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Workers' Compensation

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WORKERS' COMPENSATION

by

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THE title of this year's Article provides a distinctive clue to the wide ranging changes taking place in the field of compensation law. Although the legislature has decreed that the Compensation Act[1] shall henceforth be called by a new name,[2] this new name cannot veil the old problems nor quiet the debate surrounding possible federal compensation of injured workpersons.[3] Continuing threats of pre-emptive federal legislation have not only generated rapid legislative and judicial changes but also increased the controversy and debate surrounding this country's oldest form of social insurance. This Article discusses the status of federal pre-emptive legislation as well as recent legislative enactments and judicial interpretations which occurred during this last survey year.

I. FEDERAL LEGISLATION

The extensive revisions of the Texas Compensation Act in 1971,[4] 1973[5] and 1975[6] are directly traceable to a desire by the United States Congress to pre-empt state compensation programs.[7] The federal attempt to replace state control of the compensation process with a system of national workers' compensation has been spurred by the report of the National Commission on State Workmen's Compensation Laws[8] as well as increasing criticism from labor and some industry spokesmen.[9] The reasons for the growing concern are economic, in terms of both premiums received and benefits paid:

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1. TEX. REV. CIV. STAT. ANN. arts. 8306, 8307, 8309 (Vernon 1967 & Supp. 1978).

2. The name has been changed from Workmen's Compensation to Workers' Compensation. TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (Vernon Supp. 1978).

3. The author respectfully requests the reader's permission to refer to workpersons, both male and female, as workmen throughout the remainder of the article. While this may well be inappropriate in view of the increasing number of women in the labor force, it is simply easier to write and read the more familiar "workmen" than the stilted, stiff "workperson."

4. *See* TEX. REV. CIV. STAT. ANN. arts. 8306, 8307, 8309 (Vernon Supp. 1978).

5. *Id.* These amendments as well as the 1971 amendments are noted and discussed in Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 29 SW. L.J. 183 (1975).

6. *See* TEX. REV. CIV. STAT. ANN. arts. 8306, 8307, 8309 (Vernon Supp. 1978). The 1975 amendments are noted and discussed in Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 30 SW. L.J. 213 (1976).

7. The history of federal workers' compensation bills in Congress is noted in Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 31 SW. L.J. 259 (1977).

8. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAW, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (July 1972). The Commission was created by Congress in 1970. 29 U.S.C. § 676 (1970).

9. *See* Odlin, *The Workers' Compensation Controversy: A Status Report*, 5 JOB SAFETY AND HEALTH, April 1977, at 16. *Job Safety and Health* is the official magazine of the Occupational Safety and Health Administration, U.S. Department of Labor.

> The social security administration reports that compensation payments for job-related injuries in 1975, the latest year for which complete figures are available, totaled $6.5 billion, including $1.4 billion paid by the federal government. The latter payment included $957 million paid to sufferers of pneumoconiosis (black lung). . . .
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> The American Mutual Insurance Alliance (AMIA) estimates that the cost of workers' compensation insurance grew to $8 billion in 1976. Benefits between 1972 and 1976, the Alliance estimates, increased 125 percent, while premiums grew by 100 percent.[10]

Despite the tremendous cost to employers, a cost which is passed on to the consuming public, there is mounting criticism that compensation payments do not keep pace with the cost of living and are not uniform in benefits, enforcement, or administration from state to state.[11] Although federal legislation has not yet been passed by Congress, it may only be a matter of time. Since 1973 bills calling for a national compensation act have been introduced at every session of Congress.[12] Legislation calling for a national workers' compensation act has again been filed in 1977.[13] Moreover, in addition to the study by the National Commission on State Workmen's Compensation Laws there have been no less than five other lengthy studies of the compensation system since 1970: two by United States Senate subcommittees; one by a House sub-committee; and two in the federal executive branch.[14] The most recent report was issued in January 1977 by the policy group of the inter-departmental workers' compensation task force.[15] The task force recommended that the states be given more time to strengthen and upgrade their compensation programs before establishing a federal minimum standard or other reform measures.[16]

While it is perfectly evident that state compensation programs need to be revised and updated, it is also evident that improvements have been made in these programs since the National Commission's report.[17] Numerous groups

10. *Id.* at 17. Estimates for 1974 indicate that employers, insured or self-insured, spent $7.8 billion to insure their work injury risks. This was estimated to be over $1 billion more than the amount spent in 1973. CHAMBER OF COMMERCE OF THE UNITED STATES, ANNUAL ANALYSIS OF WORKERS' COMPENSATION LAWS 3 (1976 ed.).

11. *See* Odlin, *supra* note 9, at 17-18.

