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Workers' Compensation Law

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WORKERS' COMPENSATION LAW

by

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SWEEPING changes went into effect January 1, 1991 in almost every area of the workers' compensation law. The Texas Workers' Compensation Commission (Commission), comprised of six persons, three employers and three wage earners and chosen by the Governor with the advice and consent of the Senate, administers the workers' compensation system. The Commission adopts rules to guide the agency and select the executive director, who acts as the executive officer and administrative head of the Commission. While the main office and one field office of the Commission are housed in Austin, an additional twenty-five offices are scattered throughout the state.

I. DISPUTE RESOLUTION

The old pre-hearing-award-trial-de-novo system no longer exists for injuries occurring after January 1, 1991. In its place stands a new administrative system of dispute resolution with limited court access.[1] To help all parties understand their rights and obligations under the law, the Commission may order or an injured worker may request a Benefit Review Conference (BRC).[2] The purpose of the BRC is to explain to the parties their respective rights. The Benefit Review Officer (BRO) reviews the facts in issue and other relevant information, determines the issues in dispute, and, if possible, solves those disputes. At the time it schedules a BRC, the Commission sets a Contested Case Hearing (CCH) to hear the case if the disputed issues are not resolved at the BRC.[3] Alternatively, beginning in 1992, both parties may agree to a binding arbitration[4] after the BRC. A CCH, however, constitutes an informal mini-trial of disputed issues before a CCH Officer. Witnesses may be called and evidence presented of issues not resolved at the BRC. The CCH Officer makes an award that either party may appeal to an appeals panel within the Commission.[5]

The appeals panel decision of the Commission may be appealed by either

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1. TEX. REV. CIV. STAT. ANN. art. 8308-6.01-6.64 (Vernon Supp. 1991).
2. *Id.* art. 8308-6.11.
3. *Id.* art. 8308-6.31.
4. *Id.* art. 8308-6.21.
5. *Id.* art. 8308-6.41.

party to a court of competent jurisdiction,[6] but the issues and evidence in most cases will be limited to those matters developed before the Commission. Unlike the prior law, the party appealing will have the burden of proof.[7] For all issues other than compensability or income or death benefits, judicial review will follow the procedures of section 19 of the Administrative Procedure and Texas Register Act[8] and will be governed by the substantial evidence rule.[9]

II. BENEFIT SCHEME

The benefit scheme in all workers' compensation systems is based upon a percentage of average weekly wage. The manner of calculating the average weekly wage of an individual, therefore, gains paramount importance. Under the old law, the determination involved the assumption that every worker works six days a week or 300 days a year.[10] This definition inflates an individual's average weekly wage by at least seventeen percent if he works five days a week.[11] The new workers' compensation law defines the average weekly wage so as to reflect the wages the individual actually receives per week, using the last thirteen weeks of earnings.[12] The two following examples compare the old system to the new workers' compensation scheme.

Prior Law	*Present Law*
Example One	
$7.00 per hour	Same
$280.00 per week	Same
$14,560.00 per year	Same
Works 240 days a year	Same
$14,560.00 ÷ 240 = $60.66 average daily wage	13 × $280.00 = $3,640.00 $3,640.00 ÷ 13 = $280.00 average weekly wage (AWW)
$60.66 × 300 = $18,198.00 $18,198.00 ÷ 52 = $349.96	
$349.69 AWW	$280.00 AWW
$349.69 × .6667 = $233.14	$280.00 × .75 = $210.00 $280.00 × .70 = $196.00

6. *Id.* art. 8308-6.61.
7. *Id.* art. 8308-6.62.
8. *Id.* art. 6252-13a.
9. *Id.* art. 8308-6.64.
10. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1959) (repealed 1991).
11. *Id.*
12. TEX. REV. CIV. STAT. ANN. art. 8308-4.10 (Vernon Supp. 1991).

