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WORKERS' COMPENSATION

by

David Noteware and Tim Bates***

WHILE the legislature did not make any extensive changes in the Workers' Compensation Act during the Survey period, the legislative committee on workers' compensation reform is currently holding hearings that may drastically change the Texas workers' compensation system.[1] Public demands for reform continue because the cost of the compensation system remains one of the highest in the nation, while it provides proportionally low benefits to employees injured on the job.[2] The current debates and proposed changes in the system affect such areas as the proposed elimination of the trial de novo, further reduction of attorneys' fees, and other significant changes.[3]

SUBSTANTIVE LAW

A. Duty of Good Faith and Fair Dealing

The courts continue to expand the duties and responsibilities of workers' compensation insurers while interpreting substantive law under the Workers' Compensation Act. By far, the most significant case of this Survey period affecting workers' compensation insurers and employees is *Aranda v. Insurance Co. of North America*.[4] In *Aranda* the Texas Supreme Court an-

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1. *See*, Dallas Morning News, Nov. 11, 1988, at 1, § D. Senator Bob Glasgow, Co-Chairman of the Joint Select Committee on Workers' Compensation Reform, told the Texas Association of Business that the legislature is drawing up recommendations in workers' compensation insurance that could drastically change this system. These changes may include eliminating lump sum settlements, restricting attorneys' fees, and deleting the trial de novo of Industrial Accident Board awards. Speaker of the House Gib Lewis stated that it is a high priority of the House of Representatives to reform the Workers' Compensation Act.

2. *See* Dallas Morning News, Oct 7, 1988, at 1, § D. A consultant hired to study the Texas workers' compensation system that stated that it is flawed with one of the highest medical costs of any state system, it provides unequal benefits for injured workers, and has an administrative body that lacks the authority and resources to effectively do its job.

3. *Id.* Representative Richard Smith stated that the workers' compensation bill will be House Bill Number 1 when the state legislature convenes in January. A consultant hired to study the Texas workers' compensation system stated that the trial de novo represents one of the most controversial issues in Texas workers' compensation law.

4. 748 S.W.2d 210 (Tex. 1988); *see also* Aetna Casualty & Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987) (holding that a cause of action exists against a workers' compensation insurance carrier under TEX. INS. CODE ANN. § 21.21 (Vernon 1981) when the carrier fails to comply with the terms of a workers' compensation compromise settlement agreement).

nounced the rule that a workers' compensation insurer has a duty to deal fairly and in good faith with injured employees when it processes their compensation claims.[5]

In *Aranda*, two companies employed the claimant and each company used a different workers' compensation insurer.[6] When the *Aranda* claimant suffered a repetitious traumatic injury, both insurers agreed that the claimant's injuries occurred during the course of his employment.[7] Yet, the insurers refused to pay the claimant benefits until the Industrial Accident Board (IAB) resolved which insurer should pay the claim.[8] Mr. Aranda brought suit against both insurers alleging: (1) a breach of the insurers' duty of good faith and fair dealing in processing his claim, and (2) intentional misconduct in handling his claim.[9] The trial court and court of appeals agreed with the insurers that Mr. Aranda's good faith allegations failed to state a cause of action.[10] Further, the court of appeals held that the exclusivity provision of the Workers' Compensation Act barred Mr. Aranda's intentional misconduct allegations.[11]

The Texas Supreme Court, however, reversed the lower courts' decisions and held that the contractual relationship between the insurer and the employee created a special relationship equal to that established by other types

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5. 748 S.W.2d at 212-15.

6. *Id.* at 211.

7. *Id.*

8. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 8307, § 5c (Vernon Supp. 1989) (establishes payment of proportionate share prior to liability determination in cases concerning multiple subscribers). The legislature amended the Workers' Compensation Act to handle disputes between carriers similarly situated to the carriers in *Aranda*. Article 8307, § 5c states:

> In any proceeding in which it is determined that compensation, including costs for medical services incurred, is allowable in a sum certain for injuries sustained by an employee, but there is a dispute with respect to which of two or more subscribers said employee was serving at the time of the injury, the Association and other workers' compensation insurer, or insurers, of each such subscriber shall be required to pay a proportionate share of the compensation benefits, including costs for medical services incurred, for the injuries received. Such proportionate share due from the Association and other workers' compensation insurer, or insurers, shall be determined by dividing the compensation benefits, including costs for medical services incurred, by the number of subscribers who are alleged to have been the employer of the injured employee at the time of injury, and the Association and workers' compensation insurer of each such subscriber shall pay such proportionate share, or shares, depending on whether they insure one or more of such subscribers. The Board or court shall deliver the full amount of the workers' compensation award, including costs for medical services incurred, in the same manner as if the sum had been paid only by the responsible insurer. Thereafter, upon final determination of liability for compensation, whether by agreement, award of the Board or order of the court, the insurer, or insurers found not to be liable shall be entitled to reimbursement for its, or their proportionate share paid from the insurer who is determined to be liable for compensation and medical costs incurred. No award or judgment pursuant to this section shall affect any rights of the claimant, directly or collaterally, in any other claim or suit, nor shall evidence of such award or judgment be admissible in any other suit brought by the claimant.

Id.

9. *Aranda*, 748 S.W.2d at 211-12.

10. *Id.* at 211.

11. *Id.*

of insurance contracts.[12] Because this special relationship implicitly creates the duty of good faith and fair dealing, the Texas Supreme Court held that the insurance carriers must meet heightened standards in the processing and payment of workers' compensation claims.[13] Additionally, the supreme court noted that the existence of the IAB does not negate the special trust relationship between the carrier and the employee.[14] Finally, the supreme court held that the exclusivity provision of the Workers' Compensation Act does not bar claims for a breach of the duty of good faith and fair dealing because good faith damages differ from the damages recoverable under a claim for workers' compensation benefits.[15]

In setting out a cause of action for the breach of the duty of good faith and fair dealing against an insurer, the supreme court held that a plaintiff must prove the following elements:

(1) The carrier does not have a reasonable basis for denying benefits;
(2) The carrier knew or should have known that no reasonable basis exists for denying the claim or delaying payment of the claim;
(3) The carrier's lack of good faith, separate and independent from the original job-related injury, proximately caused damages to the claimant; and
(4) The employee sustained ordinary damages as a result of the carrier's action.[16]

If a jury finds that a carrier breached the duty of good faith and fair dealing, the claimant may recover ordinary tort damages, and also punitive damages.[17]

Since the *Aranda* decision two courts have commented on what constitutes a reasonable basis to deny a claim. In *Fuentes v. Texas Employers Insurance Association*[18] the insurance carrier had denied benefits to the employee based upon a medical opinion obtained by the carrier.[19] The trial court entered summary judgment on behalf of the carrier, holding that the

12. *Id.* at 212. The supreme court also noted the well established rule under Texas law that "accompanying every contract is a common law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a *tort* as well as a breach of contract." *Id.* (quoting Montgomery Ward & Co. v. Scharrenbeck, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947) (emphasis added). This same duty of care and faithfulness that arises under common law contracts applies to insurance contracts.

13. *Aranda*, 748 S.W.2d at 212; *see* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (holding that the insurer owes the insured a duty of good faith and fair dealing because of the special trust relationship between parties).

14. *Aranda*, 748 S.W.2d at 212. The supreme court noted that the Industrial Accident Board may ultimately rectify an unreasonable carrier's actions, but the injured employee would incur interim damages because of his inability to meet basic living expenses or pay for medical care. *Id.*

15. *Id.* at 214. The court noted that the Workers' Compensation Act only bars damages for personal injuries and thus does not bar damages for tortious bad faith or breach of contract. *Id.*

16. *Id.* at 215. In setting out the elements of this cause of action, implicitly included in the court's discussion are the elements of proximate causation and damages. *Id.* at 214.

17. *Id.* at 215.