> This [nonuniform benefits] may have been more acceptable in an era when there were more marked differences in the cost of living in different geographical areas. With most goods and services now provided by companies marketing on a multiterritorial basis, the prices are generally uniform. A refrigerator, a suit of clothes, or a carpet is likely to cost as much in Mississippi as it does in New York, for example.

Id. at 17.

12. S. 2008, 93d Cong., 1st Sess. (1973); H.R. 8771, 93d Cong., 1st Sess. (1973); S. 2018, 94th Cong., 1st Sess. (1975); H.R. 15609, 94th Cong., 1st Sess. (1975).

13. H.R. 2058, 95th Cong., 1st Sess. (1977). For a summary of this bill see *Report of the Committee on Workmen's Compensation and Employer's Liability*, 8 FORUM, Oct. 1977, at 114 (Special Issue). *Forum* is the official publication of the section of insurance, negligence, and compensation law of the American Bar Association.

14. Odlin, *supra* note 9, at 17.

15. *Id.*

16. *Id.*

17. *See* CHAMBER OF COMMERCE OF THE UNITED STATES, *supra* note 10, at 51. This annual report contains a chart summarizing the compliance evaluations for each state made by an ad hoc committee of the National Commission on State Workmen's Compensation Laws formed in February 1975. Although unofficial, this committee focused on the Commission's 19 essential recommendations and attempted to chart each state's progress toward compliance with the essential recommendations. *Id.* at 51-52. *See also* Odlin, *supra* note 9, at 20-21.

including the National Commission[18] itself oppose federal legislation.[19] Despite this strong opposition, despite the significant improvements in almost all state programs, despite the lesson of history teaching us that federal programs are not panaceas for all of our social ills,[20] it seems likely that the federal bureaucracy, in the near future, may succeed in preempting state control of workers' compensation programs. Unless all concerned with the compensation system, individually and collectively, work to revitalize this historically sound and effective approach to industrial injuries, we may well lose control of yet another aspect of our daily lives to the amorphous "they."[21]

II. STATUTORY AMENDMENTS

The 65th Legislature adopted twenty-three amendments affecting the Workers' Compensation Act.[22] One of the first amendments passed added article 8306b, sections 1 and 2,[23] and amended article 5.76 of the Insurance Code[24] to simply change the name of the Act from Workmen's Compensation to Workers' Compensation. The remaining amendments increased both indemnity and nonindemnity benefits available under the Act, corrected procedural anomalies, and expanded government employees' benefits.

By amending article 8306, section 29(c)[25] the legislature solved a complex problem involving the calculation of increases in the minimum-maximum compensation rate as related to the published annual average weekly wage of manufacturing production workers in Texas. Through the addition of the words "cumulative" and "cumulatively" in one key sentence, compensation benefits are anticipated to increase as originally intended by the legislature when this section was first added in 1973.[26]

A new section, article 8309, section 6, provides coverage for the services of doctors of podiatric medicine.[27] Such services surprisingly had not been covered by the term "medical aid."[28] A podiatrist, however, is specifically excluded, unlike a chiropractor, from being appointed by the Board to

18. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, *supra* note 8, at 126.

19. These groups include the American Bar Association, National Association of Manufacturers, National Council of Self-Insureds, American Mutual Insurance Alliance, Compensation Section of the Association of Trial Lawyers of America, Workmen's Compensation Lawyers Association, and many others. *See* Millus, *Is Federalization of Workmen's Compensation Inevitable*, 62 A.B.A.J. 1010 (1976), Odlin, *supra* note 9, at 17-21; 62 A.B.A.J. 1629 (1976).

20. Millus, *supra* note 19, at 1014.

21. Aside from the local versus federal issue there is the cost factor of federal control. The postal service and social security administration, to mention only two, are the classic examples of inept federal bureaucracies. One observer has been quoted as saying that a federal takeover of compensation programs could send costs up "five times as much and twice as fast." Odlin, *supra* note 9, at 20.

22. All of the amendments will be noted and discussed *infra* except TEX. REV. CIV. STAT. ANN. art. 8309g (Vernon Supp. 1978), which was an appropriations bill authorizing $1.7 million to the attorney general for the payment of claims made under the workers' compensation program for state employees.

23. TEX. REV. CIV. STAT. ANN. art. 8306b, §§ 1, 2 (Vernon Supp. 1978).

24. TEX. INS. CODE ANN. art. 5.76 (Vernon Supp. 1978) (the assigned risk pool).

25. TEX. REV. CIV. STAT. ANN. art. 8306, § 29(c) (Vernon Supp. 1978).

26. *Id.*

27. *Id.* art. 8309, § 6.

28. *Id.* art 8306, §§ 7, 7a, 7b; *see id.* arts. 4567-4575a.

participate in a "medical committee" examination[29] or autopsy[30] in a claim for occupational disease.