Example Two

$8.50 per hour	Same
$340.00 per week	Same
$17,680.00 per year	Same
Works 240 days a year	Same
$17,680.00 ÷ 240 = $73.67 average daily wage	13 × $340.00 = $4,420.00 $4,420.00 ÷ 13 = $340.00 AWW
$73.67 × 300 = $22,101.00 $22,101.00 ÷ 52 = $425.02	
$425.02 AWW	$340.00 AWW
$425.02 × .6667 = $283.36	$340.00 × .70 = $238.00
$252.00 maximum	

The abrogation of the old "210 day rule" in favor of the thirteen week rule reverses Texas law in two situations. The first is evidenced by the case of *Texas Employers Insurance Association v. McMahon*,[13] which held that a person who purposely limits his number of days worked so as not to violate a social security regulation can look to another employee who has worked 210 days in the year immediately preceding his injury.[14] The other instance occurs when the wages of a full-time cafeteria worker are sufficient to prove average weekly wage for a part-time worker who does the same work, as in *Lubbock Independent School District v. Bradley*.[15]

In the case of a minor, the old law stated that "[i]f it be established that the injured employee were a minor when injured and that under normal conditions his wages would be expected to increase, that fact may be considered in arriving at his average weekly wages, and compensation may be fixed accordingly."[16] The new statute limits this rule in that "the adjustment shall not consider expected wage levels for a period occurring more than three years after the date of the injury."[17] This new statute applies to lifetime as well as death benefits.[18]

Under the old scheme for determining benefits, whether temporary, partial, total, lifetime, or death, payments equalled sixty-six and two-thirds percent of the average weekly wage, with a maximum of $252.00 and a minimum of $42.00.[19] In an attempt to offset decreases caused by the change of the definition of average weekly wage, the percentage standard and the maximum and minimum were changed, as reflected in the following table:

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13. 509 S.W.2d 665 (Tex.Civ.App.—Beaumont 1974, writ ref'd n.r.e.).
14. *Id.* at 668.
15. 579 S.W.2d 78 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.). The *Bradley* case has been used universally in all school district employment cases.
16. TEX. REV. CIV. STAT. ANN. art. 8306, § 12j (1931)(repealed 1991).
17. TEX. REV. CIV. STAT. ANN. art. 8308-4.10 (Vernon Supp. 1991).
18. *Id.*
19. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 8, 10-12 (1987) (repealed 1991).

Maximum Benefits Payable at Rate of the Percentage of Difference Between Average Weekly Wage and Weekly Earning After the Injury

		Maximum	*Minimum*
Temporary Income Benefits	100%	$428.00	$64.00
Impairment Income Benefits	70%	299.60	64.00
Supplemental Income Benefits	70%	299.60	64.00
Lifetime Income Benefits	100%	428.00	64.00
Death Benefit	100%	428.00	64.00

This table reflects the plan breakdown of weekly benefits into five separate areas discussed below: temporary income benefits; impairment income benefits; supplemental income benefits; lifetime income benefits; and death benefits.

A. Temporary Income Benefits[20]

Temporary income benefits (TIB) compare to the old total incapacity benefits. These benefits generally compensate for the time lost from an injury after its initial impact. Under the old law, this was paid on the basis of 66⅔% of the average weekly wage, while under article 8308 it is paid on the basis of 70% of that wage.[21] A special provision for those people who make less than $8.50 per hour provides for payment based upon 75% of the average weekly wage for the first twenty-six weeks of compensation.[22] Unlike the prior law, wherein payments for total incapacity benefits were paid up to 401 weeks, article 8308 limits the payment of TIBs to 104 weeks.[23] As the table below shows, a worker must make more than $8.50 per hour before the new law grants an increase in TIBs because of the changed definition of average weekly wage. Unfortunately, the vast majority of people injured in Texas fall below the $8.50 per hour rate.[24]

Weekly Temporary Income Benefits[25]

*Hourly Wage**	*Prior Law* (401-week duration)	*Present Law* (104-week duration)	
$ 4.00	$133.35	1-26 weeks	$120.00
		27+ weeks	112.00
5.00	166.66	1-26 weeks	150.00
		27+ weeks	140.00
6.00	200.00	1-26 weeks	180.00
		27+ weeks	168.00