18. 757 S.W.2d 31 (Tex. App.—San Antonio 1988, no writ).

19. *Id.* at 33.

carrier, which had based the denial of the claim on a medical opinion, had unequivocally established a reasonable basis for rejecting the claim.[20] Relying on *Aranda* and recognizing that carriers have the right to deny questionable claims, the court of appeals upheld the summary judgment and established that the simple denial of a claim, although later proven to be in error, does not subject carriers to liability.[21] Tort liability does not attach to the carrier if a reasonable insurer under similar circumstances would have denied the claim.[22] Consequently, if the carrier erred in denying the claim, it will not be liable for bad faith damages if its conduct meets the above-mentioned, objective standard.[23]

In *Izaguirre v. Texas Employers' Insurance Association*[24] three claimants filed suit against a carrier alleging that the carrier breached its duty of good faith and fair dealing.[25] Previously the carrier had settled the claimants' underlying claims for compensation benefits and the claimants had provided releases for their compensation claims.[26] Two of the releases stated that the claimants recognized the uncertainty and the incapability of establishing the carrier's liability.[27] A third claimant, however, signed a release that did not contain this statement.[28]

Holding that the settlement of the underlying compensation claims relieved the carrier from any further liability to the injured employees, the trial court granted summary judgment for the carrier.[29] The court of appeals upheld the decision as to the first two claimants. The appellate court reasoned that in order to recover for the breach of the duty of good faith and fair dealing, the claimants must prove either (1) that the carrier had no reasonable basis to deny their claim or delay payment of benefits, or (2) that the insurer failed to establish that a reasonable basis existed for the denial or the delay.[30] Because the settlement documents specifically recognized the uncertainty of the claims, the court of appeals held as a matter of law that the carrier could not be liable for any alleged breach of the good faith and fair dealing duty.[31] Regarding the claimant that did not sign a release contain-

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20. *Id.* at 32.

21. *Id.* at 33-34. The court held as a matter of law that the denial of the claim based upon a medical opinion is a reasonable basis for denying payment of compensation claims.

22. *Id.* at 33.

23. *Id.* at 33-34; *see also* Aranda v. Insurance Co. of N. Am., 748 S.W.2d at 212 (establishing that carriers may deny invalid or questionable claims without subjecting themselves to liability for an erroneous denial of a claim).

24. 749 S.W.2d 550 (Tex. App.—Corpus Christi 1988, writ denied).

25. *Id.* at 552.

26. *Id.* at 555.

27. *Id.* The statement signed by the claimants stated: "I understand and agree that the liability of said Insurance Carrier is indefinite, uncertain and incapable of being satisfactorily established. . . ." *Id.*

28. *Id.* The insurer did not explain why it did not insert the standard uncertainty clause into this claimant's release.

29. *Id.* at 552.

30. *Id.* at 555; *see also* Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 212 (Tex. 1988) (discusses the elements of the duty of good faith and fair dealing). For a discussion of the *Aranda* decision, see *supra* notes 4-17 and accompanying text.

31. *Isaguirre*, 749 S.W.2d at 555.

ing the provision relating to the uncertainty of his claim, the court of appeals specifically held that this claimant alleged a valid cause of action for the breach of the good faith and fair dealing duty.[32]

Holding that an action for breach of the duty of good faith and fair dealing sounds in tort, the court rejected the insurance carrier's statute of limitations defense.[33] The court found that a two-year statute of limitations governs the cause of action.[34] This claim, however, arises not from the injury on the employment, but rather from separate acts during the processing of the claim.[35] An alleged series of incidents over a period of time constitutes a continuous injury, and thus the statute of limitations does not begin to run until the conduct ends or the parties resolve the underlying claim.[36]

B. Course and Scope of Employment

Under the Workers' Compensation Act, an employee may recover compensation if he sustains an injury in the course of employment.[37] The Act defines "injuries sustained in the course of employment" to

> include all other injuries of every kind and character *having to do with and originating in the work*, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer, whether upon the employer's premises or *elsewhere*.[38]

In *Lujan v. Houston General Insurance Co.*[39] the Texas Supreme Court interpreted the application of the requirement that the injury occur in the course of employment to include a delayed action injury.[40] A delayed action injury is an injury precipitated by job-related events that does not actually occur until after the employee leaves his job premises.[41]

In *Lujan* the claimant, a painter, used a pressurized spray unit to apply paint mixed with a thinner.[42] When Mr. Lujan attempted to fix a leak in the equipment, a line blew and covered him with paint.[43] Thereafter, Mr. Lujan used gasoline to remove the paint.[44] Because his employer did not provide facilities for rinsing off the residue, Mr. Lujan went home in order to use his own facilities.[45] When Mr. Lujan entered his bathroom, the pilot light from the heater ignited the gasoline fumes from his body and Mr. Lujan died in a

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32. *Id.*
33. *Id.* at 555-56; *see Aranda*, 748 S.W.2d at 213; Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987).
34. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).
35. *Isaguirre*, 749 S.W.2d at 556.
36. *Id.*
37. TEX. REV. CIV. STAT. ANN. art. 8306, § 3b (Vernon 1967).
38. *Id.* art. 8309, § 1(4) (emphasis added).
39. 756 S.W.2d 295 (Tex. 1988).
40. *Id.* at 297.
41. *Id.* (citing 1A A. LARSON, LAW OF WORKERS' COMPENSATION § 29.22 (1985)).
42. *Id.* at 295.
43. *Id.*
44. *Id.* at 295-96.
45. *Id.* at 296.

flash fire.[46] While the jury found that Mr. Lujan's injuries occurred in the course of his employment, the court of appeals rendered judgment in favor of the carrier.[47]

The supreme court reversed the court of appeals and reinstated the trial court's judgment.[48] The supreme court held that Mr. Lujan's injuries originated in his employment as a matter of law because job-related events triggered his death.[49] These events included getting paint on his body while at work and attempting to clean the paint with gasoline because the employer failed to provide bathing facilities.[50] The supreme court rejected the carrier's argument that the Workers' Compensation Act covers only injuries that arise directly from an accident that occurs while the employee is working. The supreme court's decision reaffirmed that the Workers' Compensation Act should be liberally construed in favor of the worker.[51]

Although an employee may sustain injuries at his job site, the injuries may not necessarily occur in the course of employment. For example, the Workers' Compensation Act specifically excludes from the definition of an injury sustained in the course of employment an injury resulting from a third person's actions that do not relate to the injured employee's employment.[52] Some courts and commentators refer to this exception as the "personal animosity" exception.[53] Two recent cases show the effect of this exception.

In *Security Insurance Co. v. Nasser*[54] a jealous boyfriend of a customer assaulted and killed an employee after the boyfriend saw the employee conversing with his girlfriend.[55] The injured employee filed a workers' compensation claim, but the carrier refused to pay the claim. The carrier asserted the personal animosity exception as a defense, alleging that the employee's death resulted from a personal attack and that the assailant did not direct the attack against the employee because of his employment.[56]

At trial, Mr. Nasser's estate introduced evidence showing that Mr. Nasser's duties as an employee included spending time with customers and, in

46. *Id.*

47. *Id.* The judge asked the jury whether Mr. Lujan's work or the conditions of his employment resulted in an injury to him which was a producing cause of his death. The jury answered this question favorably to Mr. Lujan. *Id.*

48. *Id.* at 298.

49. *Id.* at 297. The court noted that by enacting the Workers' Compensation Act the legislature intended to compensate employees whose injuries "hav[e] to do with and originat[e] in the work, business, trade or profession of the employer. . . ." *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 8309, § 1(4) (Vernon 1967)).

50. *Id.* at 296-97.

51. *Id.* at 297; *see* Hargrove v. Trinity Universal Ins. Co., 152 Tex. 243, 246, 256 S.W.2d 73, 75 (1953); Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243, 245 (Tex. 1985).