Article 8306, section 7—e[31] which regulates the insurer's liability for artificial appliances, prostheses, was amended to make the carrier liable for the replacement and repair of the prostheses for the employee's life rather than merely for one satisfactory fit as under the old statute.[32] This raises the question whether an employee entitled to this lifetime benefit can compromise and settle his right to future repair and replacement. Since an employee may compromise and settle his right to future medical benefits,[33] it would seem he could also compromise and settle his right to lifetime prosthetic replacement or repair. Since the right to lifetime medical and lifetime artificial appliances appear in two distinct and separate sections of the Act, however, it would behoove a carrier to explicitly include references to both rights when attempting to close nonindemnity future benefits.

The legislature also increased funeral benefits from $500.00 to $1,250.00.[34] Funeral benefits are payable to any person who incurred the expense of the burial.[35] If there are no beneficiaries or relatives, the statute places the burden on the carrier to secure burial and cover expenses up to the maximum $1,250.00.[36]

The legislature has also expanded the coverage of the Act to include not only employees hired in Texas but Texas residents recruited in Texas as well.[37] The wording change in the statute was the addition of the phrase "or, if a Texas resident, recruited in this state,"[38] in the first sentence, and the addition of the phrase, "or where the employee was recruited"[39] in the

29. *Id.* art. 8307, § 13 (Vernon 1967).
30. *Id.* § 14.
31. *Id.* art. 8306, § 7—e (Vernon Supp. 1978).
32. Tex. Rev. Civ. Stat. Ann. art. 8306, § 7—e (Vernon 1967).
33. *See, e.g.*, Finch v. Texas Employers' Ins. Ass'n, 535 S.W.2d 201 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); Barnes v. Bituminous Cas. Corp., 495 S.W.2d 5 (Tex. Civ. App.— Amarillo 1973, writ ref'd n.r.e.).
34. TEX. REV. CIV. STAT. ANN. art. 8306, § 9 (Vernon Supp. 1978).
35. *Id.*
36. *Id.*
37. *Id.* § 19. The section now provides:

> If an employee, who has been hired or, if a Texas resident, recruited in this State, sustain injury in the course of his employment he shall be entitled to compensation according to the Law of this State even though such injury was received outside of the State, and that such employee, though injured out of the State of Texas, shall be entitled to the same rights and remedies as if injured within the State of Texas, except that in such cases of injury outside of Texas, the suit of either the injured employee or his beneficiaries, or of the Association, to set aside an award of the Industrial Accident Board of Texas, or to enforce it, as mentioned in article 8307, sections 5-5a, shall be brought either
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> a. In the county of Texas where the contract of hiring was made or where the employee was recruited; or
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> b. In the county of Texas where such employee or his beneficiaries or any of them reside when the suit is brought, or
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> c. In the county where the employee or the employer resided when the contract of hiring was made or when the employee was recruited, as the one filing such suit may elect.
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> Providing that such injury shall have occurred within one year from the date such injured employee leaves this State; and provided, further, that no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred.

38. *Id.*
39. *Id.*

venue portion of the statute. These minor word changes significantly alter the existing case law on extraterritorial injury.

The phrase "who has been hired . . . in this state"[40] was interpreted by the courts as having no reference to the place where the contract of hiring was made.[41] Rather, the primary question was whether the employee was hired within Texas to perform services solely within another state or within another state and Texas.[42] If hired to perform work in Texas as well as another state, the claimant was a Texas employee regardless of whether he began work in the other state before working in Texas.[43] If hired in Texas to work only outside of the State of Texas during the term of the employment contract, the claimant could not claim the status of a Texas employee and was relegated to the protection of the law of the place of injury.[44] This was true even if the employee had previously worked for the same employer in Texas and anticipated working for the same employer in the future,[45] because a severance of the employee-employer relationship terminated the employee's status as a Texas employee.[46] Payment of travel expenses from Texas to the foreign place of employment was also insufficient to bring a claimant within the extraterritorial provision of the Act.[47]

The legislature's amendment overrules a substantial portion of prior case law. The words "recruited in this state"[48] should not be difficult to construe especially since they are modified and limited in application to "a Texas resident."[49] In view of the energy crisis and the recruitment of oil field and related workers to work in a variety of foreign countries and on the Alaskan pipeline, as well as numerous construction workers recruited to work in different states, this amendment should remedy a rather harsh doctrine that forced injured workmen to seek compensation in foreign jurisdictions or in some cases prevented any recourse whatsoever. It must be remembered, however, that the one year limitation[50] is still applicable to every employee whether hired or recruited in the State.