20. TEX. REV. CIV. ANN. art 8308-4.23 (Vernon Supp. 1991).
21. *Id.*
22. *Id.* art. 8308-4.23(d).
23. *Id.* art. 8308-1.03(32).
24. According to the Texas Department of Commerce, annual per capita income in Texas is $13,489, or less than $7.00 per hour. Lutz, *Hospitals Struggle to Survive Along U.S.-Mexican Border*, MODERN HEALTHCARE, Aug. 6, 1990, at 28.
25. TEX. REV. CIV. STAT. ANN. art. 8308-4.23 (Vernon Supp. 1991).

7.00	233.31	1-26 weeks	210.00	
		27+ weeks	96.00	
8.00	252.00 maximum	1-26 weeks	240.00	
		27+ weeks	224.00	
8.50	252.00 maximum		238.00	
9.00	252.00 maximum		252.00	
10.00	252.00 maximum		280.00	
11.00	252.00 maximum		291.02	
12.00	252.00 maximum		336.00	
13.00	252.00 maximum		364.00	
14.00	252.00 maximum		392.00	
15.00	252.00 maximum		420.00	
16.00	252.00 maximum		428.00	maximum

*40 hours/week, 240 days/year

B. Impairment Income Benefits

After the employee reaches maximum medical improvement (MMI), the employee may be entitled to impairment income benefits (IIBs) if he has suffered a permanent impairment.[26] The statute entitles the employee to three weeks of IIBs for every percentage point of impairment lost.[27] In making the determination, the doctor must use the Guides to the Evaluation of Permanent Impairment (Guides)[28] published by the American Medical Association.[29] The following examples illustrate the use of the Guides:[30]

Total Loss	*Weeks Of Benefits*
Thumb	22 × 3 = 66
Index Finger	11 × 3 = 33
Middle Finger	11 × 3 = 33
Ring Finger	5 × 3 = 15
Little Finger	5 × 3 = 15
Hand	54 × 3 = 162
Arm (below Elbow)	57 × 3 = 171
Arm (above Elbow)	60 × 3 = 180
Foot	28 × 3 = 84
Knee (Amputation)	36 × 3 = 108
Leg (Amputation at Hip)	40 × 3 = 120
Eye	24 × 3 = 72
Hearing (Loss)	35 × 3 = 105
Eye and Leg (above knee)	51 × 3 = 153
Eye and Arm (above knee)	70 × 3 = 210

26. *Id.* art. 8308-4.26.
27. *Id.*
28. AMERICAN MED. ASSOC., *Guides to the Evaluation of Permanent Impairment* (3rd ed. 2nd printing, Fed. 1989). Interestingly, the *Guides* contains the following statement: "We encourage each system not to make a 'one-to-one' translation of impairment to disability, in essence creating a use of the *Guides* which is not intended." *Id.* at 6.
29. TEX. REV. CIV. STAT. ANN. art. 8308-4.24 (Vernon Supp. 1991).
30. AMERICAN MED. ASSOC., *Guides to the Evaluation of Permanent Impairment* (3rd ed. 2nd printing, Feb. 1989).

Eye and Hand	65 × 3 = 195
Eye and Foot	45 × 3 = 135
Back, Operated	10 × 3 = 30
Hernia	10 × 3 = 30

While the new workers' compensation law almost eliminates some compensable injuries, such as heart attacks,[31] it also drastically lowers benefits in other areas. Probably the most significant is the elimination of the 300-week permanent partial loss of wage earning capacity recovery.[32] The significance of the change can be simply demonstrated by considering the recovery of a 50-year-old-plus male who earns $8.00 per hour doing manual labor, suffers a back injury, and misses six months of work recovering from a back operation.

