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Workers' Compensation

Tom Needham

WORKERS' COMPENSATION

by

*Tom Needham**

I. GOOD CAUSE

STRICT compliance with the requirements of the Workers' Compensation Act (the Act) that a claimant give notice to his employer within thirty days after an injury or first manifestation of an occupational disease and that he file a claim with the Industrial Accident Board (the Board) within one year may be waived for good cause in meritorious cases.[1] The Act does not define good cause, but the accepted standard is whether the employee exercised the same degree of diligence as that of an ordinary prudent person similarly situated.[2] In *Applegate v. Home Indemnity Co.*[3] the jury found that an employee failed to give notice of his injury within thirty days and that the employee believed that his injury was not job-related. The jury further determined that the employee's belief was not good cause for the delay. Following the entry of a take-nothing judgment, the employee appealed. One point of error was that the jury's failure to find good cause was in conflict with the jury's finding that the employee believed his injury was not job related.[4] The *Applegate* court affirmed the trial court's judgment, holding that no conflict existed.[5] Since good cause is an objective test, the jury could have reasonably inferred that a prudent person would have realized that his injury was job related before the statutory time period had elapsed. This finding therefore does not conflict with the jury's finding of the employee's subjective belief.[6]

II. 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.[7] In *Overstreet v. Home Indemnity*

* J.D., Baylor University School of Law. Attorney at Law, Ford, Needham & Johnson, P.C., Dallas, Texas.

1. TEX. REV. CIV. STAT. ANN. art. 8307, § 4A (Vernon Supp. 1987) (establishing time limits as to notice of injury and claims for compensation).

2. Traders & Gen. Ins. Co. v. Jaques, 131 S.W.2d 133, 136 (Tex. Civ. App.—Austin 1939, writ dism'd judgmt cor.).

3. 705 S.W.2d 157 (Tex. App.—Texarkana 1985, writ dism'd).

4. *Id.* at 158.

5. *Id.* at 159.

6. *Id.*

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

Co.[8] the Texas 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.[9] The lower court based its holding on a set of requests that the court deemed admitted.[10] In a per curiam decision the Texas Supreme Court held that the admissions did not establish an informed election.[11] 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. The supreme court reversed and remanded for the court of appeals to determine whether additional theories of waiver, estoppel, or ratification had been established.[12]

On remand the court of appeals in *Overstreet v. Home Indemnity Co.*[13] held that when a worker is unable to know whether injuries are work related prior to a jury verdict, the worker is not precluded from bringing a workers' compensation claim even though he has claimed and received group medical benefits.[14] The court noted that in *Bocanegra v. Aetna Life Insurance Co.*[15] the supreme court held that the theories of waiver, estoppel, and ratification were merely variations of the broader doctrine of election.[16] The *Overstreet* court concluded that when the broader defense of election has not been established, the narrower defenses cannot logically be held to have been established.[17]

III. COURSE AND SCOPE

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.[18] 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.[19] Several exceptions modify the general rule, such as when the means of transportation is a part of the worker's employment contract, is paid by the employer, or is controlled by the employer, or when the employer directs the employee to proceed from one place to another.[20]

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8. 678 S.W.2d 916 (Tex. 1984) (per curiam).
9. *Id.* at 916.
10. *Id.*; *see* TEX. R. CIV. P. 169 (subject of request for admission deemed admitted if not answered within period of the rule).
11. 678 S.W.2d at 916.
12. *Id.*
13. 696 S.W.2d 188 (Tex. App.—Dallas 1985), *writ ref'd n.r.e. per curiam*, 704 S.W.2d 14 (Tex. 1986).
14. 696 S.W.2d at 190.
15. 605 S.W.2d 848, 850-51 (Tex. 1980).
16. 696 S.W.2d at 189.
17. *Id.*
18. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).
19. *See* Janak v. Texas Employers' Ins. Ass'n, 381 S.W.2d 176, 178 (Tex. 1964).
20. *Id.* at 179 (citing TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967)).

In *United States Fire Insurance Co. v. Eberstein*[21] the beneficiaries of a worker sought recovery of workers' compensation death benefits arising from a fatal automobile accident. The worker was the sole employee of a professional corporation, and the corporation provided the automobile that he was driving at the time of the accident. The *Eberstein* court noted that although the facts may bring transportation within the purview of article 8309, section 1b, the requirements of section 1 of that article must still be met.[22] The court held that the worker's travel was not in the furtherance of his employer's business and thus not in the course of his employment.[23] The court reasoned that the mere gratituous furnishing of transportation would not bring an otherwise noncompensable injury occurring during travel within the protection of the Act.[24]

The general rule that the Act does not apply to injuries received going to and from work does not apply when an employer intends workers to use a particular route to go to and from work and the route is so closely related to the employer's premises as to be fairly treated as a part of those premises.[25] This exception is known as the access doctrine.[26] In *Turner v. Texas Employers' Insurance Association*[27] the court considered whether a worker's injury came within the purview of the access doctrine. The worker was injured in an automobile collision while crossing a parking lot owned by her employer in order to gain access to a public parking lot not owned by her employer. Her jobsite was several blocks from the place of injury. The *Turner* court held that under these facts her injuries were not received within a reasonable time and distance from the place where her work was to be done.[28] The court concluded that it would require an unreasonable extension of the access doctrine in order to bring the worker's injuries within the purview of the access doctrine.[29]

IV. INJURY

Home Insurance Co. v. Blancas[30] involved the admissibility of certain evidence in order to prove that a worker had sustained a compensable injury as a result of lung disease. A medical doctor testified as to the examination and

21. 711 S.W.2d 355 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
22. *Id.* at 357.
23. *Id.*
24. *Id.*
25. Texas Compensation Ins. Co. v. Matthews, 519 S.W.2d 630, 631 (Tex. 1974) (route "so closely related to the employer's premises as to be fairly treated as a part of the premises").
26. *Id.*; Standard Fire Ins. Co. v. Rodriguez, 645 S.W.2d 534, 538 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Dean, 604 S.W.2d 346, 349 (Tex. Civ. App.—El Paso 1980, no writ); Texas Employers' Ins. Ass'n v. Lee, 596 S.W.2d 942, 943 (Tex. Civ. App.—Waco 1980, no writ); Stoudt v. International Ins. Co., 568 S.W.2d 904, 905 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Aetna Life Ins. Co. v. Woods, 449 S.W.2d 86, 89 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.); Kelty v. Travelers Ins. Co., 391 S.W.2d 558, 562 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).
27. 715 S.W.2d 52 (Tex. App.—Dallas 1986, writ ref'd).
28. *Id.* at 54 (injuries must be within "reasonable margin of time and space").
29. *Id.* at 55.
30. 713 S.W.2d 192 (Tex. App.—Corpus Christi 1986, no writ).