While remedying one difficulty related to foreign employment, the legislature created a possible trap for unwary employers who recruit Texas residents. If a non-Texas employer recruits a Texas employee to work in a foreign jurisdiction, the employee, if injured, may claim Texas compensa-

40. *Id.*
41. 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); Renner v. Liberty Mut. Ins. Co., 516 S.W.2d 239 (Tex. Civ. App.—Waco 1974, no writ).
42. *Id.*
43. Texas Employers' Ins. Ass'n v. Dossey, 402 S.W.2d 153, 156 (Tex. 1966).
44. Hale v. Texas Employers' Ins. Ass'n, 150 Tex. 215, 225-28, 239 S.W.2d 608, 614-15 (1951); Southern Underwriters v. Gallagher, 135 Tex. 41, 45, 136 S.W.2d 590, 592 (1940); Renner v. Liberty Mut. Ins. Co., 516 S.W.2d 239, 241 (Tex. Civ. App.— Waco 1974, no writ).
45. Renner v. Liberty Mut. Ins. Co., 516 S.W.2d 239, 241 (Tex. Civ. App.—Waco 1974, no writ).
46. *Id.; see* Hale v. Texas Employers' Ins. Ass'n, 150 Tex. 215, 228, 239 S.W.2d 608, 616 (1951).
47. Renner v. Liberty Mut. Ins. Co., 516 S.W.2d 239, 241 (Tex. Civ. App.—Waco 1974, no writ).
48. *See* note 37 *supra*.
49. *Id.*
50. *Id.*

tion. If the employer is not a subscriber under the Texas Act, there is nothing to prevent the claimant from asserting a non-subscriber cause of action against the employer, assuming Texas jurisdiction over the employer, whereby the employee can collect common law damages and the employer waives all common law defenses.[51] The employee, of course, would still be required to prove negligence on the part of the employer.[52] Nevertheless, a prudent employer who recruits Texans to work in foreign jurisdictions should purchase Texas compensation coverage or make provisions to be self-insured against potential non-subscriber claims.

In the area of procedure and venue, the legislature passed several amendments affecting compensation practice both at the Board and trial court level. The first change involved the pre-hearing conference which was first authorized by the legislature in 1969.[53] In 1975 the legislature amended the statute to require the pre-hearing officer to prepare a report to the Board on cases not settled at the pre-hearing conference.[54] In amending the statute, however, the legislature inadvertently omitted a portion of the second sentence of section 10(b) wherein the Board was authorized to direct "the parties; [sic] their attorneys or the duly authorized agents of the parties"[55] to attend pre-hearing conferences. The amended section simply provided that the Board could direct "the parties,"[56] and not their attorneys or agents, to appear for pre-hearing conferences.[57] The legislature has now cured this defect by again amending section 10 and reinserting the original language.[58] This word change may appear insignificant, but it must be remembered that Board members have the power to impose sanctions for contempt in the same manner and to the same extent as district judges.[59] Thus an attorney, an authorized agent, or the claimant or carrier representative who fails to appear for a pre-hearing conference without showing good cause may well be jailed or fined for contempt.

An even more important aspect of the language change in the pre-hearing statute concerned the Board's statutory power to bar persons guilty of unethical or fraudulent conduct from practicing before it.[60] In its rules,[61] the Board has decreed that failure to attend a pre-hearing conference without good cause will be considered unethical or fraudulent conduct.[62] The rule applies to attorneys or claimants' agents and carrier representatives.[63] Thus,

51. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 1, 4 (Vernon 1967).
52. *Id.*
53. *Id.* art. 8307, § 10(b) (Vernon Supp. 1978). *See generally* Boykin, *Presenting a Claim to the Texas Industrial Accident Board*, 12 TRIAL LAW. F., July-Sept. 1977, at 6; Boykin, *The Texas Industrial Accident Board: An Insider's Point of View*, 9 TRIAL LAW. F., Jan.-March 1975, at 5; Solomon, *The Pre-hearing Conference in Workmen's Compensation*, 9 TRIAL LAW. F., Oct.-Dec. 1974, at 11.
54. TEX. REV. CIV. STAT. ANN. art. 8307, § 10(b) (Vernon Supp. 1978).
55. 1969 Tex. Gen. Laws ch. 18, § 9, at 52.
56. 1975 Tex. Gen. Laws ch. 430, § 1, at 1131.
57. This inadvertent amendment by deletion along with a second amendment by deletion was discussed in Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 29 SW. L.J. 183, 215 n.17 (1975).
58. TEX. REV. CIV. STAT. ANN. art. 8307, § 10(b) (Vernon Supp. 1978).
59. *Id.* art. 8307, § 4 (Vernon 1967).
60. *Id.*
61. *See* Tex. Indus. Accident Bd., Emergency Rules, 2 Tex. Reg. 3214-24 (1977).
62. *Id.* rule 061.13.00.020(a)(11), (b)(1).
63. *Id.*

the reinsertion of the prior language in the pre-hearing statute provides the Board with the power to compel attendance at pre-hearing conferences and to discipline any person who chooses to ignore such orders.