Under the prior law, recovery was calculated on the following basis for a person earning $8.00 per hour for 40 hours per week for 52 weeks: $8.00 × 40 = $320.00 × 52 = $16,640.00 divided by 240 days actually worked produced an average daily wage of $69.00. Thus, $69.00 × 300 = $20,700.00 divided by 52 weeks equaled a $398.00 average weekly wage. Assuming that the person could still receive a minimum wage of $4.00 per hour, the loss of wage earning capacity system deducted $160.00 from $398.00, leaving $238.00. The person was thus entitled to 66⅔% of the $238.00 shortfall in salary for 300 weeks, or $47,700.00, plus the twenty-six weeks temporary total benefits at the maximum of $252.00 per week.[33]

In contrast, the present law provides an average weekly wage of $320.00; the individual is entitled to 75% of the average weekly wage, or $240.00, for the first twenty-six weeks.[34] In addition, the law entitles the individual to ten impairment points for an operated back, which translates into 70% of the average weekly wage for thirty weeks, or 224.00 a week, for a total of $6,720.00.

	Prior Law	*Present Law*
Temporary Total Loss benefits	$ 6,552.00	$ 6,240.00
Permanent Partial Loss benefits	47,700.00	6,720.00
Total	$ 54,252.00	$ 12,960.00

Applying the same formulas to an employee earning $428.00 per week generates the following result:

	Prior Law	*Present Law*
Temporary Total Loss benefits	$ 6,552.00	$ 7,789.60
Permanent Partial Loss benefits	74,988.00	8,988.00
Total	$ 81,540.00	$ 16,770.60

The following table shows the prior general injury type of permanent

31. *See infra* notes 73-77.
32. TEX. REV. CIV. STAT. ANN. art 8306, § 12 (1987) (repealed 1991).
33. *Id.*
34. TEX. REV. CIV. STAT. ANN. art. 8308-4.23 (Vernon Supp. 1991).

partial benefits[35] compared to the current impairment income benefits scheme:[36]

Weekly Impairment Income Benefits

*Hourly Wage**	*Prior Law*	*Present Law*
$ 4.00	$133.35	$112.00
5.00	166.66	140.00
6.00	200.00	168.00
7.00	233.31	196.00
8.00	252.00 maximum	224.00
8.50	252.00 maximum	238.00
9.00	252.00 maximum	252.00
10.00	252.00 maximum	280.00
11.00	252.00 maximum	291.02
12.00	252.00 maximum	304.50

*40 hours/week, 240 days/year

C. *Supplemental Income Benefits*

The new legislation ties Supplemental Income Benefits (SIBs) to the impairment benefits system when the impairment equals or exceeds 15% of the body as a whole.[37] The supplemental income benefit concept replaces the earning capacity doctrine in the old law. Under old law the percentage of incapacity made no difference, but the incapacity had to be permanent.[38] Once that determination was made, the fact finder decided the loss of earning capacity.[39] After that determination, the injured party received 66⅔% of the difference between his average weekly wage and his average weekly earning capacity for 300 weeks.[40]

The new supplemental benefits are payable at 64% of the difference between the average weekly wage and the wages earned, if any, for the period of time the claimant is qualified.[41] SIBs are calculated quarterly and paid monthly.[42] To qualify for SIBs the employee must comply with four basic requirements: a) impairment rating of at least 15%; b) no continuation of work or acceptance of work earning less than 80% of the employee's average weekly wage; c) no lump-sum treatment of any portion of his impairment income benefits; and d) good faith search for employment commensurate with the employee's capabilities.[43] In addition, the claimant may seek SIBs at any time within one year after the expiration of impairment benefits, if the employee first, earns less than 80% of his average weekly wage for at least ninety days, second, meets the four requirements stated above, and, third,

35. TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (1987) (repealed 1991).
36. TEX. REV. CIV. STAT. ANN. art. 8308-4.26 (Vernon Supp. 1991).
37. *Id.* art. 8308-4.28.
38. TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1987) (repealed 1991).
39. *Id.*
40. *Id.*
41. TEX. REV. CIV. STAT. ANN. art. 8308-4.28 (Vernon Supp. 1991).
42. *Id.*
43. *Id.*

proves that his impairment causes the lower earnings.[44]

