1976

Workmen's Compensation

Thomas P. Sartwelle

WORKMEN'S COMPENSATION

by

*Thomas P. Sartwelle**

THE Texas Legislature extensively amended the Texas Workmen's Compensation Act in 1973,[1] but few of the changes have been reflected in reported appellate opinions during the last two survey years.[2] Next year should bring a great deal of appellate writing on most of these amendments. During this survey year the legislature again amended the Act, but these changes are not as extensive as the radical surgery performed in 1973. In addition, there was one opinion overturning established law and pronouncing new compensation law, as well as other interesting judicial rulings further analyzing established concepts. These amendments, both legislative and judicial, will significantly affect workmen's compensation practice and deserve observation and analysis.

I. STATUTORY AMENDMENTS

The Sixty-Fourth Legislature adopted eight amendments to the Workmen's Compensation Act.[3] Three of these are of general interest while the remainder are of limited importance.[4] Article 8309, section 1a,[5] allowing elective workmen's compensation coverage for partners, sole proprietors, and corporate executive officers, has been amended also to provide elective coverage for real estate salesmen compensated solely by commissions.[6]

A controversial procedural problem was remedied by the legislature with the adoption of article 8307d.[7] This article provides for nonsuit of an appeal from an Industrial Accident Board award any time before the jury retires for deliberation, but only after *notice to all parties and a hearing.* It

* B.B.A., LL.B., The University of Texas. Attorney at Law, Houston, Texas.

1. *See* TEX. REV. CIV. STAT. ANN. arts. 8306, 8307, 8309 (Supp. 1975-76).

2. Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 29 SW. L.J. 183 (1975).

3. TEX. REV. CIV. STAT. ANN. art. 8307, § 10, art. 8307d, art. 8309, § 1a, art. 8309h, §§ 3-5 (Supp. 1975-76); TEX. INS. CODE ANN. art. 5.76(c) (Supp. 1975-76); ch. 55, [1975] Tex. Laws 119 (1976 Appropriations Bill).

4. Ch. 55, [1975] Tex. Laws 119 (appropriations to the attorney general for operating expenses and claim payments to state officers and employees covered by workmen's compensation pursuant to TEX. REV. CIV. STAT. ANN. art. 8309g (Supp. 1975-76)); TEX. REV. CIV. STAT. ANN. art. 8309h, § 3 (Supp. 1975-76) (providing workmen's compensation coverage for employees of political subdivisions); *id.* § 4 (allowing a joint fund by two or more political subdivisions for payment of workmen's compensation claims and exempting the fund from regulation by the State Board of Insurance); *id.* § 5 (providing an offset against compensation payments for payment of any other disability benefits payable to employees of a political subdivision); TEX. INS. CODE ANN. art. 5.76(c) (Supp. 1975-76) (providing assigned risks coverage for any risk under the Workmen's Compensation Act, the Longshoremen's and Harbor Workers' Compensation Act and/or the Federal Coal Mine Health Safety Act of 1969).

5. Ch. 88, [1973] Tex. Laws 194, *as amended*, TEX. REV. CIV. STAT. ANN. art. 8309, § 1a (Supp. 1975-76).

6. TEX. REV. CIV. STAT. ANN. art. 8309, § 1a (Supp. 1975-76).

7. *Id.* art. 8307d.

is further provided that such nonsuit shall not prejudice the right of an adverse party to assert a claim for affirmative relief.

The controversy over the right to nonsuit in compensation cases existed primarily when the carrier appealed the Board's award and attempted to nonsuit the action when the claimant filed an answer without asserting a counterclaim. Under such circumstances a nonsuit resulted in the complete extinction of the claimant's cause of action against the carrier because of the well-established principle that the mere filing of suit completely vacates the Board's award as to the parties to the suit.[8] Thus, after the carrier nonsuited the cause of action, the Board's award was vacated and unenforceable, the time limit for perfecting appeal by the claimant was exhausted, the claimant had no pleading upon which any affirmative relief could be granted, and, therefore, the claim for compensation was effectively terminated.[9] Such result emphasized form over substance and was a trap for the unwary even though it was technically correct. With the passage of article 8307d, however, each party should now have his day in court.

Prehearing conferences were first authorized by the legislature in 1969.[10] The statute simply provided for the mandatory use of prehearing conferences and prehearing officers for "the purpose of adjusting and settling claims for compensation."[11] Other than providing the Board with the authority to promulgate "procedural rules and regulations . . . to govern such prehearing conferences,"[12] the legislature has remained aloof not only from the smoldering controversy surrounding the efficiency with which such conferences are conducted but also from the sometimes partisan nature of the prehearing officers. While the prehearing conference has undoubtedly contributed greatly to the speedy and equitable disposition of compensation claims,[13] it has been subject to abuse by over-zealous individuals who were not required to account for their actions or recommendations. Effective September 1, 1975, however, all prehearing officers are required to prepare a report to the Board on cases not settled at the prehearing conference, stating not only the officer's recommendation but also the basis for such recommendation.[14] Moreover, contrary to prior procedure, the officer is required to furnish copies of the recommendation and justification to all interested parties, and the association is to forward a copy to the subscriber.[15] Thereafter, all parties, except unrepresented claimants, must file a formal statement with

8. *See, e.g.*, Latham v. Security Ins. Co., 491 S.W.2d 100 (Tex. 1972); Texas Reciprocal Ins. Ass'n v. Leger, 128 Tex. 319, 97 S.W.2d 677 (1936); Zurich Gen. Accident & Liab. Ins. Co. v. Rodgers, 128 Tex. 313, 97 S.W.2d 674 (1936).

9. *See* Hardware Mut. Cas. Co. v. Clark, 360 S.W.2d 921 (Tex. Civ. App.—Waco 1962, writ dism'd), distinguishing Federal Underwriters Exch. v. Reed, 138 Tex. 271, 158 S.W.2d 767 (1942).

10. Ch. 18, § 9, [1969] Tex. Laws 52, *as amended*, TEX. REV. CIV. STAT. ANN. art. 8307, § 10 (Supp. 1975-76).

11. Ch. 18, § 9, [1969] Tex. Laws 52.

12. *Id.*

13. Boykin, *The Texas Industrial Accident Board: An Insider's Point of View*, 9 TRIAL LAW. F., Jan.-March 1975, at 5; Salomon, *The Pre-Hearing Conference in Workmen's Compensation*, 9 TRIAL LAW. F., Oct.-Dec. 1974, at 11.

14. TEX. REV. CIV. STAT. ANN. art. 8307, § 10 (Supp. 1975-76).

15. *Id.*

the Board, as in the past, but the statement must now include a point-by-point reply to the prehearing officer's recommendations.[16] In compliance with the amended statute the Board has adopted a printed form for use by prehearing officers in making their recommendations. This form does not appear to be entirely satisfactory insofar as the justification for the recommendation is concerned because the form does not require a narrative exposition. It is suggested that a narrative statement of the reasons justifying the recommended award would enable the parties to refute or enlarge specifically on critical points of law or evidence, thereby enabling the Board members to weigh *all* sides of the controversy and arrive at an informed decision.[17]

II. SUBSTANTIVE LAW

Industrial Accident Board Rule-Making Power. The rule-making power of the Industrial Accident Board is limited in comparison to other state agencies.[18] The Board's rule-making power is found in article 8307, section 4 which provides: "The Board may make rules not inconsistent with this law for carrying out and enforcing its provisions."[19] This power is not frequently challenged, but as noted in a recent opinion by the Beaumont court of civil appeals[20] inferentially involving the Board's power, "[r]ules promulgated by the Industrial Accident Board have fared poorly in the courts."[21] The Beaumont court's opinion involved a non-profit corporation, Industrial Foundation of the South, which sought to tie into the Board's computer system and extract certain items of information on every claim for workmen's compensation filed by Texas employees. The Foundation alleged it was

16. *Id.*

17. Two minor amendments by deletion also occurred in the amendment of art. 8307, § 10. In the second sentence of § (b) in the prior article, the Board was specifically authorized to direct "the parties; [*sic*] their attorneys or the duly authorized agents of the parties" to attend prehearing conferences. Amended § (b) now provides that the Board may only direct "the parties" to appear for prehearing conferences.

Also in § (b) the language providing that facts developed in prehearing conferences could not be used in any proceedings before the Board or elsewhere has been changed. The following language has been deleted: "[facts developed in a prehearing conference may not be used] [b]efore the Board, or elsewhere in a contested case where the facts involved therein or in any one of them is sought to be contradicted by the association, employee or the subscriber." In its place is the simplified phrase: "except before the Board." This deletion and substitution, however, does not appear to change the purpose and intent of the article.

18. *See, e.g.*, the Railroad Commission, which exercises power delegated by the constitution and statutes, Texarkana & Ft. S. Ry. v. Houston Gas & Fuel Co., 121 Tex. 594, 51 S.W.2d 284 (1932); the Texas Alcoholic Beverage Commission, which exercises police power delegated by statute, Texas Liquor Control Bd. v. Attic Club, Inc., 457 S.W.2d 41 (Tex.), *appeal dism'd*, 400 U.S. 986 (1970).

19. TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (1967). The Board is also granted limited rule-making power to govern pre-hearing conferences. *Id.* § 10(b) (Supp. 1975-76): "The Board shall promulgate procedural rules and regulations not inconsistent with this law to govern such pre-hearing conferences and provided further, such rules and regulations shall not affect nor change any substantive portion of this law."

20. Texas Indus. Accident Bd. v. Industrial Foundation of the South, 526 S.W.2d 211 (Tex. Civ. App.—Beaumont 1975, writ filed).

21. *Id.* at 219. *See also* Jackson v. Texas Employers' Ins. Ass'n, 471 S.W.2d 450 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.); Kelley v. Indus. Accident Bd., 358 S.W.2d 874 (Tex. Civ. App.—Austin 1962, writ ref'd); Burton v. I.C.T. Ins. Co., 304 S.W.2d 292 (Tex. Civ. App.—Texarkana 1957, no writ).

engaged in gathering information on compensation claimants for dissemination to its numerous members (various employers of workmen) in order to evaluate a prospective employee's past job injuries before determining his capacity to perform a given task. This information was sought under the provisions of the Texas Open Records Act.[22] The trial court ordered the Board to permit copying of the information. The court of civil appeals reversed the judgment of the trial court on grounds not relevant to this discussion, but, in so doing, it reviewed the Board's contention that the Foundation was not entitled to the information because of the provisions of Board rule 9.040 denying access to prior compensation claim records except under restricted circumstances, and then only to designated individuals and companies.[23] It was the Board's contention that the rule had the force and effect of law, relying on language to that effect in *Clawson v. Texas Employers' Insurance Ass'n*[24] and *Galacia v. Texas Employers' Insurance Ass'n.*[25] As cogently noted by the Beaumont court, *Clawson* and *Galacia* "were severely wounded by Chief Justice Calvert's repudiation of the basic holding in each case."[26] In overruling the Board's contention, the court pointed out that rule 9.040 did not appear to have any foundation in the compensation statute, and in fact, the Board had not pointed to any statutory foundation.[27]

While the court's commentary concerning the lack of authority for the Board rule is clearly dictum, the discussion points up the fact that several Board rules now in effect appear to be subject to the same criticism. For example, rule 8.140,[28] although ambiguous in its language and apparent application, appears to provide that no compromise settlement agreement will be approved by the Board for an amount less than the maximum weekly compensation rate in effect at the time of injury. This rule appears to contravene the legislative method provided to compute the monetary recov-

---

22. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Supp. 1975-76). *See generally* Comment, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 SW. L.J. 431 (1975).

23. TEX. INDUS. ACCIDENT BD. RULES 9.040 (1974):

> As a prerequisite for approval of a request for a record check or for the furnishing of information on a claimant, there must be a workmen's compensation claim for the named claimant open or pending before this Board or on appeal to a court of competent jurisdiction from the Board at the time the record search request or request for information is presented to this Board. . . . The Board will furnish the requested information or a record check only to the following: (1) the claimant; (2) the attorney for the claimant; (3) the carrier; (4) the employer at the time of the current injury; (5) third-party litigants.

24. 469 S.W.2d 192, 195 (Tex. Civ. App.—Houston [14th Dist.] 1971) (citing Galacia v. Texas Employers' Ins. Ass'n, 348 S.W.2d 417 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.), as its sole authority), *aff'd*, 475 S.W.2d 735 (Tex. 1972).

25. 348 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.).

26. 526 S.W.2d at 219, citing Clawson v. Texas Employers' Ins. Ass'n, 475 S.W.2d 735 (Tex. 1972).

27. In fact, TEX. REV. CIV. STAT. ANN. art. 8307, § 9 (1967), appears to be completely contrary to the Board's position: "Upon the written request and payment of the fees therefor . . . the board shall furnish to any person entitled thereto a certified copy of any order, award, decision or paper on file in the office of said board . . . ."

28. TEX. INDUS. ACCIDENT BD. RULES 8.140 (1974).

ery in compensation cases[29] which is tied to the claimant's wage rate. The establishment of wage rate is an integral part of the statutory scheme with the burden of proof on the claimant.[30] Thus, over the years the issue of wage rate, especially as it affects the compensation rate during periods of partial incapacity, has generated a substantial amount of litigation[31] simply because it provides an avenue by which a carrier's ultimate dollar liability can be greatly reduced. Without any statutory authority, the Board's rule has simply provided that all claimants will receive the same compensation in all compromise settlement situations, contrary to article 8307, section 12.[32]

The Board has also adopted rules for the calculation of vision and hearing loss.[33] There is, however, no statutory authority for such rules. Rule 11.033[34] provides that the costs of medical reports required by statute to be filed by a treating physician[35] will be paid by the carrier. The justification set out in the rule is that the charge will be considered a "necessary expense in the reasonable care of the injured workman."[36] The medical services statute,[37] however, simply states that the association shall provide medical aid, chiropractic services, hospital and nursing services, and medicines as may be required to cure and relieve the effects naturally resulting from the injury. It further provides that the physician rendering services to a claimant *shall* render reports concerning the nature and extent of the injury to the Board, the association, and the claimant. Failure to make reports can relieve the association and the claimant from any obligation to pay for such services. The statute does not speak to the issue of payment for a narrative or any other kind of medical report. It can only be assumed, therefore, that the legislature did not intend that such reports be rendered for a fee. The Board's justification for the rule fails to find support in the explicit wording of the statute, since such reports obviously are not included in the listed services to which a claimant is entitled. Nor can support for the rule be found in article 8306, section 7b[38] which allows the Board to regulate fees and charges allowed by section 7. Regulation by the Board is limited to those services for which section 7 allows a charge to be made, *i.e.*, medical

29. *See* TEX. REV. CIV. STAT. art. 8306, §§ 10, 11, 12 (Supp. 1975-76); *id.* art. 8309, § 1 (1967).
30. *See, e.g.*, Texas Employers' Ins. Ass'n v. Shannon, 462 S.W.2d 559 (Tex. 1970); Texas Employers' Ins. Ass'n v. Ford, 153 Tex. 470, 271 S.W.2d 397 (1954).
31. *See, e.g.*, Hartford Accident & Indem. Co. v. Hale, 400 S.W.2d 310 (Tex. 1966); Griffin v. Superior Ins. Co., 161 Tex. 195, 338 S.W.2d 415 (1960); Southern Underwriters v. Schoolcraft, 138 Tex. 323, 158 S.W.2d 991 (1942); Texas Employers' Ins. Ass'n v. McMahon, 509 S.W.2d 665 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Smith, 469 S.W.2d 486 (Tex. Civ. App.—Texarkana 1971, writ ref'd n.r.e.); Travelers Ins. Co. v. Sides, 403 S.W.2d 519 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).
32. TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (1967): "Where the liability of the association or the extent of the injury of the employé is uncertain, indefinite or incapable of being satisfactorily established, the board may approve any compromise, adjustment, settlement or commutation thereof made between the parties."
33. TEX. INDUS. ACCIDENT BD. RULES 8.070, 8.080 (1974).
34. *Id.* 11.033.
35. TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Supp. 1975-76).
36. TEX. INDUS. ACCIDENT BD. RULES 11.033 (1974).
37. TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Supp. 1975-76).
38. *Id.* § 7b (1967).

aid, chiropractic, hospital, and nursing services, medicines, and rehabilitation services.

Suicide. A workman's willful attempt to injure himself is theoretically excluded as a compensable injury.[39] In 1943 the Texas Supreme Court announced an exception to the general rule as it applied to suicide in *Jones v. Traders & General Insurance Co.*[40] Although suicide was considered to be an independent agency breaking the causal connection between injury and death, the court ruled that compensation would be allowed since the insanity producing the suicide was so violent as to cause the employee to take his life through uncontrollable impulse or in a delirium or frenzy.[41] This exception became known as the uncontrollable impulse theory of recovery,[42] and remained viable until this survey year when the supreme court departed from *Jones* and adopted a different theory of recovery in workmen's compensation suicide cases[43] as well as in negligence suicide cases.[44]

In the compensation case, *Saunders v. Texas Employers' Insurance Ass'n*, the employee sustained a compensable back injury, subsequently undergoing an unsuccessful lumbar laminectomy complicated by thrombophlebitis. After months of apparently intractable pain, the employee took his life through a self-inflicted shotgun wound. Expert testimony established that the combination of drugs taken by the employee could cause depression and give rise to strong suicidal impulses in susceptible individuals. The majority of the court of civil appeals[45] applied the *Jones* uncontrollable impulse rule, holding there was no evidence raising the issue of delirium or frenzy and, therefore, reversed and rendered judgment for the carrier. The concurring opinion[46] argued for review of *Jones* in light of present scientific knowledge of drugs and human behavior.