treatment of two of the employee's co-workers. Her opinion as to the employees' condition was, at least in part, based upon prior examination and treatment of the co-workers.[31] The evidence revealed that the employee had been exposed over a long period of time to the same conditions as his co-workers. The doctor testified that in light of the condition of the co-workers' lungs it would be almost impossible for the claimant not to be similarly affected. The *Blancas* court held that the evidence was properly admitted for the purpose of showing the probability that the worker had contracted a lung disease made the basis of his claim for compensation.[32]

In *Austin Independent School District v. Maynard*[33] the employer argued that a worker's injuries were the result of his engaging in injurious practices. The Act states that where an employee persists in insanitary or injurious practices that imperil or retard his recovery, his compensation may be partially or wholly withheld.[34] The school district claimed that the worker's failure to lose excessive weight following an injury to his back constituted such an injurious practice. The trial court disregarded jury answers favorable to the school district and entered judgment in favor of the worker. Because the school district had failed to request a special issue on whether the worker's failure to lose weight was willful,[35] the court held that the omitted element of the school district's defense would be deemed found against the school district.[36]

V. HEART ATTACK

Heart attacks have long been recognized by Texas courts as compensable under certain circumstances.[37] A claim for compensation following a heart attack may be predicated upon physical exertion, mental stress traceable to a definite time, place, and cause, or upon repetitive traumatic physical activities.[38] In *Texas Employers' Insurance Association v. Courtney*[39] a worker's beneficiaries sought death benefits following a worker's fatal heart attack. The carrier asserted that there was no probative evidence that the worker experienced any particular exertion while on the job that could have caused his heart attack. The evidence revealed that the worker had lifted the lid of

31. *Id.* at 194.
32. *Id.* at 195.
33. 711 S.W.2d 377 (Tex. App.—Austin 1986, no writ).
34. TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (Vernon 1967).
35. 711 S.W.2d at 379. Whether a claimant's action is willful is an essential element of the carrier's defense under TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (Vernon 1967).
36. 711 S.W.2d at 380.
37. Standard Fire Ins. Co. v. Sullivan, 448 S.W.2d 256, 257 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); Aetna Casualty & Sur. Co. v. Calhoun, 426 S.W.2d 655, 656 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.); Mid-Western Ins. Co. v. Wagner, 370 S.W.2d 779, 783 (Tex. Civ. App.—Eastland 1963, writ ref'd).
38. Henderson v. Travelers Ins. Co., 544 S.W.2d 649, 651 (Tex. 1976); Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207, 211 (Tex. 1973); U.S. Fire Ins. Co. v. Reardon, 695 S.W.2d 758, 760 (Tex. App.—El Paso 1985, no writ); Blair v. INA, 686 S.W.2d 627, 630 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Kiel v. Texas Employers' Ins. Ass'n, 679 S.W.2d 656, 659 (Tex. App.—Houston [1st Dist.] 1984, no writ).
39. 709 S.W.2d 382 (Tex. App.—El Paso 1986, writ ref'd n.r.e.).

a tool box that weighed approximately two and one-half pounds and immediately thereafter collapsed. A doctor testified that the worker suffered from severe pre-existing coronary artery disease. He further testified that any amount of increased activity can cause a heart attack and that it was medically probable that lifting the tool box lid precipitated this worker's heart attack.[40] A doctor testifying for the insurance carrier stated that raising the tool box lid could not have precipitated a heart attack, although he conceded on cross examination that the stress level necessary to trigger a heart attack was relative to the extent of a patient's pre-existing arterial disease.[41] Affirming the judgment in favor of the worker's beneficiary, the *Courtney* court noted that although this particular task may not have been a great physical strain or exertion, the requisite strain or exertion may be less for someone suffering from a pre-existing circulatory problem.[42]

The *Courtney* court's liberal construction of strain or exertion is consistent with the interpretations of other courts, including the Texas Supreme Court, in passing upon what activities are deemed sufficient physical exertion to produce a compensable injury. These courts have held that the exertion or strain necessary to produce a compensable injury is that degree of exertion that is in fact a contributing cause of the heart attack.[43] The *Courtney* court further stated that a claimant must establish that a specific event caused the heart attack and must trace the event to a definite time, place, and cause.[44] The worker in *Courtney* was not relying upon repetitious traumatic physical activities to establish a compensable heart attack. In such cases, the injury develops gradually and without a specific cause or incident.[45]

VI. WAGE RATE

The injured worker bears the burden of establishing an average weekly wage under one of three methods set forth by the Act.[46] Each method em-

40. *Id.* at 383.

41. *Id.*

42. *Id.*; *see* Continental Ins. Co. v. Marshall, 506 S.W.2d 913, 917 (Tex. Civ. App.—El Paso 1974, no writ); Texas Employers' Ins. Ass'n v. Brown, 622 S.W.2d 608, 610 (Tex. App.—El Paso 1981), *aff'd*, 635 S.W.2d 415 (Tex. 1982).

43. Henderson v. Travelers Ins. Co., 544 S.W.2d 649, 654 (Tex. 1976) (operating hoist caused sufficient strain); Board v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207, 211 (Tex. 1973) (installing electrical conduit caused strain); Royal Ins. Co. v. Goad, 677 S.W.2d 795, 802 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (climbing two flights of stairs was sufficient exertion); Northbrook Nat'l Ins. Co. v. Goodwin, 676 S.W.2d 451, 453 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (exertion turning a steering wheel to avoid collision was sufficient exertion); Sun Belt Ins. Co. v. Childress, 640 S.W.2d 356, 360 (Tex. App.—Tyler 1982, no writ) (driving a 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 was sufficient 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 was sufficient 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 vehicle was sufficient strain).

44. 709 S.W.2d at 384.

45. Davis v. Employers' Ins., 694 S.W.2d 105, 107 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

46. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).

braces an arbitrary standard to establish a basis for 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 preceding his injury, then his own wages are the standard.[47] If he has not, but other employees of the same class have worked at least 210 days in a similar employment in the same or neighboring place during the year immediately prior to the worker's injury, then other employee's wages may be used to determine the applicable wage rate.[48] If neither of these two methods is applicable, then the standard is a wage rate that is just and fair to both the worker and the employer.[49] 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, nor resort to the just and fair method without eliminating the applicability of the first and second methods.[50] While this statutory scheme appears simple, its application in practice creates considerable procedural difficulties.[51]

In *Liberty Mutual Fire Insurance Co. v. Richards*[52] the court considered the correct method of submitting wage rate when the worker is a part-time employee. The court addressed the question of whether the term "day" as used in the Act means a full eight-hour day or whether it means any day on which an employee worked, regardless of the number of hours.[53] The worker's payroll records revealed that she had worked at least 240 days during the one year immediately preceding the injury. Only a few of these days were full eight-hour days, however. The majority were four-hour days. The *Richards* court noted that under the Act an employee is not compensated for loss of earnings, but rather, for loss of earning capacity calculated at a rate based on his or her earning capacity when employed full time.[54] The *Richards* court held that if an employee works less than eight-hour days, his average weekly wage should be calculated by the method prescribed in article 8309, section 1(2) or, if that is not possible, then the court should use the method prescribed in article 8309, section 1(3).[55] Although the court did not specifically state its definition of the term "day," by implication it has defined the term to mean a full, eight-hour day.