However, if the employee fails to qualify for benefits for twelve consecutive months, then that employee's entitlement to supplemental benefits ceases.[45] When paid in sequence, temporary income benefits, impairment income benefits, and supplemental income benefits terminate 401 weeks from the date of injury.[46] The employee loses SIBs if he refuses vocational rehabilitation services, refuses to cooperate with the Commission, or fails to file a quarterly statement of earnings.[47]

D. Lifetime Income Benefits

The following lifetime income benefit injuries mirror the old law, except that benefits being paid increase 3% a year, notwithstanding the maximum weekly benefit: a) total and permanent loss of sight in both eyes; b) loss of both feet at or above the ankle; c) loss of both hands at or above the wrist; d) loss of one foot at or above the ankle and the loss of one hand at or above the wrist; e) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg; and f) an injury to the skull resulting in incurable insanity or imbecility.[48] The lifetime benefits are payable at the rate of 75% of the employee's average weekly wage.[49]

E. Death Benefits[50]

"Death benefits are payable at the rate of seventy-five percent of the employee's average weekly wage."[51] The new statute eliminates non-dependent parents as parties that take upon death of a child.[52] The law also changes the definition of "dependent": Under the old law a dependent meant one who received any benefit from the relative,[53] while the new definition requires regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood.[54]

III. LUMP SUM OF BENEFITS[55]

Commute is the new synonym for payment in lump sum. Accrued benefits must be paid in lump sum.[56] Only impairment income benefits can be commuted, and then only if the employee returns to work for at least three

44. *Id.*
45. *Id.*
46. *Id.* art. 8308-4.29.
47. *Id.* art. 8308-4.28.23, -4.31.
48. *Id.*
49. *Id.*
50. *Id.* art. 8308-4.41.
51. *Id.*
52. *Id.* art. 8308-4.42.
53. *See* Industrial Accident Bd. v. Lance, 556 S.W.2d 101 (Tex. Civ. App.—Amarillo 1977, no writ); Hartford Accident & Indem. Co. v. Crowley, 509 S.W.2d 939 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).
54. TEX. REV. CIV. STAT. ANN. art. 8308-1.03 (Vernon Supp. 1991).
55. *Id.* art. 8308-4.27.
56. *Id.* art 8308-4.13.

months earning at least 80% of his average weekly wage.[57] Accelerated payments, if approved by the Commission, can be made, but cannot exceed the employee's net pre-injury wage.[58] In special circumstances of financial hardship, the Commission may order advances of income benefits, which may not exceed four times the maximum weekly temporary income benefits.[59]

IV. MEDICAL BENEFITS

While the new law continues the unlimited medical benefits scheme of the old law,[60] the new legislation institutes the following limitations and restrictions: a) the new law prohibits compromising or settling of medical;[61] b) the legislation limits claimant to free choice of two doctors before approval of insurance carrier and commission is required;[62] c) spinal surgery requires a preliminary second opinion of insurance carrier doctor;[63] d) fee guidelines continue but include auditing of the insurance carrier;[64] e) the Commission requires pre-authorization for certain health care treatments;[65] f) overcharges by health care providers constitute a class A misdemeanor;[66] g) the employee's treating doctor must approve or recommend all health care.[67]

V. COVERAGE

Although workers' compensation coverage remains voluntary for non-governmental employees, the new law requires an employer to notify both employees and the Texas Workers' Compensation Commission if it does not have workers' compensation coverage.[68] The law clearly defines independent contractors, with truck drivers and certain building and construction workers given the opportunity to work as independent contractors not covered under the law.[69] In any building and construction contract with the state or political subdivision, the contractor must carry workers' compensation insurance.[70]

An employee may opt out of the system by giving the employer notice within five days of employment.[71] This means that any employee injured within the first five days of employment has an option to bring an action

