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Workers' Compensation

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WORKERS' COMPENSATION

by

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I. LEGISLATION

THE legislature did not make any extensive changes in the Workers' Compensation Act (the Act) during the Survey period. The legislature did, however, add two noteworthy amendments.[1]

One amendment provides for a twelve percent penalty and a reasonable attorney's fee should the Texas Employers' Insurance Association[2] (the Association) fail or refuse to pay indemnity compensation when due.[3] These provisions only apply when the Board has approved a compromise settlement agreement or when the court has approved an agreed judgment.[4] Venue for such a suit is the same as for a suit to set aside the final ruling and decision of the Industrial Accident Board[5] (the Board).[6] The amendment to the statute contains no time limitations after which the Association shall be deemed to have failed or refused to make payment.[7] As such, this amendment will no doubt foster litigation aimed at defining the time limitations.

The legislature also enacted provisions granting subrogation rights to the Second Injury Fund.[8] This amendment grants the Second Injury Fund the same rights and obligations as the Association would have with regard to subrogation, recovery from third persons, and the right to attorney's fees.[9] The amendment became effective September 1, 1985,[10] and abrogates the supreme court's holding in the recent case of *Johnson v. Second Injury Fund*.[11] The *Johnson* court held that subrogation rights under the Act did not exist except when clearly mandated by the legislature and that no such mandate existed with regard to the Second Injury Fund.[12] The amendment

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1. TEX. REV. CIV. STAT. ANN. art. 8307, § 5a (Vernon Supp. 1986); *id.* art. 8306, § 12 c(b).
2. *See id.* art. 8308, § 1 (creating the Association).
3. *Id.* art. 8307, § 5a.
4. *Id.*
5. *See id.* art. 8307, § 1 (creating the Board).
6. *Id.* art. 8307.
7. *Id.*
8. *See id.* art. 8306, § 12c(b) (Vernon Supp. 1986) (creating Second Injury Fund to compensate those suffering a subsequent injury for combined incapacity).
9. *Id.*
10. *Id.*
11. 688 S.W.2d 107 (Tex. 1985).
12. *Id.* at 109.

clearly mandates that subrogation rights do exist, effectively undermining the basis of the court's decision.

Other legislative actions with regard to the Act were basically housekeeping in nature.[13]

II. SUBSTANTIVE LAW

A. Claim for Compensation

One of the statutory requisites of the Act is that a claim for compensation shall be made within one year after the occurrence of the injury or first distinct manifestation of an occupational disease.[14] In *Northbrook National Insurance Co. v. Goodwin*[15] the carrier contended that a fatal variance existed between the worker's initial claim of a heart attack and the subsequent proof at trial, which established that he had in fact suffered an angina attack. The court reasoned that the initial claim placed the employer on notice of the type of problem and gave the employer information as to the general basis for the claim.[16] The court held that it would be unreasonable to require a claimant specifically to identify the nature of an injury by the appropriate medical category.[17] This holding is consistent with the underlying rationale of the Act's claim procedure. The Act seeks to provide sufficient notice to the employer and insurance carrier to allow an appropriate investigation and disposition of the claim.[18]

B. Good Cause

Strict compliance with the Act's requirements that a claimant give notice to his employer within thirty days after an injury or first manifestation of an occupational disease and that a claim be filed with the Board within one year may be waived for good cause in meritorious cases.[19] In *The City of San Antonio v. Miranda*[20] the worker failed to file a claim for compensation with the Board until approximately eighteen months following his shoulder injury. The court observed that the worker had a fourth grade education and had performed heavy labor for the same employer for twenty-six years. A

13. The maintenance tax paid by insurance carriers for support of the Industrial Accident Board was increased. TEX. REV. CIV. STAT. ANN. art. 8306, § 28 (Vernon Supp. 1986). The Board is given authority to remit the proceeds from subrogation recoveries to the State Treasury for deposit to the Second Injury Fund. *Id.* art. 8307, § 6a(d). District and county clerks are required to advise the Board of the filing of a workers' compensation suit and also required to forward workers' compensation judgment to the Board, the expense of which will be taxed as court costs. *Id.* art. 8309a, § 7. The requirements for filing reports regarding the prevention of accidents and injuries to state employees applies only to state agencies. *Id.* art. 8309g, § 6. Subrogation monies recovered by the State Employees Workers Compensation Program may be used to pay compensation and other benefits to state employees. *Id.* art. 8309, § 18.

14. *Id.* art 8307, § 4a.

15. 676 S.W.2d 451 (Tex. App.—Houston [1st Dist.] 1984, no writ).

16. *Id.* at 453.

17. *Id.* at 454.

18. *Id.* (quoting Johnson v. American Gen. Ins. Co., 464 S.W.2d 83, 84 (Tex. 1971)).

19. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon Supp. 1986) (establishing time limits as to notice of injury and claims for compensation).

20. 683 S.W.2d 517 (Tex. App.—San Antonio 1984, no writ).

doctor allowed the worker to return to work following his injury on more than one occasion, although the worker continued to complain of pain in his shoulder while working. The doctor diagnosed a pulled muscle. The worker subsequently underwent surgery to repair a tear in the rotator cuff of his shoulder. The worker claimed that he failed to file a claim for compensation because he believed that his injuries were not serious.[21] Texas courts have held that a worker can establish the requisite good cause if he was acting under the belief that his injury was trivial, and he was not provided affirmative medical opinions to the contrary.[22] Further, good cause may exist if a physician actually advised a worker that his injuries were not serious and the worker believes and relies upon that advice in the exercise of ordinary care.[23] The *Miranda* court held that the facts presented by the worker constituted sufficient probative evidence to support the jury's finding of good cause.[24]

A finding of good cause also waives strict compliance with the requirement that beneficiaries file a claim for compensation within one year of the death of a worker.[25] In *Texas General Indemnity Co. v. Goodwin*[26] the widow of a lung cancer victim did not not file her claim for compensation within the statutory period. The record revealed that the worker died of lung cancer related to his exposure to asbestos fibres during his employment many years prior to his death. His widow based her claim for compensation upon death resulting from an occupational disease.

The court reiterated that the test for establishing good cause for delay in filing a claim beyond the statutory period is that standard of conduct of an ordinarily prudent person.[27] Texas courts have long recognized that a worker has a reasonable period of time for investigation, preparation and filing of a claim after he determines the seriousness of his injury.[28] The *Goodwin* court held by analogy that when the beneficiaries believe that death may have resulted from an occupational disease, a reasonable period of time is allowable for the investigation, preparation and filing of a claim.[29] Note that in both the *Miranda* and *Goodwin* decisions the worker was required to establish good cause for failure to file a claim not only during the statutory period but for the entire period between the date of injury and the date of filing.[30]

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21. *Id.* at 522.

22. *See* Harkey v. Texas Employers Ins. Ass'n, 208 S.W.2d 919, 922-23 (Tex. 1948); Liberty Mut. Ins. Co. v. Stanley 534 S.W.2d 191, 193 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

23. Harkey v. Texas Employers Ins. Ass'n, 208 S.W.2d 919, 922 (Tex. 1948); Travelers Ins. Co. v. Rowan, 499 S.W.2d 338, 341-42 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.).

24. 683 S.W.2d at 523.

25. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon Supp. 1986) (establishing one-year filing deadline for compensation).