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47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *See* Holliman v. Leander Indep. School Dist., 679 S.W.2d 92, 95 (Tex. App.—Austin 1984, writ ref'd n.r.e.).
52. 704 S.W.2d 399 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).
53. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).
54. 704 S.W.2d at 402 (citing Texas Employers' Ins. Ass'n v. Clack, 132 S.W.2d 399 (Tex. 1939); Lubbock Indep. School Dist. v. Bradley, 579 S.W.2d 78 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.)).
55. *Id.* at 402; *see* TEX. REV. CIV. STAT. ANN. art. 8309, § 1(2), (3) (Vernon 1967).

VII. PARTIAL INCAPACITY

In *Gauthier v. Aetna Casualty & Surety Co.*[56] a jury found that a worker had sustained a $100 per week loss of earning capacity during a period of partial incapacity. The trial court disregarded the jury's finding on the basis that no evidence supported the diminution in average weekly earning capacity and entered judgment n.o.v. in favor of the carrier. The *Gauthier* court reversed and remanded, instructing the trial court to enter judgment on the verdict, and holding that a claimant need not introduce direct evidence of disability resulting in a reduction of earning capacity, but may establish such disability by circumstantial evidence upon the testimony of lay witnesses alone.[57] The court further noted that because such damages are uncertain, the court should allow the jury great latitude in awarding compensation.[58]

Upon rehearing[59] the court withdrew its prior opinion[60] and reversed and remanded the matter for a new trial.[61] The *Gauthier* court reconsidered its prior holding in light of the Texas Supreme Court's decision of *Texas Employers' Insurance Association v. Lara.*[62] The supreme court held in *Lara* that because the court did not submit the issue of the wage rate before injury to the jury and the jury was not informed of a stipulated wage rate, it had no basis from which it could determine a reduction in earning capacity in compliance with the court's instructions.[63] The *Gauthier* court noted that in the case before it the facts were similar to those in *Lara*, in that the parties had stipulated an average weekly wage rate but the rate was never revealed to the jury. Thus the *Gauthier* court concluded that, as in *Lara*, the jury had no basis from which it could reach a determination of the worker's reduction in earning capacity.[64]

In *Lozano v. Vigilant Insurance Co.*[65] a trial court entered a take nothing judgment against a worker because the jury found his average weekly earning capacity during partial incapacity to be an amount equal to his stipulated weekly wage earning capacity prior to the injury. On appeal the worker asserted that the jury's finding of partial incapacity and its finding of no reduction in earning capacity were in conflict. The appellate court affirmed the trial court's action because the record before the court failed to contain the stipulation of the parties as to average weekly wage.[66] In dictum, however, the *Lozano* court stated that a workers' compensation claimant can be

56. 704 S.W.2d 377 (Tex. App.—Houston [14th Dist.] 1985), *opinion withdrawn*, 720 S.W.2d 174 (Tex. App.—Houston [14th Dist.] 1986, no writ).
57. 704 S.W.2d at 379.
58. *Id.*
59. 720 S.W.2d 174 (Tex. App.—Houston [14th Dist.] 1986, no writ).
60. *Id.* at 175.
61. *Id.* at 177.
62. 711 S.W.2d 224 (Tex. 1986).
63. *Id.* at 225. The difference between average weekly wage before injury and average weekly earning capacity during partial incapacity determines plaintiff's average weekly earning capacity during partial incapacity. TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (Vernon Supp. 1987) sets out this formula.
64. 720 S.W.2d at 176.
65. 714 S.W.2d 393 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).
66. *Id.* at 394.

partially disabled without suffering a reduction in earning capacity.[67] The *Lozano* court cited *Gonzales v. Texas Employers' Insurance Association*[68] as authority for this proposition.[69] The holding of the *Gonzales* case, as reiterated by the *Lozano* court, is dependent, however, upon the particular definition of partial disability submitted to the jury.[70] The holding would not appear to be applicable when the definition of partial incapacity contained in Texas Pattern Jury Charges is submitted to the jury.[71]

VIII. DEATH CLAIMS

If an employee's death results from a compensable injury, a claim for benefits arises under the Act in favor of the worker's legal beneficiaries.[72] In *Antwine v. Dallas Independent School District*[73] a worker sustained an injury during the course of his employment. During the pendency of the worker's claim for benefits under the Act, he died, and the independent executrix of his estate was substituted as plaintiff. The school district filed a motion for summary judgment alleging that it had paid all workers' compensation benefits accruing from the date of injury until the date of death. The trial court granted the school district's motion for summary judgment. In affirming the judgment, the *Antwine* court stated that it is settled law that unaccrued workers' compensation benefits terminate with the death of an injured worker if the injury is general and no final judgment has been entered on the claim.[74] On appeal the executrix had contended that an issue existed as to whether the worker's death was work related and thus summary judgment was improper.[75] The *Antwine* court noted, however, that a suit for death benefits under the Act is distinct from a claim for workers' compensation benefits.[76] If a worker dies following an on-the-job injury, and if the death is thought to be work related, a new and independent proceeding under the Act must be instituted on behalf of the proper beneficiaries.[77]

IX. FUTURE MEDICAL CARE

When a worker receives a compensable injury, the Act requires the carrier to furnish medical services to the worker.[78] The duty to furnish medical services usually continues after the issue of monetary compensation is concluded.[79] In the event of a final Board award or a judgment in favor of the

67. *Id.*
68. 419 S.W.2d 203 (Tex. Civ. App.—Austin 1967, no writ).
69. 714 S.W.2d at 394.
70. 419 S.W.2d at 206.
71. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 22.02 (1970).
72. TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon Supp. 1987).
73. 698 S.W.2d 226 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).
74. *Id.* at 228.
75. *Id.*
76. *Id.*
77. TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon Supp. 1987).
78. *Id.* § 7.
79. A Board award, a judgment adverse to the claimant, or a settlement could terminate such duty.