57. *Id.* art. 8308-4.27.
58. *Id.* art. 8308-4.321.
59. *Id.* art. 8308-4.32.
60. *Id.* art. 8308-4.61.
61. *Id.*
62. *Id.* art. 8308-4.62.
63. *Id.* art. 8308-4.67.
64. *Id.* art. 8308-4.68, 8.21.
65. *Id.* art. 8308-8.28.
66. *Id.* art. 8308-10.08.
67. *Id.* art. 8308-4.61.
68. *Id.* art. 8308-3.22.
69. *Id.* art. 8308-3.05, 3.06.
70. *Id.* art. 8308-3.23, 3.24.
71. *Id.* art. 8308-3.08.

under common law or under the statute.[72]

VI. HEART ATTACKS

A heart attack is a compensable injury . . . only if:
(1) the attack can be identified as:
  (A) occurring at a definite time and place; and
  (B) caused by a specific event occurring in the course and scope of employment;
(2) the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack; and
(3) the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.[73]

Clearly the statute precludes compensation for a heart attack due to occupational disease. Neither mentally nor physically stressful events occurring over a period of time produce a compensable heart attack under this statute.[74] While in the past a person could recover by showing the slightest evidence of strain or over-exertion, such as walking up nine concrete steps,[75] the new test requires a showing that the work "was a substantial contributing factor of the attack."[76] The new act fails to define "heart attack." Existing case law defines heart attack to include not only "myocardial infarction," but also acute coronary insufficiency or an angina attack from temporary constrictions of the heart arteries.[77]

VII. CONTRIBUTION

At the request of the insurance carrier, the commission may order that impairment income benefits and supplemental income benefits be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.

The commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.

If the combination of the compensable injuries results in an injury compensable under Section 4.31 of [the Workers' Compensation Act], the benefits for that injury shall be paid as provided by Section 4.47 of this Act.[78]

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72. Rabjohns v. Hospital Corp. Int'l, 573 F. Supp 438 (E.D. Tex. 1983), *aff'd sub nom.* Ferguson v. Hospital Corp. Int'l, 769 F.2d 268 (5th Cir. 1985).

73. TEX. REV. CIV. STAT. ANN. art. 8308-4.15 (Vernon Supp. 1991).

74. *Id.* (overruling City of Bridgeport v. Barnes, 591 S.W.2d 939 (Tex.Civ.App.—Ft. Worth 1979, writ ref'd n.r.e.)).

75. Continental Ins. Co. v. Marshall, 506 S.W.2d 913 (Tex.Civ.App.—El Paso 1974, no writ).

76. TEX. REV. CIV. STAT. ANN. art 8308-4.15 (Vernon Supp. 1991).

77. Northbrook Nat'l Ins. Co. v. Goodwin, 676 S.W.2d 451 (Tex.App. -Houston [1st Dist.] 1984, writ ref'd n.r.e.).

78. TEX. REV. CIV. STAT. ANN. art. 8308-4.30 (Vernon Supp. 1991).

Unlike the old law,[79] contribution applies not only to temporary benefits, but also to impairment income benefits and supplemental income benefits.[80] The prior injuries must have been compensable to reduce benefits.[81]

Under prior law, if a person was a high wage earner, contribution would have little or no effect on the amount of money recovered.[82] Under the language of the new statute, however, it will be up to the Commission to consider the effect of contribution on a case-by-case basis.[83]

The legislature made a significant change in the application of the lifetime benefit provision. Previously, the prior injury did not need to be compensable to determine whether the claimant would receive lifetime benefits.[84] Under article 8308-4.31(c), set out above, the legislation indicates that it must be a "combination of . . . compensable injuries" for lifetime benefits to apply.[85]

VIII. MENTAL TRAUMA

> It is the express intent of the legislature that nothing in this Act shall be construed to limit or expand recovery in cases of mental trauma injuries.
>
> A mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination is not a compensable injury for the purposes of this Act.[86]