Except for suits which involve extraterritorial injuries[64] or occupational disease,[65] venue of actions which seek to set aside Industrial Accident Board awards has been limited to the county where the injury occurred.[66] The legislature has now broadened the venue provisions of the Act with respect to accidental injuries, but has not changed the provisions relating to occupational disease.[67] Effective August 29, 1977, a suit to set aside an award of the Industrial Accident Board in any case except extraterritorial injury or occupational disease may be brought: (1) in the county where the injury occurred; (2) in the county where the employee resided at the time the injury occurred; or (3) if the employee is deceased, in the county where the employee resided at the time of his death.[68] Naturally, the expanded venue provision will engender numerous races to the courthouse, particularly when the employee is injured in a conservative county, but resides in a liberal county or vice versa. Although there is no such provision in the statute, it would seem logical to assume that the suit filed second in time would be subject to a plea in abatement or perhaps a motion to dismiss since all issues can be litigated and resolved in the first suit and since one venue provision is not dominant over the others. It is conceivable, however, that one award could be litigated in two different counties at the same time. For example, assume the Board enters an award denying compensation to an employee residing in Brazoria County, but allegedly injured in Harris County. The employee files suit to set aside the award in the county of his residence, Brazoria County. If an additional claimant, a hospital for example, asserts an independent claim for hospital expenses, the employee's suit does not vacate the award as to the hospital.[69] The hospital, moreover, can pursue a claim independent of the employee[70] by simultaneously filing suit to set aside the award as to its claim in Harris County, the county where the injury occurred.

The legislature also passed an amendment formalizing a procedure that has been used to settle compensation suits for years. Section 12, article 8307,[71] requires Board approval of any compromise settlement between the parties. If suit is filed to set aside a Board award, the statute requires court approval of any compromise.[72] Some courts have interpreted the statute to

64. TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (Vernon Supp. 1978).

65. *Id.* art. 8307, § 5 (Vernon 1967). This venue provision was added in 1947 when occupational diseases became compensable. 1947 Tex. Gen. Laws ch. 113, § 11, at 180.

66. 1917 Tex. Gen. Laws ch. 103, § 5, at 283. The original Act simply provided that suit was to be instituted in "some court of competent jurisdiction." 1913 Tex. Gen. Laws ch. 179, § 5, at 433.

67. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1978). *See* notes 37-52 *supra* and accompanying text.

68. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1978).

69. Latham v. Security Ins. Co., 491 S.W.2d 100 (Tex. 1972).

70. Maryland Cas. Co. v. Hendrick Memorial Hosp., 141 Tex. 23, 169 S.W.2d 969 (1943); Harleysville Mut. Ins. Co. v. Frierson, 455 S.W.2d 370 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ).

71. TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (Vernon 1967).

72. *See, e.g.*, Texas Employers Ins. Ass'n v. Miller, 137 Tex. 449, 154 S.W.2d 450 (1941).

require personal appearances by the claimant and claimant's attorney in order to secure approval of a compromise settlement. Other district courts, however, have routinely accepted the claimant's affidavit in lieu of a personal appearance. The legislature has now specifically approved the procedure of settling compensation suits by the use of affidavits,[73] although the court retains the power to order an oral hearing. The affidavit must evidence the claimant's full understanding of the terms of the settlement and his agreement to settle the suit. Critics may say that an oral hearing offers the claimant more protection from overreaching by the carrier, or perhaps his own attorney, than does the affidavit procedure. This criticism, however, overlooks the fact that most oral hearings are simply rubber stamp affairs conducted with a minimum of interest. Moreover, the Industrial Accident Board for years has routinely approved compromise settlement agreements without personal appearances and has relied upon the adversary system to protect the claimant from any overreaching. The courts, too, should demonstrate faith in the adversary system. After all, once a court has reviewed the settlement terms and the claimant's affidavit, if there is any question about the propriety of the settlement, the parties can be ordered to appear for an oral hearing. In view of the legislative approval of the affidavit procedure, it is submitted that the courts should rarely require more.