worker, the carrier's duty to furnish reasonable and necessary medical services incurred as a result of the injury lasts for the pendency of the worker's life.[80] When a claim is concluded by a compromise settlement agreement, either before the Board or before the district court, provisions for the carrier to provide future medical care, or open medical, for a period of time is customary.[81]

In *Ryan v. Travelers Insurance Co.*[82] a worker had obtained a district court judgment relating to an on-the-job injury. Subsequently, during January 1983, the worker incurred additional medical expenses related to the on-the-job injury. He filed a claim with the Industrial Accident Board to recover these expenses in February 1983. The Board's final award was not made until April 23, 1984. The carrier alleged that the Board did not have jurisdiction under the Act to enter the award. The Act provides that the Board has jurisdiction over claims such that it may render successive awards to a worker for expenses arising six months prior to the date of each successive award.[83] The trial court granted the carrier's motion for summary judgment and discharged the carrier except for medical expenses incurred within the six months preceding the Board's award.[84]

The *Ryan* court noted that this was a case of first impression and that legislative intent must be considered by the court in interpreting this provision of the Act.[85] The legislature has stated that the purpose of the Act is to provide prompt and fair workers' compensation payments to injured workers, to minimize the expense and delay to the claimant; and to provide an equitable system allowing the injured worker the maximum recovery.[86] The court noted that the Act should be liberally construed to effectuate its primary purposes of benefiting injured workers and encouraging settlement of valid claims.[87] The court further noted that provisions of a statutory scheme should be construed consistently with the other provisions.[88] The court stated that the strict construction of section 5 urged by the carrier would place an unreasonable burden upon the claimant, the Board, and the court system.[89] Thus, the *Ryan* court construed the language of section 5 to require a claim every six months, as opposed to requiring the Board to enter an award each six months.[90] This construction is consistent with the purposes and other provisions of the Act.[91]

In *King v. Texas Employers' Insurance Association*[92] a worker entered into

80. *Id.* § 7.
81. *Id.*
82. 715 S.W.2d 172 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).
83. *See* TEX. REV. CIV. STAT. ANN. 8307, § 5 (Vernon Supp. 1987) (Board procedure).
84. 715 S.W.2d at 174.
85. *Id.* at 175.
86. *Id.* (citing Acts of 1969, ch. 18, § 1, 61st Leg. 48).
87. *Id.* (citing Stott v. Texas Employers' Ins. Ass'n, 645 S.W.2d 778, 780 (Tex. 1983)).
88. *Id.* (citing Black v. American Bankers Ins. Co., 478 S.W.2d 434 (Tex. 1972)).
89. *Id.* at 176.
90. *Id.*
91. *Id.*
92. 716 S.W.2d 181 (Tex. App.—Fort Worth 1986, no writ).

a compromise settlement agreement that provided that the carrier would provide future medical expenses for ten years. The district court approved the compromise settlement agreement by an agreed judgment. Subsequently, the worker incurred medical expenses that the carrier failed to pay. The worker filed suit for breach of contract in district court. The carrier filed a motion for summary judgment, alleging lack of jurisdiction in the district court. The trial court granted the carrier's motion for summary judgment.

On appeal the worker argued that the matter had not been presented to the Board because the worker could not force the carrier to comply with the provisions of the Act.[93] Article 8307, section 12b provides that whenever a dispute arises concerning the payment of medical expenses provided for in an agreed judgment, the dispute shall be presented to the Board within six months of the time when a written refusal for payment of expenses has been filed with the Board.[94] The worker contended that the carrier could circumvent section 12b by refusing to make a written refusal of payment. In affirming the court's summary judgment in favor of the carrier, the *King* court noted that it is unreasonable to believe that the legislature imposed a requirement on a worker to present a claim to the Board while at the same time providing the carrier with the power to prevent such presentation by withholding written refusals of payment.[95] The *King* court held that the filing of a written notification by the worker with the Board of the carrier's refusal to make payment would satisfy the requirements of section 12b and allow a worker to obtain a final ruling from the Board.[96] The worker could then appeal the ruling, if he so chose, under the provisions of section 5 of article 8307 of the Act.

In *Aetna Casualty & Surety Co. v. Marshall*[97] the court addressed the question of whether Texas law recognizes a cause of action by a worker against the carrier arising out of the carrier's handling of medical claims during a post-judgment period. The *Marshall* court, in affirming a judgment rendered in favor of the worker, held that a cause of action for the handling of open medical claims under a workers' compensation agreed judgment exists both under the insurer's duty of good faith and fair dealing toward the insured and under article 21.21.[98]

X. COURT'S CHARGE

In *Pennsylvania National Mutual Casualty Insurance Co. v. Hannah*[99] the court considered how to word an issue correctly in order to submit the ques-

93. TEX. REV. CIV. STAT. ANN. art. 8307, § 12b (Vernon Supp. 1987).
94. *Id.*
95. 716 S.W.2d at 183.
96. *Id.*
97. 699 S.W.2d 896 (Tex. App.—Houston [1st Dist.] 1985), *aff'd*, 724 S.W.2d 770 (Tex. 1987).
98. *Id.* at 901; *see* TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon 1981).
99. 701 S.W.2d 67 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

tion of an employee's dual capacity to the jury.[100] The issue submitted to the jury inquired as to whether at the time of the injury the worker was performing the tasks of an ordinary workman in the course and scope of employment for his employer as distinguished from his usual activities as a corporate officer for his employer.[101] The carrier's objection to the submitted issue was that the correct test was whether the worker was hired to perform both executive and employee-related duties, as opposed to inquiring what tasks were actually being performed at the time of the injury. The *Hannah* court agreed with the carrier's objection to the submitted issue and reversed and remanded the matter for new trial.[102]

In *Southerland v. Illinois Employers' Insurance Co.*[103] a worker sustained a compensable injury to his neck and back as a result of a fall. Subsequently, while undergoing a diagnostic procedure in the hospital, the worker was insecurely strapped to an examining table, which was then rotated causing him to fall to the floor and sustain additional injuries to his back. At trial the worker requested the court to instruct the jury that the term "disability" includes disability resulting from medical treatment instituted to cure or relieve an employee from the effects of his injury.[104] The court refused this instruction, and the worker urged that such refusal constituted reversible error.

On appeal the *Southerland* court noted that the requested instruction was clearly a correct statement of Texas law, which provides that disability resulting from medical treatment instituted to cure or relieve an employee from the effects of an injury is properly compensable.[105] Thus, the worker would be entitled to compensation for any disability resulting from the medical treatment of the original injury that the jury might find.[106]

Although the trial court has considerable discretion in deciding what instructions are proper, the critical issue is whether the failure to instruct the jury was reasonably calculated to and probably did cause rendition of an improper verdict.[107] The *Southerland* court, in reversing the judgment and remanding the matter for trial, held that the requested instruction was essential because the separate aggravating factor was specifically compensable under the law.[108]

In *Port Naches Independent School District v. Soignier*[109] a worker was injured when he climbed from a scaffolding onto a basketball goal in order to

100. *See* Harris v. Casualty Reciprocal Exch., 632 S.W.2d 714, 715-18 (Tex. 1982) (discussing the dual capacity doctrine); TEX. REV. CIV. STAT. ANN. art. 8309, § 1a (Vernon Supp. 1987).