The supreme court reviewed the history of the *Jones* rule, emphasizing the two components of the rule, *i.e.*, uncontrollable impulse and lack of knowledge of the physical consequences of the act (uncontrollable impulse evidenced by a delirium or frenzy). In rejecting the rule, the court correctly pointed out that the strict application of the delirium or frenzy element, as applied in other jurisdictions, had been severely criticized and finally abandoned.[47] In fact, the *Jones* rule had become the minority position.[48] Thus, the supreme court abandoned *Jones*, holding in favor of a new theory of compensation. Over-simplified, this theory asks if the proximate cause of the death was the chain of events initiated by the injury suffered in the

39. *Id.* art. 8309, § 1.
40. 140 Tex. 599, 169 S.W.2d 160 (1943).
41. *Id.* at 602-03, 169 S.W.2d at 162.
42. *See* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 36.10-.21 (1973); Annot., 15 A.L.R.3d 616 (1967).
43. Saunders v. Texas Employers' Ins. Ass'n, 526 S.W.2d 515 (Tex. 1975), *noted in* 54 TEXAS L. REV. 180 (1975).
44. Exxon Corp. v. Brecheen, 526 S.W.2d 519 (Tex. 1975).
45. Texas Employers' Ins. Ass'n v. Saunders, 516 S.W.2d 242 (Tex. Civ. App.—Houston [14th Dist.] 1974) (majority opinion), *reviewed in* Sartwelle, *supra* note 2, at 225-26.
46. 516 S.W.2d at 245.
47. 526 S.W.2d at 517, citing numerous cases from other jurisdictions.
48. *See* 1A A. LARSON, *supra* note 42, § 36.22; Annot., 15 A.L.R.3d 616 (1967).

course and scope of the employee's employment.[49] As explained by the supreme court in *Saunders*, the newly adopted theory is concerned with:

> [W]hether an *uncontrollable impulse* resulted from an impairment of the workman's reasoning facilities which would *cause* the suicidal act to be an involuntary one.
>
> The essential question then becomes what criteria are to be followed in reaching the ultimate conclusion as to whether or not the record establishes sufficient mental derangement, causally related to the original injury. . . . [W]e believe that in cases where the effects of injuries suffered by the deceased result in his becoming *dominated by a derangement* of the mind which *impairs* the *ability to resist the impulse* to take his own life to the extent that the decedent was in fact *unable to control it*, the suicide cannot be termed as willful under Article 8306, [*sic*] §1.[50]

Applying the theory to the facts developed in *Saunders*, the court held that the expert testimony established that the suicidal act was the result of a drug-induced mental derangement which impaired the employee's ability to resist the uncontrollable impulse to kill himself. Since the testimony further established that the mental derangement arose out of the "effects" (drug treatment) of a compensable injury, the suicide would not be willful as contemplated by the statute. Thus, the judgment of the lower court was reversed, but because of the new theory adopted by the court, the case was remanded for a new trial in the interest of justice.[51]

As always, the difficulty arises in the application of real world facts to the esoteric theory. Although great strides have been made in understanding the complex workings of the human psyche as well as the effects of drugs on human behavior, few would contend that man's knowledge concerning these subjects even remotely approaches a predictable science. This lack of definitive knowledge has created controversy in other jurisdictions as to both the kind and the degree of mental derangement which will convert suicide into a compensable injury.[52] The Texas court, however, has indicated its willingness to allow evidence of any type of derangement, organic or psychogenic, whether induced by trauma, disease, drug therapy, or other causes, as long as the result is a *dominating derangement* of the mind which impairs the ability to resist the suicidal impulse to the extent that the employee is unable to control the impulse.[53] The key to recovery, then, is expert testimony establishing that the employee was *compelled* to do what he did by the circumstances of the injury or its treatment (uncontrollable impulse). The conjecture and speculation that will be engendered by this requirement, however, may result in excessively strained interpretations of the testimony, as occurred in *Saunders*.

A review of the expert testimony quoted in both the supreme court's

49. 1A A. LARSON, *supra* note 47, § 36.30.
50. 526 S.W.2d at 517-18 (emphasis added).
51. *Id.* at 519.
52. *See* 1A A. LARSON, *supra* note 42, § 36.22.
53. 526 S.W.2d at 517-18.

opinion[54] and the majority opinion of the court of civil appeals[55] reveals the total absence of any direct testimony that the employee was *uncontrollably* compelled to commit suicide. The most that can be gleaned from the expert testimony is that the continuing problems resulting from the injury *may* have caused the employee's depression which *may* have been aggravated by the prescribed drugs, resulting in a distortion of his values and value judgments. This testimony may satisfy the requirement of mental derangement but it certainly does not provide evidence of the required uncontrollable impulse which obviates the statutory prohibition against willful injuries. It appears that the only evidence of uncontrollable impulse in *Saunders* was supplied by the court's statement to that effect. If the supreme court was intent on changing the suicide rule, perhaps it should have adopted the simpler and more realistic chain of causation theory argued by Justice Coulson in his concurring opinion in the civil appeals court:[56]

> At and before his death, Saunders was under the influence of . . . drugs which, when combined, induced mental depression, and altered his normal mental processes in a manner which impaired his normal good judgment. The combination of the pain resulting from his injury, together with the prescribed medication, so impaired his thought processes that he did a tragic thing in taking his life. The evidence would justify a conclusion that Saunders would not have committed that final act but for the injury suffered . . . the consequential pain and suffering, and the medical treatment made necessary as a result of such injury.

Curiously, a second suicide case reached the supreme court during this survey year. In *Gregory v. Texas Employers' Insurance Ass'n*[57] the carrier was unable to produce direct evidence of suicide but did produce overwhelming circumstantial evidence. Even so, a Brazoria County jury rendered a verdict in favor of the beneficiaries, but the court of civil appeals held, as a matter of law, that the evidence conclusively established that the employee's death resulted from self-inflicted injuries.[58] The supreme court, however, straining as in *Saunders*, reversed the judgment of the court of civil appeals and remanded the case for consideration of other points of error.[59]

The evidence recited by the supreme court revealed that the employee jumped or fell from a 43-foot building on his employer's premises. An eyewitness saw the employee approximately midway in the fall. The body maintained the same configuration until it hit the ground 20 feet from the edge of the building. The carrier's expert testimony established that a body striking the ground 20 feet from the edge of a 43-foot building would have had to leave the roof at a horizontal speed of 9.15 miles per hour. The evidence also revealed the existence of a stairway on the side of the building with various fixtures extending above the stairway platform which was

54. *Id.* at 518.
55. 516 S.W.2d at 243-44.
56. *Id.* at 245 (Coulson, J., concurring).
57. 530 S.W.2d 105 (Tex. 1975).
58. Texas Employers' Ins. Ass'n v. Gregory, 521 S.W.2d 898 (Tex. Civ. App.—Houston [14th Dist.] 1975).
59. 530 S.W.2d at 108.

located approximately 25 feet above the ground and extended six feet, seven inches from the side of the building. The beneficiaries contended that rather than running off the building the employee fell and struck some part of the stairway which caused the body to ricochet or deflect in an outward direction. This, they contended, accounted for the fact that the body landed 20 feet from the edge of the building. The supreme court recognized its previous opinions holding that circumstantial evidence alone can conclusively establish an ultimate fact[60] but held that it would be unreasonable to conclude, as a matter of law, that the employee intentionally jumped from the building, since it was possible that he fell and struck a portion of the stairway.

In order to obtain the full flavor of the supreme court's strained interpretation of the few facts recited in its opinion, it is necessary to review the full recitation of the evidence in the court of civil appeals opinion.[61] In addition to the meager facts recited by the supreme court, the evidence revealed that the injury occurred during the employee's lunch break and that the employee's duties did not require his presence on or near the roof of the building where the incident occurred. Moreover, the eyewitness first saw the body when it was above the stairway platform, and the feet were pointed outward from the building and the head was higher than the feet at an angle of approximately 30 degrees. The body remained in this configuration until it hit the ground. More importantly, photographs taken after the accident showed that the light fixtures extending above the stairway platform were undamaged, except for one of three light bulbs which may have been broken. The court of civil appeals realistically recognized that the beneficiaries' theory that the body struck the light fixtures and was propelled outward to the point where it landed was unacceptable because:

> The body would have had to be propelled outward to strike the light fixture [6' 7" according to the undisputed evidence]. It is most improbable that the resistence from hitting the light bulb and its breaking would have exerted sufficient force to propel the body outward to such a distance that the head hit thirteen or fourteen feet from the vertical of the light fixture. The eye witness testified that the body fell without any turning or tumbling motion.[62]

Moreover, there was undisputed evidence concerning the employee's two previous attempts to commit suicide. Co-employees also testified that the deceased exhibited depressive symptoms and very poor work habits for a number of weeks prior to his death and had become withdrawn, uncommunicative, irritable, and depressed all of the time. As the court of civil appeals said, no reasonable conclusion could be drawn from the evidence other than the fact that the employee willfully and intentionally injured himself.[63] However, in view of the supreme court's liberal and strained interpretations

60. *Id.* at 106, citing Prudential Ins. Co. of America v. Krayer, 366 S.W.2d 779 (Tex. 1963), and Cavanaugh v. Davis, 149 Tex. 573, 235 S.W.2d 972 (1951).
61. 521 S.W.2d at 900-02.
62. *Id.* at 900.
63. *Id.* at 902.

in *Saunders* and *Gregory*, it appears evident that an assault on the intentional injury exclusion has begun and will undoubtedly be completed within a short time.

Specific Injuries—Extend to and Affect. The supreme court wrote two opinions on the "extend-to-and-affect" doctrine in specific injury cases during the last survey year. One case defies explanation based on past judicial principles and the other reaffirms long-established precepts applicable to specific injury cases.

In *Western Casualty & Surety Co. v. Gonzales*[64] the employee cut his left hand, severing tendons in his middle finger. After medical treatment, including several operations, the finger was amputated. Prior to the amputation, the employee experienced difficulty with the movement of his injured hand, arm, and elbow, and was given various medications, including injections of a drug described as attenuated cobra venom. These injections caused generalized edema of the left arm, preventing further injections at that site. Subsequent injections were administered in the legs. Soon after the initial leg injections, the claimant became severely ill and suffered complete paralysis for two weeks. Following the paralysis, the employee experienced severe low back pain, numbness of the lower extremities, and a severe antalgic gait requiring the use of a back brace and a cane. The jury found that the injury to the left hand extended to and affected the claimant's body, and the court of civil appeals affirmed the total and permanent verdict in spite of apparently valid objections to the special issues.[65] The supreme court first noted that the evidence adequately supported the jury's total-permanent finding. The only serious question was whether there was any evidence to support the jury finding that the injury to the left hand extended to and affected the body generally.

In affirming the lower court judgments, the supreme court was primarily concerned with the sufficiency of the medical testimony connecting the hand injury to the other numerous parts of the claimant's body. The claimant's expert witness was unable to explain the anatomical reasons for the claimant's disability as it progressed from his hand to other parts of his body: "The doctor stated that his opinion was not 'based on medical probability' because '[m]edically speaking, you couldn't account for it.' This is to say, just *how* the cut on the hand or the three operations or the shock therapy or the injections . . . or either of these, caused the present condition[s] . . . ."[66]

Undaunted by the ineptitude of the medical testimony, the court sought to dignify the conclusions offered as medical evidence by stating:[67]

> This Court has never required that the medical expert explain *or even understand* the precise biochemistry or mechanism by which the

64. 518 S.W.2d 524 (Tex. 1975) (Greenhill, C.J., dissenting), *aff'g* 506 S.W.2d 303 (Tex. Civ. App.—Corpus Christi 1974), *reviewed in* Sartwelle, *supra* note 2, at 210-11.

65. 506 S.W.2d at 307; Sartwelle, *supra* note 2, at 210-11 nn.178-81 and accompanying text.

66. 518 S.W.2d at 527 (emphasis by the court).

67. *Id.* at 527-28 (emphasis added).

initial trauma affects the health or organs of the injured party.

. . . .

The record reveals an uninterrupted and increasingly debilitating sequence of events which had its genesis in the initial injury to the hand. The origin and cause of the physical consequences resulting in the general injuries *have no other explanation in this record.*

. . . .

The testimony of Dr. Miller [claimant's expert], along with the fact that there was an uninterrupted chain of events leading from the specific injury to general injuries, is sufficient to support the jury finding that the injury to the left hand . . . extended to and affected his body generally.

Considering the court's conclusion in light of established specific injury principles leaves considerable doubt as to whether the court has adopted a "chain of causation" theory for extension of specific injuries to general injuries. The medical testimony, in spite of the court's attempt to boot-strap it into credibility, completely failed to connect the effects of the original injury to the general disability as has been required in the past.[68]

Less than three months after *Gonzales* the court again wrote an opinion in a specific injury case but rejected a claim of general disability similar to the claim made in *Gonzales*. In *Texas Employers' Insurance Ass'n v. Wilson*[69] a 60-year-old oil field worker was struck in the right eye with a piece of chain. The injury resulted in the surgical removal of the eye. The carrier admitted liability for the eye, but the claimant sought general disability based on an alleged traumatic neurosis caused by the injury. The expert testimony established that the claimant suffered generalized disability resulting from a variety of factors, including anxiety over the loss of his eye, loss of his ability to secure employment and work with only one eye, as well as anxiety over the lawsuit.

The jury found that the *disability* was not limited to the claimant's eye, but that the *injury* did not extend to and affect the claimant's body thereby causing incapacity to the body generally.[70] The court of civil appeals held these answers to be in irreconcilable conflict, but the supreme court held that the jury's answers supported a judgment for the specific injury only, reversing the lower court judgments and rendering judgment for the specific injury. The court correctly noted that the answer to the first special issue only established that the claimant sustained general *disability* but did not constitute a finding that the *injury* was the cause of the general disability. The jury's answer to the second special issue indicated that the claimant failed in his burden to secure a finding that the *original injury* extended to and affected other parts of the body. The claimant contended, probably because of the language in *Gonzales*, that a general injury was established as a matter of law, because of the undisputed medical evidence that the neurosis

68. *See, e.g.*, Travelers Ins. Co. v. Marmolejo, 383 S.W.2d 380 (Tex. 1964); Texas Employers' Ins. Ass'n v. Espinosa, 367 S.W.2d 667 (Tex. 1963); Texas Employers' Ins. Ass'n v. Brownlee, 152 Tex. 247, 256 S.W.2d 76 (1953).

69. 522 S.W.2d 192 (Tex. 1975).

70. *Id.* at 193.

arose following the injury—a chain of causation argument. In reply the court wrote:[71]

> It may be true that . . . [the] anxiety state can be traced back to the period of time immediately following his accident for if there had been no accident and no physical harm there would have been no resulting claim or suit. This, however, would not show conclusively as a matter of law that the anxiety state was a wholly separate injury arising out of the original accident. As was stated in Texas Employers' Association v. Espinosa, 367 S.W.2d 667 (Tex. 1963):
>
> 'Specific injuries like all bodily injuries have their painful aftermaths and like undesirable consequences, but mere proof of this is insufficient in law to show an extension of a specific injury.'
>
> It therefore must be concluded that although the claimant may be disabled by reason of a neurosis traceable in part to *circumstances* arising out of and immediately following his *injury*, there must be a finding that the neurosis was the result of the injury.

The similarities between *Gonzales* and *Wilson* are startling. The results are perplexing and seemingly irreconcilable at first blush because of the identity of the "chain of causation" arguments advanced by both claimants. Further analysis, however, indicates that both opinions reached the correct result but *Gonzales* for the wrong reasons and based on the wrong theory.

A study of the evidence in *Gonzales* clearly reveals that the claimant's physical problems subsequent to the injury resulted from the injections and other medical treatment administered to him because of the original injury to the hand. These injections and/or an apparent reaction to the medication set in motion the entire series of physical problems, including paralysis of his upper body and lower extremities as well as numbness of both legs, which resulted in the general disability. Thus, it would seem that the correct theory of recovery, based on the recitation of the evidence, is the well-established proposition that the employee is entitled to recover for any disability resulting from consequences and sequelae of the medical treatment instituted to cure or relieve the effects of his injury. In such case the disability is considered to be proximately caused by the original injury and is, therefore, compensable.[72] Based on this theory of recovery, it appears that the result reached in *Gonzales* was correct. However, using the theory of extension of a specific injury into a general injury results in an opinion of questionable authority which can only cast doubt on the validity of established theories.[73]

---

71. *Id.* at 194-95.

72. *See, e.g.*, Hartford Accident & Indem. Co. v. Thurmond, 527 S.W.2d 180 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); Liberty Mut. Ins. Co. v. Pool, 449 S.W.2d 121 (Tex. Civ. App.— Texarkana 1969, writ ref'd n.r.e.); Maryland Cas. Co. v. Sosa, 425 S.W.2d 871 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.); 1A A. LARSON, *supra* note 42, §§ 13.00-.11.

73. There was also an additional difficulty in *Gonzales* with the specific injury theory of recovery which was raised by the carrier in the court of civil appeals but apparently ignored by the supreme court or perhaps not brought forth in the application for writ of error. The carrier objected to the special issues because they simply inquired whether the injury to the left hand extended to and affected any part of the claimant's body other than the left hand. 506 S.W.2d at 307. This precise submission had been

Good Cause—General Injury. To perfect a claim for compensation an employee must give notice of injury and file a claim for compensation within the time prescribed by statute.[74] The statute also provides that "for good cause" strict compliance with the limitations may be waived.[75] Numerous good cause cases have been litigated in recent years,[76] and this survey year was no exception. Analysis of prior opinions evokes the observation that the courts seem to have required more strict adherence to this portion of the statute than any other portion of the workmen's compensation law.[77]

In *Lee v. Houston Fire & Casualty Insurance Co.*[78] the employee was injured on May 5, 1976,[79] but his claim for compensation was not filed with the Board until June 16, 1970, three years, one month and ten days after the injury. Several days after the accident, the claimant asked a supervisor if the "papers" had been sent in, and he was told that the supervisor notified the insurance carrier, and that the owner had notified the "Accidental Board." After seeking medical treatment, and approximately two months after the injury, the employee again talked to his employer about a medical report from his doctor and was assured it would be sent to the "Accidental Board." Approximately one month later, the claimant again talked to his supervisor and again received assurance that the accident had been reported to the carrier and the Board. In August 1967 the insurance carrier paid a $90 medical bill incurred by the claimant. Approximately twenty months later an independent insurance adjuster, acting on behalf of the carrier, contacted the claimant with respect to a final settlement. Over the next thirteen months, the insurance adjuster and the claimant had many conversations and many meetings, and each time the adjuster would assure the claimant not to worry about his workmen's compensation benefits because he would be "taken care of." In June 1970 the claimant was informed that no claim had ever been filed and that he would not receive compensation. Shortly thereafter, the claimant was discharged from his employment of eighteen years. Several days later, the claimant personally filed a claim with the Industrial Accident Board. The employee testified that he did not know he needed to file a claim for compensation, but thought his employer and supervisor would file the necessary papers. He also testified that had he known he needed to file a claim, he would have done so and would not have relied on anyone to do so for him.

---

condemned by the supreme court in Travelers Ins. Co. v. Marmolejo, 383 S.W.2d 380 (Tex. 1964), but the court of civil appeals sustained the submission.

74. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).

75. *Id.*

76. *See, e.g.*, Texas Employers' Ins. Ass'n v. Hubbard, 518 S.W.2d 529 (Tex. 1974); Continental Cas. Co. v. Cook, 515 S.W.2d 261 (Tex. 1974); Aetna Cas. & Sur. Co. v. Hughes, 497 S.W.2d 282 (Tex. 1973); Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969).

77. *See* cases cited in note 76 *supra*. *See also* Moronko v. Consolidated Mut. Ins. Co., 435 S.W.2d 846 (Tex. 1968); *accord*, Texas Employers' Ins. Ass'n v. Renfro, 496 S.W.2d 227 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ dism'd).

78. 530 S.W.2d 294 (Tex. 1975).

79. Article 8307, § 7a provides that the limitations of § 4a shall not begin to run against the employee until the employer files the employer's first report of injury (§ 7), provided the employer or the Association had notice of the injury. This provision was not involved in *Lee* since this amendment was not effective until Aug. 30, 1971.