26. 689 S.W.2d 469 (Tex. App.—Houston [14th Dist.] 1985, no writ).

27. *Id.* at 470.

28. Hawkins v. Safety Casualty Co., 207 S.W.2d 370, 372 (Tex. 1970); Moronko v. Consolidated Mgt. Ins. Co., 435 S.W.2d 846, 847 (Tex. 1968); Texas Employers Ins. Ass'n v. Renfro, 496 S.W.2d 277, 230 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ dism'd).

29. 689 S.W.2d at 471.

30. 687 S.W.2d at 523; 689 S.W.2d at 471; *see* Continental Casualty Co. v. Cook 515

The statutory period during which a claim for compensation must be filed may be extended in limited circumstances. The Act provides for a tolling of the limitations period for the filing of a claim when the employer's first report of injury[31] is not filed as required by the Act.[32] In *Smith v. Home Indemnity Co.*[33] an injured worker failed to file his claim within the statutory period and, without alleging good cause, relied upon the tolling provisions of the Act. The worker admitted that he had not notified his employer of the injury until eleven months after the injury occurred. The Act's requirement for the filing of the employer's first report of injury was therefore inapplicable, as were the tolling provisions of the Act.[34]

C. *Election of Remedies*

A worker may waive his workers' compensation claim if he makes an informed choice to pursue a course of action that is so inconsistent with his workers' compensation claim as to constitute manifest injustice should he be granted workers' compensation benefits.[35] This situation arises most often in relation to workers' compensation claims in which a worker has filed for benefits under his employer's group insurance policy.

In *Overstreet v. Home Indemnity Co.*[36] the supreme court reversed the lower court's holding that a worker could not pursue a workers' compensation claim due to his election to obtain group insurance benefits.[37] The lower court based its holding on a set of requests that had been deemed admitted.[38] In a per curiam decision the supreme court held that the admissions did not establish an informed election.[39] This holding underscores the fact that the injured worker must do considerably more than sign and file a group insurance application for benefits and receive benefits in order to establish an election of remedies.

In *Smith v. Home Indemnity Co.*[40] the Fort Worth court of appeals affirmed a summary judgment in favor of the carrier based on election of remedies.[41] In *Smith* the worker was fully aware that group insurance was for non-work-related injuries and that workers' compensation was for job-related injuries at the time he filed for group benefits. It was further established that he received all available medical and disability benefits available under the group insurance coverage before filing a workers' compensation

S.W.2d 261, 263 (Tex. 1974) (worker required to show good cause from date of injury to date of filing).

31. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 7 (Vernon Supp. 1986) (establishing employer's duty to file first report).

32. *See id.* art 8307, § 7a.

33. 683 S.W.2d 559 (Tex. App.—Fort Worth 1985, no writ).

34. *Id.* at 565.

35. Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848, 851 (Tex. 1980).

36. 678 S.W.2d 916 (Tex. 1984).

37. *Id.*

38. *Id.* at 916; *see* TEX. R. CIV. P. 169 (subject of request for admission deemed admitted if not answered within period of the rule).

39. 678 S.W.2d at 916.

40. 683 S.W.2d 559 (Tex. App.—Fort Worth 1985, no writ).

41. *Id.* at 565.

claim. The court held that the worker had made an informed election.[42] Practitioners should note that in both *Overstreet* and *Smith* the claim of election of remedies was founded on requests that had been deemed admitted. Since a party will be precluded from offering summary judgment proof contradictory to deemed admissions the failure to respond to what might appear to be innocuous requests concerning collateral benefits can be fatal.

D. Injury

In *National Union Fire Insurance Co. v. Janes*[43] the El Paso court of appeals interpreted the statutory definition of injury to not include damage to artificial appliances.[44] The worker in *Janes* had previously fractured his right femur. The fracture was treated by placing a metal compression plate on the femur at the fracture site. The incident in question occurred while the worker was climbing into his truck, felt a thud in his right leg, and his leg buckled. The compression plate attached to his femur had broken. The broken plate had to be surgically removed and a new compression plate put in its place.

In an opinion that strictly interpreted what constitutes an injury, the court held that the plate was in the same category as a brace or a cast.[45] The court further stated that without an expression of legislative intent recovery should not be allowed for injuries to artificial members.[46]

In *Davis v. Employers Insurance of Wausau*[47] the court addressed the proper interpretation of occupational disease as a type of compensable injury.[48] Occupational disease is statutorily defined in part as "damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities extending over a period of time and arising in the course of employment . . . ."[49] The court noted that this provision reflects the legislature's recognition of this type of injury as one that develops gradually and without a specific cause or incident.[50] In the *Davis* case the worker had low back problems that progressively worsened and ultimately required surgery. Her job involved handling of heavy items, twisting into awkward positions and bending and reaching while trying to maintain balance. A doctor testified that these repetitive traumatic physical activities were a cause of the worker's condition worsening until surgery was required. Although the court stated that an occupational disease must be judged on a case by case basis, it found this evidence sufficient to support the jury's finding of occupational disease.[51]

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42. *Id.*
43. 687 S.W.2d 822 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).
44. *Id.* at 825-26.
45. *Id.* at 826.
46. *Id.*
47. 694 S.W.2d 105 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
48. *Id.* at 107.
49. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1986).
50. 694 S.W.2d at 107.
51. *Id.*

The court also noted that the worker must establish a causal link between repetitious traumatic physical activities occurring on the job and incapacity.[52] The court stated, however, that "the disease must be inherent in that type of employment as compared with employment generally."[53] The court apparently based this conclusion on the Act's statement that "[o]rdinary diseases of life to which the general public is exposed outside of the employment shall not be compensable . . . ."[54] The court's application of the ordinary disease exception to the complainant in this case fails to differentiate between the two distinct types of occupational diseases in the Act. The first type is any disease that arises out of and in the course of employment that includes those conditions commonly considered diseases or injuries in the ordinary sense of the word, such as asbestosis or heat exhaustion.[55] The second type of occupational disease is damage or harm to the physical structure of the body that occurs as a result of repetitious traumatic physical activities extending over a period of time and arising in the course of employment.[56] The second type of compensable injury is an occupational disease only because the legislature so labeled it and is not an ordinary disease of life. This confusion of terminology is often responsible for requirements necessary to establish the first type of occupational disease being erroneously placed upon a worker who has sustained an injury due to repetitious traumatic physical activities.

E. Heart Attacks

Although Texas courts have long recognized heart attacks as being compensable under certain circumstances,[57] the law in this area is still in a developmental stage. A claim for compensation following a heart attack may be predicated upon physical exertion, mental stress traceable to a definite time, place and cause,[58] or upon repetitive traumatic physical activities.[59] A grouping of decisions along these lines allows some reconciliation of the holdings.

In *Blair v. INA*[60] the worker suffered from severe pre-existing coronary disease. The medical testimony indicated the worker was on the verge of having a heart attack at any time, regardless of activity. Shortly before his heart attack the worker coiled up a cable that weighed over 100 pounds and rolled the cable several hundred feet to a scrap pile. The doctor testified that

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. Standard Fire Ins. Co. v. Sullivan, 448 S.W.2d 256, 257 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.) (heart attack compensable when caused by strain or overexertion); Aetna Casualty & Sur. Co. v. Calhoun, 426 S.W.2d 655, 656 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.) (same); Midwestern Ins. Co. v. Wagner, 370 S.W.2d 779, 783 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.) (same).
58. *See infra* notes 60-67 and accompanying text.
59. *See infra* notes 68-73 and accompanying text.
60. 686 S.W.2d 627 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

this was not unusually strenuous activity, but considering the severity of the underlying heart trouble it was the amount of activity that made the heart attack occur at the moment it did.