101. 701 S.W.2d at 68.

102. *Id.* at 69, 71.

103. 696 S.W.2d 139 (Tex. App.—Houston [14th Dist.] 1985, no writ).

104. *Id.* at 141.

105. *Id.* (citing Western Casualty & Sur. Co. v. Gonzalez, 518 S.W.2d 524 (Tex. 1975)).

106. *Id.*

107. *Id.* (citing Mobile Chem. Co. v. Bell, 517 S.W.2d 245 (Tex. 1974); Minchen v. Rogers, 596 S.W.2d 179 (Tex. App.—Houston [1st Dist.] 1980, no writ)).

108. *Id.* at 142.

109. 702 S.W.2d 756 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).

reach a gym ceiling that he was painting. The carrier requested the trial court to instruct the jury, in part, that if an employee violated instructions intended to limit the scope of his employment, any injury he received while violating those instructions would be outside the course and scope of employment. The trial court refused to submit the requested instruction and, following a jury verdict, entered judgment in favor of the worker. In affirming the judgment[110] the *Soignier* court followed the reasoning of *Brown v. Forum Insurance Co.*,[111] which held that an employee acting in furtherance of his employer's business but violating a rule regulating the manner and method of performing the work was nonetheless still in the course and scope of his employment.[112]

Mathis v. Charter Oak Fire Insurance Co.[113] involved a worker who sustained four compensable back injuries during four consecutive years. The worker's four claims were consolidated for trial. The jury found that each injury was a producing cause of total and permanent incapacity. The jury further found that the successive injuries had respectively contributed certain percentages to the worker's incapacity. The trial court rendered judgment in favor of the worker on one injury and granted take-nothing judgments against the worker on the remaining three injuries.[114] The worker appealed the three take-nothing judgments.

By way of cross points the carrier contended that the four findings of total and permanent incapacity and the findings of contribution were irreconcilably conflicting. In addressing the cross point, the *Mathis* court held that contrary to the carrier's position, the Act does not contain language even suggesting that a worker may recover only one award for total and permanent incapacity.[115] The court noted that the carrier may raise the defense of proportionate reduction if the evidence establishes that an earlier compensable general injury caused the incapacity underlying the claim.[116] The court noted that this is an affirmative defense and that the burden of proof rests upon the carrier to establish that previous injuries were compensable and caused the current injury.[117] The carrier must also show the percentage of contribution of the prior injury to the injury in dispute.[118] The failure of the carrier to do so operates as a waiver of that defense.[119]

In framing the issues to be used in submitting a carrier's section 12c defense, the *Mathis* court recommended the use of the issues set forth by Texas Pattern Jury Charges.[120] The court admonished, however, that the wording

110. *Id.* at 757.
111. 507 S.W.2d 576 (Tex. Civ. App.—Dallas 1974, no writ).
112. *Id.* at 578.
113. 707 S.W.2d 234 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).
114. *Id.* at 235.
115. *Id.* at 239.
116. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Vernon Supp. 1987)).
117. *Id.* at 240.
118. *Id.*
119. *Id.* at 241 (citing TEX. R. CIV. P. 279); *see* Denton Publishing Co. v. Boyd, 460 S.W.2d 881 (Tex. 1970).
120. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 25.05 (1970).

of such issues is appropriate only when one injury is the subject of the suit and that the wording must be appropriately altered to exclude the language "to the incapacity found by you" when two or more injuries form the basis of the plaintiff's claim for compensation.[121] Failure to do so will render the findings immaterial.[122]

XI. WRONGFUL DISCHARGE

The Act provides that an employer may not terminate an employee for pursuing a claim under the Act.[123] Should such a termination occur, the employee is entitled to damages and reinstatement.[124] 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's having pursued a claim.[125] In *Hunt v. Van Der Horst Corp.*[126] a worker worked for an employer from January 1968 until he was fired on February 12, 1981. The worker was injured at approximately 2:00 p.m. on February 12, 1981, and was fired at approximately 3:30 p.m. The worker brought a suit against his employer for wrongful discharge. The trial court granted summary judgment for the employer, and the worker appealed.

On appeal the employer contended that a decision to fire the worker had been made before his injury. Further, since the worker had not taken steps to file a workers' compensation claim the Act's provisions did not apply. The *Hunt* court reversed the judgment and remanded the matter for trial, holding that the worker could maintain an action for wrongful discharge if there was a causal connection between his workers' compensation claim and his termination even if it were not the sole reason he was fired.[127] The court held that a fact issue existed as to whether the workers' compensation claim contributed to the employer's ultimate decision to fire the worker.[128] The court further held that the legislative purpose of section 8307c of the Act is to allow workers to claim benefits to which they are entitled under the Act without fear of reprisal in the form of termination.[129] Thus, to advance this purpose this provision of the Act may apply to situations in which the employee is fired before filing his claim for compensation.[130]

In *VanTran Electric Corp. v. Thomas*[131] a worker sought and obtained a judgment that included exemplary damages against his employer for having discharged him in violation of article 8307c after his filing of a workers'

121. 707 S.W.2d at 241.
122. *Id.*
123. TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (Vernon Supp. 1987).
124. *Id.* § 2.
125. *Id.*
126. 711 S.W.2d 77 (Tex. App.—Dallas 1986, no writ).
127. *Id.* at 79.
128. *Id.*
129. *Id.* at 80 (citing Carnation Co. v. Borner, 610 S.W.2d 450, 453 (Tex. 1980); Texas Steel Co. v. Douglas, 533 S.W.2d 111, 115 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.)).
130. *Id.* (citing Texas Steel Co. v. Douglas, 533 S.W.2d 111, 115-16 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.)).
131. 708 S.W.2d 527 (Tex. App.—Waco 1986, writ ref'd n.r.e.).

compensation claim. The Act provides that a person who violates article 8307c is liable for reasonable damages suffered by the employee as a result of the violation.[132] The *Thomas* court affirmed the judgment in the worker's favor, holding that article 8307c authorizes the award of reasonable damages and as such is not restricted to actual damages.[133]