52. "An injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment." TEX. REV. CIV. STAT. ANN. art. 8309, § 1(2) (Vernon 1967).

53. *See* A. LARSON, LAW OF WORKERS' COMPENSATION § 11.21 (1985).

54. 755 S.W.2d 186 (Tex. App.—Houston [14th Dist.] 1988, no writ), *on remand from* 724 S.W.2d 17 (Tex. 1987).

55. 755 S.W.2d at 189.

56. *Id.*

his capacity as an employee he became acquainted with the girl.[57] Had it not been for her visits to the restaurant as a customer and Mr. Nasser's duty to be friendly with her, the assailant would never have seen the two talking.[58] After a jury verdict in favor of the claimant's estate, the court of appeals reversed the jury verdict and held that no evidence existed to show that the assailant intended to injure Mr. Nasser because of his employment.[59]

The supreme court reversed the court of appeals and remanded the case to the lower court to consider other points of error because the personal animosity exception did not apply.[60] The court gave two reasons in explaining its holding.[61] First, the court found that some evidence supported the jury's finding that the claimant suffered injuries in the course of his employment.[62] The supreme court focused on the claimant's responsibility to act in a friendly manner towards customers, and the fact that this courtesy resulted in the assailant attacking the claimant.[63] In explaining the personal animosity exception, the court stated that the exception only applies to disputes that have been transported into the place of employment from the injured employee's private or domestic life and that do not exist as a result of the claimant's employment.[64]

Additionally, the supreme court found that the jury's verdict incorporated a finding that the assailant's mental status prevented him from intending to assault the employee.[65] When an insane or irrational assailant injures an employee, the personal animosity exception does not apply because the assailant does not intend to injure the employee solely as the result of personal

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57. *Id.* at 190-91.

58. *Id.* at 191.

59. *Id.* at 188-89. The jury issue consisted of the following:

> Do you find from a preponderance of the evidence, that Izzat Nasser was injured in the course of his employment on or about February 20, 1981?
>
> " 'INJURY IN THE COURSE OF EMPLOYMENT' means any injury having to do with and originating [from] the work, business, trade, or profession of the employer, received by an employee while engaged in or about the furtherance of the affairs or business of his employer, whether upon the employer's premises or elsewhere. An injury is not in the course of employment if it is caused by the act of another person intended to injure the employee because of reasons personal to the employee and not directed against him as an employee or because of his employment. A person cannot intend to injure an employee if the person is incapable of entertaining a rational intent or is incapable of rational reasoning."
>
> ANSWER ("We do," or "We do not.")
>
> ANSWER We do.

Id. at 189-90.

60. Nasser v. Security Ins. Co., 724 S.W.2d 17, 19 (Tex. 1987).

61. *Id.* at 18-19.

62. *Id.*

63. *Id.* at 19. The supreme court emphasized that if not for the girlfriend's visits to the restaurant as a customer, the assailant would never have seen the employee talking to his girlfriend. *Id.*

64. *Id.* The court noted that "whenever conditions attached to the place of employment or otherwise incident to the employment are factors in the catastrophic combination, the consequent injury arises out of the employment." *Id.*

65. *Id.*

motivations.[66] Thus, when asserting the personal animosity defense, the carrier must prove the following three elements: (1) the assailant's intent to injure the employee; (2) the assault occurred because of personal reasons; and (3) the assault did not occur because of reasons associated with the claimant's employment or employee status.[67] On remand, the court of appeals affirmed the jury verdict.[68]

The Dallas court of appeals recently reviewed the personal animosity exception in light of the *Nasser* opinion. In *Porter v. Dallas Independent School District*[69] the court of appeals held that the mere fact that an assailant kills an employee on the premises of his employer does not mean that the killing occurred in the course of his employment.[70] In *Porter* a school janitor, while on duty at the school, noticed a child near his automobile which was parked at his nearby residence.[71] Thinking that the child was vandalizing his car, the janitor left the school premises, confronted the child in front of his residence, and spanked the child.[72] Thereafter, the child left and the janitor returned to the school.[73] Later, the child's grandmother approached the janitor on school premises and shot and killed him.[74]

The Dallas court of appeals reversed a jury verdict in favor of the claimant's estate and held that the claimant's death did not occur during the course of his employment because the grandmother killed him for personal reasons.[75] The appellate court explained that the assailant did not kill the janitor because he worked for the school district or because of his janitorial duties. Additionally, the janitor was not acting in furtherance of his employer's business when he left the school property to discipline the child.[76] Consequently, the injury resulted from a dispute that arose in the janitor's private life but had severe repercussions in his place of employment.[77] The court of appeals, therefore, applied the personal animosity exception.[78]

C. *Prejudgment Interest*

In *Jones v. Liberty Mutual Insurance Co.*[79] the Texas Supreme Court held

66. 755 S.W.2d at 192-93.
67. *See Nasser*, 724 S.W.2d at 18 n.1; TEX. REV. CIV. STAT. ANN. art. 8309, § 1(2) (Vernon 1967).
68. 755 S.W.2d at 187.
69. 759 S.W.2d 454 (Tex. App.—Dallas 1988, petition for writ of error filed).
70. *Id.* at 455-56.
71. *Id.* at 455.
72. *Id.*
73. *Id.*
74. *Id.* at 456.
75. *Id.*
76. *Id.*
77. *Id.* at 455-57.
78. *See id.* at 456; *see also* TEX. REV. CIV. STAT. ANN. art. 8309, § 1(2) (Vernon 1967), which excludes from the definition of an injury sustained in the course of employment:

> (2) An injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment.

TEX. REV. CIV. STAT. ANN. art. 8309, § 1(2) (Vernon 1967).
79. 745 S.W.2d 901 (Tex. 1988).

that a workers' compensation insurer may not recover prejudgment interest in a third-party subrogation case.[80] The injured worker in *Jones* filed a third-party suit against other parties for injuries received in the automobile accident that caused his occupational injury.[81] The compensation insurer intervened for its subrogation interest.[82] After the award of damages to the plaintiff, the trial court allowed the insurer to recover the proportionate amount of prejudgment interest attributable to the amounts it had previously paid the claimant.[83] The court of appeals affirmed the trial court's judgment.[84]

The supreme court reversed the lower courts' holdings and held that a compensation insurer may not recover prejudgment interest on the sums that it paid to or on behalf of the workers' compensation claimant when it intervenes in the injured employee's third party action.[85] The court reasoned that the Workers' Compensation Act explicitly provides that the insurer may only recover: (1) past compensation benefits paid; (2) medical expenses paid; and (3) attorneys' fees.[86] The court also explained that the Workers' Compensation Act governs the compensation insurer's right to subrogation.[87] Thus, the supreme court ruled that the injured employee alone recovers all prejudgment interest.[88] This holding allowed the plaintiffs to enjoy the use of compensation benefits and to recover the interest on those benefits from the third-party tortfeasors.

After *Cavnar v. Quality Control Parking Inc.*[89] the question of whether an

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80. *Id.* at 903.

81. *Id.* at 901.

82. *Id.*; TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1989) governs a compensation carrier's right to subrogation. Article 8307, § 6a provides:

> (a) If compensation can be claimed under this law by the injured employee or his legal beneficiaries, then the Association shall be subrogated to the rights of the injured employee, and may enforce in the name of the injured employee or his legal beneficiaries the liability of said other person, and in case the recovery is for a sum greater than that paid or assumed by the association to the employee or his legal beneficiaries, then out of the sum so recovered the association shall reimburse itself and pay said costs and the excess so recovered shall be paid to the injured employee or his beneficiaries.
>
> (c) If at the conclusion of a third-party action a workmen's compensation beneficiary is entitled to compensation, the net amount recovered by such beneficiary from the third-party action shall be applied to reimburse the association for past benefits and medical expenses paid and any amount in excess of past benefits and medical expenses shall be treated as an advance against future benefit payments of compensation to which the beneficiary is entitled to receive under the Act.

