Dist. v. Noack*,[151] a wrongful discharge case, the court found that it was a reversible error to admit into evidence an administrative decision regarding a school employee's unemployment compensation claim.[152] This was highly prejudicial, because it was fact finding by a state agency which negated the defendant's defense to the claim in this case.[153] Moreover, it was not competent evidence, because the Commission was determining whether there was any merit to the defendant's contention that

140. *Id.*
141. *Id.* at 102-03 (construing TEX. INS. CODE ANN. art. 21.21, § 3 (Vernon 1981) and Official Order 41060, § 1.003(b), Texas State Board of Insurance, June 4, 1982.)
142. 816 S.W.2d 838 (Tex. App.—Fort Worth 1991, writ denied).
143. *Id.* at 839 (stating that an action under TEX. REV. STAT. ANN. art. 8307c, § 1 (Vernon Pamph. 1991) is not an action under the Texas Torts Claim Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (Vernon 1986)).
144. 821 S.W.2d 691 (Tex. App.-El Paso 1992, no writ).
145. *Id.* at 694.
146. *Id.* (construing TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. Pamph. 1991)).
147. *Id.*
148. 831 S.W.2d 81 (Tex. App.—El Paso 1992, no writ).
149. *Id.* at 84 (construing TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Pamph. 1992)).
150. *Id.* at 87.
151. 830 S.W.2d 796 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
152. *Id.* at 798.
153. *Id.* at 799.

Noack was discharged for misconduct connected with his work, while the issue in this case is whether Noack was discharged for filing a workers' compensation claim.

The court in *Cedillo v. Valcar Enters. & Darling Del. Co., Inc.*[154] held that it was proper to remove a workers' compensation retaliation claim under 8307c to federal court when pendant to a related and removable federal question claim under the Age Discrimination in Employment Act.[155]

The court in *McAlister v. Medina Elec. Coop, Inc.*[156] established three rules: (1) the exclusive remedy provision of the workers' compensation statute barred a claim for negligent or reckless infliction of emotional distress; (2) the terms of the employee handbook did not expressly limit the employer's right to terminate employees at will and afforded no basis for a breach of contract claim; and (3) conduct of the employer in terminating the employee for economic reasons which was not extreme or outrageous, and any emotional distress suffered by the employee which was not severe precluded the claim of intentional infliction of emotional distress.[157]

XIX. ERISA

The court in *Benson v. Wyatt Cafeterias, Inc.*[158] held that the Employee Retirement Income Security Act (ERISA) pre-empted plaintiff's state law cause of action for a work-related accident when the employer purchased an employee injury benefit plan which provided more benefits than what is required by the workers' compensation law.[159] The test articulated by the court as to "whether the plan falls under the umbrella of ERISA does not hinge on the employer's motive in instituting the plan, but 'whether the plan, as an administrative unit, provides only those benefits' the applicable state law requires."[160]

Gibson v. Wyatt Cafeterias, Inc.[161] concerns the same fact scenario as *Benson*.[162] The Eastern District of Texas, however, reached a different conclusion than the Northern District of Texas.[163] The court in *Gibson* held that there was no ERISA pre-emption since this was a claim for personal injury damages rather than benefits under an employee benefit plan.[164]

The court held in *Texas Employers' Ins. Ass'n v. Puckett*[165] that the employee's action against employer's workers' compensation carrier for breach of the duty of good faith and fair dealing was not pre-empted by ERISA.[166]

154. 773 F. Supp. 932 (N.D. Tex. 1991).
155. *Id.* at 938, 941-42.
156. 830 S.W.2d 659 (Tex. App.—San Antonio 1992, writ denied).
157. *Id.* at 663-65.
158. 780 F. Supp. 1132 (N.D. Tex. 1991).
159. *Id.* at 1134 (construing 29 U.S.C. §§ 1001-1461 (1985 & Supp. 1991)).
160. *Id.* at 1133 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 107 (1983)).
161. 782 F. Supp. 331 (E.D. Tex. 1992).
162. *Id.*
163. *Id.* at 335.
164. *Id.* (construing 29 U.S.C. § 1144(a) (1985)).
165. 822 S.W.2d 133 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
166. *Id.* at 141 (construing 29 U.S.C. § 1003 (1990)).

XX. BAD FAITH[167]

The court in *GAB Bus. Serv., Inc. v. Moore*[168] found that the evidence supported a finding that the defendant, who handled the workers' compensation claims for the city, was an independent contractor acting under its own authority and did not come within the protective ambit of the official immunity doctrine, since this claim was within the amount the defendant was authorized to pay without notifying the city.[169]

The court in *Chemical Express Carriers, Inc. v. Pina*[170] held that an injured truck driver could not recover damages from his employer under a negligence theory because no workers' compensation coverage existed and, at same time, recover damages from the employer for lack of good faith and fair dealing in its failure to give benefits as if there was workers' compensation coverage.[171] Workers' compensation and negligence are two co-existent, but inconsistent, remedies.[172]

In *Transportation Ins. Co. v. Archer*,[173] the court held that a workers' compensation carrier owes no duty to a wife to deal fairly and in good faith with her husband in processing his workers' compensation claim.[174]