The jury rendered a total and permanent verdict for the claimant, finding that he had good cause for failing to file his claim. Judgment was entered in favor of the claimant, but the court of civil appeals reversed and rendered judgment for the carrier, noting that the courts have uniformly held that the test for good cause is whether the employee prosecuted his claim with that degree of diligence as would have been exercised by a person of ordinary prudence under the same or similar circumstances.[80] The appeals court also emphasized the well-established law that ignorance of the statutory requirements will not excuse a failure to file a claim.[81] The court held that there was no evidence that the claimant relied upon his employer to file a claim on his behalf because he had testified he would have filed the claim himself had he known of the requirement. This holding is particularly unfortunate since it is well established that reliance upon one's employer does indeed constitute good cause under certain circumstances.[82]

The supreme court, after analyzing the evidence, simply held that given the totality of the facts, circumstances and conduct of the claimant, it could not be said, as a matter of law, that good cause did not exist up to the time that the claim was filed. Accordingly, it reversed the judgment of the court of civil appeals and remanded the cause to that court for a consideration of points not considered. In reaching this holding the supreme court distinguished a case relied upon by both parties, *Allstate Insurance Co. v. King*,[83] observing that in *King* the claimant was fully aware of the seriousness of his injuries and incapacity and had never received any benefits of any kind from his employer or the insurance company after he was fired from his job two months after his accident. The claimant in *King* filed no claim until fourteen months after his employment was terminated. Moreover, in *King* it was not contended that anyone told the claimant that a claim had *actually been filed*, as the claimant in *Lee* had been told, because King's only contention was that his employer *promised* to file a claim—an important distinction in good cause cases.

In *Texas Employers' Insurance Ass'n v. Thomas*[84] the court affirmed a total-permanent verdict, overruling the carrier's attack on the jury's good cause findings. The court summarily disposed of the points with a bare recitation of the evidence. In fact, it is difficult even to begin to evaluate

80. Houston Fire & Cas. Ins. Co. v. Lee, 521 S.W.2d 739, 741 (Tex. Civ. App.—Texarkana), *rev'd and remanded*, 530 S.W.2d 294 (Tex. 1975), citing Moronko v. Consolidated Mut. Ins. Co., 435 S.W.2d 846 (Tex. 1968), and Hawkins v. Safety Cas. Co., 146 Tex. 381, 207 S.W.2d 370 (1948); *accord, e.g.*, Texas Employers' Ins. Ass'n v. Hubbard, 518 S.W.2d 529 (Tex. 1974); Aetna Cas. & Sur. Co. v. Hughes, 497 S.W.2d 282 (Tex. 1973); Texas Employers' Ins. Ass'n v. Portley, 153 Tex. 62, 263 S.W.2d 247 (1953); Copinjon v. Aetna Cas. & Sur. Co., 242 S.W.2d 219 (Tex. Civ. App.—San Antonio 1951, writ ref'd).

81. 521 S.W.2d at 741, citing Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969).

82. *See, e.g.*, Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969); Texas Employers' Ins. Ass'n v. Coronado, 519 S.W.2d 517 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); Twin City Fire Ins. Co. v. King, 510 S.W.2d 370 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); Travelers Ins. Co. v. Echols, 508 S.W.2d 422 (Tex. Civ. App.—Texarkana 1974, no writ).

83. 444 S.W.2d 602 (Tex. 1969).

84. 517 S.W.2d 832 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

the court's holding because of the small amount of recited evidence. Apparently, the employee was injured on April 8, 1971, but did not file his claim with the Board until June 7, 1972, one year, one month and twenty-nine days later. The injury was evidently reported by the employee, and soon thereafter he was told by his employer that it was unnecessary to file a claim because "the company would take care of it." Subsequently, the employee filed his claim when told to do so by a representative of the Board. During the interim, the claimant continued working for his employer doing light work but earning full wages. Without reciting any other evidence (assuming there must have been more), the court simply held there was evidence to support the jury's good cause finding, citing three cases.[85] Reviewing the court's cited authority is useless, however, because of the total lack of evidence of any good cause existing after the first six months and up to the date of the filing of the claim. The mere fact that the claimant may have continued to work for the same employer is certainly not sufficient, without more, to support a good cause claim.[86] It is, of course, elementary that good cause must exist up to the time the claim is actually filed,[87] but in the instant case the evidence recited by the court fails to demonstrate continuing good cause.

Incredibly, the same court decided a similar case holding that the employee failed to establish good cause, reversing the trial court judgment and rendering judgment for the carrier. In *Texas Employers' Insurance Ass'n v. Coronado*[88] the claimant was injured in July 1970, but his claim for compensation was not filed until January 31, 1972. The injury consisted of an allergic reaction to a product used in his employment. Although his condition continued to deteriorate, he continued working for the same employer. In March 1971, however, he terminated his employment and did not work thereafter. The evidence demonstrated that soon after the injury he was assured by the employer that a claim *would be filed.* Subsequently, on an unidentified date, the claimant was assured a claim *had been filed.* This was the only basis for the failure to file a claim. The San Antonio appeals court concluded, however, that the claimant knew his injury was serious and knew he had a claim for compensation but still failed to take action, as would a reasonably prudent person, to protect his rights.[89]

In *Dillard v. Aetna Insurance Co.*,[90] a summary judgment case, the Austin court assumed the claimant had good cause for failing to file her

85. *Id.* at 837, citing Moronko v. Consolidated Mut. Ins. Co., 435 S.W.2d 846 (Tex. 1968), Aetna Cas. & Sur. Co. v. Bruns, 490 S.W.2d 879 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.), and Charter Oak Fire Ins. Co. v. Dewett, 460 S.W.2d 468 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

86. *See* Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969); Dillard v. Aetna Ins. Co., 518 S.W.2d 255 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

87. *See, e.g.*, Texas Employers' Ins. Ass'n v. Brantley, 402 S.W.2d 140 (Tex. 1966); Texas Cas. Ins. Co. v. Beasley, 391 S.W.2d 33 (Tex. 1965), *cert. denied*, 382 U.S. 994 (1966); Jones v. Texas Employers' Ins. Ass'n, 128 Tex. 437, 99 S.W.2d 903 (1937); Texas Employers' Ins. Ass'n v. Coronado, 519 S.W.2d 517 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

88. 519 S.W.2d 517 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

89. *Id.* at 519-20.

90. 518 S.W.2d 255 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

claim until June 1972, ten months after her injury. The claim was not actually filed until November 1972 because the claimant was told by a clerk at the Industrial Accident Board in Austin that she did not need to file a claim until six months after the employer filed its first report of injury. Furthermore, the clerk advised the claimant that an employer's report of injury had not been filed. This advice was, of course, erroneous, since the accident occurred in August 1971.[91] The court properly held that ignorance of the law was not good cause nor was erroneous advice from a clerk at the Industrial Accident Board, since erroneous advice from an attorney does not constitute good cause.[92]

Other good cause cases decided during the survey year offered no surprises. In *Transport Insurance Co. v. Ansley*,[93] to be distinguished from the facts in *Texas Employers' Insurance Ass'n v. Thomas*,[94] the court properly noted that even though the employer told the claimant *a claim would be filed*, and even though the claimant continued to work for the same employer for several months, a twelve-month delay in filing was not, as a matter of law, good cause.[95] In *Texas Employers' Insurance Ass'n v. Allen*[96] the claimant suffered a heart attack which the jury found to be a result of an accidental injury, but failed to file a claim for two years and three months. The claimant acknowledged he knew his heart condition was related to his job activities and that his injury was serious but stated that he delayed filing his claim because he thought he would eventually be able to return to work and because his personal physician never told him the injury was job related. The court held that the claimant's conduct did not meet the standard of ordinary care and reversed and rendered judgment for the carrier.

Good Cause—Death Claim. The filing requirements applicable to general and specific injuries are also applicable to beneficiaries of a deceased employee.[97] Good cause can excuse a failure to file a claim timely.[98] In *Davis v. Texas Employers' Insurance Ass'n*[99] the widow filed her claim twenty months after the employee's death. Her testimony established that her husband returned home after performing heavy work and suffered an apparent heart attack. She was given a copy of a death certificate wherein a justice of the peace—serving as coroner—listed the cause of death as "natural causes—heart failure." It was not until many months later, while talking to her husband's co-worker, that she learned her husband had become sick on the day of his death but had continued to work. Her claim was filed immediately thereafter. The trial court granted the carrier's

91. *See* note 79 *supra*.
92. *See* cases cited in 518 S.W.2d at 257.
93. 526 S.W.2d 186 (Tex. Civ. App.—El Paso 1975, no writ).
94. 517 S.W.2d 832 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *see* note 84 *supra* and accompanying text.
95. 526 S.W.2d at 188.
96. 519 S.W.2d 194 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).
97. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).
98. *Id.*
99. 516 S.W.2d 452 (Tex. Civ. App.—El Paso 1974, no writ).

motion for summary judgment, but the court of civil appeals reversed the judgment and remanded the case for trial. The case is unusual because the widow's allegation of good cause was based solely on her reliance upon the death certificate made out by the coroner, a case of first impression in Texas. The court analogized the reliance upon the coroner's report to the well-established line of cases in which there has been reliance upon representations by a medical doctor[100] and characterized the widow's reliance upon the report as reasonable under the circumstances, citing the coroner's statutory duty to determine and certify the correct cause of death.[101] It seems somewhat superfluous to connect the coroner's statutory duty to the reasonably prudent conduct standard, since there did not appear to be any circumstances surrounding the death, evident to the widow, which would put her on notice that the heart attack was job related. The surrounding circumstances would seem to be the key to cases of reliance upon representations by doctors or, as in *Davis*, coroners. Unless there are contraindications evident to the claimant, would it be unreasonable to rely upon what appear to be expert conclusions? Probably not.

Independent Contractor Versus Employee. The Texas Workmen's Compensation Act does not, of course, provide compensation for independent contractors. The distinction between an employee and an independent contractor is based primarily on control or the right of control of the details of the work.[102] In the absence of a written contract the actual exercise of control is sufficient to establish an employer-employee relationship.[103] Without question, this has become one of the difficult areas of compensation law. The supreme court has recently shed light on this problem area, however, and has eased the burden of distinguishing what has become an ephemeral concept. *Continental Insurance Co. v. Wolford*[104] involved a brick mason who orally contracted with Tiffany Homes, Inc., to lay bricks at a townhouse construction site. Claimant agreed to furnish his own helpers, scaffolding, and wheelbarrow. Tiffany was to supply bricks, water, mortar, and sand. Payment was seven cents per brick, but the cost of the mortar and sand was deducted from the claimant's payments. Nothing was withheld for social security or income tax purposes. After working one week under this arrangement, the claimant was injured in a fall from a scaffold.

At trial the claimant testified that the Tiffany supervisor had the right to fire him at any time if his work was done improperly. Tiffany's carrier apparently did not produce any evidence concerning the right of control. The jury concluded the claimant was an employee. The Houston [Fourteenth District] court of civil appeals,[105] in a lengthy opinion, analyzed numerous prior opinions and concluded that the jury's verdict was supported by

100. *See id.* at 454-55 and cases cited and discussed therein.
101. *Id.* at 454.
102. *See, e.g.*, Anchor Cas. Co. v. Hartsfield, 390 S.W.2d 469 (Tex. 1965); Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964).
103. *Id.*
104. 526 S.W.2d 539 (Tex. 1975).
105. 515 S.W.2d 364 (Tex. Civ. App.—Houston [14th Dist.] 1974), *rev'd*, 526 S.W.2d 539 (Tex. 1975).

sufficient evidence. In affirming the verdict the court held that the claimant's uncontroverted testimony that Tiffany could fire him at any time was sufficient, in spite of all other factors, to establish a right of control. In so holding the court relied upon the similar decision of *Liberty Mutual Insurance Co. v. Boggs.*[106] Upon review of *Wolford* the supreme court reversed the judgments of the lower courts and rendered judgment for the carrier, concluding that the claimant's testimony merely reflected that Tiffany could discharge him if dissatisfied with his work. Contrary to the specific holding by the court of civil appeals, the supreme court was of the opinion that the right to discharge was not evidence of control of the details of the work or of a right to control the details. Since the right to terminate exists with either an employee or an independent contractor, such right could not be determinative of the claimant's status with Tiffany. The court noted that the minimal degree of control by Tiffany was much less than that found in the leading case of *Anchor Casualty Co. v. Hartsfield*[107] and, therefore, the claimant was held to be an independent contractor as a matter of law.

Injury in the Course and Scope of Employment. During the 1974 survey year, a divided Tyler court of civil appeals in *Millers Mutual Fire Insurance Co. v. Scott*[108] held there was no evidence to establish that the employee received an injury in the course and scope of his employment. During this survey year, however, the supreme court reversed the appeals court judgment, holding there was legally sufficient evidence to support the jury's finding of accidental injury.[109] There was no direct evidence of how the employee was injured or what type of work, if any, he was doing at the time of injury. The employee was seen on the employer's premises at approximately 7:00 a.m., but he never punched his time card for that day. The evidence indicated, however, that the time clock did not always function. At approximately 7:30 a.m. he helped a co-employee start a fork lift which caught fire. The fire department was called and came to the premises to fight the fire. About thirty minutes later the employee was seen standing near the scale house apparently doing nothing, and several hours thereafter he was found unconscious, bleeding from the mouth, nose, and ear. Although his duties did not normally require him to be in the area where he was found, he testified that he was occasionally required to do some work around that area. There was also evidence that a whiskey bottle was found near the scene of the accident, in addition to testimony that the employee had been sent home several days prior to the injury because he was intoxicated. The testimony was disputed as to whether the employee smelled of alcohol when he was found and whether he had seemed drunk earlier in the morning. The employee suffered a severe head injury and could not testify as to how the injury occurred or the nature of his activities from 8:00 a.m. until he was found.

106. 66 S.W.2d 787, 792 (Tex. Civ. App.—Eastland 1933, writ dism'd).
107. 390 S.W.2d 469 (Tex. 1965).
108. 513 S.W.2d 246 (Tex. Civ. App.—Tyler 1974), *reviewed in* Sartwelle, *supra* note 2, at 202-04.
109. Scott v. Millers Mut. Fire Ins. Co., 524 S.W.2d 285 (Tex. 1975).

As noted by the supreme court, it is the employee's obligation to prove that his injuries were sustained in the course and scope of his employment by proving that they had to do with and originated in the work of his employer and were received by him while engaged in or about the furtherance of the employer's affairs or business.[110] Acknowledging the total absence of direct evidence demonstrating an injury in the course and scope of employment, the employee argued that his retrograde amnesia was sufficient to make the case analogous to those involving an employee found dead at a place where his duties required him to be or where he may properly be while performing his duties during regular work hours. In such cases, the employee argued, there is a presumption of injury in the course and scope of employment, absent evidence to the contrary.[111] The majority of the court of civil appeals seemingly acknowledged the existence of such a presumption but held that the presumption is rebuttable, and that the evidence produced by the carrier destroyed the presumption. Thereafter, the presumption is unavailable as evidence.[112] The supreme court refused to decide whether a presumption of course and scope arises in a case where the employee claims a loss of memory because the court of civil appeals had been correct in holding that any such presumption had been rebutted, but more importantly, because there was a jury finding in favor of the employee, supported by legally sufficient evidence, thereby making the existence of a presumption irrelevant.[113]

In considering the sufficiency of the employee's evidence, viewing the evidence and all reasonable inferences in the light most favorable to the verdict and disregarding all contrary evidence, the court emphasized these facts: (1) the employee was injured on the employer's premises during regular work hours on a regular work day; (2) he was injured at a place where he could properly be in performing his duties; (3) it did not *affirmatively* appear that he *did not begin work* on the day in question *or* that he *stopped work to pursue a personal mission.*[114] The third emphasized "fact" appears to be a holding that the *carrier* must *affirmatively* produce evidence to demonstrate that the employee did no work at all or that he pursued a mission of his own. If so, new law has been written into the Compensation Act. Such a holding seems more appropriate to appellate review of a summary judgment case rather than a jury verdict. It would seem to be more advisable for the court to rely simply on the *affirmative* evidence from the *claimant's witnesses* to the effect that he was not

110. *Id.* at 288, citing Texas Gen. Indem. Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963).

111. The employee cited Elledge v. Great Am. Indem. Co., 312 S.W.2d 722 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.), American Gen. Ins. Co. v. Jones, 250 S.W.2d 663 (Tex. Civ. App.—Galveston 1952), *rev'd on other grounds*, 152 Tex. 99, 255 S.W.2d 502 (1953), and Associated Employers Lloyds v. Wiggins, 208 S.W.2d 705 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.).

112. 513 S.W.2d at 250; *cf.* Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354 (Tex. 1971); Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 143 S.W.2d 763 (1940); Mitchell v. Ellis, 374 S.W.2d 333 (Tex. Civ. App.—Fort Worth 1963, writ ref'd).

113. 524 S.W.2d at 288.

114. *Id.* at 289.

intoxicated on the morning of the accident. Combined with the other emphasized "facts," this testimony would seem to reduce the case to a simple fact issue which was decided in favor of the claimant by the jury. Otherwise, despite the court's protestations to the contrary, the case stands for the proposition that in fact there is a presumption in favor of injury in the course and scope of employment which presumption must be *affirmatively* rebutted by the carrier. This would be contrary to previous case law regarding the use of a presumption as evidence.[115]

The Beaumont court of civil appeals decided the case of *City of Austin v. Johnson*[116] on the basis that the employee's injury did not originate in the work, business, or trade of the employer, but the opinion also may have implications in the area of occupational disease. The suit was based on the theory that the deceased's heart attack was caused by emotional stress, worry, and anxiety arising from the termination of his job. The widow alleged that on September 9, 1971, the employee was informed that his job with the city of Austin would be terminated on October 1, 1971. The emotional reaction allegedly contributed to a fatal heart attack on September 20, 1971. A jury verdict was returned in favor of the widow.

The court recognized that the definition of "injury sustained in the course of employment" contained in article 8309, section 1[117] requires that the injury be of such kind and character as has to do with and originate in the employer's work and must be suffered while the employee is engaged in or about the furtherance of the affairs of the employer.[118] The court then wrote:

> In *Kimbrough v. Indemnity Ins. Co.*, 168 S.W.2d 708, 709 (Tex. Civ. App.—Galveston 1943, writ ref'd), we find:
>
> 'The injury must be brought about by a risk which is incidental to and arises out of the task the workman has to do in fulfilling his contract for service, and to which the employee would not be subjected but for the employment contract for service.'
>
> See also *Safety Casualty Co. v. Wright*, 138 Tex. 492, 160 S.W.2d 238, 242 (1942):
>
> 'In this connection, it may be said that a risk is incidental to employment when it belongs to or is connected with what a workman has to do in performing his contract of service.'
>
> To hold that worry and anxiety over job loss is 'connected with what a workman has to do in performing his contract of service' would in our opinion not be reasonable.[119]

---

115. *See* cases cited note 112 *supra*. It is interesting to note that on remand to the court of civil appeals the Tyler court sustained the carrier's insufficiency points of error and remanded the case to the trial court for a new trial. Millers Mut. Fire Ins. Co. v. Scott, 529 S.W.2d 315 (Tex. Civ. App.—Tyler 1975, no writ).