Id.

83. 745 S.W.2d at 901.

84. *Id.*

85. *Id.* at 903.

86. *Id.* at 902.

87. *Id.* at 903.

88. *Id.*; *see also* Moseley v. State Dep't of Highways & Pub. Transp., 748 S.W.2d 226, 227 (Tex. 1988) (holding that a self-insured entity such as the Texas Department of Highways and Public Transportation may not recover prejudgment interest of their subrogation claim of workers' compensation benefits).

89. 696 S.W.2d 549 (Tex. 1985). *Cavnar* drastically changed damages in tort cases by allowing plaintiffs to recover prejudgment interest on all claims for personal injury damages.

employee may recover prejudgment interest on medical expenses in a workers' compensation case remained unanswered. In *Standard Fire Insurance Co. v. Morgan*[90] the supreme court held as a matter of law that an employee in a workers' compensation case cannot recover prejudgment interest on past medical expenses. The high state court distinguished the holding in *Cavnar* on the basis that *Cavnar* dealt with damages under the Wrongful Death Act and not damages under the Workers' Compensation Act.[91]

Additionally, the supreme court recognized that the Workers' Compensation Act allows for recovery of prejudgment interest on past due weekly installments.[92] Past medical expenses, however, do not constitute past due weekly installments within the meaning of the Compensation Act.[93] Three justices argued that an injured employee should be allowed to recover prejudgment interest on past medical expenses in order to make the claimant whole.[94] Since the Workers' Compensation Act should be liberally construed in favor of the injured employee, and the Act remains silent as to the recovery of prejudgment interest on unpaid medical expenses, the dissenters argued that the court should interpret the Act's silence favorably for the employee and allow prejudgment interest.[95]

D. Period of Incapacity

In order to recover workers' compensation benefits, an injured employee must be incapacitated for at least a period of one week.[96] In *Garcia v. Insur-*

The Texas Supreme Court justified its allowance of prejudgment interest in personal injury actions by noting that the award of prejudgment interest helps to make the plaintiff whole. *Id.* at 552. Prejudgment interest further compensates personal injury claimants for the lost opportunity of investment proceeds that they could have earned on interest on the damages between the time of the occurrence and the time of the judgment. *Id.*

90. 745 S.W.2d 310 (Tex. 1987).

91. *Id.* at 313. The court reasoned that the legislature, by enacting an exact compensation scheme within the Workers' Compensation Act, distinguished this fact scenario from an action under the Wrongful Death Act as discussed in *Cavnar*. *Id.*; *see also* General Elec. Co. v. Kunze, 747 S.W.2d 826, 832-33 (Tex. App.—Waco 1987, writ denied) (holding that an employee could not recover prejudgment interest on his damages for lost past wages and lost past employment benefits, because his economic expert compounded interest on damages that were argued to the jury).

92. 745 S.W.2d at 313.

93. *Id.*

94. *Id.* at 313-14. Justices Robertson, Ray, and Mauzy concurred, and dissented from the majority opinion. *Id.* at 313.

95. *Id.* at 314. The Texas Supreme Court has recognized that courts should construe the Workers' Compensation Act liberally in favor of the employee. Navarette v. Temple Indep. School Dist., 706 S.W.2d 308, 309 (Tex. 1986).

96. TEX. REV. CIV. STAT. ANN. art. 8306, § 6 (Vernon 1967). Article 8306, § 6, states:

> No compensation shall be paid under this law for an injury which does not incapacitate the employee for a period of at least one week from earning full wages, but if incapacity extends beyond one week compensation shall begin to accrue on the eighth day after the injury. The medical aid, hospital services, chiropractic services and medicines, as provided for in Section 7 hereof, shall be supplied as and when needed, and according to the terms and provisions of said Section 7. If incapacity does not follow at once after the infliction of the injury or within eight days thereof but does result subsequently, compensation shall begin to accrue with the eighth day after the date incapacity commenced. In any event the employee shall be entitled to the medical aid, hospital service,

ance Co.[97] the Texas Supreme Court addressed the question of what constitutes incapacity for a period of one week. On December 14, 1984, Mrs. Garcia fell at work and injured herself.[98] She went to the infirmary and returned to her duties without receiving medication or treatment.[99] Mrs. Garcia did not report for work on December 15 and 16, but returned to work on December 17.[100] Thereafter, Mrs. Garcia left work on December 19 and went to a hospital emergency room because she was experiencing pain.[101] The following day she returned to work.[102] Later, Mrs. Garcia went on vacation from December 22 to January 14 and after a short return to work, she left work on January 17 to visit a doctor.[103] On January 23 she began missing work due to her previous injury. Because she failed to report to work on January 24, 25, and 28 without notifying her employer, Mrs. Garcia's employer terminated her employment on February 1.[104]

In *Garcia* the jury determined that Mrs. Garcia became permanently and partially incapacitated beginning January 23, 1985.[105] The court of appeals reversed and rendered judgment for the carrier because Mrs. Garcia testified on cross examination that her injuries neither caused her to miss work for as long as a week, nor incapacitated her from earning full wages for a week.[106]

The supreme court reversed the court of appeals' decision, reasoning that some evidence existed that Mrs. Garcia's injuries kept her from earning full wages from December 22 to January 14, her vacation period, and for some time period after her termination.[107] The supreme court found that Mrs. Garcia's testimony did not constitute a judicial admission and that the court of appeals used the wrong standard in evaluating the testimony. The supreme court held that the court of appeals should have considered only the evidence tending to support the jury finding of permanent and partial incapacity and should have disregarded all evidence to the contrary.[108]

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chiropractic service, and medicines provided in this law. Provided further, that if such incapacity continues for four (4) weeks or longer, compensation shall be computed from the inception date of such incapacity.

Id.

97. 751 S.W.2d 857, 858 (Tex. 1988).
98. *Id.* at 857.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 858.
106. *Id.* Mrs. Garcia testified on cross-examination:
(Question) Following your fall, December 14, 1984, Mrs. Garcia, you were never off for as long as a week because of that injury, were you?
(Answer) Well, no.
(Question) Okay. And you were not incapacitated for a week from earning full wages, were you?
(Answer) Well, no.

Id.

107. *Id.*
108. *Id.* In deciding a no-evidence point, the standard of review is that the court of appeals can consider only the evidence and inferences tending to support the finding and the court

E. Representative of Insurer

Since the last survey, the Fort Worth court of appeals addressed the question of whether an employee of the subscriber can act as a representative of the insurance carrier for trial purposes. In *McKinney v. National Union Fire Insurance Co.*[109] the plaintiff invoked the "rule" under rule 267 of the Texas Rules of Civil Procedure.[110] During the trial, a safety administrator of the claimant's employer remained in the courtroom and later testified as the representative of the insurance company.[111] The claimant objected, stating that because the safety administrator did not work as an employee of the insurance carrier, he could not act as its representative under rule 267. Because the safety administrator heard other witnesses' testimony after the invocation of the rule, the claimant further argued that the court should not allow the safety administrator to testify.[112]

In analyzing rule 267, the trial court ruled that the safety administrator could act as a representative of the insurance carrier, even though the insurance carrier did not employ him.[113] The appellate court affirmed the trial court's decision, noting that employment does not constitute a prerequisite to being a representative of the insurer under rule 267.[114]

F. Subrogation—Attorneys' Fees

The trial court possesses wide discretion in the apportionment of attorneys' fees in workers' compensation subrogation cases.[115] In *Twin City Fire Insurance Co. v. Meave*[116] the employee's wrongful death beneficiaries brought a third-party action, which settled during the trial.[117] The compensation carrier intervened in the suit for reimbursement of death benefits it paid on behalf of the deceased, and for any future payments due to the fam-

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must disregard all evidence and inferences to the contrary. *Id.*, (citing Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 593 (Tex. 1986)).