The court stated that the compensation determination turns upon whether the worker presented evidence of "an undesigned, untoward event involving overexertion or strain traceable to a definite time, place and cause"[61] that was a producing cause of his heart attack.[62] The court held that the jury's finding that the worker's activities did not involve overexertion was against the great weight and preponderance of the evidence.[63] The court's liberal construction of the word overexertion is consistent with the liberal interpretation of other courts, including the Texas Supreme Court, in passing upon what activities are deemed sufficient physical exertion.[64]

In *Kiel v. Texas Employers' Insurance Association*[65] a worker engaged in heavy manual labor for approximately one hour and then was involved in a stressful confrontation with a co-employee. Shortly thereafter he suffered a fatal heart attack. The medical testimony indicated that the physical exertion and the mental stress of the argument incited, accelerated or aggravated an underlying pre-existing condition thereby causing the fatal heart attack. The court observed that within the limited area of heart attack cases the jury does have a recognized area of common knowledge and expertise and is not bound by expert testimony.[66] The court found, however, that since the medical testimony was not rebutted nor weakened on cross-examination the jury's finding of no producing cause was against the great weight and preponderance of the evidence.[67]

The court in *U.S. Fire Insurance Co. v. Rearden*[68] held that a fatal heart attack brought about by the pain and stress caused by an otherwise unre-

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61. *Id.* at 629.

62. *Id.* This holding is applicable only when the worker is not relying upon repetitious traumatic physical activities to establish a compensable heart attack.

63. *Id.*

64. Henderson v. Travelers Ins. Co., 544 S.W.2d 649, 653 (Tex. 1976) (operating hoist caused sufficient strain); Baird v. Texas Employers Ins. Ass'n, 495 S.W.2d 207, 211 (Tex. 1973) (installing electrical wiring caused strain); Sunbelt Ins. Co. v. Childress, 640 S.W.2d 356, 360-61 (Tex. App.—Tyler 1982, no writ) (driving truck was sufficient strain); Western Casualty & Sur. Co. v. Dickie, 609 S.W.2d 874, 876 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (sawing lumber caused strain); Standard Fire Ins. Co. v. Sullivan, 448 S.W.2d 256, 258 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.) (operating tractor caused strain); Midwestern Ins. Co. v. Wagner 370 S.W.2d 779, 783 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.) (climbing in and out of truck caused heart attack).

Two recent cases addressed the issue of judicial construction of overexertion. In Northbrook Nat'l Ins. Co. v. Goodwin, 676 S.W.2d 451 (Tex. App.—Houston [1st Dist.] 1984, no writ) the court found the exertion necessary to turn the steering wheel to avoid a collision while driving a cement truck sufficient to support the jury's verdict in favor of the plaintiff. *Id.* at 453. In Royal Ins. Co. v. Goad, 667 S.W.2d 795 (Tex. App.—Fort Worth 1984, no writ) the court held that a worker walking from his truck to his employer's building entrance and climbing two flights of stairs was sufficient to support the jury's finding of producing cause. *Id.* at 802. Note that the decisions addressing this issue may be reconciled when overexertion is construed as that degree of exertion that is in fact a contributing cause of the heart attack.

65. 679 S.W.2d 656 (Tex. App.—Houston [1st Dist.] 1984, no writ).

66. *Id.* at 659.

67. *Id.*

68. 695 S.W.2d 758 (Tex. App.—El Paso 1985, no writ).

lated compensable injury gave rise to a compensable death claim.[69] This holding is not an extend to and affect holding,[70] but rather a consideration of the heart attack as a part of the original injury. It is significant to note that the worker's heart attack occurred eight months following the original injury.

The court relied uon the reasoning of the Texas Supreme Court in *Stodgill v. Texas Employers' Insurance Association*[71] in which the court found that the stress from an accidental on-the-job injury was the producing cause of a heart attack forty-seven days later.[72] The *Rearden* court reasoned that the causal connection between traumatic aggravation of pre-existing conditions and heart attacks is subject to dispute in the medical profession and that in the case at bar direct medical evidence indicated that the stress and pain from the original injury was a producing cause of the decedent's heart attack.[73]

In *Northbrook National Insurance Co. v. Goodwin*[74] the court considered the term heart attack and concluded that it is not restricted to conditions involving lasting physical damage to the heart muscle, but that the test is whether some form of cardiac injury occurred.[75] In *Goodwin* the worker had suffered a temporary constriction of the heart arteries that caused an angina attack. The court held that he had sustained a injury under the Act.[76]

F. Hernia

One decision of note was handed down with regard to the hernia provisions of the Act.[77] The court in *INA v. Lackey*[78] held that the protrusion requirement of the statute is not applicable in cases involving umbilical hernias.[79] The court further held that protrusion occurring five days after the initial injury would satisfy the statutory requirement of a sudden and immediate appearance after the injury.[80]

G. Concurrent Injuries

In *Rivera v. Texas Employers' Insurance Association*[81] the court addressed the question whether a worker who had sustained concurrent general and specific injuries was entitled to have the jury consider the combined, unsegregated effects of both injuries in assessing incapacity under sections 10 and

69. *Id.* at 762.
70. *See infra* notes 92-94 and accompanying text for a discussion of extend to and affect cases.
71. 582 S.W.2d 102 (Tex. 1979).
72. *Id.* at 105.
73. 695 S.W.2d at 761-62.
74. 676 S.W.2d 451 (Tex. App.—Houston [1st Dist.] 1984, no writ).
75. *Id.* at 453.
76. *Id.*
77. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 12b (Vernon 1967).
78. 688 S.W.2d 689 (Tex. App.—Beaumont 1985, no writ).
79. *Id.* at 690.
80. *Id.*
81. 29 Tex. Sup. Ct. J. 132 (Jan. 11, 1986).

11 of the Act.[82] The carrier relied primarily on two prior supreme court decisions to support its position that the worker's loss in wage earning capacity was solely attributable to his leg injury. The first decision, *Hargrove v. Trinity Universal Insurance Co.*,[83] established the rule that when the worker suffers a specific injury and a concurrent general injury, the worker can recover compensation only for the injury that provides the longest period of incapacity or greatest benefits.[84] The second decision, *Texas General Indemnity Co. v. Scott*,[85] held that the worker had the burden to plead, prove and secure jury findings supporting recovery under each theory before he could elect to recover under one of the two theories.[86] The *Rivera* Court held that the carrier's reliance on these two authorities was misplaced.[87] The court noted that *Hargrove* simply stood for the proposition that a trial court cannot add the compensation awarded for a general injury together with the compensation awarded for a specific injury and enter a judgment in excess of the amount recoverable for either injury alone.[88] The court further explained that *Scott* was predicated upon the trial court's error in failing to submit a sole cause issue when the incapacity issues submitted did not allow for determination of whether the jury's finding of incapacity was based upon the effects of the claimant's general injury, specific injury, or both.[89] The court in *Scott* did not base its decision upon any error in combining the effects of the concurrent injuries.[90] The *Rivera* court held that when a worker sustains a concurrent general and specific injury, the jury may consider the combined, unsegregated effects of both injuries in assessing incapacity under sections 10 and 11 of the Act.[91]