On its face, this provision seems to reverse the holding in *Director, State Employees Workers' Compensation Division v. Camarata*.[87] In *Camarata* the claimant suffered mental trauma when shown an office memo critical of his work performance. However, as one writer has pointed out, "recovery would still exist in three instances in a case involving a mental 'accidental' injury: 1. if not arising from a personnel action; or 2. if arising from a personnel action but not principally arising; or 3. if arising principally from a personnel action which was not legitimate."[88]

IX. EXTRA-HAZARDOUS EMPLOYER[89]

One of the most significant changes under the new law is the establishment of a program to identify "extra-hazardous employers." The term "extra-hazardous employer" means an employer whose employees sustain substantially more injuries than may be reasonably expected in that em-

79. *Id.* art. 8308 § 12c (1987) (repealed 1991).
80. *Id.* art. 8308-4.30 (Vernon Supp. 1991).
81. *Id.*
82. TEX. REV. CIV. STAT. ANN. art 8308-4.30 (Vernon Supp. 1991).
83. *Id.* art. 8308 § 12c (1987) (repealed 1991).
84. Aetna Casualty and Sur. Co. v. Depoister, 393 S.W.2d 822 (Tex.Civ.App.—Corpus Christi 1965, writ ref'd n.r.e.).
85. TEX. REV. CIV. STAT. ANN. art. 8308-4.31 (Vernon Supp. 1991).
86. *Id.* art. 8308-4.02.
87. 768 S.W.2d 427 (Tex.App.—El Paso 1989, no writ).
88. Southers, *Overview of the New Workers' Compensation Act*, TRIAL LAWYERS FORUM, vol. 24 no. 3 at 12 (1990).
89. TEX. REV. CIV. STAT. ANN. art. 8308-7.04 (Vernon Supp. 1991).

ployer's business or industry.[90] Under the legislative scheme, the Workers' Health and Safety Division of the Commission notifies each extra-hazardous employer and its insurance carrier that the employer has been so identified. The extra-hazardous employer must, within thirty days, secure the performance of a safety consultation by the division, the employer's insurance carrier, or another professional source approved by the division. The safety consultant then files a report with the Commission and the employer describing any hazards uncovered by the safety consultation. The employer and the consultant create a specific accident prevention plan to cure the problems identified by the consultant. The employer must comply with the plan.[91]

Six months later, the division re-inspects the employer's premises. If the division finds that the employer has followed the accident prevention plan or other acceptable corrective measures, the division shall so certify. However, an employer who fails to abate the hazard commits a class B administrative violation, punishable by a fine of up to $5,000, with each day of non-compliance constituting a separate violation.[92] In addition, once a plan has been formulated under the extra-hazardous employer program, the division may investigate accidents occurring at the work sites.[93] The Commission bills an employer for the reasonable cost of services provided through this program.[94]

X. ATTORNEYS' FEES

An attorney may assist an injured employee at a BRC, CCH, or arbitration hearing, as may an individual of the employee's choice who does not work for an attorney or receive a fee.[95] "An insurance carrier may be represented by an attorney or adjuster."[96]

The attorney must base his or her fees upon actual time and expenses as presented by written evidence to the Commission or court; the fee, however, cannot exceed 25% of the claimant's recovery.[97] In deciding whether to approve attorneys' fees, the Commission or the court considers the following items:

(1) the time and labor required, novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
(2) the fee customarily charged in the locality for similar legal services;
(3) the amount involved in the controversy;
(4) the benefits to the claimant that the attorney is responsible for securing; and

90. *Id.*
91. *Id.*
92. *Id.*
93. TEX. REV. CIV. STAT. ANN. art. 8308-7.04 (Vernon Supp. 1991).
94. *Id.*
95. *Id.* art. 8308-6.04.
96. *Id.*
97. TEX. REV. CIV. STAT. ANN. art. 8308-4.09 (Vernon Supp. 1991).