109. 747 S.W.2d 907 (Tex. App.—Fort Worth 1988, writ granted).

110. TEX. R. CIV. P. 267. Rule 267 stated, at the time of trial:

> Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such corporation to aid counsel in the presentation of the case. If any party be absent the court in its discretion may exempt from the rule a representative of such party.

Id.

111. 747 S.W.2d at 910.

112. *Id.*

113. *Id.*; *see also* Yates v. Pacific Indem. Co., 193 S.W.2d 266, 267 (Tex. Civ. App.—Texarkana 1946, writ ref'd n.r.e.) (allowing the employee of an employer to be the representative for a workers' compensation carrier in a compensation case). The appellate court's interpretation makes practical sense because, while the Workers' Compensation Act makes the plaintiff sue the compensation carrier, in essence employees of the employer will have more knowledge about the nature of the injury, especially a safety administrator in an alleged toxic chemical case.

114. 747 S.W.2d at 910.

115. *See* Hartford Ins. Co. v. Branton & Mendelsohn, Inc., 670 S.W.2d 699, 703-04 (Tex. App.—San Antonio 1984, no writ).

116. 743 S.W.2d 765 (Tex. App.—Houston [1st Dist.] 1988, no writ).

117. *Id.*

ily of the deceased.[118] After the settlement, the trial court apportioned attorneys' fees between the plaintiff's attorney and the carrier's attorney from the amount awarded to the insurance carrier for its subrogation interest.[119]

The carrier appealed from the apportionment of attorneys' fees to the plaintiff's attorney, claiming that it did not benefit from his work. Additionally, the carrier asserted that the plaintiff's attorney should have, but did not, present a detailed account of hours expended in the prosecution of the plaintiff's case and an appropriate hourly rate.[120] The court of appeals rejected these assertions, holding that the carrier obviously benefitted from the plaintiff's attorney's negotiating a settlement that satisfied the carrier's subrogation claim.[121] Further, the court of appeals held that to recover attorneys' fees under the Act the claimant need only prove the nature and extent of the attorney's services.[122] Specifically, the court of appeals required no specific itemization of attorneys' fees.

G. Collateral Estoppel

In *Medina v. El Paso Machine & Steel Works, Inc.*[123] the court held that jury issues answered in a workers' compensation case collaterally estopped the employee from relitigating those issues in a third-party action.[124] *Medina* involved a construction worker who, following an accident, filed a workers' compensation claim and also filed a third-party action against other defendants alleging tort damages.[125] The trial court severed the workers' compensation case from the third-party action and tried the workers' compensation case first.[126]

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118. *Id.*

119. *Id.* at 766. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a(b) (Vernon Supp. 1989). Section 6a(b) provides for apportionment of attorneys' fees in workers' compensation subrogation actions. Section 6a(b) states:

> [i]f the Association obtains an attorney to actively represent its interest and if the attorney actively participates in obtaining a recovery, the court shall award and apportion an attorneys' fee allowable out of the association's subrogation recovery between such attorneys taking into account the benefit accruing to the association as a result of each attorney's service, the aggregate of such fees not to exceed thirty-three and one-third percent (33⅓%) of the subrogated interest.

Id.

120. 743 S.W.2d at 766. The apportionment of attorneys' fees lies within the sound discretion of the trial court. *Hartford Ins. Co.*, 670 S.W.2d at 703-04. The court of appeals determines whether the trial court abused its discretion by looking at the facts of each case individually. University of Texas v. Melchor, 696 S.W.2d 406, 407-08 (Tex. App.—Houston [14th Dist.] 1985, no writ).

121. 743 S.W.2d at 766-67. The plaintiff's attorney described his work on the case, and the appellate court noted the extensiveness of the attorney's work. *Id.*

122. *Id.* at 766. The appellate court determined that the attorney did not need to submit either a detailed account of the hours he expended on the case or an hourly rate to justify the apportionment of attorneys' fees under the Workers' Compensation Act. *Id.*; *see* University of Texas v. Melchor, 696 S.W.2d 406, 408 (Tex. App.—Houston [14th Dist.] 1985, no writ); Hartford Ins. Co. v. Branton & Mendelsohn, Inc., 670 S.W.2d 699, 703-04 (Tex. App.—San Antonio 1984, no writ).

123. 740 S.W.2d 99 (Tex. App.—El Paso 1987, no writ).

124. *Id.* at 101.

125. *Id.* at 100.

126. *Id.*

At the trial of the workers' compensation case the jury found that the claimant did not receive an injury and that the construction company did not employ the claimant.[127] The third-party defendants moved for summary judgment in their case, asserting that collateral estoppel barred the plaintiff from alleging in the third-party action that he received any injuries from the accident.[128] Based on the jury finding in the workers' compensation case, the trial court entered summary judgment in favor of the third-party defendants and held that the previously answered jury issues estopped the claimant from asserting a claim for injuries received in the accident.[129]

The court of appeals affirmed the summary judgment, noting that the claimant did not bring forth on appeal any claims of error about a lack of fairness or a heavier burden or a denial of due process.[130] Taking judicial notice that a jury is more apt to render a verdict against a defendant whom it knows has insurance, as compared to a third-party action when neither party can introduce evidence of insurance, the appellate court affirmed the use of collateral estoppel in this situation.[131] The court of appeals reasoned that if the employee could not obtain an affirmative injury finding in the compensation case, he should not be able to relitigate his injury allegations in the third-party case.[132]

H. Diversity Jurisdiction

For years federal courts usually have refused to exercise jurisdiction over workers' compensation cases. The Fifth Circuit in *Hernandez v. Travelers Insurance Co.*[133] and *Campbell v. Insurance Co. of North America*[134] applied 28 U.S.C. section 1332(c)[135] and dismissed the compensation claims for lack of jurisdiction. Section 1332(c) provides:

> That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.[136]

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* The appellate court limits its review to only those issues expressly presented and raised at the trial court. An appellate court cannot consider other grounds as reversible error on appeal. *See* Fantastic Homes, Inc. v. Combs, 596 S.W.2d 502 (Tex. 1979); City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671 (Tex. 1979).
131. 740 S.W.2d at 101. The court noted that courts usually take judicial notice of the fact that juries are more likely to render judgments against defendants whom they know have insurance. *Id. See* Kirby Petroleum Co. v. Jones, 383 S.W.2d 610, 613-14 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.).
132. *Id.*
133. 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974).
134. 552 F.2d 604 (5th Cir. 1977) (per curiam).
135. 28 U.S.C. § 1332(c) (1982).
136. *Id.* The legislature amended this statute in 1964 in response to direct action statutes adopted in Louisiana and Wisconsin. S. REP. NO. 1308, 88th Cong., 2nd Sess., *reprinted in* 1964, U.S. CODE CONG. & ADMIN. NEWS 2778, 2779.

The *Hernandez* court analyzed the situation where the claimant filed an appeal from the award of the IAB.[137] In *Hernandez* the Fifth Circuit held that a suit filed against an insurer under a workers' compensation statute represented a "direct action" within the meaning of section 1332(c).[138] Further, the appellate court held that workers' compensation insurance constituted an insurance policy or contract within the meaning of the same section.[139]

The Fifth Circuit distinguished *Hernandez* from a later case concerning an appeal by the workers' compensation carrier of a workers' compensation award by the IAB.[140] In *Campbell*, the carrier, instead of the claimant, filed suit to set aside the IAB award. Despite this distinction from *Hernandez*, the *Campbell* court reasoned that the same policy considerations of *Hernandez* applied to the facts in *Campbell*. The *Campbell* court reasoned that because the burden of proof lies on the claimant in a workers' compensation de novo proceeding, and the parties would be formally realigned, the reasoning in the *Hernandez* court still held sway.[141] Thus, the *Campbell* court dismissed the cause for lack of jurisdiction.[142]

The Sixth Circuit, in *Aetna Casualty & Surety Insurance Co. v. Greene*,[143] rejected the holding of the *Campbell* case.[144] Thus in *Northbrook National Insurance Co. v. Brewer*[145] the Fifth Circuit decided to reexamine its holdings in the *Hernandez* and *Campbell* cases. The plaintiff urged that a workers' compensation case does not constitute a direct action in that the plaintiff does not bring a suit directly against an insurer when he could have placed liability upon the insured.[146] Also, the carrier, relying upon the *Aetna* opinion, argued that the *Campbell* court erred in applying section 1332(c) to an action brought *by* rather than *against* an insurer.[147] Finally, the carrier contended that the workers' compensation policy at issue did not amount to a "policy or contract of liability insurance" within the meaning of section 1332.[148] The three-judge panel deciding the *Brewer* case held that without an en banc hearing it remained bound by the opinions in *Hernandez* and *Campbell* and, therefore, it affirmed the district court's decision to dismiss

137. 489 F.2d at 724.