116. 525 S.W.2d 220 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

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

118. 525 S.W.2d at 221, citing Smith v. Texas Employers' Ins. Ass'n, 129 Tex. 573, 105 S.W.2d 192 (1937), Texas Indem. Co. v. Clark, 125 Tex. 96, 81 S.W.2d 67 (1935), and McKim v. Commercial Standard Ins. Co., 179 S.W.2d 357 (Tex. Civ. App.—Dallas 1944, writ ref'd); *see, e.g.*, Tex. Gen. Indem. Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963).

119. 525 S.W.2d at 221.

The Beaumont court noted the absence of any Texas authority involving this particular fact situation but cited and relied on three out-of-state cases in holding that such injury is not compensable.[120] Thus, the trial court was reversed and judgment rendered that the claimant take nothing.

The beneficiary in *Johnson* undoubtedly based her cause of action on an accidental injury theory, *i.e.*, an undesigned, unforeseen, untoward, or unexpected event traceable to a definite time, place and cause,[121] rather than on the pre-1971 occupational disease statute[122] which contained an exclusive list of physically induced diseases qualifying as occupational diseases. The 1971 amendment of the occupational disease statute transformed the specific list of diseases into a definition which expanded the occupational disease concept to include any disease arising out of the employment situation as well as diseases induced by repetitious physical traumatic activity.[123] At this time last year only three reported cases had considered the amended occupational disease statute[124] and the same is true for the 1975 survey year. None of these cases has shed any light on the operation of the new amendment, but at least one commentator has already suggested, as contended in *Johnson*, that mentally induced diseases, *i.e.*, high blood pressure, heart attacks, etc., are compensable under the amended statute.[125] Analysis of prior compensation law as well as the wording of the new statute demonstrates this is not so.[126]

Occupational disease has long been recognized to be a disease which is acquired in the usual and ordinary course of employment and which is incidental thereto.[127] While this element of occupational disease is not

120. *Id.*, citing Seals v. City of Baton Rouge, 94 So. 2d 478 (La. Ct. App. 1957), *In re* Korsun's Case, 354 Mass. 124, 235 N.E.2d 814 (1968), and Chapman v. Aetna Cas. & Sur. Co., 221 Tenn. 376, 426 S.W.2d 760 (1968).

121. *See, e.g.*, Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972); Consolidated Underwriters v. Wright, 408 S.W.2d 140 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); Solomon v. Massachusetts Bonding & Ins. Co., 347 S.W.2d 17 (Tex. Civ. App.—San Antonio 1961, writ ref'd).

122. Ch. 113, §§ 2-9, [1947] Tex. Laws 176-80 (repealed 1971).

123. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Supp. 1975-76):

> 'Occupational Disease' shall be construed to mean any disease arising out of and in the course of employment which causes damage or harm to the physical structure of the body and such other diseases or infections as naturally result therefrom. An 'Occupational Disease' shall also include damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities extending over a period of time and arising in the course of employment; provided, that the date of the cumulative injury shall be the date disability was caused thereby. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident to an 'Occupational Disease' or 'Injury' as defined in this section.

124. Charter Oak Fire Ins. Co. v. Hollis, 511 S.W.2d 583 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (dictum); Haley v. Texas Employers Ins. Ass'n, 487 S.W.2d 369 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.); Legate v. Bituminous Fire & Marine Ins. Co., 483 S.W.2d 488 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.). *Haley* and *Legate* both held that the amendment was not applicable because the case under consideration arose prior to the effective date of the amendment.

125. Terry, *Occupational Disease and Cumulative Injury*, 8 TRIAL LAW. F., April-June 1974, at 3.

126. *See* Sartwelle, *supra* note 2, at 183-90.

127. *See, e.g.*, Texas Employers Ins. Ass'n v. McKay, 146 Tex. 569, 210 S.W.2d 147 (1948); Solomon v. Massachusetts Bonding & Ins. Co., 347 S.W.2d 17 (Tex. Civ.

generally recognized as emanating from the definition of injury in the course of employment as written in article 8309, this does appear to be its source.[128] Thus, a workman contending that emotional stress, anxiety, and worry created by a job situation resulted in physical injuries must prove not only that the injury occurred while the workman was engaged in or about the furtherance of his employer's affairs or business, he also must establish, as required by article 8309, that the injury was of a kind and character that had to do with and *originated* in the employer's work, trade, or profession.[129] These requirements are reflected in the amended occupational disease definition which qualifies compensable diseases as being only those arising "out of and in the course of employment" and excludes "ordinary diseases of life to which the general public is exposed outside of the employment."[130] While these two sections of the Act use slightly different wording, the intent of the statute is to exclude those diseases that do not originate in and arise out of job-related risks. Certainly, an accidental injury, either physical or mental, with or without physical harm to the bodily structures, is compensable when traceable to a definite time, place, and cause,[131] but untraceable stimuli such as anxiety, tension, pressure, and overwork present tenuous proof problems which would end only when all alleged injuries to the nervous system and psyche are declared compensable. Such result would convert compensation insurance into employee health insurance.[132] Fortunately, the Beaumont court of civil appeals recognized these problems in *Johnson*, and, it is submitted, correctly held that it is unreasonable to saddle industry with the burden of "cradle-to-grave" health insurance.[133]

App.—San Antonio 1961, writ ref'd); Texas Employers' Ins. Ass'n v. Cowan, 271 S.W.2d 350 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.); Rudd v. Gulf Cas. Co., 257 S.W.2d 809 (Tex. Civ. App.—El Paso 1953, no writ); American Sur. Co. v. Ritchie, 182 S.W.2d 501 (Tex. Civ. App.—Waco 1944, writ ref'd w.o.m.).

128. *Cf.* Shelton v. Standard Ins. Co., 389 S.W.2d 290 (Tex. 1965); Texas Gen. Indem. Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963); Walker v. Texas Employers' Ins. Ass'n, 443 S.W.2d 429 (Tex. Civ. App.—Fort Worth 1969, writ ref'd); Thomas v. Travelers Ins. Co., 423 S.W.2d 359 (Tex. Civ. App.—El Paso 1967, writ ref'd).

129. *See* cases cited at note 128 *supra*.

130. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Supp. 1975-76).

131. *See, e.g.*, Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955); Travelers Ins. Co. v. Garcia, 417 S.W.2d 630 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); Aetna Ins. Co. v. Hart, 315 S.W.2d 169 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.).

132. *Cf.* Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972); Houston Fire & Cas. Co. v. Biber, 146 S.W.2d 442 (Tex. Civ. App.—San Antonio 1940, writ dism'd jdgmt cor.).

133. The court of civil appeals in Hartford Accident & Indem. Co. v. Olson, 466 S.W.2d 373, 376 (Tex. Civ. App.—El Paso 1971), *aff'd*, 477 S.W.2d 859 (Tex. 1972), denying a heart attack claim based on several alleged frustrating job experiences occurring over a 19-day period, commented:

> Regardless of the liberal construction of the Workmen's Compensation Act in favor of the workman, of the purpose of the Act to place on the shoulders of industry the expense incident to the hazard, and with sympathy for the workman and his family, there is still no basis upon which to convert the statute into employees' health insurance, which we would have to do to affirm this case. We are making this statement aware that we are not producing an exact legal test that can be applied at all times. We regret this, but the courts are having this problem universally when they attempt to draw the line in heart cases.

Course and Scope of Employment—Borrowed Servant. A borrowed servant is usually considered to be the general employee of one employer but becomes a borrowed or special servant of another when performing specific acts on behalf of the latter.[134] Naturally, when the borrowed servant is injured the question arises as to which employer will be burdened with the compensation claim.[135] The borrowed servant problem arose in a rather strange way in *Associated Indemnity Co. v. Hartford Accident & Indemnity Co.*[136] Hartford was the compensation carrier for a temporary labor contractor supplying temporary employees to various businesses. The particular employee involved was hired by Hartford's insured and sent to work on the premises and under the control of Associated's insured, the Frito-Lay Company. The oral contract specified that Frito-Lay would pay the labor contractor a fixed hourly charge for the worker, but out of this hourly charge the labor contractor would pay all wages, social security and withholding taxes, and also would pay for workmen's compensation coverage. After his injury, the employee made a claim against Frito-Lay, but was told that he was the employee of the labor contractor. He filed claim against Hartford, who did not deny coverage but made a voluntary settlement. This settlement was made in accordance with a general practice of Hartford to pay claims of the labor contractor's employees for injuries sustained while working under the direction and control of the labor contractor's customers such as Frito-Lay. The employee then filed a third-party action against Frito-Lay. Hartford intervened, asserting its claim for compensation subrogation. Hartford also impleaded Associated as a third-party defendant, alleging that Associated actually owed the compensation which Hartford paid. The trial court denied the employee's claim on the ground that Frito-Lay was the actual employer and, therefore, could not be subject to a common law suit by the injured workman.[137] Hartford's claim against Associated was remanded to the trial court and both filed motions for summary judgment. The trial court granted Hartford's motion.

This is apparently a case of first impression in Texas. Associated argued that the labor contractor could properly agree to furnish workmen's compensation coverage on temporary employees since such employees must be considered employees of both the labor contractor and Frito-Lay. In support of this contention Associated relied on several out-of-state cases apparently holding that one could be a simultaneous employee of the labor contractor and the temporary employer. Hartford, on the other hand, took the position that the dual employment theory was inconsistent with the established Texas borrowed servant doctrine which made the temporary

134. *See, e.g.*, J.A. Robinson Sons v. Wigart, 431 S.W.2d 327 (Tex. 1968); Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963).

135. *See* cases cited at note 134 *supra*. *See also* Home Indem. Co. v. Draper, 504 S.W.2d 570 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); Rotge v. Texas Employers' Ins. Ass'n, 502 S.W.2d 562 (Tex. Civ. App.—San Antonio 1973, no writ).

136. 524 S.W.2d 373 (Tex. Civ. App.—Dallas 1975, no writ).

137. *Id.* at 375, citing Waldroup v. Frito-Lay, Inc., No. 4643 (Tex. Civ. App.—Eastland, Aug. 10, 1973) (unreported).

employer, *i.e.*, the employer with the right of control over the details of the work at the time of the injury, the employer chargeable with compensation responsibility. Hartford further contended that any contract whereby the temporary employer assumed responsibility for workmen's compensation payments would be illegal. No Texas case had ever decided that particular issue, and the Dallas court of civil appeals neatly side-stepped it by holding, based on principles of equitable subrogation, that Hartford had not shown any unjust enrichment and, therefore, was not entitled to recovery. As an aside, the court also pointed out that if Hartford's contention that the arrangement for compensation between the parties was illegal, then Hartford was attempting to take advantage of an illegal transaction which could not be enforced under equitable principles. Thus, the court reversed the judgment in favor of Hartford and rendered judgment denying all recovery by Hartford against Associated.

Third-Party Suits. The whole scheme of subrogation and recovery from third parties was completely rewritten in 1973 when the legislature amended section 6a of article 8307.[138] In place of what had been a simplistic, straightforward statute, the legislature created a complicated and sometimes vague scheme which appears to be designed primarily to enhance fees collected by claimants' attorneys, while further increasing the expense of workmen's compensation coverage without a concomitant increase in benefits to the injured workman. At this writing there has been only one case, *Simpson v. Texas Employers' Insurance Ass'n*,[139] which has considered this new subrogation scheme. In this case, however, the court was not called upon to interpret the actual provisions of the statute but only to decide whether the 1973 amendment was substantive or procedural and, therefore, retroactive. The survivors of a deceased employee and the compensation carrier, Texas Employers', stipulated, as had been the prevalent practice under the old statute, that Texas Employers' would be entitled to recover its full subrogation lien from the first monies recovered by the plaintiffs from a negligent third party. The employee died on April 15, 1970, some three years prior to the amendment. After the effective date of the amendment, the third-party action went to trial and was settled, but the attorneys representing the plaintiffs argued that they were entitled to attorneys' fees as stipulated in the amended statute. Plaintiffs, arguing the provisions of article 8309, section 3b[140] which provides, in effect, that amendments to the Act shall not affect pending compensation cases, contended that this section was limited only to the amount of weekly benefits payable. The court of civil appeals, however, in a well-reasoned opinion, overruled this contention, holding that the amendment to the subrogation statute was substantive and not merely procedural and could not constitutionally be retroactive. The appeals court thus sustained the trial court's denial of attorneys' fees to the plaintiffs' attorneys.

138. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Supp. 1975-76).
139. 519 S.W.2d 209 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).
140. TEX. REV. CIV. STAT. ANN. art. 8309, § 3b (Supp. 1975-76).

Second Injury Fund—Prior and Subsequent Compensable Injuries. Prior to September 1, 1971, section 12c of article 8306[141] provided the insurer the defense of percentage contribution of prior compensable injuries to a present incapacity. The rationale for this provision was said to be to encourage employers to hire handicapped workers and to prevent double recovery for the same incapacity.[142] The 1971 amendment of section 12c[143] destroyed this defense by providing that "the Association shall be liable for *all* compensation provided by this Act."[144] In the survey year 1974 the Eastland court of civil appeals specifically held that under amended section 12c "proof of a prior compensable injury will no longer reduce recovery of a workman because of such prior injury."[145] In *Texas Employers' Insurance Ass'n v. Haunschild*[146] the carrier attacked the amended statute, contending that it was not liable for the combined incapacities created by multiple compensable injuries. The Amarillo court of civil appeals, speaking through Justice Reynolds, in one of the most impressive, thorough, and persuasive opinions by any Texas court in recent years, reached the same conclusion as did the *Creswell* court, *i.e.*, proof of a prior compensable injury will no longer reduce a workman's recovery for subsequent incapacity. In *Haunschild* the employee injured his neck in July 1973 and underwent two operations. The carrier introduced evidence of a prior compensable back and neck injury occurring in November 1972 which resulted in back surgery. The jury found that the 1972 injury contributed sixty-five percent to the employee's incapacity at the time of trial. The trial court disregarded the contribution finding and entered judgment for the full compensation due for the present incapacity. The sole question on appeal was whether the 1971 amendment to section 12c still allowed reduction of the carrier's liability by the percentage of incapacity contributed by a prior compensable injury.

The carrier contended that the legislature intended the amendment to affect only those cases wherein the carrier was entitled to reimbursement from the Second Injury Fund[147] but that in all other cases the carrier would still be entitled to reduce recovery by the amount a previous compensable

---

141. Ch. 349, § 1, [1947] Tex. Laws 690.

142. *See, e.g.*, St. Paul Fire & Marine Co. v. Murphree, 163 Tex. 534, 357 S.W.2d 744 (1962); Gilmore v. Lumbermen's Reciprocal Ass'n, 292 S.W. 204 (Tex. Comm'n App. 1927, jdgmt adopted); *see* Altman, *The Status of "Other Compensable Injuries" Under the Texas Workmen's Compensation Act*, 10 TRIAL LAW. F., Oct.-Dec. 1975, at 18.

143. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Supp. 1975-76) provides:

> If an employee who has suffered a previous injury shall suffer a subsequent injury which results in a condition of incapacity to which both injuries or their effects have contributed, the Association shall be liable for all compensation provided by this Act, but said Association shall be reimbursed from the 'Second Injury Fund' as hereinafter described, to the extent that the previous injury contributes to the combined incapacity.

144. *Id.* (emphasis added).

145. Texas Employers' Ins. Ass'n v. Creswell, 511 S.W.2d 68 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

146. 527 S.W.2d 270 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

147. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c-1 (Supp. 1975-76), providing for reimbursement to the Association in situations involving a combination of specific injuries resulting in total and permanent incapacity.

injury contributed to an incapacity. The court of civil appeals, however, after an exhaustive analysis of the prior statute and the "plain, ordinary words"[148] employed by the legislature in the amendment, concluded "that the workmen's compensation insurance carrier's liability for the incapacity produced by the combined effects of multiple general injuries is not reduced by the percentage of incapacity contributed by compensable general injuries other than the one in suit."[149]

In concluding that an employee is entitled to full compensation regardless of prior incapacity, the court refused to decide whether the amendment to the Second Injury Fund statute[150] entitled the carrier to be reimbursed from the fund for liability resulting from multiple general injuries as well as multiple specific injuries causing total and permanent incapacity. The court preferred to consider that issue in a case directly raising the question.[151] In light of the seemingly clear language of the Second Injury Fund statute, as well as the supreme court's interpretation of the operation of the statute,[152] it seems evident that employers will indeed pay twice for the same incapacity. This result has been said to remove "the harshness of the law off the shoulders of the injured workman and place it upon those better able to protect themselves."[153] This same author also proposes an amendment to the Second Injury Fund which would allow insurers to recover from the fund the portion of the compensation chargeable to the incapacity created by the prior compensable injury. In this manner, employment of handicapped workers would be encouraged because the recovery from the fund could then be applied to the employer's loss experience.[154]

This analysis appears to overlook the fact that the fundamental purpose of the Compensation Act, unlike general tort law, is not to restore completely what is lost but rather, in a dignified manner, to provide limited financial support and unlimited medical support which will enable an injured work-

148. 527 S.W.2d at 275.
149. *Id.* at 275-76.
150. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c-1 (Supp. 1975-76).
151. 527 S.W.2d at 276.
152. The present language of §§ 12c and 12c-1 is identical to the prior language of these sections except the prior sections refer specifically to the employee, not the Association. Accordingly, prior 1971 Second Injury Fund cases appear to be applicable to an interpretation of the amended language. In Second Injury Fund v. Keaton, 162 Tex. 250, 345 S.W.2d 711 (1961), the supreme court held that § 12c does not create an independent cause of action within itself, but must be construed in connection with § 12c-1. Section 12c-1 limited the liability of the Second Injury Fund to situations involving a combination of specific injuries resulting in total and permanent incapacity. The court specifically noted that combinations of general injuries and injuries resulting only in partial disability were not compensable from the Second Injury Fund.

Under the amended language of § 12c-1, the association must file its claim against the Second Injury Fund within 180 days following the date of injury. It must also file evidence of its payment of all compensation provided for under the Act as well as evidence of the pre-existing permanent physical impairment qualifying the association for reimbursement. Good cause under art. 8307, § 4a is applicable to such filing. Obviously, in all cases other than an outright severance of a hand, arm, leg, etc., it will be very difficult to comply with the 180-day requirement, not only from the standpoint of knowing the full effects of the injury within 180 days, but also producing evidence that all payments due under the Act have been paid.
153. Altman, *supra* note 142, at 20.
154. *Id.* at 21.

man to recover from the effects of an industrial injury and return to fruitful employment while passing the cost of the injury on to the consuming public.[155] Workmen's compensation was never intended to be a tort system, social insurance, or health insurance.[156] Unless workmen's compensation is changed into "cradle-to-grave" health insurance, with the concomitant increase in cost and governmental participation, there does not appear to be any reasonable rationale which would allow tort-like, windfall recoveries.