The Texas Supreme Court considered the question of whether article 8307c is preempted by the National Labor Relations Act[134] in the case of *Ruiz v. Miller Curtain Co.*[135] Following a discussion of the preemption doctrine originating from the supremacy clause of the United States Constitution[136] and the pertinent provisions of the National Labor Relations Act,[137] the court concluded that federal law did not preempt the Texas statute.[138] The court noted that the Texas workers' compensation system does not involve labor union functions or collective bargaining and that the filing of a workers' compensation benefits claim does not constitute the type of concerted activity contemplated by the National Labor Relations Act.[139]

XII. 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 after such an award, the Act authorizes the court to award a lump sum for attorney's fees not to exceed twenty-five percent of the beneficiary's recovery.[140] The Act further provides that upon settlement of a case in which the carrier admits liability for the death but disputes the proper beneficiaries, attorney's fees shall be paid periodically rather than in a lump sum.[141]

In *Courtney v. Texas Employers' Insurance Association*[142] a judgment was entered awarding a widow workers' compensation death benefits and additionally awarding attorney's fees in a lump sum based upon twenty percent of the present value of the future workers' compensation death benefits calculated according to the Widow's Pension Table. On appeal the use of the Widow's Pension Table was attacked on several grounds. First, the future weekly benefits are paid without discounting for the possibility of remarriage and the provisions of the Act providing for lump sum attorney's fees based upon such benefits make no provision for a discount for the possibility of remarriage.[143] Secondly, the Widow's Pension Table, although discounted for remarriage, does not take into account the two-year lump sum payment

132. TEX. REV. CIV. STAT. ANN. art. 8307c, § 2 (Vernon Supp. 1987).
133. 708 S.W.2d at 531.
134. 29 U.S.C. §§ 151-168 (1982).
135. 702 S.W.2d 183 (Tex. 1985).
136. U.S. CONST. art. VI, § 2.
137. 29 U.S.C. §§ 157-158 (1982).
138. 702 S.W.2d at 186.
139. *Id.* at 185.
140. TEX. REV. CIV. STAT. ANN. art. 8306, § 8(d) (Vernon Supp. 1987).
141. *Id.*
142. 709 S.W.2d 778 (Tex. App.—El Paso 1986, writ ref'd n.r.e.).
143. *Id.* at 779.

to which the widow is entitled upon remarriage.[144] Third, the Widow's Pension Table is based on 1960 United States Life Tables for White Females and the United States Employees' Compensation Remarriage Tables; the Widow's Pension Table thus fails to take into account the increased life expectancy and decreased probability of remarriage that is reflected by more current statistical tables.[145] Fourth, the Widow's Pension Table is based upon statistical data utilizing a three and one-half percent discount rather than the statutorily mandated four percent discount.[146] For these reasons, the appellant urged that the present value of future benefits should be calculated by means of the United States 1978 Life Tables and such figures should in turn be used to calculate the award of a lump sum of attorney's fees. The *Courtney* court affirmed the trial court's judgment, noting that the award of attorney's fees and the method of calculation is within the trial court's discretion.[147]

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.[148] If the worker pursues compensation under the Act, the carrier is subrogated to the worker's rights against the third party.[149] If the worker recovers in the third-party action, the Act entitles the carrier to reimbursement for previously paid medical expenses.[150] 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.[151]

These benefits are usually received by the carrier as a result of the 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 its 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.[152] The fee is paid out of the carrier's portion of the recovery and cannot exceed one-third of its interest.[153]

In *United States Fidelity & Guaranty Co. v. Dean*[154] an injured worker recovered under the Act and then pursued a third-party claim. A lawsuit was filed against the third-party defendant, and the case settled without the carrier's knowledge. The trial court awarded the worker's attorney one-third of the carrier's subrogation claim. Upon learning of these events the

144. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon Supp. 1987).
145. 709 S.W.2d at 780.
146. *Id.*
147. *Id.*
148. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a(a) (Vernon Supp. 1987).
149. *Id.*
150. *Id.* § 6a(c).
151. *Id.*
152. *Id.* § 6a(a), (b).
153. *Id.* § 6a(b).
154. 697 S.W.2d 471 (Tex. App.—Tyler 1985, no writ).

carrier had the cause of action reinstated, filed a plea in intervention, and unsuccessfully attempted to set aside the award of attorney's fees. On appeal the court held that section 6a is applicable to those circumstances in which the carrier's interest is not actively represented in obtaining the recovery from the third party and that section 6a entitled the worker's attorney to attorney's fees in the amount granted.[155]

In those situations in which the carrier retains its own attorney to represent its subrogation interests during the third party action, the trial court must divide the attorneys' fees allowable out of the carrier's subrogation recovery between the carrier's attorney and the worker's attorney.[156] A number of cases have considered the factors that the trial court must take into account in apportioning the attorneys' fees between such attorneys.[157] These cases reveal that the trial court must first determine if the subrogation attorney actively participated in the case, and if so, then assess the contributions of each attorney in actually obtaining the recovery.

In *The University of Texas System v. Melchor*[158] the university alleged that the trial court had erred in apportioning approximately eighty-five percent of the attorneys' fees available from the subrogation recovery to the worker's attorney and only fifteen percent to the university's attorney. In affirming the trial court's apportionment of attorneys' fees, the appellate court noted that in a case of contested liability the subrogation attorney does not actively participate in a case by simply filing the necessary intervention papers and reviewing pleadings.[159] The court considered the fact that the worker's attorney had conducted all pre-trial discovery, handled pre-trial motions, incurred substantial expenses in preparing the case, and assumed responsibility for negotiating the settlement with the third party. The court noted that it was the action of the worker's attorney that secured the recovery of the subrogation amount and that it was unlikely that the university would have recovered any of its subrogation interest solely upon the work that was done by its subrogation attorney.[160] The *Melchor* court set forth three factors that the trial court should take into consideration in matters of contested liability where the carrier is actively represented by its own attorney: the degree of participation requested of the subrogation attorney by the worker's attorney; whether such requests by the worker's attorney were reasonable; and the degree to which the subrogation attorney responded to

155. *Id.* at 472; *see* Metropolitan Transit Auth. v. Plessner, 682 S.W.2d 650, 652-653 (Tex. App.—Houston [1st Dist.] 1984, no writ).

156. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a(b) (Vernon Supp. 1987).

157. Hartford Ins. Co. v. Branton & Mendelsohn, Inc., 670 S.W.2d 699, 702-704 (Tex. App.—San Antonio 1984, no writ); Houston Gen. Ins. Co. v. Metcalf, 642 S.W.2d 79, 80 (Tex. App.—Tyler 1982, writ ref'd n.r.e.); Union Carbide Corp. v. Burton, 618 S.W.2d 410, 416 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); International Ins. Co. v. Burnett & Adhers, Assocs., 601 S.W.2d 199, 201-202 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.); Insurance Co. of N. Am. v. Stuebing, 594 S.W.2d 565, 567-568 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); Lee v. Westchester Fire Ins. Co., 534 S.W.2d 392, 394-396 (Tex. Civ. App.—Amarillo 1976, no writ).