There were also two amendments applicable to compensation insurance carriers. Article 8308[74] was amended to add section 20a[75] which requires a carrier who cancels a policy prior to its normal expiration date to: (1) notify the subscriber by certified mail at least ten days prior to the date of cancellation; and (2) notify the Board by certified mail or in person on or before the date of cancellation. Failure to give the requisite notices extends the policy coverage until such notice is given. The Board had sought the power to require such notice for years. As far back as 1953, the Board rules have contained a provision that all policies were presumed to be in effect until a cancellation notice was received by the Board.[76] Because there was no statutory authority to support the rules, however, the courts held them insufficient to bind the carriers.[77] Effective September 1, 1977, with or without a Board rule, cancellations of workers' compensation policies will be ineffective until both the subscriber and the Board are notified.

The second amendment that affected compensation carriers increased the general revenue contributions required by section 28 of article 8306.[78] The prior statute[79] created a special workmen's compensation fund to be used by

73. TEX. REV. CIV. STAT. ANN. art. 8307, § 12a (Vernon Supp. 1978). At the same time the legislature approved settlements by affidavit, however, the Industrial Accident Board enacted a new rule requiring the claimant to personally appear before a Board representative who can recommend the approval of a compromise settlement agreement. The personal appearance requirement, however, can be waived by the Board representative upon a showing of good cause. Tex. Indus. Accident Bd., Emergency Rule 061.08.00.230, 2 Tex. Reg. 3221 (1977).

74. TEX. REV. CIV. STAT. ANN. art. 8308 (Vernon 1967 & Supp. 1978).

75. *Id.* art. 8308, § 20a (Vernon Supp. 1978).

76. Tex. Indus. Accident Bd., Rule 2.03 (1953).

77. *See, e.g.*, Johnson v. Firemen's Ins. Co., 398 S.W.2d 318 (Tex. Civ. App.—Eastland 1965, no writ); Burton v. I.C.T. Ins. Co., 304 S.W.2d 292 (Tex. Civ. App.—Texarkana 1957, no writ).

78. TEX. REV. CIV. STAT. ANN. art. 8306, § 28 (Vernon Supp. 1978).

79. Tex. Rev. Civ. Stat. Ann. art. 8306, § 28 (Vernon 1967).

the Board to defray the cost of administering the Act. The tax was one-fourth of one per cent of the gross premiums collected by each carrier writing compensation insurance and a like amount of tax on self-insurers based on total annual medical and indemnity costs. The amendment abolished the workmen's compensation fund, increased the tax to 45/100 of one per cent and provided that the tax be paid into the general revenue fund. The legislature also eliminated the $7.50 filing fee which was collected from employers when they notified the Board that they had become subscribers under the Act.[80] The penalty for failure to report coverage, however, was not changed.[81]

A number of amendments were passed which substantially affect workers' compensation as it applies to employees of the state and its various institutions, agencies, and political subdivisions. The self-insured compensation program for state employees was amended to exclude several groups from the employee definition.[82] Specifically excluded from coverage were: (1) persons performing personal services for the state as independent contractors or volunteers; (2) members of the state military forces; (3) persons who, at the time of injury, were performing services for state or federal political subdivisions or who were controlled by an agency other than the State of Texas; (4) employees of the Department of Highways and Public Transportation covered by article 6674s;[83] and (5) employees of the University of Texas and Texas A & M University system.[84]

The legislature also provided a method for collecting unpaid compensation judgments from the state and its political subdivisions. If the state or any of its departments, divisions, or political subdivisions fail to comply with a judgment, and if the claimant successfully secures mandamus compelling compliance, he is also entitled to a twelve per cent penalty on the amount of the judgment and reasonable attorneys' fees for prosecuting the mandamus.[85] This article applies to the State Employees' Act,[86] Political Subdivision Act,[87] and Texas A & M employees,[88] University of Texas employees,[89] and highway department employees.[90] This amendment was

80. TEX. REV. CIV. STAT. ANN. art. 8308, § 18a (Vernon Supp. 1978).
81. *Id.*
82. *Id.* art. 8309g.
83. *Id.* art. 6674s (Vernon 1977) (individual compensation program for department employees).
84. *Id.* arts. 8309b, 8309d (Vernon 1967 & Supp. 1978). Strangely enough even though Texas A & M University, in 1947, was allowed to provide its employees with workers' compensation coverage, 1947 Tex. Gen. Laws ch. 229, § 1, at 417, and in 1951, the University of Texas was allowed to do the same, 1951 Tex. Gen. Laws ch. 310, § 1, at 522, Texas Tech University's individual workers' compensation program, similar in all respects to those established for A & M and Texas, 1957 Tex. Gen. Laws ch. 252, § 1, at 536, was abolished by the 1977 legislature. All Texas Tech employees are now entitled to participate in the workmen's compensation program for state employees provided in art. 8309g. TEX. REV. CIV. STAT. ANN. art. 8309g—1 (Vernon Supp. 1978). The employees covered include all employees of Texas Tech University, Pan Tech Farm, Texas Tech University School of Medicine and all other agencies under the direction and control of the Texas Tech University Board of Regents. *Id.* Presumably, these amendments also include employees of Texas Tech University Law School.
85. TEX. REV. CIV. STAT. ANN. art. 8309i (Vernon Supp. 1978).
86. *Id.* art. 8309g.
87. *Id.* art. 8309h.
88. *Id.* art. 8309b (Vernon 1967 & Supp. 1978).
89. *Id.* art. 8309d.
90. *Id.* art. 6674s (Vernon 1977).