Compromise Settlement Agreement—Suit To Set Aside. In the sequel to a plea of privilege appeal arising during the 1974 survey year,[157] the Fort Worth court of civil appeals affirmed a jury verdict finding that false representations were relied upon by the employee in executing a compromise settlement agreement and finding the employee totally-permanently disabled. In the second appeal, *Texas Employers' Insurance Ass'n v. Sprabery*,[158] the evidence demonstrated that the claimant was referred to a doctor by the carrier and underwent back surgery. The doctor subsequently represented to him that he had no permanent disability and would be able to return to his usual occupation. An insurance adjuster told the claimant, who could neither read nor write, that he could never recover more than $8,000 in addition to the compensation already paid. A compromise settlement agreement was executed for the total sum of $6,500. Subsequently, the employee underwent a third back operation by a doctor of his choice who advised him he could never return to his former occupation. The carrier did not contest the total-permanent finding but did argue that the jury's finding of legal fraud by the doctor and legal fraud by the insurance adjuster were in irreconcilable conflict. It is difficult to determine the basis for this contention based on the recitations in the court's opinion, but the court of civil appeals summarily swept aside the carrier's attack, holding that there was no fatal conflict.[159]

Suit To Set Aside Board Award. In order to appeal an award of the Industrial Accident Board the statute requires that within twenty days of the date of the award notice must be given to the Board of the intent to appeal.[160] Within twenty days after filing notice of intention to appeal a suit to set aside the award must be filed in the county where the injury occurred.[161] These statutory requirements constitute a general statute of limitation,[162] and compliance with each provision is mandatory and jurisdic-

155. 1 A. LARSON, *supra* note 42, §§ 2.00-.70.
156. *Id.; cf.* Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972); Houston Fire & Cas. Co. v. Biber, 146 S.W.2d 442 (Tex. Civ. App.—San Antonio 1940, writ dism'd jdgmt cor.).
157. Texas Employers' Ins. Ass'n v. Sprabery, 507 S.W.2d 340 (Tex. Civ. App.—Fort Worth 1974, no writ).
158. 520 S.W.2d 447 (Tex. Civ. App.—Fort Worth 1975, no writ).
159. *Id.* at 449, citing Little Rock Furniture Mfg. Co. v. Dunn, 148 Tex. 197, 222 S.W.2d 985 (1949).
160. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).
161. *Id.*
162. Richards v. Consolidated Underwriters, 411 S.W.2d 436 (Tex. Civ. App.—Beaumont 1967, writ ref'd).

tional.[163] The most frequent reason why compensation appeals are dismissed, other than for simple failure to comply with the statutory time limits, seems to be for filing suit against the wrong insurance company! In the 1974 survey year the supreme court affirmed the dismissal of an employee's suit because the carrier was misnamed,[164] and during this survey year there were three appeals in which the carrier was misnamed.

In *Garcia v. Employers Casualty Co.*[165] the employee gave timely notice of appeal and filed suit to set aside the Industrial Accident Board award rendered against Employers Casualty Company as the workmen's compensation carrier for Texas Tech University. Unfortunately, rather than naming Employers Casualty Company as defendant, Texas Employers' Insurance Association was named and service requested through the Insurance Commissioner. Prior to any answer by Texas Employers', but after the expiration of twenty days from the date of filing notice of appeal, the employee filed a "supplemental petition to show correct name of defendant." This pleading correctly named Employers Casualty Company as the defendant and requested service on the defendant's agent in Lubbock. Each carrier answered and subsequently filed motions for summary judgment. Texas Employers' filed evidence establishing that it was not the compensation carrier for the university. Employers Casualty Company sought dismissal of the suit since it was not timely filed. Both motions were granted.

On appeal, the employee's primary contention was that the mistake as to the defendant was a misnomer and not a mistake in identity and was correctable by a supplemental petition with relation back to the date of original filing, relying on *Adams v. Consolidated Underwriters.*[166] In *Adams* the employee intended to sue Consolidated Underwriters. In fact, he did actually serve the agent of Consolidated Underwriters but named the defendant by the wrong corporate name—Consolidated *Casualty* Underwriters, which did not exist. After the expiration of the statutory time limit, an amended petition was filed correcting the name of the defendant and service was again had on the agent served with the original petition. In this situation the court held that the principal of misnomer applied, and that the original petition was a timely filing of suit under the statute. The court in *Garcia* distinguished *Adams* on its facts. The court pointed out that Texas Employers' Insurance Association and Employers Casualty Company were separate, distinct entities formed at different times under dissimilar names, despite the fact that they had similar officers and shared offices and telephone numbers in Lubbock. Thus, the court held that contrary to *Adams*, Garcia mistakenly identified, not misnamed, the defendant, *i.e.*, sued and served the *wrong defendant* by its *correct legal name* and tardily sued and served the *right defendant* by its *correct legal name*, thereby preventing the operation of the misnomer doctrine.

163. Oilmen's Reciprocal Ass'n v. Franklin, 116 Tex. 59, 286 S.W. 195 (1926).
164. Commercial Standard Fire & Marine Ins. Co. v. Martin, 501 S.W.2d 430 (Tex. Civ. App.—Texarkana 1973), *jdgmt modified per curiam*, 505 S.W.2d 799 (Tex. 1974).
165. 519 S.W.2d 685 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).
166. 133 Tex. 26, 124 S.W.2d 840 (1939).

Additionally, the employee argued that article 5539b,[167] providing that a plea of limitation is unavailable as a defense to a change of facts or theory not based on an occurrence distinctly different from the original facts or theory prevented the operation of the limitation specified in article 8307, section 5.[168] The court of civil appeals disagreed, holding that the mandatory and jurisdictional requirements of the Compensation Act would not allow the substitution of a new and different party under the guise of amending the theory or facts upon which recovery is sought. The court pointed out that the specific holding of the supreme court in *Latham v. Security Insurance Co.*[169] made the award against Employers Casualty Company final since it was a party to the Board's award but was not timely named in the suit seeking to set aside the award.

In *Carpenter v. Gulf Insurance Co.*[170] the result was the same as in *Garcia* but on slightly different facts. The Industrial Accident Board listed Gulf Insurance Company as the insurance carrier for the employer and denied any recovery. The employee appealed, naming Gulf Insurance Company, Gulf Insurance Liquidating Company, and Washington Fire and Marine Insurance Company as defendants. Two years later the defendants' attorney advised the employee's attorney that Select Insurance Company was the proper carrier. The employee's attorney then filed an amended petition naming Select as a defendant. The trial court dismissed the cause as to the original defendants and granted Select's motion for summary judgment, entering a take-nothing judgment as to Select.

On appeal the employee contended that the Industrial Accident Board furnished erroneous information as to the employer's insurance carrier and that she relied upon such information to her detriment. In addition, it was argued that Select had a "duty" to furnish her with the correct information as to coverage. The court of civil appeals summarily brushed aside these arguments, holding that since Select was not a party to the proceeding before the Industrial Accident Board, neither the district court nor the court of civil appeals could acquire jurisdiction to render any type of order other than one of dismissal.[171] Because the summary judgment evidence clearly revealed that none of the original defendants was the carrier for the employee's employer, the dismissal with prejudice as to them was sustained. Since the trial court did not acquire any jurisdiction over Select, however, and since the only proper judgment as to it could be dismissal,[172] the summary judgment in favor of Select was reversed and judgment rendered dismissing the cause as to Select. The dismissal as to Select, however, was without prejudice, since theoretically the employee could refile a claim with the Industrial Accident Board and establish good cause for the late filing, thereby reviving the claim against the correct carrier.

167. TEX. REV. CIV. STAT. ANN. art. 5539b (1967).
168. *Id.* art. 8306, § 5.
169. 491 S.W.2d 100 (Tex. 1972).
170. 515 S.W.2d 60 (Tex. Civ. App.—San Antonio 1974, no writ).
171. *Id.* at 62, citing Commercial Standard Fire & Marine Ins. Co. v. Martin, 505 S.W.2d 799 (Tex. 1974).
172. 515 S.W.2d at 62.

Finally, in *Charter Oak Fire Insurance Co. v. Square*[173] the carrier narrowly escaped paying a Board award that it attempted to appeal when it misnamed itself as plaintiff. The carrier timely filed suit to set aside an award of the Industrial Accident Board styling the suit "Charter Oak Fire Insurance Co. a/k/a Travelers Insurance Co. v. Dorothy Jean Square." The claimant filed a plea in abatement alleging that the Board's award was entered against Travelers Insurance Company, the notice of appeal was filed by Travelers Insurance Company, Charter Oak was not a party to any Board proceeding, Charter Oak and Travelers were two separate and distinct corporations and, therefore, the appeal by Charter Oak should be dismissed for want of jurisdiction. Subsequently, a plaintiff's first amended original petition was filed deleting all references to Charter Oak and naming Travelers as the sole plaintiff. However, the trial court sustained the plea in abatement, dismissing the suit for want of jurisdiction.

On appeal, the court of civil appeals noted that the employee's allegations were indeed correct, that Travelers was the carrier named by the Board in the award and was the carrier filing the notice of appeal. It was also noted, however, that courts normally consider a petition in its entirety and construe it as favorably to the pleader as possible, looking to the pleader's intendment in order to determine the nature and purpose of the suit.[174] Considering the petition as a whole, the court of civil appeals concluded that Travelers could be considered the real plaintiff in interest and since the mere misnaming of the plaintiff in an original petition does not prevent tolling of a statute of limitations, the misnomer was correctable by an amended petition even after the running of the statute of limitation.[175] Thus, the trial court's order was reversed, and the cause remanded for trial on the merits.

Garcia and *Square* are examples of the confusion that can frequently occur where carriers have numerous subsidiary companies in their corporate structures. Frequently, a carrier will underwrite a risk in one of several subsidiary companies.[176] Although these companies are normally thought of as being one and the same, they are in fact separate, distinct entities. Unless care is exercised in naming, as plaintiff or defendant, the particular company underwriting the risk, either an employee or a carrier risks losing an appeal. When any doubt exists, it would appear advisable to secure a copy of the employer's notice of becoming a subscriber which requires the employer to designate the name of the carrier providing compensation coverage.[177]

173. 526 S.W.2d 635 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).
174. *Id.* at 636, citing cases.
175. *Id.* at 637, citing cases.
176. No explanation was given as to how or why Charter Oak was named in the *Square* petition.
177. TEX. REV. CIV. STAT. ANN. art. 8308, § 18a (Supp. 1975-76). This section provides that when an employer becomes a subscriber, or when a policy is renewed, the employer or the carrier must notify the Board of such fact and provide the Board with certain information including the name of the insurance company providing the coverage. A penalty is provided for noncompliance. Article 8307, § 5 provides that any interested party may obtain a certified copy of the employer's notice of becoming a subscriber, free of charge, upon written request. This section specifically limits the right to obtain a free certified copy to a claim "pending in Court," but § 9 of the same article

Injury in the Course of Employment—Heart Attacks and Strokes. One of the most difficult and frequently litigated issues in compensation law is the compensability of heart attacks and strokes occurring on the job. The difficulties arise from a number of inherent problems associated with both legal and medical theory and from the age-old legal problem of drawing the line in different fact situations. The combination of all of these perplexing and sometimes baffling problems has resulted in a large number of disparate opinions that simply add confusion to an issue desperately in need of consistency. Moreover, the results of these cases, when compared to those dealing with other types of compensable injuries, are often ludicrous, compensability turning upon the precise type of work undertaken at the time of injury as well as the phraseology of the medical testimony. Two examples of these problems occurred during this survey year.

In *Texas Employers' Insurance Ass'n v. Mitchusson*[178] the deceased workman died of a coronary infarction complicated by a cerebral embolus resulting in a stroke syndrome. The carrier appealed an award of death benefits to the widow, apparently contending that there was no evidence or insufficient evidence to sustain the jury's finding of injury in the course and scope of employment. The court of civil appeals affirmed the trial court judgment in favor of the widow. The carrier's primary attack centered on the issue of whether the employee's death resulted from overexertion or strain related to his job activities. This requirement of overexertion and strain[179] is the feature which distinguishes heart attack and stroke cases from all other physical injuries compensable under the Compensation Act. There is nothing in the compensation statute designating heart attacks or strokes to be compensable only if they result from overexertion or strain. This is a court-made doctrine, and it is the primary source of the difficulties in this area of compensation law, especially when combined with medical causation problems.

In *Mitchusson* the court of civil appeals reviewed the evidence, quoting at length from the record in order to find both overexertion and strain as well as the medical phraseology connecting the overexertion and strain to the death—a typical heart attack-stroke opinion. In fact, based on the evidence recited by the court, it is difficult to discern the reason the case was tried or appealed, since the elements of compensability as they now exist seemed to be clearly established.

In *Hartford Accident & Indemnity Co. v. Thurmond*[180] the employee recovered disability benefits for a heart attack and subsequent open heart surgery allegedly produced by "strain" related to his employment. The carrier appealed, contending, among other things, that the evidence was legally and factually insufficient to support the finding of injury and the finding that the injury was a producing cause of disability. In a unique

provides for furnishing certified copies of any "order, award, decision or paper" on file with the Board for a specified fee upon receipt of a written request.

178. 515 S.W.2d 168 (Tex. Civ. App.—Eastland 1974, no writ).

179. *See, e.g.*, Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207 (Tex. 1973); Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972).

180. 527 S.W.2d 180 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

argument, based upon the testimony of a heart surgeon, the carrier contended that a "heart attack" to be compensable must comply with the accepted medical definition which encompasses the concept of damage or death of heart muscle. The employee, forty-one at the time of the accident, suffered a prior heart attack approximately one year before the attack made the basis of the suit. He returned to his regular duties as a mechanic after many months of convalescence, but continued to suffer from angina. On August 13, 1970, while performing his mechanic duties, the employee "had to strain to lift a pump"[181] and immediately experienced severe chest pains and dizziness. Twelve days later he underwent a coronary artery bypass operation which produced complications requiring further surgery several months later. He was unable to continue working as a mechanic. The jury found that the claimant sustained an "injury" on August 13, 1970, and that the "injury" was a producing cause of total-permanent disability. Medical bills in excess of $9,000 were also awarded.

The medical testimony, quoted at length by the court, was surprisingly in agreement that the claimant did not suffer a classic "heart attack" but rather suffered from "coronary insufficiency" as a result of the "strain." The question was whether coronary insufficiency qualified as a condition creating damage or harm to the physical structure of the body. The claimant's expert testified that it did, while the carrier's expert testified, equivocally, that it probably did not under the facts and circumstances of the claimant's "injury." Based upon this testimony, the carrier contended that the claimant's burden was to prove that he suffered damage to his heart muscle and that the only evidence sufficient to meet this burden was evidence of a myocardial infarction.

The court of civil appeals disagreed with this contention, stressing that the statute[182] defined injury as damage or harm to the physical structure of the body. Relying upon a traumatic neurosis opinion by the supreme court[183] interpreting the phrase "physical structure of the body" to mean the entire breathing, living, and functioning person, the court of civil appeals held that damage to the physical structure of the body actually means that the structure in question "no longer functions as it should"[184] or that there is "impairment of use or control"[185] of the physical structure. Satisfying itself that coronary insufficiency produces an injury of some kind to the heart, the court overruled the carrier's contentions as to the sufficiency of the evidence on injury.

The court then turned to the real issue in the case—whether the "injury" (coronary insufficiency) was a producing cause of the subsequent surgeries and the total disability apparently stemming from the surgeries. The carrier argued that the only evidence on the issue was the claimant's doctor's

181. *Id.* at 185.
182. Ch. 113, §§ 2-9, [1947] Tex. Laws 176-79 (repealed 1971). The definition of injury in effect in 1970 is the same as that now in effect. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Supp. 1975-76).
183. Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955).
184. 527 S.W.2d at 188.
185. *Id.*

opinion based on medical possibility rather than medical probability. The carrier's expert testified that the episode of August 13, 1970, was not a producing cause for the surgeries. The episode simply precipitated the claimant's going to the doctor for further evaluation. The claimant's doctor testified that the incident did indeed cause the need for surgery and that such surgery would not have occurred *at that time* if it had not been for the incident. The court, without any enlightening discussion, simply held that the testimony of the doctor created a fact issue to be decided by the jury. The jury, therefore, was at liberty to believe whatever testimony it chose. In a related attack, the carrier also raised a factual sufficiency argument on the issue of whether the medical care associated with the surgeries (over $9,000) was reasonably required as a result of the "injury." The court attempted to bolster its anemic holding on this issue by citing various opinions holding that disability resulting from medical treatment instituted to cure the effects of an injury are compensable just as are the effects of the original injury.[186] While this statement is true,[187] it appears to be placing the cart before the horse, or perhaps allowing the tail to wag the dog, and certainly does nothing to solve the problem of whether the original "injury" was a producing cause of the surgeries. Ultimately, the court simply held that the testimony of the employee's doctor that the "injury" precipitated the surgery and that without the "injury" he would not have had the surgery *when he did* was sufficient evidence to uphold the jury verdict.

The issue in *Thurmond* concerning the payment of the medical bills for open-heart surgery illustrates the complexities of heart attack and stroke cases. The payment of these expenses by the employer's compensation carrier seems somewhat unjust when present-day medical knowledge concerning cardiology is considered. Obviously, Thurmond suffered the common disease of atherosclerosis which affects thousands of people in the United States and is now thought to begin in early life.[188] The causes of occlusive heart disease are thought to be many and varied,[189] but in light of the fact that individuals in all walks of life suffer from the disease, it seems logical to conclude that Thurmond's heart disease certainly did not result from nor was it aggravated by his employment or the "strain" suffered in August 1970. Where, then, is the link connecting the heart surgery made necessary by the long-standing atherosclerosis to Thurmond's employment? What connection to the employment exists to justify charging the employer and ultimately the consuming public[190] with the expenses of a medical problem suffered by thousands? The apparent answer from the *Thurmond* court is because Thurmond suffered a "strain" in the course of his employment. This answer overlooks the fact that Thurmond's "injury" was no more than a continuation of the coronary insufficiency symptoms that he

186. *Id.* at 190.
187. *See* note 72 *supra* and accompanying text.
188. *See* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1225-36 (7th ed. 1974); E. SAGALL & B. REED, THE HEART AND THE LAW 407-24 (1968).
189. E. SAGALL & B. REED, *supra* note 188, at 419-23.
190. *See* notes 155, 156 *supra* and accompanying text.

suffered for at least one year before his "injury" and the fact that his injury was indeed no more than coronary insufficiency. The fact that this particular attack occurred on the job was fortuitous, but nonetheless, it established the basis for compensability. Had the attack occurred a few hours before or after the time that it did, at his home or while playing golf or straining at stool, Thurmond would not have received compensation.