H. Extend to and Affect

In *Southern Farm Bureau Casualty Insurance Co. v. Aguirre*[92] a worker sustained the traumatic amputation of a portion of his second, third and fourth fingers of his right hand. Following considerable treatment, the worker continued to experience intense pain, swelling, coldness, and poor circulation in his right hand. Doctors diagnosed the worker as having a condition known as sympathetic dystrophies. The worker underwent additional surgeries in an effort to relieve this condition. At the time of trial the worker continued to experience pain, swelling, coldness and poor circulation in his right hand. He also had trouble sleeping, had very little strength in his

82. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10, 11 (Vernon Supp. 1986) (establishing benefits associated with partial and total incapacity).
83. 256 S.W.2d 73 (Tex. 1953).
84. *Id.* at 75.
85. 253 S.W.2d 651 (Tex. 1953).
86. *Id.* at 653-54.
87. 29 Tex. Sup. Ct. J. at 133-34.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. 690 S.W.2d 672 (Tex. App.—Waco 1985, writ ref'd n.r.e.).

right hand, had very little use of his right hand and arm, had no feeling under his arm and did not perspire on the right side of his face and arm.

The carrier argued that the injury was confined to the right hand or fingers and that pain alone extending from an injury to a specific member of the body does not make the injury a general one. The carrier also argued that the worker's inability to use the fingers on his right hand because of pain and swelling was the sole cause of his incapacity.

The jury found that the specific injury to the worker's fingers extended to and affected his body generally and that such extension was a producing cause of total incapacity.[93] The *Aguirre* court affirmed the judgment, stating in a well reasoned opinion that:

> Although symptons of this extension may be manifested primarily in appellee's hand and fingers, this does not alter the fact that the original injury did extend to and affect the sympathetic nervous system and that the symptoms result from this extension. The pain produced by the extension caused an impairment of appellee's general ability to work resulting in total and permanent incapacity.[94]

I. Course and Scope

In order to establish a compensable injury a worker must show that the injury occurred in the furtherance of the affairs or business of his employer and that the injury was of the kind and character that originated in or related to the employer's business.[95] In *Ashley v. Home Indemnity Co.*[96] the worker was a truck driver whose duties involved delivering produce between Texas and New Mexico. While making such a delivery and traveling along a route normally traveled by himself and other employees, the worker inexplicably reversed his direction and traveled approximately eighty miles in the wrong direction before his truck overturned and he was killed. The jury determined that the death occurred in the course of employment.[97] The trial court granted judgment notwithstanding the verdict in favor of the carrier.[98] The court of appeals reversed the trial court and found that the evidence was sufficient to support the jury's verdict.[99]

The *Ashley* court did not decide the more interesting question. Assuming that the jury had found the death was not in the course of employment, would the trial court have erred in refusing to grant judgment notwithstanding the verdict in favor of the worker's beneficiaries? As noted by the court, the facts presented would generally raise a presumption that the worker was acting in the scope of his employment when the injury and death oc-

93. *Id.* at 677.
94. *Id.* at 678.
95. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).
96. 685 S.W.2d 780 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.).
97. *Id.* at 781.
98. *Id.*
99. *Id.* at 783.

curred.[100] This presumption compels a conclusion that the conduct fell within the scope of employment as a matter of law in the absence of positive evidence to the contrary.[101] Only if positive evidence to the contrary was introduced would the presumption vanish, and it would then be the worker's burden to prove that the conduct was within the course of employment by a preponderance of the evidence.[102] There was no positive evidence to the contrary, but since the same evidence that would raise the presumption would also support the jury's verdict, the court did not address this question.

As a general rule, an injury received while traveling to and from work is not compensable because such travel is not within the course of employment.[103] Exceptions to the general rule exist when the means of transportation is furnished as a part of a worker's contract of employment, or is paid for by the employer, is under the control of the employer, or when the employee is directed in his employment to proceed from one place to another place.[104]

In *Callisburg Independent School District v. Favors*[105] a worker was fatally injured in an automobile collision while she was traveling between her home and the school in which she was teaching a home economics summer program. She had stopped a short distince from her home to buy materials for her students' use during the class. The store in which the teacher purchased the materials was on her normal route to and from school. The *Callisburg* court observed that the worker's injury in route to her place of employment was not compensable under the general rule.[106] The court then considered whether the injury was compensable under any of the exceptions. The court held that the worker would have been making the trip even had she not stopped to purchase supplies, since the injury occurred on her regular route to work.[107] The injury was thus non-compensable.[108] It would appear that the *Callisburg* court reasoned that an employee cannot combine his regular travel to or from work with the performance of a service in the furtherance of his employer's business and still come within the exception.[109]

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100. *Id.* at 782; *see* Lumbermen's Lloyds v. Jones, 268 S.W.2d 909 (Tex. 1954) (evidence raised presumption that worker was acting within scope of employment).

101. 685 S.W.2d at 782.

102. *Id.*

103. *See* Janak v. Texas Employers Ins. Ass'n, 381 S.W.2d 176, 178 (Tex. 1964).

104. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967) (setting forth exceptions).

105. 695 S.W.2d 370 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

106. *Id.* at 372.

107. *Id.*

108. *Id.*

109. In American Gen. Ins. v. Coleman, 303 S.W.2d 370 (Tex. 1957) the supreme court held that travel may be compensable when the means of transportation was furnished by the employer, when the employee was reimbursed for his travel expense by the employer as a part of this contract of employment, when the employee has undertaken a special mission at his employer's direction, or when the employee performed a service in furtherance of the employer's business with the express or implied approval of his employer. *Id.* at 374. This decision was before the enactment of § 1b of article 8309. The *Callisburg* court, however, as well as decisions cited therein, continued to refer to the language of the *Coleman* court. 695 S.W.2d at 372.

In *Smith v. Dallas County Hospital District*[110] the Dallas court of appeals considered whether an employee who was on call and was injured in an automobile collision while traveling to work was injured within the course of employment. Each time the worker performed on call service she was paid an extra hour's pay to cover her travel time to and from work. The court, in affirming a summary judgment granted by the trial court in favor of the employer, adopted a restrictive interpretation of section 16 of the Act.[111] The court held that the employee's transportation was not furnished or controlled by the employer and that she had not literally been directed from one place to another by her employer.[112] The court further held that the extra hour payment was not for actual travel time, but was rather a payment for nonproductive time during which she did not perform any duties for her employer.[113]

The dissent argued that the employee's on call travel directly facilitated the employer's ability to provide its services.[114] Additionally, the employer's practice of paying for such travel time indicated the employer's consideration of such travel time as being in the course of employment.[115] Finally, the dissent noted that increased trips due to the on call system exposed the worker to risks greater than those borne by the general traveling public.[116] Since this was a review of a summary judgment, the dissent concluded that at a very minimum a fact issue as to course of employment had been raised.[117]