138. *Id.* at 722-23. A direct action statute allows an injured party to bring a cause of action directly against the insurance carrier as compared to suing the insured. *See* Northbrook Nat'l Ins. Co. v. Brewer, 854 F.2d 742, 743 (5th Cir. 1988).

139. 489 F.2d at 722; *see Brewer*, 854 F.2d at 744.

140. 552 F.2d at 604.

141. *Id.* at 605; *see Brewer*, 854 F.2d at 744-45. The *Brewer* court noted that *Campbell* remains a controversial case in the Fifth Circuit. *Id.* at 745; *see also* Dairyland Ins. Co. v. Makover, 654 F.2d 1120, 1125-26 (5th Cir. 1981) (holding that an insurance company could bring a declaratory judgment action in federal court to determine whether its policy covered a particular automobile accident). In this case, the majority determined that section 1332(c) did not apply, thus giving the district court subject matter jurisdiction. *Id.* at 1125.

142. 552 F.2d at 605.

143. 606 F.2d 123 (6th Cir. 1979).

144. *Id.* at 127.

145. 854 F.2d 742 (5th Cir. 1988), appeal pending.

146. *Id.* at 744-45.

147. *Id.*

148. *Id.*

the case for lack of subject matter jurisdiction.[149]

I. Punitive Damages

Injured employees generally may not recover punitive damages from their employers in workers' compensation cases. The estate of a deceased employee, however, may recover punitive damages from the employer when the employer's willful acts or omissions result in the death of the employee.[150] In *Otis Elevator Co. v. Joseph*[151] the court addressed the issue of whether the employee's own negligence should be compared to the gross negligence of the employer with a resultant reduction in damages.

In *Joseph* the trial court submitted an issue inquiring of and comparing the employer's gross negligence to the employee's ordinary negligence. The jury found that the employee's negligence amounted to sixty-five percent of the cause of his death and that the employer's gross negligence constituted thirty-five percent of the cause of the employee's death.[152] Thereafter, the trial court disregarded the jury findings and awarded all of the exemplary damages to the employee's estate.[153] The court of appeals upheld the trial court's judgment and noted that the trial court should not have submitted issues comparing the ordinary negligence of the employee and the gross negligence of the employer to the jury.[154] The appellate court reasoned that the different theories underlying ordinary negligence and gross negligence and their different elements of proof make the two theories incompatible.[155] Further, although article 33.001 of the Texas Civil Practice and Remedies Code[156] bars recovery of actual damages by a plaintiff whose negligence amounts to more than fifty percent in a negligence action, that section does not apply to actions.[157]

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149. *Id.* at 745. The court's opinion gives a tone that they would like to reconsider *Campbell*, and predicts that *Campbell* possibly could be overturned. *Id.*

150. TEX. REV. CIV. STAT. ANN. art. 8306 § 3a (Vernon 1967). Under this section, an employee waives his common law rights if he does not give a written notice to his employer that he does not wish to waive these rights. However, the employee does not waive his constitutional rights, which allow his estate to recover damages for his wrongful death if the gross negligence of the employer causes the employee's death. *See* Wright v. Gifford-Hill & Co., 725 S.W.2d 712, 714 (Tex. 1987).

151. 749 S.W.2d 920 (Tex. App.—Houston [1st Dist.] 1988, no writ). *But see* Wright v. Gifford-Hill & Co., 736 S.W.2d 828, 833 (Tex. App.—Waco 1987, writ ref'd n.r.e.); Jannette v. Deprez, 701 S.W.2d 56, 59 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); Pedernales Elec. Coop., Inc. v. Schultz, 583 S.W.2d 882, 885 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

152. 749 S.W.2d at 922-23.

153. *Id.*

154. *Id.*; *see* 725 S.W.2d 712 (Tex. 1987); Anderson v. Trent, 685 S.W.2d 712, 714 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); Turner v. Lone Star Indus., Inc., 733 S.W.2d 242, 244 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). *But see* Wright v. Gifford-Hill & Co., 736 S.W.2d 828, 833 (Tex. App.—Waco 1987, writ ref'd n.r.e.); Jannette v. Deprez, 701 S.W.2d 56, 59 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); Pedernales Elec. Coop., Inc. v. Schultz, 583 S.W.2d 882, 885 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

155. 749 S.W.2d at 922. The court noted that punitive damages exist to punish the defendant and not compensate the plaintiff.

156. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon Supp. 1989).

157. 749 S.W.2d at 922.

J. *Wrongful Discharge*

The Workers' Compensation Act prohibits employers from discharging or discriminating against employees for the following reasons: (1) the employee in good faith filed a workers' compensation claim; or (2) the employee hired a lawyer to represent him in a claim; or (3) the employee instituted, or caused to be instituted, in good faith, any proceeding under the Workers' Compensation Act; or (4) the employee testified or is about to testify in any compensation proceeding.[158]

In *General Electric Co. v. Kunze*[159] an employee alleged that the company wrongfully discharged him because he pursued a claim.[160] In *Kunze* the employee had worked for his employer for nineteen years before he injured himself on the job.[161] He worked in his employer's Houston office for seventeen years, transferred to the Baton Rouge office for one year, and then transferred to the Waco office where he sustained a job-related injury.[162] After the compensation carrier refused to pay his medical bills, he returned to work and told his boss that he intended to retain an attorney to handle his workers' compensation claim.[163] His boss became very upset and told him that he could not hire an attorney to prosecute his compensation claim.[164] Later his boss gave him several derogatory evaluations, and thereafter fired him based on his alleged poor job performance at the Waco office.[165]

At trial the employee produced evidence to demonstrate that his firing resulted from his prosecution of his workers' compensation claim and not because of his job performance at the Waco office. Although the employer originally explained that it had fired the employee because of his performance in the Waco office, the employer attempted to introduce into evidence documents that portrayed that the employee had an unsatisfactory work record in the Houston office as well.[166] The employer argued that the evidence of job performance at the Houston office refuted the employee's inference

158. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1989). Article 8307c provides:

> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.
>
> Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

Id.

159. 747 S.W.2d 826 (Tex. App.—Waco 1987, writ denied).

160. *Id.* at 828.