also made applicable to Texas Tech University employees, but as noted,[91] Tech employees now come under the State Employees' Compensation Program.[92]

The legislature also amended A & M's program,[93] limiting the University's special compensation waiver privilege. Originally, A & M,[94] Texas,[95] and Texas Tech[96] were given the right to have employees and prospective employees undergo physical examinations to determine if they were "physically fit to be classified" as workmen.[97] Moreover, each school could require a worker who failed the physical examination to execute an *unlimited waiver of his rights to compensation!*[98] The legislature amended sections 13, 14, and 15[99] of the A & M program to provide that the University can secure and retain in its permanent records a complete medical history of a prospective employee[100] and employ individuals with pre-existing physical conditions. Most important, the university's special waiver of compensation privilege was limited to apply only to an injury or death attributable to a specified condition identified in the waiver.[101] Strangely enough, the University of Texas statute, which is virtually a carbon copy of the A & M statute, was not amended. Texas still retains the unlimited waiver right.

In 1969 the legislature established a work furlough program for prisoners confined to the Texas Department of Corrections.[102] Section 9 of the article[103] provided that prisoners employed pursuant to the Act were not entitled to workers' compensation coverage if injured on the job. Section 9 was amended, however, and now specifically provides that a prisoner is entitled to collect compensation benefits for on-the-job injuries.[104]

The legislature also restricted coverage related to political subdivisions.[105] Jurors and individuals appointed to conduct elections were excluded from the employee definition unless specifically declared to be employees by a majority vote of the governing body of the political subdivision involved.[106] At the same time political subdivisions were given the discretion to provide coverage for elected officials.

There were two additional amendments to the compensation program covering employees of political subdivisions.[107] Section 5(a)[108] was amended to provide that under optional salary continuation plans for municipalities,[109]

91. *See* note 84 *supra*.
92. TEX. REV. CIV. STAT. ANN. art. 8309g (Vernon Supp. 1978).
93. *Id.* art. 8309b (Vernon 1967 & Supp. 1978).
94. 1947 Tex. Gen. Laws ch. 229, at 417.
95. 1951 Tex. Gen. Laws ch. 310, at 522.
96. 1957 Tex. Gen. Laws ch. 252, at 536.
97. 1947 Tex. Gen. Laws ch. 229, § 13, at 421; 1951 Tex. Gen. Laws ch. 310, § 13, at 526-27; 1957 Tex. Gen. Laws ch. 252, § 13, at 540-41.
98. 1947 Tex. Gen. Laws ch. 229, § 15, at 422; 1951 Tex. Gen. Laws ch. 310, § 15, at 527; 1957 Tex. Gen. Laws ch. 252, § 15, at 541.
99. TEX. REV. CIV. STAT. ANN. art. 8309b, §§ 13, 14, 15 (Vernon Supp. 1978).
100. *Id.* § 13.
101. *Id.* § 15.
102. *Id.* art. 6166x—3 (Vernon 1970 & Supp. 1978).
103. 1969 Tex. Gen. Laws ch. 493, § 9, at 1601.
104. TEX. REV. CIV. STAT. ANN. art. 6166x—3, § 9 (Vernon Supp. 1978).
105. *Id.* art. 8309h.
106. *Id.* § 1.
107. *Id.* art. 8309h.
108. *Id.* § 5.
109. *Id.* art. 1269m (Vernon 1963 & Supp. 1978).

when an employee's salary is continued, but offset by the payment of workers' compensation, both the employer and employee shall pay into the employee's pension fund the amount of money by which the wage was offset.[110] The section further provides that the employee's pension benefits will not be reduced because of the on-the-job injury or the compensation benefits received.[111] Section 5(b) provides that when benefits are offset the employer may not withhold the offset portion of the employee's wages until the compensation benefits are received.[112]

A new article[113] allows a municipality a right of subrogation when it has made salary continuation payments to a workman injured by the tortious conduct of a third person, unless that third person is an employee of the same municipality. The fact that the employee has a third party action is not a ground for denying the employee benefits under the salary continuation program.[114] The last amendment dealing with political subdivisions is the amendment of article 2028.[115] This article now provides that, in a suit against a school district, citation may be served on the school board president or the school superintendent.