In *INA v. Bryant*[118] a worker who had been terminated by her employer was injured when returning to the employer's premises to pick up her final paycheck. The trial court granted a summary judgment against the employee that was reversed and remanded by the Waco court of appeals. The supreme court, in affirming the court of appeals' decision, stated that if the employer's practice required the employee to return to pick up her final pay, her injury would be within the course and scope of employment.[119] The court held that if the employee reasonably believed she was required to return to her place of employment to pick up her final pay, then her injury would be incidental to her employment and incurred in the furtherance of the employer's affairs.[120] The court's holding encompasses the reasonable subjective belief of the employee in determining whether an injury is compensable.[121]

The Act specifically excludes consideration of certain injuries as having

110. 687 S.W.2d 69 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).
111. TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967).
112. 687 S.W.2d at 72.
113. *Id.*
114. *Id.* at 74 (Akin, J., dissenting).
115. *Id.*
116. *Id.* at 75.
117. *Id.*
118. 686 S.W.2d 614 (Tex. 1985).
119. *Id.* at 615.
120. *Id.*
121. *Id.*

been sustained in the course of employment, such as an injury received while in a state of intoxication.[122] In *Aetna Casualty and Surety Co. v. Silas*[123] the Beaumont court of appeals held that state of intoxication was to be given its commonly understood meaning as a condition resulting from the use of alcoholic liquor.[124] The supreme court refused to grant an application for writ of error, but issued a per curiam opinion in which it stated that the refusal should not be considered as approval of the lower court's holding that state of intoxication results only from the use of alcoholic liquor.[125]

In *Texas General Indemnity Co. v. Jackson*[126] the Tyler court of appeals noted the *Silas* per curiam opinion and through the use of dicta broadened the definition of intoxication to include the voluntary introduction of any substance into a person's body that results in a loss of the normal use of mental or physical faculties.[127] The court affirmed the trial court's refusal to submit a state of intoxication instruction since the only evidence was that the worker was not mentally alert, in a daze, and similar descriptions.[128] The court reiterated the rule concerning circumstantial evidence[129] and concluded that the above testimony constituted no evidence that the worker was intoxicated from voluntary use of alcohol or drugs.[130]

J. Total Incapacity

In *San Antonio v. Miranda*[131] the doctor assigned the worker a twenty percent disability rating and placed some restrictions on his manual laboring ability. During the time he worked following his injury he earned as much as before his injury. The worker was forty-eight years of age with a fourth grade education and a twenty-six year work history with his employer. The court upheld the jury's finding of total and permanent incapacity, noting that economic loss due to an injury is not an element necessary to show total incapacity.[132] The fact that a worker continues to work and earn as much or even more money following the injury is simply one factor to be weighed by the jury in applying the Act's definition of total incapacity to the evidence.[133] The court stated that "[t]he definition of total incapacity does not require that an injured person be reduced to a condition of complete and

122. TEX. REV. CIV. STAT. ANN. art 8309, § 1 (Vernon 1967).
123. 631 S.W.2d 551 (Tex. App.—Beaumont 1982, writ ref'd n.r.e.).
124. *Id.* at 553.
125. 635 S.W.2d 425 (Tex. 1982).
126. 683 S.W.2d 879 (Tex. App.—Tyler 1984, no writ).
127. *Id.* at 881.
128. *Id.*
129. "To establish a fact by circumstantial evidence the circumstances relied upon must have probative force sufficient to constitute a basis of legal inference; it is not enough that they raise a mere surmise or suspicion of the existence of the fact or permit a purely speculative conclusion." Lumbermen's Underwriters Alliance v. Bell, 594 S.W.2d 569, 570-71 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).
130. 683 S.W.2d at 881.
131. 683 S.W.2d 517 (Tex. App.—San Antonio 1984, no writ); *see also supra* notes 19-30 and accompanying text (a discussion of other aspects of *Miranda*).
132. *Id.* at 520.
133. *Id.*

abject helplessness causing an absolute disability to perform any kind of labor."[134]

K. Wage Rate

The injured worker bears the burden of establishing an average weekly wage under one of three methods set forth by the Act.[135] Each method embraces an arbitrary standard to establish a basis from which an award can be calculated. If the worker has worked 210 days or more in the same or similar employment during the year immediately before his injury, then his own wages are the standard.[136] If he has not, but other employees of the same class have worked at least 210 days in similar employment in the same or neighboring place during the year immediately prior to the worker's injury, then such other employees' wages may be used to determine wage rate.[137] If neither of these two methods are applicable, then the standard is a wage rate that is just and fair to both parties.[138] These methods are mutually exclusive. The worker cannot resort to the second method to establish wage rate until the applicability of the first method is eliminated from the case.[139] The worker cannot resort to the just and fair method without eliminating the applicability of the first and second methods.[140] While this statutory scheme appears simple, its application in practice creates considerable procedural difficulties.

In *Holliman v. Leander Independent School District*[141] the Austin court of appeals grappled with the proper application of this scheme. The worker was a cafeteria manager at a school during the school year. She did not work 210 days during the year immediately preceding her injury. The worker introduced evidence of another employee of the same class who had worked for 210 days immediately preceding the worker's date of injury as a cafeteria manager at a different school. The jury found that the worker sustained permanent partial incapacity but failed to find that there was another worker of the same class who worked at least 210 days of the year immediately preceding the injury.[142] The jury thus made no finding of a wage rate prior to the date of injury.[143]

The court held that the jury's finding of permanent partial incapacity and failure to find a wage rate during the twelve months immediately prior to the date of injury resulted in an irreconcilable conflict.[144] The case was therefore reversed and remanded for a new trial.[145] The procedural question then

134. *Id.*
135. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. 679 S.W.2d 92 (Tex. App.—Austin 1984, no writ).
142. *Id.* at 95.
143. *Id.*
144. *Id.* at 96.
145. *Id.*

presented was how to submit proper issues to the jury when the worker seeks to establish wage rate through the wages of another employee without creating an irreconcilable conflict should the jury fail to find that there was another such employee.

The majority opinion in *Holliman* suggested that the worker submit the just and fair issue conditionally when the worker seeks to rely on the wages of another employee.[146] While this submission could avoid a conflict in the jury's findings, it would be directly contrary to supreme court rulings that the worker cannot resort to the just and fair standard until he has discharged his burden of eliminating the first and second standards from the case.[147]

Justice Powers in a concurring opinion discussed the principle of allowing the worker to plead and prove alternatively that the just and fair standard is applicable if the second is inapplicable.[148] Justice Powers noted that this solution would require some adjustments by the legislature or the courts to the elimination rule presently imposed on the worker.[149] The concurring opinion suggests another potential solution, that of placing the burden of eliminating the second standard upon the carrier when the worker chooses to proceed on the theory that the second standard is applicable.[150]

The dissent in *Holliman* argued that wage rate issue submission should remain the same in the circumstances under discussion.[151] Additionally the worker should have the simultaneous burden of both establishing and eliminating the second standard through the offer of contradictory evidence.[152] If the worker chooses not to assume this impossible burden and simply submits an affirmative issue as to the second standard, and the jury fails to find such a similar employee exists, then the worker must face a retrial of his case without having had an opportunity to resort to the third standard to establish wage rate.[153]

L. Court's Charge

Texas Pattern Jury Charges contains an alternative issue and instruction concerning course of employment that may be submitted in heart attack cases.[154] The supreme court in *Nicholes v. Texas Employers' Insurance Association*[155] specifically approved the instruction as a proper one for the jury