Reliance upon overexertion and strain as the only link to employment in heart and stroke cases seems to encourage the fabrication of theories designed to secure compensation, and it certainly encourages strained opinions and tenuous results by the courts. Moreover, there is absolutely no continuity of interpretation of facts nor any consistency of results in similar cases. Overexertion has different meanings when applied to different occupations.[191] The falacy of using overexertion as the link to employment in heart and stroke cases lies in the rather obvious fact that in many occupations what is considered usual exertion is enough to precipitate an incident. In other occupations so little effort is required that if it exceeded so as to constitute unusual effort, there certainly arises a common sense and medical question as to whether the small effort involved actually precipitated the incident. An employee whose job requires him to lift and load 100-pound sacks all day long, week in and week out, is denied compensation when he lifts a 50-pound mail sack because this is not overexertion for him, but the office worker whose job requires no lifting is granted compensation when he overexerts and picks up the same 50-pound mail sack.[192]

The court-made overexertion test applies to heart attacks and strokes only. It does not apply to any other physical injury to a structure of the body, even though the process of disease and the mechanical process of injury are exactly the same in many instances. For example, back injuries resulting in disc herniation are compensable as long as they can be traced to a definite time, place, and cause. Any cause will suffice. The cases involving back injuries are legion. The mechanism of injury is varied and diverse, ranging from simply twisting or bending over or lifting some object, to crush injuries resulting from falls and objects falling on the employee. Everyone is familiar with the story heard in many back injury cases—"I reached down to pick up the box of feathers, and I had to twist, and I heard this pop and felt something let go in my back." The mechanism of injury is never questioned in back cases, and yet the disease process related to the intervertebral disc is similar to that affecting the heart and the cerebral arteries. A herniated disc "caused" by twisting, turning, bending, etc., is thought to be the end result of a lifelong degenerative process, and the mechanical "cause" of the herniation, *i.e.*, twisting, turning, bending, etc., is simply the "straw that breaks the

191. *See, e.g.*, Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207 (Tex. 1973); O'Dell v. Home Indem. Co., 449 S.W.2d 485 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); Monks v. Universal Underwriters Ins. Co., 425 S.W.2d 431 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

192. *See* Gioscia v. Workmen's Compensation Bd., 28 App. Div. 2d 1067, 284 N.Y.S.2d 149 (1967), *and compare with* Marlowe v. Huron Mountain Club, 271 Mich. 107, 260 N.W. 130 (1935).

camel's back."[193] And so it is with atherosclerotic heart disease.[194] Yet, compensation for these similar conditions is based on different legal requirements. In one, virtually no exertion is required; in the other, unusual exertion is required. Is there a sound, logical difference?

The first time the supreme court was faced with a heart attack-stroke case was in *Carter v. Travelers Insurance Co.*,[195] wherein the court held a hotel maid's cerebral vascular occlusion resulting from heavy work and overexertion was compensable as an accident. The court gave no explanation for the requirement. Since that time the phrase used to identify this extraordinary proof requirement has normally been written as "strain and overexertion."[196] Implicit in this phrase is the comparison of an employee's usual exertion with the exertion causing the injury. If the injury causing exertion is "unusual" under the facts and circumstances, the injury becomes compensable.[197] If there is no more than ordinary exertion, it is not compensable.[198] In *O'Dell v. Home Indemnity Co.*[199] the court, without intending to do so, articulated very precisely the problem inherent in the overexertion test:

> While the evidence presented here indicated that the *work performed* by the deceased *was normally strenuous*, plaintiff [beneficiaries] produced *no evidence that O'Dell's* [employee's] *heart attack* was related to or occasioned by any *unusual strain or overexertion* in O'Dell's work. Evidence that the work performed by the deceased was strenuous, standing alone, is not sufficient. There must be a showing that the deceased experienced strain or overexertion and further that there was a causal connection between the strain or overexertion and the injury complained of, being the fatal heart attack in this instance. Here there was no evidence that O'Dell had performed any unusually strenuous work on the day of his death.[200]

In none of the heart attack-stroke cases is there any hint of a reasonable

193. R. SPURLING, LESIONS OF THE LUMBAR INTERVERTEBRAL DISC 30-31 (1953); R. SPURLING, LESIONS OF THE CERVICAL INTERVERTEBRAL DISC 44-45 (1956).

194. *See* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 188, at 37-39; E. SAGALL & B. REED, *supra* note 188, at 419-23.

195. 132 Tex. 288, 120 S.W.2d 581 (1938).

196. *See, e.g.*, Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207 (Tex. 1973); Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972); Whitaker v. General Ins. Co. of America, 461 S.W.2d 148 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.); O'Dell v. Home Indem. Co., 449 S.W.2d 485 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); Bean v. Hardware Mut. Cas. Co., 349 S.W.2d 284 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Talmadge, 256 S.W.2d 945 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Young, 231 S.W.2d 483 (Tex. Civ. App.—Texarkana 1950, no writ).

197. *See, e.g.*, Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207 (Tex. 1973); Carter v. Travelers Ins. Co., 132 Tex. 288, 120 S.W.2d 581 (1938); Aetna Cas. & Sur. Co. v. Scruggs, 413 S.W.2d 416 (Tex. Civ. App.—Corpus Christi 1967, no writ); Midwestern Ins. Co. v. Wagner, 370 S.W.2d 779 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.); Hartford Accident & Indem. Co. v. Gant, 346 S.W.2d 359 (Tex. Civ. App.—Dallas 1961, no writ).

198. *See, e.g.*, Whitaker v. General Ins. Co. of America, 461 S.W.2d 148 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.); O'Dell v. Home Indem. Co., 449 S.W.2d 485 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); Monks v. Universal Underwriters Ins. Co., 425 S.W.2d 431 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

199. 449 S.W.2d 485 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.).

200. *Id.* at 487 (emphasis added).

rationale for the overexertion distinction. It would seem that this court-made requirement is the antithesis of the liberal construction required in compensation cases. In actual practice, however, most courts strain credibility to find overexertion and some, as in *Thurmond*,[201] seem to require only meager evidence of strain without mentioning overexertion. Nevertheless, the requirement still exists and uneven results continue to abound in the reported cases. Perhaps the real reason for the distinction is found in opinions in heart attack cases in New York and New Jersey.[202] Both formerly required unusual exertion in heart cases and both judicially declared that the distinction was necessary because of the presumption that death or injury from heart disease is ordinarily the result of natural physiological causes rather than trauma or strenuous effort. Larson, analyzing the reason for the distinction, has observed:

> For while most of the law built up around the 'accident' requirement, for example, has been based on false premises and embroidered with irrelevant distinctions, there has been a utilitarian purpose behind it all which cannot be disregarded when all the logical criticisms have been exhausted. That practical consideration is the fear that the heart cases and related types of injury and death will get out of control unless some kind of arbitrary boundaries are set, and will become compensable whenever they take place within the time and space limits of employment. Most states have chosen to press the 'accident' concept into service as one kind of arbitrary boundary, but, with a few exceptions, one gets the impression that what is behind it all is not so much an insistence on accidental quality for its own sake as the provisions of an added assurance that compensation will not be awarded for deaths not really caused in any substantial degree by the employment.[203]

Based on current medical knowledge, the artificial boundaries created by the courts for heart attack-stroke cases appear well founded and completely justified. Unfortunately, the unusual exertion test is ill suited to its purported purpose of drawing the legal line. It is submitted that Professor Larson's proposed rule for heart and related cases[204] is the modern-day remedy to the heart attack-stroke-back line drawing problem. Professor Larson suggests that the essence of the problem is causation, which must be recognized as a two-part question—(1) legal causation and (2) medical causation:

> Under the legal test, the law must define what kind of exertion satisfies the test of 'arising out of the employment.'
>
> Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this collapse.
>
> All too often these two tests are scrambled together. When this happens, the effect is usually that one is lost sight of. Thus, . . . obsession

201. Hartford Accident & Indem. Co. v. Thurmond, 527 S.W.2d 180 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

202. Kayser v. Erie County Highway Dep't, 276 App. Div. 789, 92 N.Y.S.2d 612, 613 (1949); Neylon v. Ford Motor Co., 13 N.J. Super. 56, 80 A.2d 235 (1951), *rev'd*, 8 N.J. 586, 86 A.2d 577 (1952).

203. 1A A. LARSON, *supra* note 42, § 38.81, at 7-166.

204. *Id.* § 38.83, at 7-169 to -202.

with the legal test of unusual exertion may lead to a holding that a very slight exertion, because it satisfies the legal test in being unusual for this employee, is adequate to support an award, although its ability medically to account for the collapse seems remote. Conversely, obsession with medical causation sometimes leads to a slighting of the need for precision in defining the legal rule, with the result that decisions may be based on statements by doctors that the exertion did or did not cause the heart attack, although neither the doctors nor the lawyers may have had a clear and consistent concept of what 'caused' meant in this setting.[205]

Professor Larson argues for the adoption of a rule based upon his well-known positional risk doctrine. This doctrine, in situations not involving any *personal, non-occupational* risk element, argues for the acceptance of *any actual risk arising from the employment*, even to the extent that the employment merely puts the employee in the place where the injury, from a neutral force, occurred, because it is greater than the zero employee contribution.[206] But when the employee contributes some personal element to the risk, *i.e.*, a personal enemy or a personal disease, then the employment must contribute something substantial to increase the risk, the reasoning being that the employment must offset the causal contribution of the personal risk.[207] As applied to heart cases the rule would be:

If there is some personal causal contribution *in the form of a previously weakened or diseased heart*, the employment contribution must take the form of an exertion greater than that of nonemployment life. . . . Note that the comparison is not with *this employee's* usual exertion *in his employment* but with the exertions of normal *nonemployment* life of this or any other person.

If there is no personal causal contribution, that is, if there is no prior weakness or disease, *any* exertion connected with the employment and causally connected with the collapse as a matter of medical fact is adequate to satisfy the *legal* test of causation. This is the heart case application of the actual risk test: *this* exertion in fact causally contributed to *this* collapse.

In both situations, with or without prior personal weakness or disease, the claimant must also show that *medically* the peculiar exertion contributed causally to the heart attack.

To develop the parallel between idiopathic fall and heart cases a little further: note first that they resemble each other in that the personal weakness is often quantitatively the larger factor in both. In a typical idiopathic fall case, the personal weakness asserts itself first, in the form of a heart attack, and the employment element is then added in the form of contact with the floor. In a typical exertion-heart case, the employment element comes first in the form of work exertion, and the personal element second, in the form of a heart attack from the exertion.

Now suppose this comparison. A man has a diseased heart.

(1) He has a heart attack and hit his head on the ground—the

205. *Id.* at 7-170 to -171.
206. *Id.* §§ 8.43, 9.40.
207. *Id.* §§ 11.23, 12.10-.14.

same ground that supports all creatures on earth, and makes claim for the head injury.

(2) He is standing motionless waiting for an elevator and has a heart attack, and makes claim for the heart attack.

The parallel is that (even if we assume that a doctor might have testified in the second case that the effort of standing contributed to the heart attack) there is nothing in either case added to everyday nonemployment life, and therefore, since the personal causal element stands alone, there is nothing to satisfy the legal causal requirement.[208]

Under Professor Larson's proposed rule, the employee whose job requires the lifting of 200-pound sacks and whose lifting of one such 200-pound sack medically produces a heart attack would receive compensation, even in the presence of a history of heart disease, because people generally do not lift 200-pound weights as a part of nonemployment life and, therefore, the episode would not be ascribed to the ordinary wear and tear of life. Under the unusual-exertion rule, there would be no compensation regardless of previous heart condition because the employee did not exceed the usual exertion required by his job.[209] On the other hand, the office worker who is not required to do any lifting lifts a 20-pound weight and produces medical evidence that this lifting caused a heart attack. Under the old test, primarily concerned with the comparison between usual exertion and unusual exertion, the employee would receive compensation. Under Professor Larson's rule, the result would depend on whether there was a personal causal element in the form of a previously weakened heart. If there was not, compensation would be awarded since the employment contributed something and the employee's personal life contributed nothing. If there was previous heart disease, however, compensation should be denied in spite of the medical testimony because, legally, the personal causal contribution was substantial while the employment added nothing to the usual wear and tear of life, since the employee's nonoccupational exertions certainly include lifting objects weighing 20 pounds, *e.g.*, golf clubs, trash cans, etc.[210]

Larson's proposal has been criticized on the ground that current medical opinion holds that heart attacks are rare in the absence of long-standing atherosclerotic arterial disease and, therefore, singling out pre-existing disease cases for special treatment would be unfair and of doubtful validity.[211] This criticism does not appear valid if the real purpose of compensation law and theory is considered—care and treatment of injuries and diseases *arising out of and originating in the employment.*[212] Larson responds to this criticism by pointing out that the original proposal[213] did indeed take this medical opinion into account.[214] He then writes:

208. *Id.* § 38.83, at 7-172.
209. *Id.* at 7-173.
210. *Id.* at 7-174.
211. *See* 32 J. AM. TRIAL LAW. ASS'N 427, 439 (1968).
212. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967); Texas Gen. Indem. Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963).
213. Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441 (1967).
214. *Id.* at 473.

> But the consequence of this fact [medical opinion] is merely that in almost all cases the test will be comparison with nonemployment life. Since . . . this is the soundest and fairest comparison to make when the object is to distinguish work-connected collapses from those that are due to normal progression of a disease, the fact that this comparison would become the normal one should be a point in its favor.
>
> The criticism also slights a crucial distinction that is familiar at many points where law and medicine intersect. Medical theory is one thing; a legal record on appeal is another. It is not at all uncommon for a record to arrive before an appellate court showing that a man with no prior history of heart disease suffered a coronary occlusion or myocardial infarction. What is the Court supposed to do? Shall it say that, although there is no evidence in the record of heart disease, it will supply that fact by judicial notice, because the preponderance of medical theory holds that the man must have had pre-existing heart disease? But this may actually contradict the record, which may contain undisputed testimony that the man was healthy and had no previous history of heart disease.
>
> The legal answer is that the determination of pre-existing heart disease is one of medical fact in the particular case, and that the burden of proof of that fact is on the party alleging its existence as part of his case.[215]

The second half of the proposed rule involves the presently accepted requirement of medical evidence that the exertion contributed causally to the injury.[216] This requirement is already familiar and only reiterates the distinction between the normal progression of a disease resulting in a fortuitous occurrence on the job and an injury causally related to the employment.

While the primary thrust of Professor Larson's proposal is directed to heart cases, there does not appear to be any valid reason why this proposal cannot provide a rule of general application, and, more importantly, practicality, to any physical injury case, especially back injuries. Such use of this rule is advocated by Larson.[217]

Some may say that the proposed rule does not take into account the specific wording of the Texas statute[218] defining injury to include aggravation of a pre-existing disease or injury. It is suggested, however, that the aggravation doctrine is indeed viable and applicable in the use of the Larson

---

215. 1A A. LARSON, *supra* note 42, § 38.83, at 7-181 to -183.
216. *Id.* at 7-188 to -202.
217. *Id.* at 7-183 to -185.

> [T]here are cases on the books that make one wonder whether the cerebral hemorrhage or disc protrusion might not have been just as much the result of natural progression as any coronary thrombosis. For example, awards for cerebral hemorrhage have been made based on such activities as filling prescriptions, and sweeping lint; 'even slight exertion' has been said to suffice. As to disc cases . . . [there was] the award for a disc herniation attributed to the truck driver's act of lifting his foot from the brake pedal. It might be difficult to call this an exertion beyond the ordinary wear and tear of life, although if the case were presented as one in which the total strain of truck driving surpassed that of nonemployment life, the matter might appear in a different light.

Id. at 7-183 to -184.
218. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Supp. 1975-76).

rule. The primary inquiry is causation, *i.e.*, what factor in the employment *caused* or *aggravated* the pre-existing atherosclerotic disease, degenerative disc disease, etc.? This inquiry is from both the legal and medical point of view. If the disease is aggravated, legally and medically, by exertion greater than that in ordinary nonemployment life, the injury is compensable; otherwise, it is not compensable.

One reason for the poor performance of the current Texas overexertion doctrine in recent years has been the special issues submitted in many heart attack cases. The issues have been taken from *Texas Pattern Jury Charges*.[219] The heart attack issues suggested by the Committee, and apparently approved by several courts,[220] consist of an issue inquiring whether the claimant suffered an injury (heart attack)[221] and an issue directed to what is designated as a course and scope question,[222] but what should more accurately be designated as the "arising out of and originating in the employment"[223] issue, *i.e.*, the causal link to the employment. The suggested *Pattern Jury Charge* issue reads as follows:

> Do you find from a preponderance of the evidence that plaintiff had such heart attack in the course of his employment by A.B.C. Company?
>
> A heart attack is in the course of employment if it is produced or precipitated by an employee's work or the conditions of his employment. Otherwise, a heart attack is not in the course of employment, even if it occurs on the job.[224]

The obvious defect in this issue is the fact that it incorrectly defines what is known to be the absolute minimum criterion for a compensable heart attack—overexertion and strain.[225] In view of the well-established, court-made requirement of overexertion, the issue should be submitted by inquiring whether "a particular strain, overexertion or shock"[226] caused the injury. Interestingly, a distinguished member of the Texas Trial Lawyers' Association unequivocally and without questioning its validity, provides the element of overexertion in a suggested jury charge in a heart attack death case.[227] It is submitted that whether the issues are general with instructions, as in the *Texas Pattern Jury Charges* short form,[228] or whether they are specific

---

219. 2 TEXAS PATTERN JURY CHARGES §§ 20.02, 21.11, 29.02, 29.04 (1970).

220. *See, e.g.*, Hartford Accident & Indem. Co. v. Thurmond, 527 S.W.2d 180 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); Continental Ins. Co. v. Marshall, 506 S.W.2d 913 (Tex. Civ. App.—El Paso 1974, no writ).

221. 2 TEXAS PATTERN JURY CHARGES § 20.02 (1970). Proposed issue 20.02, which is the same as 29.02 proposed for use in a death case, provides: "Do you find from a preponderance of the evidence that plaintiff had a heart attack on or about January 17, 1970?"

222. *Id.* § 21.11. Proposed issue 29.04 for use in a death case is exactly the same as 21.11.

223. *See* TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).

224. 2 TEXAS PATTERN JURY CHARGES § 21.11 (1970).

225. *See* cases cited notes 196-98 *supra* and accompanying text.

226. Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207, 210 (Tex. 1973); Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859, 860 (Tex. 1972).

227. Peery, *Recovery of Death Benefits Under the Texas Workmen's Compensation Law*, 9 TRIAL LAW. F., April-June 1975, at 20, 23.

228. 2 TEXAS PATTERN JURY CHARGES 7-11 (1970).

issues as proposed in the text of *Texas Pattern Jury Charges*,[229] the terms "overexertion" or "strain" must be included. Moreover, in order properly to submit what seems to be the current Texas law (at least in theory), a definition of overexertion should be given which includes the underlying thesis for the theory of heart attack-stroke compensation, *i.e.*, comparison of the normal exertion required in the employment to the alleged overexertion or strain causing the injury.[230] As previously indicated, however, the clumsy overexertion approach appears to foster strained, convoluted results lacking in any degree of consistency. Thus, adoption of the Larson test is favored over the continued use of the overexertion theory, even if submitted properly.