158. 696 S.W.2d 406 (Tex. App.—Houston [14th Dist.] 1985, no writ).

159. *Id.* at 409.

160. *Id.* at 408.

these requests.[161] The *Melchor* court further held that the worker's attorney need not submit a detailed account of time expended and hourly rate charged in order to justify his fees under section 6a, but may rely upon a contingent fee agreement in establishing his entitlement to a part or all of the statutory fee allowed out of the subrogated recovery.[162]

At the conclusion of the third-party action the Act treats any recovery in excess of the amount necessary to reimburse the carrier for past benefits as a credit against future benefits for compensation and medical benefit payments for which the carrier would otherwise be liable.[163] In awarding attorney's fees to the worker's attorney for obtaining the carrier's subrogated interest, the court must take into account the true benefit to the carrier, which would include liability for future payments of which the carrier has been relieved.[164] In *McCollum v. Baylor University Medical Center*[165] the court considered the question of a worker's attorney's right to an attorney's fee under the Act when a third-party claim was concluded and the carrier had paid no benefits to the worker.

In *McCollum* the carrier denied that the worker's injury had occurred in the course and scope of employment. While the compensation case was pending, the worker brought suit against the third-party tortfeasor and settled the third-party action. The carrier filed a motion for summary judgment alleging that the worker's settlement would exceed any amount for which the carrier might potentially be liable. The trial court granted the motion and entered judgment against the worker. The appellate court reversed and remanded the compensation case for trial.[166]

The *McCollum* court held that the issue of the carrier's liability under the Act must be tried in order to determine the extent that the third party settlement benefitted the carrier.[167] When the extent of the carrier's liability, if any, is determined, the worker's attorney is then owed attorney's fees from the carrier for his services in having obtained the settlement of the third-party claim. The reasoning of the *McCollum* court prevents a worker's attorney from being denied compensation for his services that accrued to the benefit of a carrier in those cases in which the carrier has paid no benefits prior to the conclusion of the third-party claim.

Texas Employers' Insurance Association v. Keenom[168] involved an appeal in a workers' compensation death case in which attorney's fees were awarded. Before the case was tried, the beneficiaries settled their claim against a third party responsible for the worker's death. Subsequently the workers' compensation suit was tried, and a verdict was rendered in favor of

161. *Id.* at 409.
162. *Id.* at 408.
163. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a(c) (Vernon Supp. 1987).
164. Chambers v. Employers' Ins. Ass'n, 693 S.W.2d 648, 650 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).
165. 697 S.W.2d 22 (Tex. App.—Dallas 1985, no writ).
166. *Id.* at 26.
167. *Id.* at 25.
168. 716 S.W.2d 59 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

the beneficiaries. The judgment entered by the trial court included attorney's fees equal to twenty-five percent of the total amount of undiscounted compensation benefits owed to the beneficiaries after allowing recoupment for the funds received from the third-party settlement.[169] The judgment further awarded attorney's fees in an amount equal to twenty-five percent of the third-party settlement for which the carrier had obtained credit.[170]

The carrier contended that attorney's fees should not have been awarded from the credit that the carrier received due to the third party settlement. The claimant's counsel contended that the same result should be reached whether his efforts benefitted the carrier by a credit or by the recoupment of a subrogation interest. The worker's counsel relied upon the decisions of *McCollum v. Baylor University Medical Center*[171] and *Metropolitan Transit Authority v. Plessner*[172].

In *Plessner* several injured workers recovered under the Act and then pursued third-party claims that were settled prior to the filing of a lawsuit. The carrier filed suit for declaratory judgment[173] seeking a declaration that the provisions of the Act entitling the workers' attorneys to attorney's fees were inapplicable when a lawsuit had not been filed. The *Plessner* court held that section 6a is applicable whether the subrogated interest is obtained through settlement prior to or subsequent to filing of suit.[174] The court noted that to hold otherwise would result in an unreasonable interpretation that would require workers' attorneys to file lawsuits immediately on claims involving a subrogation interest or to perform work on a claim for which they would not receive compensation.[175] The *Keenom* court adopted the analysis and reasoning of the *Plessner* and *McCollum* decisions in holding that an award of attorney's fees to the worker's attorney from the credit that the carrier received from the third-party recovery was proper.[176]

The carrier in *Keenom* further argued that an award of a lump sum of attorney's fees based on the total amount of undiscounted compensation benefits was in error.[177] In rejecting this argument the court noted that prior decisions have held that attorney's fees paid in a lump sum are not subject to the statutory discount mandated in other circumstances.[178] The *Keenom* court affirmed the trial court's award of a lump sum of attorney's fee based on the total amount of undiscounted compensation benefits.[179]

In *The City of Garland v. Huston*[180] the city appealed the trial court's

169. *Id.* at 60.
170. *Id.*
171. 697 S.W.2d 22 (Tex. App.—Dallas 1985, no writ), *discussed supra* notes 165-67 and accompanying text.
172. 682 S.W.2d 650 (Tex. App.—Houston [1st Dist.] 1984, no writ).
173. TEX. REV. CIV. STAT. ANN. art. 2524-1 (Vernon 1965).
174. 682 S.W.2d at 563.
175. *Id.*
176. 716 S.W.2d at 63.
177. *Id.* at 64.
178. *Id.* at 65; *see* TEX. REV. CIV. STAT. ANN. art. 8306a (Vernon 1967).
179. 716 S.W.2d at 66.
180. 702 S.W.2d 697 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

allocation of attorney's fees pursuant to article 8307, section 6a.[181] The city contended that the worker's attorney could not have represented the city in obtaining its subrogation interest because it would have created a conflict of interest between the carrier and the worker. The city further contended that since the worker's attorney did not file a full written disclosure statement acknowledged by the claimant as required by the Act,[182] the worker's attorney was not entitled to any fees. The *Huston* court noted that the worker's attorney was entitled to a fee pursuant to section 6a as a result of benefit accruing to the city as a result of his service, not as a result of representation of the carrier.[183] Since the worker's attorney's entitlement to the fee under factual situations such as before the *Huston* court was not as a result of representing the carrier, the Act's written disclosure requirement was inapplicable.[184]

The Act regulates attorney's fees for representing a workers' compensation claimant.[185] In *Martin v. Travelers Indemnity Co.*[186] a worker's attorney sought to recover attorney's fees under the Texas attorney's fee statute[187] in addition to those authorized by the Act. The *Martin* court adopted the reasoning of *Prudential Insurance Company of America v. Burke*[188] and held that the intent of the legislature was to exclude from article 2226 claims in which attorney's fees were otherwise recoverable under the Act.[189] The *Martin* court held that the provisions of the Act regulating attorneys' fees would operate to bring claims under the Act within the purview of the exclusionary language of article 2226.[190]

XIII. EMPLOYER'S LIABILITY

Employers are not required to carry workers' compensation coverage in the State of Texas. Generally, however, those employers who do carry

181. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1987).