146. *Id.* at 95.
147. *See* Aetna Ins. Co. v. Giddens, 476 S.W.2d 664, 665 (Tex. 1972); Texas Employers Ins. Ass'n v. Ford, 271 S.W.2d 397, 399 (Tex. 1954).
148. 679 S.W.2d at 101 (Powers, J., concurring).
149. *Id.* at 105.
150. *Id.* at 106.
151. *Id.* at 96 (Shannon, J., dissenting).
152. *Id.*
153. *Id.* at 97-98.
154. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, PJC 29.04 (1970) sets forth the following issue: "Do you find from a preponderance of the evidence that he had such heart attack in the course of his employment by ABC Company?" The following instruction is submitted in connection with such issue: "A heart attack is in the course of employment if it is produced or precipitated by an employee's work or the conditions of his employment. Otherwise a heart attack is not in the course of employment, even if it occurs on the job."
155. 692 S.W.2d 57 (Tex. 1985).

with regard to a heart attack occurring in the course of employment.[156]

In *Jackson v. United States Fidelity & Guaranty Co.*[157] the supreme court considered a case involving the calculation of contribution for a prior compensable specific injury.[158] The issues submitted to the jury were those contained in *Texas Pattern Jury Charges*.[159] The jury found the worker had sustained a twenty-five percent loss of use of his left hand and further found that prior compensable injuries had contributed twelve and one-half percent to his incapacity. The question was whether the jury meant that twelve and one-half percent of the twenty-five percent incapacity was contributed by prior injuries, therefore allowing a recovery of twelve and one-half percent incapacity, or whether the jury meant that the prior injury contributed twelve and one-half percent ot the twenty-five percent incapacity thereby allowing a recovery of 21.875 percent incapacity.[160] The trial court entered a judgment of twelve and one-half percent incapacity.[161]

The supreme court noted that although the issues were taken from the pattern jury charges, they had never before been addressed specifically in a reported case.[162] The court held that the issues produced an ambiguous fact finding and that the appellate courts must interpret findings to support the judgment.[163] The trial court's interpretation was therefore affirmed in a 6-3 decision. The majority opinion in *Jackson* does not provide an answer on how to charge the jury so as to resolve the ambiguity found to have been created by the issues in question.

A vigorous dissent argued that the pattern jury charge issues are gramatically correct and unambiguous.[164] The dissent asserted that the jury was asked to find the percentage (zero to one hundred) that the prior injury contributed to the twenty-five percent incapacity.[165] Justice Kilgarlin argued that the court should reverse and render judgment for 21.875 percent incapacity.[166]

In *Home Insurance Co. v. Gillum*[167] the worker sought to establish total incapacity resulting in part from medical treatment for his initial injury. The carrier complained about an instruction and special issue submitted to the jury because they did not require the jury to find that the aggravating medical treatment was reasonable or necessary as a result of the initial in-

156. *Id.* at 57-58.
157. 689 S.W.2d 408 (Tex. 1985).
158. *Id.* at 409.
159. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, PJC 25.05 (1970) contains the following issue: "Find from a preponderance of the evidence the percentage, if any, that Plaintiff's injury of October 3, 1969, has contributed to the incapacity found by you." The instruction "Answer by giving a percentage, if any" follows the issue.
160. 689 S.W.2d at 410.
161. *Id.* at 410-11.
162. *Id.* at 411.
163. *Id.* at 412.
164. *Id.* at 412 (Kilgarlin, J., dissenting).
165. *Id.* at 414.
166. *Id.* at 415.
167. 680 S.W.2d 844 (Tex. App.—Corpus Christi 1984, no writ).

jury.[168] The court approved the instruction and stated that no authority appears for the imposition of the reasonable and necessary requirement when the medical treatment is instituted to cure and relieve an employee from the effects of his injury.[169] The court further held that the carrier is not entitled to defensive issues relating to injurious practices when it fails to establish that the worker was advised to refrain from any alleged injurious practices and that his failure to so refrain would imperil or retard his recovery.[170]

A special issue and instruction for the submission of an occupational disease claim was approved by the court in *Davis v. Insurance of Wausau*.[171] The special issue tracked the language of the Act in defining occupational disease and was followed by a submission of the full definition of injury, which includes occupational disease.[172] This form of submission appears to aid the jury in reaching their decision without the undue confusion often associated with the submission of an occupational disease claim.

The supreme court addressed the proper submission of concurrent general and specific injuries in *Rivera v. Texas Employers' Insurance Association*.[173] The worker sought to have the jury consider the combined, unsegregated effects of a concurrent general and specific injury in assessing incapacity under sections 10 and 11 of the Act.[174] He further sought to have the jury consider loss of use of the specific member alone under section 12 of the

168. The trial court submitted the following issue: "Was the injury a producing cause of any total incapacity?" In connection with such issue the jury was instructed that when total incapacity results from medical treatment instituted to cure and relieve an employee from the effects of his injury, the total incapacity is regarded as having been caused by the initial injury since it is an aggravation regarded as a probable consequence and natural result likely to flow from the initial injury. *Id.* at 850.

169. *Id.* at 851.

170. *Id.* at 848.

171. 694 S.W.2d 105 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

172. The trial court submitted the following special issue:

> Do you find from a preponderance of the evidence that Brenda D. Davis sustained damage or harm to the physical structure of her body occurring as a result of repetitious physical traumatic activities extending over a period of time and arising in the course of her employment from Delta Airlines?

The trial court submitted the following definition in connection with such issue:

> "Injury" means damage or harm to the physical structure of the body and such diseases or infections that naturally result therefrom, or the incitement, acceleration, or aggravation of any disease, infirmity, or condition, previously or subsequently existing, by reason of such damage or harm. "Injury" also means and includes "Occupational Diseases" [meaning] any disease arising out of and in the course of employment which causes damage or harm to the physical structure of the body and such other diseases or infections as naturally result therefrom. An "Occupational Disease" shall also include damage or harm to the physical structure of the body occurring as a result of repetitious physical traumatic activities extending over a period of time and arising in the course of employment; provided, that the date of the cumulative injury shall be the date disability was caused thereby. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident to an "Occupational Disease" or "Injury" as defined.

Id. at 108.

173. 29 Tex. Sup. Ct. J. 132 (Jan. 11, 1986).

174. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10, 11 (Vernon 1967); *see supra* note 81.

Act.[175] The court approved submission to the jury of a series of issues that allows the jury to first determine whether a worker's injury includes both a general and specific injury and then consider the combined unsegregated effects of the general and specific injury in determining incapacity.[176]

The court also determined the proper method for submitting a carrier's contention that a specific member caused the worker's incapacity. The proper method would be to provide a conditioning instruction in connection with the incapacity issue.[177] Finally, the court held that after having assessed incapacity based upon the combined effects of the general and specific injury, the jury may alternatively consider only the effects of the specific injury in assessing loss of use.[178] This rule allows the court properly to enter judgment in favor of the worker for the greatest benefits recoverable.[179]

M. Wrongful Discharge

The Act provides in essence that an employer may not terminate an employee for pursuing a claim under the Act.[180] Should such a termination occur the employee is entitled to damages and reinstatement.[181] A worker pursuing a claim under this section of the Act has the burden of establishing that the employer's decision was due to the worker having pursued a claim.[182] In *Luna v. Daniel International Corp.*[183] a worker sought to show that he had been wrongfully discharged for having sought medical treatment for a work related injury. The carrier filed a motion for summary judgment that alleged that the worker had failed as a matter of law to establish a causal connection between his discharge from employment and his claim for benefits under the Act. The only summary judgment evidence presented to the trial court were the depositions of the worker and of his foreman.