161. *Id.*

162. *Id.* Approximately three days after working in the Waco office, the employee injured his back. *Id.*

163. *Id.*

164. *See id.* The employee's boss testified that she did not tell the employee that he could not hire an attorney, and that she did not become upset with him when he told her that he planned to hire an attorney. *Id.*

165. *Id.*

166. *Id.* at 829. The court noted that the employer originally alleged that it had fired the

that he was a good employee for nineteen years at both the Houston and Waco offices. The trial court refused to admit this evidence.[167] On appeal, the employer asserted that the evidence should have been admitted because (1) it rebutted an inference created by the employee that he was a satisfactory employee during his nineteen-year tenure; (2) it related to the employee's allegations of lost future wages and benefits; and (3) it corroborated the employer's evidence that the company fired the employee because of his poor work performance.[168]

The appellate court affirmed the trial court's decision to exclude this evidence, holding that the employee's implied inference that he was a good employee for nineteen years did not justify the introduction of rebuttal evidence.[169] Further, the court of appeals held that the employee's work record in the Houston or Baton Rouge offices did not tend to prove or disprove the issue of why the company fired him from the Waco office, because the employer only asserted that the employee's job performance in Waco necessitated the employment termination.[170] The appellate court, however, did not rule on whether the employer could admit the past work record as evidence on the issue of the employee's lost future wages and benefits, because the employer did not offer it for this purpose at trial.[171]

Article 8307c allows employees wrongfully discharged to recover reasonable damages and allows the employee to be reinstated to his former position.[172] Since the jury had awarded the employee lost future wages for the wrongful discharge, the employer argued that an employee must seek reinstatement as a precondition to recover any future lost wages under article 8307c.[173] The court of appeals rejected the employer's argument, holding that reinstatement is not a precondition to recovering lost future wages. Additionally, the appellate court noted that, because the employer willfully and maliciously discharged the employee in violation of the statute, reinstatement in this case would be impracticable.[174]

K. Reservation of Common Law Rights

The legislature designed the Workers' Compensation Act to provide an employee with speedy and ascertainable compensation for on-the-job injuries regardless of his employer's liability. In exchange for these guarantees, the employee gives up his common law rights to sue his employer for negligence, unless the employee reserves these rights by giving proper written notice to

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employee because of his poor work performance at the Waco Division, and not because of his job performance in the Baton Rouge Division. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id. see* TEX. R. CIV. EVID. 105(b) (an appellate court cannot consider the trial court's alleged error for not admitting evidence based on grounds that were not submitted to the trial court).

172. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1989).

173. 747 S.W.2d at 830-31.

174. *Id.* at 831.

his employer.[175] Failure to give written notice to an employer constitutes a waiver of the employee's common law rights.[176] These duties and rights under the Workers' Compensation Act apply to all employees, regardless of their age.[177]

In *Whitehead v. American Industrial Transportation, Inc.*[178] the mother of a minor employee who died in a job-related accident sued the employer under the Wrongful Death Statute.[179] In trying to circumvent the exclusivity of the Workers' Compensation Act, the *Whitehead* plaintiff advanced two arguments. First, she argued that minor employees do not have to give written notice to their employers in order to reserve their common law rights. Second, the plaintiff asserted that, if the written notice provision applies to minors, it is unconstitutional because it denies minors due process of law and access to the courts as guaranteed by the United States and Texas Constitutions.[180]

Both the trial court and the court of appeals held that the written notice provision does apply to minors and that the employee's estate did not have a cause of action outside of the Workers' Compensation Act.[181] The appellate court noted that the legislature clearly intended for the Workers' Compensation Act to apply to minors because several sections of the Act refer to minors.[182] While the appellate tribunal realized that sometimes the legislature exempts minors from strict requirements of the law, the court emphasized that the legislature, not state or federal constitutions, mandates these exemptions.

In addressing the plaintiff's second argument that the waiver provision violates the minor employee's due process rights and violated the Texas open courts provision, the court held that the plaintiff had not shown the operation of these constitutional provisions harmed the minor employee.[183] Apparently, the summary judgment evidence merely showed that the deceased was a minor, and did not demonstrate that the waiver provision denied the

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175. TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967).

176. Id.; *see* Whitehead v. American Indus. Transp., Inc., 746 S.W.2d 273, 274 (Tex. Civ. App.—Texarkana 1988, writ denied); TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967) provides:

> An employee of a subscriber shall be held to have waived his right of action at common law or under any statute of this State to recover damages for injuries sustained in the course of his employment if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed said right or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within five days notice of such subscription.

Id.

177. *See Whitehead*, 746 S.W.2d at 274-75.

178. 746 S.W.2d 273 (Tex. Civ. App.—Texarkana 1988, writ denied).

179. *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001-.011, (Vernon 1986).

180. 746 S.W.2d at 274; U.S. CONST. amend. XIV; TEX. CONST. art. I, § 13.

181. 746 S.W.2d at 274-75.

182. *Id.* at 274.

183. *Id.* Apparently, a minor or his or her representative can attack these constitutional provisions if the summary judgment evidence shows that the minor's age, intelligence, or experience affected his ability to choose his right to reserve his common law rights, as compared to the workers' compensation benefits.

minor of any opportunity to choose his legal remedies due to his age, experience, maturity, or judgment. Without this summary judgment evidence, the court refused to address the plaintiff's constitutional challenges.

L. Intentional Injuries

The Workers' Compensation Act bars an employee's claims of negligence against his employer and also any nondeath claims for gross negligence against the employer.[184] The Act does not bar an employee from suing his employer when the employer commits an intentional tort.[185] *Rodriguez v. Naylor Industries*[186] demonstrates how the distinction between a specific intent to injure an employee and gross negligence sometimes becomes blurred.

In *Rodriguez* an injured employee's wife brought a suit against her husband's employer for loss of consortium.[187] While driving the employer's truck, the employee had an accident and sustained injuries. Although the employee survived, his wife alleged that his injuries made him incapable of maintaining marital relations. She further claimed that his employer intentionally caused his injuries.[188] To support this argument, she explained that her husband's supervisor directed him to deliver a truck out of town. The truck had several tires that lacked treads, appeared cracked and split, and revealed the inner tube of the tire.[189] The employee examined the truck tires and told his supervisor about their unsafe condition.[190] The supervisor responded with derogatory comments and told the employee to follow his orders.[191]

During the trip, one of the front truck tires exploded.[192] The employee called another supervisor and asked for a spare tire. The employee did not receive a spare tire; instead, his supervisor advised him to rotate one of the back tires forward as a replacement.[193] When a second tire exploded, the truck flipped and the employee was injured.[194]

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184. TEX. REV. CIV. STAT. ANN. art. 8306, § 3(a) (Vernon Supp. 1989), which provides:

> The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for.

Id.; *see* Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980); Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983).

185. *See Massey*, 652 S.W.2d at 933.

186. 751 S.W.2d 701 (Tex. App.—Houston [1st Dist.] 1988, writ granted).

187. *Id.* at 702.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* The supervisor responded to the employee, "You damn Mexicans, all you do is just bitch .... That truck has to go to Port Lavaca and then to Corpus Monday morning.... Either take it or walk." *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

Mrs. Rodriguez alleged that this evidence of conscious indifference toward her husband's safety showed that the employer's intentional conduct resulted in injury to her husband. Additionally, Mrs. Rodriguez produced an expert's affidavit which stated that, in the expert's opinion, the employee's supervisor would have known, with "substantial certainty" that the tires would explode.[195]

The court of appeals held that the summary judgment evidence did not show that the employer intended to cause injury.[196] The appellate court, in distinguishing intentional injuries from gross negligence, stated that "intent" requires either that the employer desires the consequences of his actions or that the employer believes with substantial certainty that his actions will cause injuries to his employee.[197] Thus, the court held that the intentional failure to provide an employee with safe transportation does not constitute an intentional tort, except when proof exists that the employer believes with substantial certainty that his conduct will injure the employee.[198]

One judge dissented, arguing that to grant summary judgment in this situation was inequitable. This judge found that the employer deliberately exposed the employee to an unreasonable risk of harm, which resulted in the employee's injury.[199] The dissenter argued that the employer should not be immune from common law liability under these facts on the mere ground that the employer did not actually intend to injure the employee.[200] Further, the dissenter argued that the fact finder could reasonably infer the employer's intent in this situation because the employer's acts of making the employee travel on poor tires showed its outrageous indifference to the employee's safety. According to the dissent, these actions showed that the employer knew or should have known with substantial certainty that its actions would result in injury to the employee.[201] Thus, this judge argued that a conscious, deliberate exposure of the employee to an unreasonable risk of harm essentially amounts to knowing with substantial certainty or intending to harm the employee.[202]

M. Discovery

Party communications remain privileged provided that a party makes the communication after having good cause to believe that a suit will be filed or

195. *Id.* at 702-03.