Death Claim—Gross Negligence. In *Delgadillo v. Tex-Con Utility Contractors Inc.*[231] suit was brought to recover exemplary damages pursuant to section 5 of article 8306.[232] Plaintiffs alleged several acts of active and passive gross negligence. Plaintiffs appealed an adverse jury verdict, contending that the trial court erred in refusing to submit a number of special issues concerned with the employer's *failure* to do certain acts.[233] The court of civil appeals rejected the contention, holding that there was no evidence of gross negligence as a matter of law. Relying on the landmark case of *Armco Steel Corp. v. Jones*,[234] the court noted that gross negligence consists of *positive or affirmative acts* as opposed to merely passive or negative acts and must be "something just short of intentional wrongdoing."[235] The court affirmed the judgment in favor of the employer after reviewing the evidence and finding that Tex-Con had affirmatively undertaken a number of safety precautions for the protection of the employees, thereby rebutting the conscious disregard element of gross negligence. Moreover, the court found a complete lack of evidence to demonsrate that the employer knew of the dangers and consciously failed or neglected to take precautions.[236]

Suits Against Nonsubscribers. Increasing premium escalation, associated with expanding compensation coverage and the increasing cost of benefits, makes the nonsubscriber statute an attractive alternative to complete compensation coverage. A nonsubscriber is subject to suit for all damages

229. *Id.* §§ 21.11, 29.04; *see* Peery, *supra* note 227, at 23.

230. A possible issue and instruction, similar to the Pattern Jury Charge issue on course and scope of employment (21.11 and 29.04), could be phrased as follows:

> Do you find from a preponderance of the evidence that plaintiff had such heart attack as a result of overexertion or strain in the course and scope of his employment for A.B.C. Company?
>
> You are instructed that overexertion or strain producing damage or harm to the physical structure of the body is considered to be an injury in the course of employment if you find that such overexertion or strain exceeded the usual and customary exertion or strain required in the plaintiff's employment at the time of the injury, if any.

231. 526 S.W.2d 208 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

232. TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (1967).

233. These issues are quoted by the court. 526 S.W.2d at 210.

234. 376 S.W.2d 825 (Tex. 1964).

235. 526 S.W.2d at 210, quoting Woolard v. Mobil Pipe Line Co., 479 F.2d 557, 565 (5th Cir. 1973).

236. 526 S.W.2d at 211, citing Texas Pac. Coal & Oil Co. v. Robertson, 125 Tex. 4, 79 S.W.2d 830 (1935).

suffered by an employee injured in the scope of his employment and all common law defenses are waived, but the employee must prove negligence on the part of the employer.[237] Two cases during this survey year involved one of the largest employers electing to be a nonsubscriber—J. Weingarten, Inc. In *Moore v. Weingarten, Inc.*[238] the employee slipped on a grape in an aisle near the produce counter where grapes were displayed for sale. There was no evidence that the employer knew the grape was on the floor, placed it on the floor, or that it had been on the floor long enough to put the employer on notice. The jury failed to find the employer guilty of any negligence proximately causing the employee's injuries. On appeal, the employee did not attack the jury findings, but contended that the trial court erred in failing to submit an issue inquiring if the employer failed to exercise ordinary care to inspect, discover, and remove the grape from the floor. In affirming the take-nothing judgment the court of civil appeals noted that the duty of a landowner to make his premises safe is analogous to the duty of an employer to provide his employees with a safe place to work.[239] Such being the case, the court analogized the duty to furnish an employee a safe place to work, in a situation involving a foreign substance, to the ordinary "slip and fall" cases. Relying upon numerous slip and fall cases, the court found no evidence that the grape had been on the floor for a sufficient length of time that it would have been discovered and removed by the employer had he exercised ordinary care.

The employee's second point on appeal was unique. The employee complained of the trial court's action in sustaining special exceptions to a pleading invoking a theory of products liability as a ground of recovery. It was candidly admitted that the reason for invoking strict liability was to obviate the necessity of proving negligence on the part of the employer. Under a products theory, of course, the employee could rely upon a defect in the employer's product which made it unreasonably dangerous to the user, consumer, or bystander. The evidence supporting this theory, according to the employee, was the fact that the grapes were sold unpackaged, and this failure to package created an unreasonably dangerous condition to consumers and bystanders. As the court of civil appeals noted, probably tongue in cheek, neither party was able to cite a single case from any jurisdiction which had held that a fresh eatable grape, even on the floor of a supermarket, constituted a defective product which was unreasonably dangerous. Refusing to decide if product liability law could be applicable to an employee's suit against his employer, the court held that the strict provisions of the statute[240] required proof of negligence against the employer in order to sustain recovery.[241] Thus, the take-nothing judgment in favor of the employer was affirmed.

237. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 1, 4 (1967).
238. 523 S.W.2d 445 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).
239. *Id.* at 447, citing Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567 (Tex. 1972), and Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S.W.2d 238 (1955).
240. TEX. REV. CIV. STAT. ANN. art. 8306, § 4 (1967).
241. 523 S.W.2d at 449.

In *Weingarten, Inc. v. Higginbotham*[242] the same court of civil appeals affirmed a judgment in favor of the employee. The jury found the employer negligent for failing to provide the employee with a ladder or other means to remove bacon from a high stack in a meat cooler and further found the employer negligent for stacking the bacon in the manner in which it was stacked. The court overruled the employer's no evidence and insufficient evidence attack but did allow the employer credit for sums previously paid to the plaintiff.[243]

Wrongful Discharge or Discrimination. A 1971 amendment to the Compensation Act provided that an employer could not discharge or in any manner discriminate against any employee because the employee, in good faith, filed a compensation claim, hired an attorney to represent him, or instituted, in good faith, any proceeding under the Workmen's Compensation Act, or because he testified or was about to testify in any compensation proceeding. The statute provides for "reasonable damages" and reinstatement to the former employment if the employee has been discharged in violation of the statute.[244] The first appellate interpretation of this amendment occurred in 1974 in *Swanson v. American Manufacturing Co.*[245] During this survey year, three cases involved this portion of the statute, but the courts found it unnecessary actually to interpret the specific provisions of this article. Nonetheless, two of the opinions are interesting and instructive.[246]

In *Brown v. Brookside Division of Safeway Stores, Inc.*[247] the employee alleged wrongful discharge. It is not clear from the opinion if the employee's action was brought pursuant to the provisions of article 8307c. Nevertheless, the employer's motion for summary judgment was granted on the basis that the employee had failed to comply with the terms of a written contract between his union and the employer and, therefore, had failed to exhaust the remedies afforded to him under the contract, thereby making the suit premature.

The court of civil appeals affirmed. The summary judgment evidence disclosed that plaintiff was terminated for absenteeism and had filed a grievance but that the grievance was denied. The contract provided for arbitration, but the employee never requested arbitration. The court held, relying upon a number of cases,[248] that the contract represented the exclusive method for redress by the employee, and failure to exhaust the grievance

242. 523 S.W.2d 450 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).
243. *Id.* at 453.
244. TEX. REV. CIV. STAT. ANN. art. 8307c (Supp. 1975-76).
245. 511 S.W.2d 561 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.), *reviewed in* Sartwelle, *supra* note 2, at 198.
246. The third case, Fernandez v. Reynolds Metals Co., 384 F. Supp. 1281 (S.D. Tex. 1974), involved the issue of whether an employee's action pursuant to article 8307c could be removed to federal court. Upon the employee's motion to remand the federal district court held that the cause of action was one being asserted under the state workmen's compensation statute and the removal statute (28 U.S.C. § 1445 (1970)) specifically prohibited the removal of such a case to the federal courts.
247. 517 S.W.2d 619 (Tex. Civ. App.—Waco 1974, no writ).
248. *See* cases cited *id.* at 620.

procedures prevented the maintenance of a suit to litigate the same controversy.[249]

In *Lewis v. Republic National Bank*[250] the employee filed suit asserting wrongful discharge pursuant to article 8307c. The employer's motion for summary judgment was granted. The evidence disclosed that the employee settled a compensation claim arising from an injury sustained in the course of his employment. In concluding the settlement the employee and his attorney signed what the court of civil appeals denominated "an agreement for judgment." A portion of the agreement is quoted by the court.[251] In summary, the employee agreed to release all of his claims under the Texas Employers' Liability Act, or at common law, against his employer and the employer's compensation carrier, arising prior to the execution of the agreement. In opposition to the summary judgment the employee filed an affidavit wherein he asserted that he did not intend to release his employer from any cause of action for wrongful termination, and that the use of the term "Employers' Liability Act" was ambiguous. The court of civil appeals, based on summary judgment rules, held that the employee's affidavit created a fact issue and, therefore, reversed the judgment of the trial court and remanded the case for trial.

Both *Brown* and *Lewis* deserve careful study by all concerned, especially in view of the increasing frequency with which discrimination suits are filed. One question raised by the suits filed under article 8307c, apparently not yet litigated, is whether the standard Texas Workmen's Compensation and Employers' Excess Liability Policy provides coverage to employers for actions against them under this article. The determination of this question may well affect compensation premium structure.

Extraterritorial Injuries. Article 8306, section 19[252] provides compensation coverage for employees hired in Texas, but who sustain injury, in the course of employment, outside of the state. The subtleties of the statute have been construed many times by the supreme court.[253] The Waco court of civil appeals had occasion to reconsider this well-established law in *Renner v. Liberty Mutual Insurance Co.*[254] There, claimant was a journeyman ironworker residing in Dallas, Texas, and a member of a Local Ironworkers' Union in Dallas through which he secured employment with numerous different employers. On the occasion in question he was employed through the union by American Bridge Division of United States Steel to work on the Superdome in New Orleans. American Bridge agreed to pay travel time and transportation expenses from Dallas to New Orleans and back to Dallas. The claimant began working in New Orleans but was injured on the second working day and returned to Dallas. The claimant testified, however, that

249. 517 S.W.2d at 620.
250. 528 S.W.2d 635 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).
251. *Id.* at 636.
252. TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1967).
253. *See, e.g.*, Texas Employers' Ins. Ass'n v. Dossey, 402 S.W.2d 153 (Tex. 1966); Hale v. Texas Employers' Ins. Ass'n, 150 Tex. 215, 239 S.W.2d 608 (1951); Southern Underwriters v. Gallagher, 135 Tex. 41, 136 S.W.2d 590 (1940).
254. 516 S.W.2d 239 (Tex. Civ. App.—Waco 1974, no writ).

he intended to complete the job in Louisiana, collect his travel time, return to Dallas, and secure another job through his union. The trial court granted the carrier's motion for summary judgment, which action was affirmed by the court of civil appeals.

The Waco court reviewed the many Texas cases construing section 19, noting that it is well established that the phrase "who has been hired in this State"[255] does not refer to the place where the contract of hiring is made. The primary question is whether the employee is hired within this state to perform services solely within another state or within another state and Texas. If hired to perform work in Texas as well as another state, he is a Texas employee regardless of whether he begins work in the other state.[256] In *Renner* it was without dispute that the claimant, although hired in Texas, was employed to work only outside of the State of Texas during the term of the contract in question. It was established, therefore, as a matter of law, that he never occupied the status of a Texas employee. Thus, the court held that even though the employee had worked for this same employer in Texas in the past, and even though he anticipated working for the same employer in Texas in the future, these facts had no bearing on the contract in question because a severance of the employee-employer relationship terminates the employee's status as a Texas employee.[257] Nor did the payment of travel time and transportation expenses from Dallas bring the employee within the extraterritorial provisions of the Compensation Act.[258]

III. PROCEDURAL LAW

Out-of-Court Statements of Doctors as Admissions Against the Carrier. The Waco court of civil appeals, in *Thomas v. International Insurance Co.*,[259] has held that unsworn, out-of-court statements by doctors paid by the carrier to examine and treat an employee are admissible against the carrier, to prove the truth of the matters stated, under the admissions of a party exception to the hearsay rule. A comment on this holding may properly be assigned to the procedural law-evidence commentator, but this far-reaching holding deserves critical analysis.

In *Thomas* the claimant was injured in December 1970.[260] He was sent to a doctor by his attorney after his foreman refused him permission to go to the company doctor. Subsequently, the carrier secured an Industrial Accident Board order for an examination by a Dr. Luedtke. After receiving Dr. Luedtke's initial report, the carrier's claims adjuster authorized an EMG upon Dr. Luedtke's recommendation. The EMG was performed by a Dr. Crane, and a report, indicating nerve root irritation, was sent to Dr. Luedtke, who in turn sent another written report to the carrier recommending

255. TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1967).
256. Texas Employers' Ins. Ass'n v. Dossey, 402 S.W.2d 153 (Tex. 1966).
257. *See* Hale v. Texas Employers' Ins. Ass'n, 150 Tex. 215, 239 S.W.2d 608 (1951).
258. 516 S.W.2d at 241, and cases cited.
259. 527 S.W.2d 813 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).
260. The injury occured prior to the amendment to TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Supp. 1975-76), which allowed the employee, not the carrier, the sole right to select the physician or facility to render medical treatment as a result of an injury.

hospitalization. Subsequently, the carrier requested an examination by a Dr. Sanders, a neurosurgeon, who examined the claimant and arranged to hospitalize him. The carrier, however, refused to be financially responsible for the hospital bill. Approximately three years later the carrier approved treatment by a Dr. Cotton, but when the doctor requested permission to hospitalize the claimant, the carrier again refused responsibility. Subsequently, the carrier's claims manager wrote the doctor denying that any authorization had been given for the employee's treatment and denied responsibility for any medical bills. At trial, the claimant offered as evidence the fact that the carrier "employed" and authorized Drs. Luedtke, Crane, and Sanders to treat him for his injuries, and that all of these physicians recommended hospitalization. Also offered in evidence were conversations between the claimant and Dr. Luedtke and the claimant and Dr. Sanders to the effect that he needed to be hospitalized for treatment of his injuries. Also offered was a written report from Dr. Luedtke to the carrier recommending hospitalization. The claimant also sought to prove that the carrier authorized treatment by Dr. Cotton but later repudiated the agreement and refused to pay the doctor for his services. This evidence was tendered on a bill of exception since the trial court excluded the testimony.

On appeal the claimant contended that all of the evidence was admissible "under an exception to the hearsay rule." The Waco court agreed, presumably, although not clear from the opinion, because the written and oral statements constituted admissions of a party opponent. The precise holding of the court was as follows:

> Plaintiff tendered all this evidence in the trial to the effect that these doctors [Luedtke, Crane and Sanders] employed by Defendant had recommended that Plaintiff be hospitalized. The trial court excluded this testimony. This was error. These doctors, having been employed and authorized by Defendant to examine Plaintiff, were the agents of Defendant. Therefore, *any* out-of-court statements made by these doctors, *written or oral*, to the effect that Plaintiff should be hospitalized, were admissible against the Defendant Insurance Company as an exception to the hearsay rule. These statements made by these doctors regarding the physical condition of Plaintiff were admissible.[261]

As authority for this holding, the court cited *Texas Employers' Insurance Ass'n v. Dimsdale*,[262] and *Bituminous Casualty Corp. v. Jordan*,[263] a 1961 no writ history opinion by the same Waco court of civil appeals. An examination of the court's cited authority as well as the authorities cited by these courts reveals that they furnish absolutely no support for this holding by the court.

In the *Dimsdale* case the carrier admitted that it retained the services of Drs. Patterson and Richardson to treat the employee and paid these doctors for their professional services as well as receiving medical reports from them. The trial court allowed the employee to testify that Dr. Patterson told him to

261. 527 S.W.2d at 818 (emphasis added).
262. 440 S.W.2d 359 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).
263. 351 S.W.2d 559 (Tex. Civ. App.—Waco 1961, no writ).

return to work, but that Dr. Richardson told him he was the primary doctor, and he would tell the employee when he could go back to work. In holding these statements admissible as "an exception to the hearsay rule," the Dallas court wrote:

> It is quite clear that the statements of Dr. Richardson were made by him to appellee [employee] as a part of his professional duties in connection with examining and taking care of Appellee. He was employed by appellant [carrier] to do this very thing. The identical contention as now asserted by appellant was expressly overruled by the Austin Court of Civil Appeals in the recent case of Argonaut Southwest Ins. Co. v. Morris, 420 S.W.2d 760 (Tex. Civ. App., Austin 1967, writ ref'd n.r.e.).[264]

The Austin court's opinion in *Argonaut Southwest Insurance Co. v. Morris*[265] was the only case cited by the *Dimsdale* court as authority for its holding. In *Morris* the carrier requested Dr. Simms to examine the claimant. At some point in time, the employer sent the claimant to a Dr. Paulsen. Both of these doctors apparently referred the claimant to a Dr. Farris, who sent medical reports to the carrier. The case was tried to the court *without a jury*, and the court allowed the employee to testify at length regarding conversations with Drs. Simms and Farris concerning his physical condition. The carrier's hearsay objections were overruled. The Austin court affirmed the admission of this evidence on the specific ground that the statements were in the nature of admissions against interest admissible against a principal when made by an agent within the scope of his duties. This is the first holding in this series of cases specifically designating the particular exception to the hearsay rule making these statements admissible. The Austin court wrote:

> It is quite true that unsworn, out of court statements made by doctors with reference to the physical conditions of their patients is hearsay and inadmissible. . . . It is equally true that such statements in the nature of admissions against interest are admissible against a principal when made by an agent within the scope of his duties.[266]
>
> . . . .
>
> The admissions and testimony are sufficient to support an implied finding that the doctors named were agents of appellant. It is our opinion that the statements made by these doctors regarding the physical condition of appellee were admissible. See, Vineyard v. Texas Employers' Ins. Association, 263 S.W.2d 675, Tex. Civ. App. Dallas, writ ref. n.r.e.; Bituminous Casualty Corporation v. Jordan, 351 S.W.2d 559, Tex. Civ. App. Waco, n.w.h.

An analysis of the only two cases cited as authority by the *Morris* court reveals that these opinions dealt with entirely different factual circumstances and furnish absolutely no support for the court's holding that the doctors became the agents of the insurance carrier. In *Bituminous Casualty Corp. v. Jordan*,[267] one of the cases cited by the *Thomas* court, the claimant was

264. 440 S.W.2d at 365-66.
265. 420 S.W.2d 760 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).
266. *Id.* at 763.
267. 351 S.W.2d 559 (Tex. Civ. App.—Waco 1961, no writ).

allowed to testify concerning a statement made by a doctor for the limited purpose of showing that the statement was indeed made by that doctor and relied upon by the claimant *as good cause for late filing*. After his injury, the claimant, a minor, was told by the carrier's adjuster that the company would take care of everything. Later, the adjuster requested the minor claimant to see a plastic surgeon, and arrangements were made for a surgical procedure. Although the surgery was never accomplished, the minor claimant was allowed to testify, over a hearsay objection, that the plastic surgeon selected by the carrier "prescribed plastic surgery." This testimony was offered for the limited purpose of rebutting the claims adjuster's testimony regarding his dealings with the minor claimant. The Waco court held that admission of this testimony did not present reversible error because the carrier made no motion to strike, the question having been answered before the objection was made. Moreover, the court pointed out that the adjuster testified that the plastic surgeon sent him a report suggesting plastic surgery. There was also evidence, admitted without objection, concerning the adjuster's failure to notify the minor claimant concerning the planned operation and the failure of the carrier to proceed with the operation. The trial court, at the carrier's request, had instructed the jury that the adjuster's testimony concerning discussions with the claimant about plastic surgery was not to be considered on the question of whether the claimant needed plastic surgery but only for the purpose of showing his dealings with the claimant. Accordingly, it is obvious that the *Jordan* case simply stands for the proposition that the carrier failed to timely object to the hearsay answer and made no motion to strike, thereby waiving any error. It also stands for the proposition that if it was error to admit such testimony, the carrier actually waived the harmful effect of the error by allowing other evidence on the same subject to be admitted. This opinion, having no writ history, does not stand for the proposition that the plastic surgeon became the agent of the carrier and that hearsay conversations with the plastic surgeon are admissible as admissions against the carrier.