The worker testified that his foreman discouraged him from going to the doctor. The worker further testified that the foreman seemed to be in a bad mood and was mad about the worker's doctor visit because the foreman did not want to do the paperwork or inform the company of the injury. When

175. TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (Vernon Supp. 1986) (setting benefits for specific loss categories).

176. The trial court submitted a special issue asking the jury to determine whether the worker's injury included his nose, face, or head, or whether the injury was confined to his right leg. 29 Tex. Sup. Ct. J. at 133. Following the issue, the jury was asked to find whether such injury was a producing cause of total incapacity, the beginning and ending date of any such total incapacity, whether such injury was a producing cause of partial incapacity, the beginning and ending date of such partial incapacity, and Rivera's wage earning capacity during partial incapacity. *Id.* The trial court further submitted a series of issues to the jury that allowed them to make findings as to the general and specific injuries independent of each other. *Id.*

177. *Id.* at 134.

178. *Id.* at 133.

179. *Id.*

180. TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (Vernon Supp. 1986).

181. *Id.* § 2.

182. *Id.*

183. 683 S.W.2d 800 (Tex. App.—Corpus Christi 1984, no writ).

the worker returned from the doctor's office the foreman discharged him for not returning quickly.

The worker's foreman testified that the worker had been allowed to leave the job site during the morning to see the doctor but that he did not return until the following day. He testified that he discharged the worker because he had failed to return to work after going to see the doctor, and because he was going to have to lay people off the same day anyway.

The trial court granted the carrier's motion for summary judgment. The appellate court reversed and remanded the case for a trial on the merits, holding that the worker's deposition testimony regarding his foreman's attitude toward his doctor visits was sufficient to raise a fact issue as to the causal connection between the worker's discharge and his claim for benefits under the Act.[184]

N. Attorney's Fees

In cases for death benefits in which the carrier fails to admit liability prior to the final award of the Board or disputes liability subsequent to the award, the Act authorizes the court to award lump sum attorneys' fees not to exceed twenty-five percent of the beneficiary's recovery.[185] The Act further provides that upon settlement of a case in which the carrier admits liability for the death but a dispute exists as to the proper beneficiaries, such attorney's fee shall be paid periodically and not lump sum.[186]

In *Taylor v. North River Insurance Co.*[187] the carrier admitted that the worker had received a fatal injury in the course and scope of his employment prior to trial, but continued to dispute the proper beneficiary. The court held that when litigation of a death benefits claim is forced by the carrier the Act authorizes a lump sum award of attorneys' fees.[188] This decision stands for the proposition that the Act authorizes lump sum attorneys' fees if liability on all issues except proper beneficiaries is not finally admitted prior to the Board's award.[189]

In *Royal Insurance Co. v. Goad*[190] a suit for workers' compensation death benefits in which the carrier disputed liability, the trial court rendered a judgment in favor of the worker.[191] The judgment included an award of lump sum attorneys' fees based upon the widow's pension table, which takes into consideration the contingencies of both death and remarriage.[192] In determining attorneys' fees in compensation death cases appellate courts

184. *Id.* at 803.
185. TEX. REV. CIV. STAT. ANN. art 8306, § 8(d) (Vernon Supp. 1986).
186. *Id.*
187. 693 S.W.2d 376 (Tex. 1985).
188. *Id.* at 377.
189. *Id.* at 377; *see* Stott v. Texas Employers Ins. Ass'n, 645 S.W.2d 778, 780 (Tex. 1983) (attorney entitled to lump sum payment); TEX. REV. CIV. STAT. ANN. art. 8306, §§ 7(d), 8(d) (Vernon Supp. 1986) (providing for awards of attorneys' fees).
190. 677 S.W.2d 795 (Tex. App.—Fort Worth 1984, no writ).
191. *Id.* at 802.
192. *Id.* For a discussion of the use of the widow's pension table, see Texas Employers Ins. Ass'n v. Dryden, 612 S.W.2d 223, 225 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

have routinely allowed use of the widow's pension table.[193] The *Goad* court held that the manner of computation of attorneys' fees was within the trial court's discretion and that use of the widow's pension table by the trial court did not constitute an abuse of discretion.[194]

The Act provides that if a worker is injured under circumstances that give rise to a cause of action against some person other than the employer, the employee may proceed against that person, pursue a claim for compensation under the Act, or both.[195] If the worker pursues compensation under the Act, the carrier is subrogated to the worker's rights against the third party.[196] At the conclusion of the third party action the Act entitles the carrier to reimbursement for past benefits and medical expenses paid.[197] The Act treats any recovery in excess of that amount as a credit against future benefits for compensation and medical benefit payments for which the carrier would otherwise be liable.[198]

These benefits are usually received by the carrier as a result of the worker's attorney's efforts in pursuing the worker's claim against the third party. Since the carrier has usually not agreed to compensate the worker's attorney for his efforts, and since the carrier is sometimes represented by their own attorney, the Act contains provisions allowing the court to award attorney's fees to the worker's attorney for his efforts in recovering the carrier's subrogation interest.[199] The fee is paid out of the carrier's portion of the recovery and cannot exceed one-third of its interest.[200]

In *Metropolitan Transit Authority v. Plessner*[201] several injured workers recovered under the Act and then pursued third party claims. The workers settled the third party claims prior to the filing of a lawsuit. The attorneys representing the injured workers withheld one-third of the carrier's subrogation interest as attorneys' fees. The carrier filed suit for declaratory judgment[202] seeking a declaration that the workers' attorneys were not entitled to attorneys' fees under the Act. The carrier's primary argument was that the provisions of the Act were inapplicable when a lawsuit had not been filed.

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193. *See* Texas Employers Ins. Ass'n v. Dryden, 612 S.W.2d 223, 225 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.); Texas Gen. Indem. Co. v. Daugharty, 606 S.W.2d 725, 728-29 (Tex. Civ. App.—Beaumont 1980, no writ); Texas Employers Ins. Ass'n v. Clapper, 605 S.W.2d 938, 943 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); Texas Employers Ins. Ass'n v. Critz, 604 S.W.2d 479, 484-85 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); Texas Employers Ins. Ass'n v. Miller, 596 S.W.2d 621, 627 (Tex. Civ. App.—Waco 1980, no writ); Texas Employers Ins. Ass'n v. Flores, 564 S.W.2d 831, 832-34 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Liberty Mut. Ins. Co. v. Ramos, 543 S.W.2d 392, 392-93 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

194. 677 S.W.2d at 802.

195. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a(a) (Vernon Supp. 1986).

196. *Id.*

197. *Id.* § 6a(c).

198. *Id.*

199. *Id.* § 6a(a), (b).

200. *Id.* § 6a(b).

201. 682 S.W.2d 650 (Tex. App.—Houston [1st Dist.] 1984, no writ).