(5) the experience and ability of the attorney performing the services.[98]

The Commission has adopted the following specific time limits for attorney services:[99]

Attorney Service	*Hourly Limit*
Research in Compensation Issues, Filing Initial Documents with Commission	1.0
	Total 1.0
Client Conferences (per month)	2.0
	Total 2.0
Resolving Disputes of Compensability or Amount of Payment (including research and preparation time), through either:	
1. Informal Resolution of all issues without Commission intervention; or	6.0
	Total 6.0
	2.5
2. Benefit Review Conference and Contested Case Hearing (if necessary), and Appeal Panel Review (if necessary).	1.5 1.0
	Total 5.0
Resolving Disputes about Proper Beneficiary in Death Benefits Cases (including research and preparation time), through either:	
1. Informal Resolution of all issues without Commission intervention; or	7.0
	Total 7.0
2. Benefit Review Conference, Contested Case Hearing (if necessary), and Appeal Panel Review (if necessary).	3.0 2.0 1.0
	Total 6.0
Contest of Impairment Rating, Maximum Medical Improvement, Ability to Return to Work, Entitlement to Lifetime Benefits, and all other Medical Issues relating to income benefits (including review of medical records, research, and preparation time), through either:	
1. Informal Resolution of all issues without Commission intervention; or	6.0
	Total 6.0

98. *Id.*

99. Tex. Workers' Compensation Comm'n, 15 Tex. Reg. 6662 (1990), *adopted* 16 Tex. Reg. 774 (1991) (codified at 28 TEX. ADMIN. CODE § 152.4).

2. Benefit Review Conference, and Contested Case Hearing (if necessary), and Appeal Panel Review (if necessary).	5.5 2.5 1.0	
	Total	9.0

"When an attorney's only service has been to assist a claimant with completing and filing claim forms and other documents, and the claim is not disputed, the range of hours allowed shall be in the range of one to three hours, depending upon the extent of services rendered."[100] Furthermore, a lawyer may not loan money to an injured employee.[101]

XI. SALARY CONTINUATION[102]

Section 4.06(e) provides that when the employer makes supplemental salary payments and the injured employee receives temporary income benefits, the employer becomes entitled to reimbursement from any impairment income benefits, if any, paid to the injured employee.[103] This provision impacts certain union contracts, such as the CWA and the OCAW, which provide salary supplements.

XII. OTHER SIGNIFICANT CHANGES

Other significant changes under the workers compensation legislation include: a) allowance of a lien for court-ordered child support payments;[104] b) limited recovery of exemplary damages to the greater of four times actual damages or $250,000 in an action against an insurance carrier for breach of duty of good faith and fair dealing;[105] c) imposition of criminal penalties for making a false or misleading statement to obtain or deny workers' compensation benefits;[106] d) grant of monetary recovery for administrative violations;[107] e) change of discount and interest on lump sum payments from four percent[108] to the auction rate quoted on a discount basis for the fifty-two week treasury bills issued by U.S. Government;[109] f) lack of provision for ordering surgical operations and beneficial effects of surgery rule; g) lack of award of attorneys' fee on subrogated reserved amount.[110]

100. Commission Rule 152.4.
101. TEX. REV. CIV. STAT. ANN. art. 8308-10.03 (Vernon Supp. 1991).
102. *Id.* art. 8308-4.06.
103. *Id.* art. 8308-4.06(e).
104. *Id.* art. 8308-4.08.
105. *Id.* art. 8308-10.42.
106. TEX. PENAL CODE ANN. § 32.51 (Vernon Supp. 1991).
107. TEX. REV. CIV. STAT. ANN. art. 8308-10.21 (Vernon Supp. 1991).
108. *Id.* art. 8306a (1987) (repealed 1991).
109. *Id.* art. 8308-1.04 (Vernon Supp. 1991).
110. *Id.* art. 8308-4.09 (reversing Ischy v. Twin City Fire Ins. Co., 718 S.W.2d 885 (Tex. App.—Austin 1986, writ ref'd n.r.e.)).