The *Morris* court's second cited authority was *Vineyard v. Texas Employers' Insurance Ass'n.*[268] This opinion is even less relevant to the issue than the *Jordan* opinion. *Vineyard* was a suit to set aside a compromise settlement agreement for alleged fraud in the procurement of the settlement. The trial court instructed a verdict in favor of the carrier, and the claimant appealed. The evidence revealed that the claimant underwent a preemployment physical examination by a Dr. Brown who was associated with a clinic regularly used by the employer for all medical and surgical work. After his injury, the employee was again examined by Dr. Brown who was still connected with the same clinic. The employee testified that Dr. Brown told him that he had a minor injury that would clear up within three or four weeks. Subsequently, the carrier's claims adjuster used a report from Dr. Brown, indicating that the injury was trivial, in order to secure a $75 compromise settlement agreement. The claimant testified that he relied

268. 263 S.W.2d 675 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.).

upon the statement by Dr. Brown as well as the written report in making the settlement and testified that he would not have entered into the settlement agreement if Dr. Brown had not made statements about his condition. Later, the employee underwent a spinal fusion by another doctor.

The court of civil appeals held that under the evidence the carrier was charged with the correctness of the statements made by Dr. Brown when it used such statements in making the settlement, and that the evidence raised an issue for the jury concerning the correctness of the statements. The court specifically noted that the doctor *was not the agent of the employee or the carrier* but of the employer. Nevertheless, since the carrier used the doctor's statements to influence the settlement, to the employee's damage, the court held that the carrier in effect adopted these statements and made these statements binding on the carrier insofar as the settlement with the employee was concerned. The court wrote:

> After reviewing the authorities, we are of the opinion that the doctor was not the agent of Vineyard, but was the agent of the employer, and when the agent of the insurance company used the doctor's statement, it was charged with the truthfulness of such a statement in that it was a representation to Vineyard as to his condition.
>
> It therefore follows that since the evidence raised jury issues on the pleaded issue of legal fraud in procurement of the settlement agreement, that the Court's instruction was in error.[269]

Although not noted by the *Vineyard* court, the doctor's statements were probably not hearsay since they were apparently introduced into evidence to demonstrate the state of mind of the employee at the time of the compromise settlement agreement.[270] Regardless of the theory of admissibility, it is obvious that the *Vineyard* court's specific holding was only that the carrier was chargeable with the truthfulness of statements that it adopted from an agent of the employer. There is no holding that the doctor was the agent of the carrier for purposes of the admissions exception to the hearsay rule.

The court in *Thomas* not only relied upon erroneous authority as demonstrated by the above tracing of the history of the alleged authority, but it also ignored the supreme court's recent holding in *Big Mack Trucking Co. v. Dickerson*.[271] In *Big Mack* the court was concerned with the admission into evidence of hearsay statements made by an employee of Big Mack. Immediately after a truck accident, the employee made a statement to the investigating police officer concerning the occurrence of the accident and subsequently made additional statements to a vice-president of Big Mack. Both of these statements were allowed into evidence. The supreme court, however, held that the admission of these hearsay statements was error. Regarding the employee's statements to the employer's vice-president, the court held that the trial judge must find, as a preliminary fact, that the statements were authorized by the employer. The court noted that it is very

269. *Id.* at 680.
270. *See* 1 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 796 (2d ed. 1956).
271. 497 S.W.2d 283 (Tex. 1973).

likely that the principal intends the agent's report to be made only to the principal or other persons investigating the accident for the principal and not to the whole world. Since there were no special facts demonstrating that Big Mack authorized its employee to speak to the world, the court held that it was error to allow the introduction of such statements into evidence.

With respect to the admission of the employee's statements to the investigating police officer, the court noted that it must first be found that such statements were authorized by the employer either expressly or impliedly from express authority to perform other acts. The particular question raised was whether the employee's express authority to operate a truck could be made the basis for implied authority to explain how an accident occurred. As noted by the supreme court, most authorities take the position that a driver's statements after an accident are *not* authorized by his employer.[272] As the court suggested, the well-advised employer would generally not authorize the driver to speak in circumstances involving potential liability as a result of an accident.[273]

Ignoring for the moment the problem of whether an independent practitioner of the healing arts becomes an agent of an insurance carrier simply because he performs a medical examination, it seems ludicrous that the *Thomas* court so flippantly holds that a doctor is authorized to make admissions on behalf of an insurance carrier when the supreme court finds it unbelievable that a trucking company would allow its *employee* to make binding statements regarding a vehicle accident. Certainly, it is no more realistic to believe that "the well advised employer would generally not authorize the"[274] employee "to speak"[275] for him concerning the cause of an accident than it is to believe that an insurance carrier seeking an independent medical examination would generally not authorize the physician to bind it by purported statements to a claimant asserting a money damage claim against the carrier. More importantly, however, it seems that *Thomas* simply assumes an agency relationship without requiring any proof of the essential elements of agency. An agent with express or implied authority to bind his principal by his statements is denominated a speaking agent.[276] The test of admissibility of an agent's statements against his principal is the same as the principal's substantive responsibility for the acts of the agent.[277] Moreover, the party offering the alleged agent's statement must first prove the fact and scope of the agency of the alleged agent.[278] The *Restatement (Second) of Agency* recognizes that an independent contractor who contracts to accomplish a physical result for another, but who is not acting as a fiduciary and is not under the supervision of the

272. *See* cases cited *id.* at 288.
273. *Id.* This opinion has invited strong criticism of several of its holdings. *See* Elliot, *Evidence, Annual Survey of Texas Law*, 27 Sw. L.J. 158 (1973); Note, *Admissibility Against Employer of Hearsay Evidence of Employee's Negligence*, 11 HOUS. L. REV. 481 (1974).
274. 497 S.W.2d at 288.
275. *Id.*
276. Note, *supra* note 273, at 485 & n.31.
277. *Id.* & n.32.
278. *See* C. MCCORMICK, LAW OF EVIDENCE § 267, at 642 (2d ed. E. Cleary rev. 1972).

person employing him to produce the result is a non-agent, independent contractor.[279] Neither *Thomas* nor any of its cited authority required any evidence of the fact or the scope of the alleged agency on the part of the doctor. The court merely asserted that the agency existed as if such assertion would make it so. It is submitted, however, that regardless of any such assertions, a physician retained by a carrier to perform a medical examination requiring specialized skill and training has contracted to "accomplish physical results not under the supervision"[280] of the carrier and is, therefore, a non-agent, independent contractor whose statements cannot be admissions against the carrier.

Discovery. A compensation case involving issues broader than compensation law, and having a direct impact on trial procedure generally, was decided by the San Antonio court of civil appeals. That court has determined that the failure of a plaintiff to amend answers to interrogatories and disclose the name of an expert witness used at trial does not carry with it any type of sanction. In *Texas Employers' Insurance Ass'n v. Thomas*[281] the carrier propounded interrogatories to the employee in July 1973, five months after filing suit to set aside the Board's award. One interrogatory requested the name and address of all doctors rendering treatment to the employee. A second interrogatory asked if any expert would be called as a witness at trial and, if so, requested the witness's name.[282] Three doctors were named in response to the first interrogatory, but the latter interrogatory was answered in the negative. The answers were true when filed, but on October 22, 1973, the claimant retained Dr. A. E. Minyard to perform an orthopedic examination and to testify at trial. The interrogatories were never amended. The case went to trial on November 5, 1973, and on the second day of trial the doctor was called to testify. The carrier filed a motion to withdraw its announcement of ready and for a mistrial or, alternatively, to bar Dr. Minyard's testimony. All motions were overrruled, although the trial court "did excuse the jury and give defendant's attorney all the time that he desired to make a background check on Dr. Minyard prior to cross-examination."[283]

The interrogatories were propounded pursuant to rule 168[284] which was amended by the supreme court, effective February 1, 1973, specifically to allow inquiry into the identity of "each person whom he expects to call as an expert witness at the trial and to state the subject matter concerning which the expert is expected to testify."[285] This rule was also amended to require a party to supplement the answers under certain specific circum-

279. RESTATEMENT (SECOND) OF AGENCY § 14N, comment *b*, at 80 (1957).
280. *Id.* at 81.
281. 517 S.W.2d 832 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).
282. The exact wording of the interrogatories is quoted in the court's opinion. *Id.* at 833-34.
283. *Id.* at 835. In view of the fact that the trial court overruled defendant's motion for continuance this statement by the court of civil appeals appears to be a gross overstatement of the actual facts.
284. TEX. R. CIV. P. 168.
285. *Id.*

stances. One such circumstance is when answers, though correct when made, are not true and a failure to amend would be, in substance, a knowing concealment.[286] The San Antonio court specifically recognized that the employee should have supplemented his answers to the interrogatories after the examination by Dr. Minyard in October, which examination was admittedly for the sole purpose of using the doctor as an expert witness. Nevertheless, the court held that since there are no specific sanctions set forth in the rule providing a penalty for this type of situation, the trial court did not abuse its discretion in refusing a mistrial or continuance and in allowing the doctor to testify.[287] In justifying this holding, the court wrote:

> It is seen that the medical evidence in this case was very fully developed in discovery proceedings. Plaintiff had been under the care and treatment of two doctors approved by defendant, and defendant was fully aware of plaintiff's physical condition. Dr. Minyard, who saw plaintiff on only one occasion, did not bring any new medical evidence into the case. He simply drew a different conclusion from the results achieved by the treating physicians. Dr. Stool and Dr. Robinson . . . testified that plaintiff had sustained a permanent partial incapacity of ten percent and twenty-five percent respectively. On the other hand, Dr. Minyard testified that, in his opinion, plaintiff was totally incapacitated as defined by the compensation law. There was little conflict in the findings of the doctors; each just reached a different conclusion from such findings.[288]

The difficulty with the court's rationalization for this holding is that the case appears to have been tried primarily on the extent and duration of the claimant's incapacity. Obviously, the testimony of the various physicians was vitally important in assessing the incapacity. Thus, the credibility of the medical witnesses would be of primary importance. It is difficult at best to cross-examine a physician who one knows will be called at trial. Untold hours of preparation are required to research not only the possible testifying history but the basis for his medical opinion. To do so when such a physician is sitting on the witness stand, having been called as a surprise witness from a county 250 miles away, as was Dr. Minyard, is virtually impossible. Moreover, this type of ambush can only be arranged by a plaintiff. A defendant obviously cannot obtain a physical examination without the plaintiff's knowledge, but a plaintiff can easily do so, as demonstrated in the instant case. This is the classic "trial by ambush." The only protection a defendant has is to rely on a fair and impartial enforcement of the rules as written. Absent such enforcement, there is absolutely no protection from surprise expert witnesses.

It was originally thought that the amendment to rule 168 requiring

286. *Id.*

287. The court also noted: "Plaintiff's attorney is frank to admit that he was not aware of the change in Rule 168, which requires the supplementing of answers." 517 S.W.2d at 834. This "frank" admission should not have influenced the outcome of this case in light of the overwhelming publicity given the 1973 amendments. *See, e.g.*, 35 TEX. B.J. 1037 (1972); Keith, *Texas Rules of Civil Procedure, Summary and Discussion of Amendments and Additions Effective February 1, 1973*, 36 TEX. B.J. 401 (1973).

288. 517 S.W.2d at 835.

supplemental answers to interrogatories effectively overruled the 1967 decision in *Coca Cola Bottling Co. v. Mitchell*[289] in which the court held that the plaintiff was under no duty to advise the defendant by supplemental answers to interrogatories of additional doctors consulted by the plaintiff subsequent to answering the interrogatories.[290] Apparently, the extremely plain wording of the rule, thought to do away with trial by surprise and "to liberalize and enfuse greater flexibility into the process of discovery,"[291] does not mean what it says. While it is true that no sanction specifically directed to this problem is set out in the rule, it has been suggested by one noted commentator that the result reached in the *Thomas* case is a step backward into an era long thought past:

> It is submitted that upon service of proper interrogatories, the requesting party is entitled to receive the identity and the subject matter of each expert witness the opposing party expects to call as a witness at the time such expert witness is initially employed. Because Rule 168 specifically imposes on the answering party the *continuing duty to supplement answers*, a failure to supplement arguably constitutes a violation of an order imposed by law and would authorize the trial court to employ the sanctions embodied in Rule 215a, including prohibiting the party from utilizing the expert witness not identified, striking all or a portion of the pleadings of a party, or abating the proceedings until the interrogatories have been properly supplemented. Unless the sanctions authorized under Rule 215a are available under these circumstances at the trial stage for failure to supplement, the purpose and intendment of the amendment to the Rules is frustrated and ingenious counsel may circumvent with relative impunity the obligation to furnish information . . . .[292]

The supreme court was obviously aware of this problem with respect to rule 168 because the carrier's application for writ of error was refused, no reversible error. In spite of the request by Justice Walker for "trial counsel and trial judges to advise the supreme court of amendments that are needed for purposes of clarification or for any other reasons,"[293] the supreme court was apparently of the opinion that no amendment to rule 168 was necessary, since this rule was not changed in the recent amendments to the rules effective January 1, 1976.[294] It is submitted, however, that the hiatus in the present wording of rule 168 creates an "anomalous situation which frustrates the very intent of the liberalization sought to be achieved"[295] by the 1973 amendments. Two additions are needed in order to make rule 168 effective: First, specific sanctions for failure to comply with the rule, and

289. 423 S.W.2d 413 (Tex. Civ. App.—Corpus Christi 1967, no writ).
290. Sales, *Discovery Under the Texas Rules of Civil Procedure,* 37 TEX. B.J. 39, 44 (1974).
291. *Id.* at 41.
292. Sales, *Discovery Under the Texas Rules of Civil Procedure—A Supplement,* 38 TEX. B.J. 541, 545 (1975).
293. Walker, *Discovery, 1973 Amendments to Texas Rules,* 38 TEX. B.J. 27, 32 (1975).
294. Order Amending the Texas Rules of Civil Procedure, *reprinted in* 38 TEX. B.J. 823 (1975).
295. Sales, *supra* note 292, at 545.

second, a time limit in which the supplemental answers designating additional experts must be filed *before trial.* This second suggestion is designed to prevent the rather common practice of mailing supplemental answers to opposing counsel on the Friday afternoon before a Monday trial.

Jury Argument. A classic illustration of the difficulty faced by a compensation carrier is *Hartford Accident & Indemnity Co. v. Thurmond.*[296] A substantial portion of the court's opinion deals with the improper and prejudicial efforts of the employee's attorneys to sway the jury with bias, prejudice, and sympathy. This situation is not, of course, unusual.[297] In *Thurmond* the court held that none of the arguments, nor the cumulative effect thereof, presented reversible error. One of the primary holdings of the *Thurmond* court, concerning the jury argument points of error, was that the carrier's attorney should have objected to each and every argument, but failed to do so.[298] The carrier argued, however, that had it objected to all of the objectionable remarks, many of which are summarized in the court's opinion, the continuous objections would have simply compounded the bias and prejudice and that instructions from the court would not have cured the cumulative effect of the arguments. This is, of course, a practical, commonsense argument based upon the practicalities of jury trial. The court summarily rejected the argument, illustrating, once again, the difficulty in attempting to reverse a jury verdict based primarily on trial conduct and jury argument points of error.

Sufficiency of Evidence on Appeal. Cases during the survey period involving sufficiency of the evidence produced no surprises. Typically, most cases were appealed by the insurance carriers from jury verdicts of substantial value in favor of the employees.[299] Two cases involved an employee's attack on jury findings of no accidental injury,[300] but the jury verdict was affirmed in both cases. One case, *Thomas v. International Insurance Co.*,[301] presented a situation rarely found in compensation cases. The case was the second appeal by the employee. The first appeal[302] was from a jury verdict that the claimant had sustained no total incapacity and no

296. 527 S.W.2d 180 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

297. *See, e.g.*, Texas Employers' Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856 (1954); Federal Underwriters Exch. v. Bickham, 138 Tex. 128, 157 S.W.2d 356 (1942); Twin City Fire Ins. Co. v. King, 510 S.W.2d 370 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); Tanner v. Texas Employers' Ins. Ass'n, 438 S.W.2d 395 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.).

298. 527 S.W.2d at 193.

299. *See, e.g.*, Hartford Accident & Indem. Co. v. Thurmond, 527 S.W.2d 180 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (affirming total and permanent verdict); Texas Employers' Ins. Ass'n v. Sprabery, 520 S.W.2d 447 (Tex. Civ. App.—Fort Worth 1975, no writ) (affirming total and permanent verdict); Texas Employers' Ins. Ass'n v. Thomas, 517 S.W.2d 832 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (affirming total and permanent verdict); Hartford Accident & Indem. Co. v. Williams, 516 S.W.2d 425 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (affirming total and permanent verdict).

300. Marino v. Vigilant Ins. Co., 523 S.W.2d 518 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Washington v. Aetna Cas. & Sur. Co., 521 S.W.2d 313 (Tex. Civ. App.—Fort Worth 1975, no writ).

301. 527 S.W.2d 813 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

302. Thomas v. International Ins. Co., 507 S.W.2d 286 (Tex. Civ. App.—Waco 1974, no writ).

partial incapacity following the injury in question. The court of civil appeals reversed and remanded for new trial, finding that the jury verdict was against the great weight and preponderance of the evidence. On a second trial, another jury found that the employee sustained an injury but suffered no total incapacity and no partial incapacity but was entitled to $240.25 for required medical care. The Waco court of civil appeals again reversed and remanded the case for new trial. Again, all of these cases demonstrate the correctness of the cogent observation of the Beaumont court of civil appeals that it is impossible to reconcile all of the decisions of the courts of civil appeals' rulings on sufficiency and great weight questions following total and permanent disability findings.[303] Two of these cases[304] also demonstrate that the appellate courts are viewing evidence points on appeal with increasing technicality,[305] again pointing up the fact that careful consideration should be given to the preparation of evidence points of error.[306]

303. Transport Ins. Co. v. Kennon, 485 S.W.2d 598, 600 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

304. Marino v. Vigilant Ins. Co., 523 S.W.2d 518 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Washington v. Aetna Cas. & Sur. Co., 521 S.W.2d 313 (Tex. Civ. App.—Fort Worth 1975, no writ).

305. *See, e.g.*, J. Weingarten, Inc. v. Razey, 426 S.W.2d 538 (Tex. 1968); Garza v. Alviar, 395 S.W.2d 821 (Tex. 1965); Hardy v. C.P.I. Sales, 511 S.W.2d 89 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); F.W. Woolworth Co. v. Garza, 390 S.W.2d 90 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

306. *See generally* O'Connor, *Appealing Jury Findings*, 12 HOUS. L. REV. 65 (1974); O'Connor, *Evidence Points on Appeal*, 37 TEX. B.J. 839 (1974).