202. TEX. REV. CIV. STAT. ANN. art. 2524-1 (Vernon 1965) (Uniform Declaratory Judgment Act).

The *Plessner* court observed that the purpose of section 6a of the Act was to guarantee compensation to attorneys who actually performed the necessary work in obtaining recovery of a carrier's subrogation interest.[203] The court held that section 6a is applicable whether the subrogated interest is obtained through settlement prior to or subsequent to filing of suit.[204] The court noted that to hold otherwise would result in an unreasonable interpretation that would require workers' attorneys to immediately file lawsuits on claims involving a subrogation interest or to perform work on a claim for which they would not be compensated.[205]

In *Chambers v. Texas Employers' Insurance Association*[206] the court's task was to determine the true value of the carrier's subrogation interest for purposes of awarding attorney's fees to the worker's attorney.[207] At the time of trial of the third party case the carrier claimed a subrogation interest in the amount of $35,222. During trial the worker established that his future medical expenses would be $30,000. The amount of recovery from the third party claim was sufficient to relieve the carrier from having to pay those future medical expenses.[208]

The court noted that in awarding attorney's fees to the worker's attorney for obtaining the carrier's subrogated interest, the benefit accruing to the carrier must be taken into account.[209] The court further observed that the true benefit accruing to the carrier included both the amounts previously paid by the carrier and the liability for future payments that the carrier has been relieved from paying.[210] The court of appeals held that the trial court should have included the future medical payments that the carrier had been relieved of paying in awarding attorney's fees under the Act.[211]

O. Employer's Liability

Employers are not required to carry worker's compensation coverage in the state of Texas. Generally, however, those employers who do carry workers' compensation are protected from common law liability for damages sustained by their employees.[212] Employers who choose not to carry workers' compensation are known as non-subscribers and are subject to common law actions for damages brought by their employees and their common law defenses to such actions are removed by the Act.[213]

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203. 682 S.W.2d at 653.
204. *Id.*
205. *Id.*
206. 693 S.W.2d 648 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).
207. *Id.* at 648.
208. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 6a(c) (Vernon Supp. 1986) (carrier reimbursed from recovery from third parties).
209. 693 S.W.2d at 649.
210. *Id.* at 650.
211. *Id.*
212. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967) and §§ 3a, 5 (Vernon Supp. 1986).
213. *Id.* art 8306, §§ 1, 4.

In *Holiday Hills Retirement and Nursing Center, Inc., v. Yeldell*[214] a non-subscriber sought to obtain the benefits of the comparative negligence statute.[215] The non-subscriber argued that the Act specifies those common law defenses that are removed and comparative negligence is not one of those specified. The court, in a case of first impression, noted that a plain reading of the Act makes it clear that any negligence of the worker that is not the sole proximate cause of the injury will not accrue to the benefit of a non-subscriber in defending a suit by the worker.[216] The only finding by a jury in answer to a comparative negligence issue that would benefit the non-subscriber would be a finding that the worker was 100 percent negligent.[217] This defensive theory is properly submitted to the jury by the inclusion of a sole proximate cause instruction in the court's charge.[218] The court held that comparative negligence is thus not applicable in non-subscriber cases and should not be submitted to the jury.[219]

In *Town and Country Mobile Homes, Inc. v. Vilyeu*[220] a worker was injured while attempting to enter a mobile home that was under construction. The employer, a non-subscriber, produced evidence showing that it had provided its employees with a safe method of entering the trailers under construction. The employer contended that it had no duty to an injured employee who chose to use an alternative unsafe means of entering the trailer. The worker presented evidence that the employer was aware of and permitted the method of entering the trailer used by the worker. The court observed that to allow the employer's no duty contention to succeed under these facts would be the same as allowing the employer to rely upon contributory negligence.[221] The court held that as a matter of law, when an employer knows that its employees are using unsafe methods to perform their tasks, it is the duty of the employer to eliminate those unsafe methods.[222]

Since workers' compensation coverage is optional, the Act sets forth certain notice provisions that must be complied with when an employer elects to provide workers' compensation coverage. The employer must provide its employees with notice that it has elected to carry workers' compensation insurance.[223] The employer's compensation insurance carrier is also required to notify the Industrial Accident Board that it is providing compensa-

214. 686 S.W.2d 770 (Tex. App.—Fort Worth 1985), *rev'd on other grounds*, 29 Tex. Sup. Ct. J. 103 (Dec. 14, 1985).

215. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1986).

216. 686 S.W.2d at 775.

217. *Id.*

218. The trial court instructed the jury as follows:

> There may be more than one proximate cause of an event, but there can be only one sole proximate cause. If an act or omission of any person was the sole proximate cause of an occurrence, then no act or omission of any other person could have been a proximate cause.

Id.

219. *Id.*

220. 694 S.W.2d 651 (Tex. App.—Fort Worth 1985, no writ).

221. *Id.* at 653.

222. *Id.* at 655.

223. TEX. REV. CIV. STAT. ANN. art. 8308, §§ 19, 20 (Vernon 1967).

tion coverage for the employer.[224] The carrier's filing with the Industrial Accident Board is constructive notice to the employees that coverage is available.[225]

In *Ferguson v. Hospital Corporation International, Ltd.*[226] the employer failed to comply with the notice provisions of the Act. The Fifth Circuit reviewed the history and purpose of the notice requirements under the Act, which include providing a constitutional basis for depriving injured workers of their common law remedies.[227] The court concluded that compliance with the notice provisions of the Act was critical to determining the employer's intention to be a subscriber under the Act.[228] Additionally, failure to comply with the provisions bars the employer from claiming subscriber status and thereby limits injured workers to the exclusive remedy of recovering workers' compensation benefits.[229] The court further held that an attempt by the employer to comply with the notice provisions after an injury had occurred would be ineffective since this would allow the employer to remain silent concerning its compensation coverage until after it was able to determine its potential liabiltiy following a worker's injury.[230]

A worker who is intentionally injured by his employer may pursue common law remedies even though his employer is a subscriber to the Act.[231] In *Reed Tool Co. v. Copelin*[232] the Texas Supreme Court addressed the question whether an employer who intentionally maintains an unsafe work place may be held to have intentionally injured its employee and thereby be subjected to common law liability. The court stated that the crucial question was whether the employer had a specific intent to inflict injury.[233] The court held that the intentional failure to furnish a safe place to work does not provide a basis for a claim of intentional injury unless the employer believed his conduct was substantially certain to cause the injury.[234]

In third party negligence claims by injured workers the supreme court has refused to allow courts to consider the employer's negligence in order to reduce the third party defendant's liability, since the defendant's claim for contribution is derivative to the injured worker's right to recover from his employer against whom contribution is sought under article 2212a.[235] In *Foley Co. v. Cox*[236] the court of appeals extended the reasoning of the *Varela* opinion to third party cases in which strictly liable defendants seek to appor-

224. TEX. REV. CIV. STAT. ANN. art. 8308, § 18a(a) (Vernon Supp. 1986).
225. *Id.* art. 8306, § 3c (Vernon 1967).
226. 769 F.2d 268 (5th Cir. 1985).
227. *Id.* at 270-72.
228. *Id.* at 273.
229. *Id.*
230. *Id.* at 274.
231. *See* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (Act does not exempt employer from common law liabilities for intentional act).
232. 689 S.W.2d 404 (Tex. 1985).
233. *Id.* at 406.
234. *Id.* at 408.
235. Varela v. American Petrofina Co. of Tex. Inc., 658 S.W.2d 561, 562 (Tex. 1983); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1986).
236. 679 S.W.2d 58 (Tex. App.—Houston [14th Dist.] 1984, no writ).

tion damages according to article 2212.[237]

237. *Id.* at 62.