In *Guajardo v. Liberty Mut. Ins. Co.*,[175] the court found that, although workers' compensation carriers should generally be able to rely on an expert's opinion as a reasonable basis for denial of a claim, a situation may arise in which contrary medical opinion casts sufficient doubt on the reliability of the carrier's expert opinion.[176] If so, the carrier no longer has a reasonable basis to deny coverage.[177] This, of course, is a question of fact for a jury in a bad faith action which precludes summary judgment for the carrier when the plaintiff brings direct or circumstantial evidence showing that the carrier's expert's opinion was questionable and the carrier knew or should have known it was questionable.[178]

A physician in *CNA Ins. Co. v. Scheffey, M.D.*[179] sued the workers' compensation insurer for failure to pay promptly and fairly for the medical treatment which he gave to its insureds under Article 21.21 of the Texas Insurance Code and for a breach of the duty of good faith and fair dealing owed to him.[180] The court held that the insurer did not owe the physician any common law duty of good faith and fair dealing and the physician

167. *See also* Texas Employers' Ins. Ass'n v. Puckett, 822 S.W.2d 133 (Tex. App.—Houston [1st Dist.] 1991, writ denied), *supra* under subheading "ERISA."
168. 829 S.W.2d 345 (Tex. App.—Texarkana 1992, no writ).
169. *Id.* at 350.
170. 819 S.W.2d 585 (Tex. App.—El Paso 1991, writ denied).
171. *Id.* at 588.
172. *Id.*
173. 832 S.W.2d 403 (Tex. App.—Fort Worth 1992, writ granted).
174. *Id.* at 405.
175. 831 S.W.2d 358 (Tex. App.—Corpus Christi 1992, writ denied).
176. *Id.* at 365.
177. *Id.*
178. *Id.*
179. 828 S.W.2d 785 (Tex. App.—Texarkana 1992, writ denied).
180. *Id.* at 787.

lacked standing to sue under the insurance code article regulating trade practices in the business of insurance.[181]

In *Rangel v. Hartford Acc. & Indem. Co.*,[182] the court held that the workers' compensation claimant was collaterally estopped from asserting a bad faith claim against the carrier for a delay in payment of benefits by virtue of prior agreement approved by the Industrial Accident Board, which settled the compensation claim and expressly stated that the "the liability of the carrier or the extent of the injury of the employee is uncertain, indefinite, or incapable of being satisfactorily established."[183] The uncertainty of the carrier's liability establishes, as a matter of law, a reasonable basis for withholding of payments.[184]

In *Allsup v. Liberty Mut. Ins. Co.*,[185] the court held that a claim for the breach of the duty of good faith and fair dealing against an insurer for its handling of a workers' compensation claim arises out of the Texas Workers' Compensation Act, since resolution of the workers' compensation claim is a prerequisite to, and the first element of, any determination in the bad faith claim.[186] Thus, both the workers' compensation claim and the claim for a breach of the duty of good faith and fair dealing could not be removed to federal court.[187]

In direct contrast to *Allsup*, the court in *Bastian v. Travelers Ins. Co.*[188] held that an employee's action against the workers' compensation insurer for a breach of the duty of good faith and fair dealing for its refusal to pay workers' compensation benefits did not arise under the Texas Workers' Compensation Act, but, instead, the bad faith cause of action sounds in tort.[189] Thus, the action for a breach of the duty of good faith and fair dealing could be removed to federal court.[190]

In *Mroz v. United States Fire Ins. Co.*,[191] the court held that the settlement of the workers' compensation claim does not bar a claim for the breach of the duty of good faith and fair dealing on the theories of collateral estoppel, judicial admissions, or judicial estoppel, where the cause of action was not recognized in Texas until after the settlement was entered into.[192]

The court in *Soto v. Phillips*[193] held that res judicata barred the employee from bringing claims, including a claim for a bad faith denial of benefits,

181. *Id.* at 790-92 (analyzing TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981 & Supp. 1992); Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 212-13 (Tex. 1988)).
182. 821 S.W.2d 196 (Tex. App.—Dallas 1991, writ denied).
183. *Id.* at 199.
184. *Id.*
185. 782 F. Supp. 325 (N.D. Tex. 1991).
186. *Id.* at 327.
187. *Id.*
188. 784 F. Supp. 1253 (N.D. Tex. 1992).
189. *Id.* at 1255.
190. *Id.* at 1258.
191. 826 S.W.2d 729 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
192. *Id.* at 730 (citing Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210 (Tex. 1988) as the first time Texas recognized that an insurance company has a duty of good faith and fair dealing in the handling of a workers' compensation case).
193. 836 S.W.2d 266 (Tex. App.—San Antonio 1992, writ denied).

against his employer and workers' compensation carrier which arose before the prior workers' compensation case and could have been tried in that case.[194]

In *Natividad v. Alexsis, Inc.*,[195] the court held that an adjusting firm that handled claims for a workers' compensation carrier has the same duty of good faith and fair dealing to a workers' compensation claimant that the carrier has.[196]

In *Aranda v. Insurance Co. of N. Am.*,[197] a summary judgment case, the court held that judicial estoppel is inapplicable when the compromise settlement agreement, which contained the statement that the liability of the carrier is uncertain and indefinite, was not signed or admitted under oath.[198]

194. *Id.* at 268-69.
195. 833 S.W.2d 545 (Tex. App.—El Paso 1992, writ granted).
196. *Id.* at 548.
197. 833 S.W.2d 209 (Tex. App.—Houston [14th Dist.] 1992, no writ).
198. *Id.* at 213.