182. The Act requires:

> In any case where the claimant's attorney is also representing the subrogated association, a full written disclosure must be made to the claimant, prior to actual employment by the association as an attorney, and acknowledged by the claimant, and a signed copy of the same furnished to all concerned parties and made a part of the file in the Industrial Accident Board. A copy of the disclosure with authorization and consent, shall also be filed with the claimant's pleadings prior to any judgment entered and approved by the court. Unless the claimant's attorney complies with all of the requirements as prescribed in this section, the attorney shall not be entitled to receive any of the fees prescribed in this section to which he would be entitled pursuant to an agreement with the association.

Id. § 6a(a).

183. 702 S.W.2d at 699.

184. *Id.*

185. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 7c-7d (Vernon 1967).

186. 696 S.W.2d 450 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

187. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1985) (repealed 1985) (now codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001-.006 (Vernon 1986)).

188. 614 S.W.2d 847 (Tex. App.—Texarkana), *writ ref'd n.r.e. per curiam*, 621 S.W.2d 596 (Tex. 1981).

189. 696 S.W.2d at 451 (citing *Burke*, 614 S.W.2d at 850).

190. *Id.*

workers' compensation are protected from common law liability for damages sustained by their employees.[191] Employers who choose not to carry workers' compensation are known as nonsubscribers 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.[192] In *Port Royal Development Corp. v. Braselton Construction Co.*[193] an employee of a subcontractor on a construction site sustained injuries and brought a claim against the general contractor. The general contractor impleaded the worker's employer for indemnity. The employer obtained an instructed verdict against the general contractor, from which the general contractor appealed.

The general contractor contended that the employer's immunity under the Act did not apply to bar enforcement of an indemnity agreement between an employer and a third party when the agreement was executed before the employee's injury.[194] The court agreed with the general contractor's theory, but noted that the general rule followed in Texas is that an indemnity contract will not protect a party against his own negligence unless the agreement unequivocably expresses this obligation.[195] The court noted the Texas Supreme Court's statement that Texas has progressed as near as judicially possible to the express negligence rule without actually adopting it and thereby requiring all parties to state that they intend to hold one harmless from liability for his own negligence.[196] The court then held that the particular indemnity agreement in question was not sufficient to indemnify the general contractor for its own negligence.[197]

In the case of *Davis v. Sinclair Refining Co.*[198] an employee sought to hold his employer, a subscriber to the Act, liable for common law damages for the injuries he sustained by asserting that his employer had assumed a third party's liability. The worker's contention was predicated upon the corporate merger statutes.[199] This article provides that when two corporations merge, the merging corporation ceases to exist and the surviving corporation becomes responsible for all liabilities and obligations of the merging corporation.[200] In the facts before the court, the worker's employer was the surviving corporation and the third party tortfeasor was the merging corporation.

The *Davis* court noted that Texas had previously rejected the dual capacity doctrine under which an employer was liable to his employee if he acted

191. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967); *id.* §§ 3a, 5 (Vernon Supp. 1987).
192. *Id.* §§ 1, 4 (Vernon 1967).
193. 716 S.W.2d 630 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).
194. *Id.* at 632.
195. *Id.*
196. *Id.* at 632 (citing Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 822 (Tex. 1972)). Subsequent to the court of appeals opinion Texas adopted the express negligence doctrine. *See* Ethyl Corp. v. Daniel Construction Co., 725 S.W.2d 705 (Tex. 1987).
197. 716 S.W.2d at 633.
198. 704 S.W.2d 413 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
199. TEX. BUS. CORP. ACT ANN. art. 5.06 (Vernon 1980).
200. *Id.*

in a capacity that rendered him liable apart from his primary capacity as employer.[201] The court affirmed the summary judgment in favor of the employer, stating that the Texas corporate statute does not alter the public policy expressed in the Act.[202] In a well reasoned dissenting opinion the court urged that Texas adopt the dual capacity doctrine when an employer stands in the shoes of a third-party tortfeasor.[203]

The statutory beneficiaries of a worker whose death results from the gross negligence of the worker's employer may pursue a common law cause of action for exemplary damages against the employer even though the employer is a subscriber to the Act.[204] In *Wright v. Gifford Hill & Co.*[205] a surviving spouse sought exemplary damages against her deceased husband's employer under the Act. The jury found gross negligence, proximate cause, and exemplary damages, but no issues were submitted on actual damages. The trial court entered judgment n.o.v. in favor of the employer. On appeal it was argued that the workers' compensation death benefits had been conclusively proven at trial and represented a finding of actual damages. In affirming the trial court's judgment, the court of appeals held that workers' compensation benefits are not actual damages, which must be found before exemplary damages can be recovered.[206] The Texas Supreme Court reversed the decision of the court of appeals and held that it is not necessary for a plaintiff to secure jury findings of actual damages in order to recover exemplary damages in a wrongful death case arising under article 8306, section 5.[207]

In *Glisson v. General Cinema Corp.*[208] the parents of a deceased worker sought to recovery exemplary damages under article 8306, section 5.[209] Summary judgment was granted in favor of the employer because parents are not beneficiaries entitled to exemplary damages under the Act.[210] The *Glisson* court noted that although the parents are legal beneficiaries entitled to death benefits under the Act,[211] section 5 does not create a cause of action, but merely provides that the Act does not preclude recovery specifically provided for by the Texas Constitution under article XVI, section 26.[212] Parents are not beneficiaries under article XVI, section 26 of the Texas Constitution and, thus, are not permitted to recover exemplary damages under article 8306, section 5 of the Act.[213]

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201. 704 S.W.2d at 415. The employers' dual capacity doctrine as addressed by the *Davis* court must be distinguished from the employees' dual capacity doctrine discussed *supra* note 76.
202. 704 S.W.2d at 415.
203. *Id.* at 416-22.
204. TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967).
205. 705 S.W.2d 868 (Tex. App.—Waco 1986), *rev'd*, 725 S.W.2d 712 (Tex. 1987).
206. *Id.* at 871.
207. 725 S.W.2d at 714.
208. 713 S.W.2d 694 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
209. TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967).
210. 713 S.W.2d at 694.
211. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon 1967).
212. 713 S.W.2d at 695; *see* TEX. CONST. art. XVI, § 26.
213. 713 S.W.2d at 697.