196. *Id.* at 703.

197. *Id.*; Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981); Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985). The Texas Supreme Court has adopted the definition of intent provided in RESTATEMENT (SECOND) OF TORTS § 8a (1965). This section defines intent as "the act or desire is to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." 689 S.W.2d at 406.

198. 751 S.W.2d at 703.

199. *Id.* Justice Levy notes that his dissent focuses on the majority opinion's narrow interpretation of the definition of "intentional injury." *Id.*

200. *Id.* at 704.

201. *Id.*

202. *Id.* at 704-05.

after institution of a lawsuit.[203] *City of San Antonio v. Spears*[204] considered the question of whether a prehearing conference report prepared by an employer after the employee filed a compensation claim constituted a privileged document. The trial court ordered that the employer submit the prehearing conference report to the claimant, holding that the report did not fall under the investigative privilege rule.[205] The carrier filed a writ of mandamus and the appellate court reversed the trial court and found the document to be privileged.[206]

The court of appeals reasoned that the terms "litigation," "suit," and "lawsuit" as used in the investigative privilege rules encompassed proceedings before the IAB.[207] Any other interpretation would not take into consideration the administrative powers of the IAB, including its powers to determine legal questions such as: whether an employee injured himself in the course of his employment, and whether the employee was an independent contractor.[208] Additionally, the court reasoned that if the adverse party could discover these reports, carriers would not prepare them until after they had determined whether or not to appeal the Board's award.[209]

N. Compromise Settlement Agreement

In order to set aside a compromise settlement agreement based upon a constructive fraud, the claimant must show:

(1) misrepresentations made to the worker about his or her injuries;
(2) made by the employer, workers' compensation carrier or an agent of either;
(3) reliance by the worker on the misrepresentations; and
(4) a meritorious claim for more compensation than was paid.[210]

In *Texas Employers Insurance Association v. Remy*[211] the court of appeals held that even though the claimant selected the doctor, the doctor could be

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203. TEX. R. CIV. P. 166(3)(d), which states:
> Party Communications. With the exception of discoverable communications prepared by or for experts, and other discoverable communications, between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the claims made a part of the pending litigation. For the purpose of this paragraph, a photograph is not a communication.

204. 751 S.W.2d 551 (Tex. App.—San Antonio 1988, no writ).

205. *See id.* at 552. The parties held a hearing on the privilege pursuant to Peeples v. The Honorable Fourth Supreme Judicial Dist., 701 S.W.2d 635 (Tex. 1985).

206. 751 S.W.2d at 552.

207. *Id.* at 554.

208. *Id.* at 553. Although the court noted that the IAB does not act as a court, that the claims filed before it do not constitute pleadings, and that the rules of evidence do not apply to IAB hearings, the court recognized that the IAB does have administrative powers. For instance, courts give IAB orders the force of a final judgment once the period of time for appealing the award has passed. *Id.*

209. *Id.*

210. Rodriguez v. American Home Assur. Co., 735 S.W.2d 241, 242 (Tex. 1987).

211. 752 S.W.2d 617 (Tex. App.—Fort Worth 1988, no writ).

an agent of the carrier.[212] Thus, if the doctor misdiagnosed the claimant, and the claimant relied upon the misdiagnosis to his detriment in settling his workers' compensation case, the claimant could have the settlement agreement set aside.[213]

The *Remy* claimant went to an orthopedic surgeon of his own selection after experiencing an accident at work. The surgeon examined his back and reported his condition to the insurance company. Although the carrier did not specifically authorize the doctor to treat the claimant, the doctor treated the claimant for approximately six months.[214] Thereafter, the carrier requested the doctor's report. Both parties relied on the report in reaching the settlement.

Within six months of the settlement, the claimant's condition deteriorated, showing that the doctor had misdiagnosed his condition.[215] The jury answered special issues favorable to the claimant in setting aside the settlement, but the trial court disregarded the jury finding that the doctor had acted as the agent of the carrier.[216] On appeal, the appellate court reaffirmed the jury findings and specifically held that a physician can become an agent of the carrier if the carrier or the employer uses the physician's report in reaching the settlement.[217] Since the carrier used the claimant's doctor's report to settle the claim, the claimant's doctor acted as the agent of the carrier.[218]

O. Calculation of Wage Rate

The court in *Hines v. Aetna Casualty & Surety Co.*[219] faced the question of whether the wage rate for a specific injury should be calculated before or after multiplying the percentage of contribution of a prior injury to a worker's present loss of use. In *Hines* the employee sustained an injury to his right leg in the course of his employment. He had previously suffered a compensible injury to his right knee. The jury found that the employee sus-

212. *Id.* at 620.

213. *Id.* at 620-21.

214. *Id.* at 619. The carrier's adjuster gave the employee a slip authorizing the doctor to examine the employee and report his condition back to the insurance company. The slip did not authorize the doctor to treat the employee's condition.

215. *Id.* Because it was medically impossible to diagnose the employee's problems absent the progression of his disease, the doctor did not act negligently when he failed to diagnose the full extent of the employee's problems. *Id.*

216. *Id.* The jury answered on special issues that (1) the employee was totally and permanently disabled as a result of the injuries; (2) the carrier and employee entered into the settlement agreement based upon representations made by the claimant's doctor; (3) the doctor made false representations; (4) the employee relied upon the representations and would not have entered into the compromise settlement agreement absent the representations; (5) the parties acted on a mutual mistake of a material fact when they signed the compromise settlement agreement because of the doctor's misrepresentations; and (6) the claimant's doctor acted on behalf of the carrier when he made the incorrect representations regarding the employee's injury. *Id.*

217. *Id.* at 620.

218. *Id.*; *see* Rodriguez v. American Home Assur. Co., 735 S.W.2d 241, 242 (Tex. 1987), *on remand*, 749 S.W.2d 897 (Tex. App.—San Antonio 1988, no writ).

219. 754 S.W.2d 803 (Tex. App.—Houston [1st Dist.] 1988, no writ).

tained a total loss of use of his right leg for a period of several weeks and that he suffered a 75% permanent loss of use of his right leg for several weeks, and that 50% of this loss of use resulted from his prior knee injury.[220] In assessing damages, the trial court computed the basic figure of the employee's wages by calculating 66⅔% of the employee's weekly wage and comparing it to the statutory maximum and then using the lower figure.[221] Thereafter, the court applied the percentage of incapacity (present incapacity minus contribution due to prior injury) to that figure.[222] The employee appealed, contending that the percentage contribution of the old injury should have been applied to his average weekly wage rate *before* the court calculated the base rate. This formula clearly resulted in a higher recovery for the employee.[223] The appellate court affirmed the trial court's calculations. The court reasoned that specific injuries require the use of a method for calculating damages that differs from that used for general injuries.[224] Further, the Workers' Compensation Act mandates that the court determine the basic wage figure before applying the percentage of incapacity of the prior injury to the current compensable injury.[225]

220. *Id.* at 804.
221. *Id.* at 804-05.
222. *Id.* at 805.
223. *See id.* at 805. Because this formula results in a higher recovery for the employee, the employee argued that the court should apply this formula rather than the formula which results in a lower recovery. The employee contended that the use of this formula furthers the policy that courts should construe the Workers' Compensation Act liberally in favor of the employee. *Id. See* Stott v. Texas Employers' Ins. Ass'n, 645 S.W.2d 778, 780 (Tex. 1983).
224. *Hines*, 754 S.W.2d at 804-05; *see* TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (Vernon Supp. 1989).
225. *Hines*, 754 S.W.2d at 805.