Perhaps the most controversial workers' compensation amendment was Senate Bill 1275,[116] which was passed in the waning hours of the 1977 legislative session. This bill amended the Second Injury Fund provisions,[117] the minimum-maximum compensation provisions,[118] and added two new sections to article 8307[119] dealing with confidentiality of records and fraudulent conduct, and applying a portion of the Administrative Procedure Act to the Industrial Accident Board.

The Administrative Procedure and Texas Register Act[120] was enacted in 1975 and became effective January 1, 1976.[121] Although the Act's purpose was to provide for public participation in the rule making process of various state agencies and to ensure adequate and proper public notice of proposed rules and agency actions,[122] the Industrial Accident Board was specifically exempted from the Act's provisions.[123] Now, however, new section 4b[124] provides that sections 1 through 12 of the Administrative Procedure and Texas Register Act[125] specifically apply to the Board. The Board is exempt from the provisions of sections 4(a)(3) and 4(b),[126] which provide for public access to, and indexing of, an agency's final orders, decisions and opinions.

110. *Id.* art. 8309h, § 5(a) (Vernon Supp. 1978).
111. *Id.*
112. *Id.* § 5(b).
113. *Id.* art. 999f.
114. *Id.*
115. *Id.* art. 2028.
116. 1977 Tex. Gen. Laws ch. 801, at 2004-09.
117. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 12c, 12c—1 (Vernon Supp. 1978).
118. *Id.* § 29(c). *See* note 25 *supra* and accompanying text.
119. TEX. REV. CIV. STAT. ANN. art. 8307, §§ 4b, 9a (Vernon Supp. 1978).
120. *Id.* art. 6252-13a, §§ 1-23.
121. *Id.* § 23. *See also* 1975 Tex. Gen. Laws ch. 61, §§ 1-23, at 136-48.
122. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 1 (Vernon Supp. 1978).
123. *Id.* § 3(1).
124. *Id.* art. 8307, § 4b.
125. *Id.* art. 6252-13a, §§ 1-12.
126. *Id.* §§ 4(a)(3), 4(b).

The Board is also exempt from the provisions of sections 13 through 20[127] which basically provide for the procedure, rules and regulations governing a contested agency hearing.

The portion of the Act applicable to the Industrial Accident Board[128] deals with the adoption of agency rules and requires such rules to be published in the Texas Register. In compliance with the Act the Board promulgated its emergency rules, effective August 29, 1977.[129] These new Board rules delete a number of rules which were simply restatements of the statute, adopt a few new rules, and substantially change some existing rules.[130] The new rules represent an attempt to streamline the Board's rules.[131]

The Texas Open Records Act[132] created a confidentiality problem for the

127. *Id.* §§ 13-20.

128. *Id.* §§ 1-12.

129. Tex. Indus. Accident Bd., Emergency Rules 061.01.00.010-061.14.00.010, 2 Tex. Reg. 3214-24 (1977).

130. For example, rule 061.06.00.020 (previously rule 6.020) makes the procedure for resolving disputes as to the representation of a claimant by two or more attorneys more definite. Rule 061.07.00.030 (previously rules 7.030-7.060) provides specific procedures to be followed when the Board is attempting to certify a carrier to the State Board of Insurance for wrongfully failing to pay or terminating compensation. This procedure has been needed for a number of years. Another significant change was in the Board's definition of unethical or fraudulent conduct by carrier representatives. Rule 061.13.00.020, § 9 was amended to include as unethical or fraudulent conduct, conduct "allowing an employer to dictate the methods by which and the terms on which a claim is handled and settled." The rule further states that the carrier and employer may freely discuss the claim and its evaluation and that the employer may participate in the prehearing conference.

131. In amending its rules, the Board did away with one particularly objectionable rule. Tex. Indus. Accident Bd., Rule 8.140 (1974), although ambiguous, provided 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 the injury. Obviously the rule contravened the legislative enactment regarding the computation of the compensation rate as it related to the claimant's wage rate. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10, 11, 12 (Vernon Supp. 1978); *id.* art. 8309, § 1 (Vernon 1967). The Board's new rule governing approval of compromise settlement agreements deleted the offending language. Tex. Indus. Accident Bd., Emergency Rules 061.08.00.010-061.08.00.230, 2 Tex. Reg. 3219-21 (1977). For criticism of other Board rules and practices see Sartwelle, *supra* note 6, at 215-18; Sartwelle, *supra* note 7, at 261-64, 265-70.

One particular requirement in the Board rules is beyond the scope of the Board's power. Tex. Indus. Accident Bd., Emergency Rule 061.05.00.170(c), 2 Tex. Reg. 3216 (1977). This rule deals with directed medical examinations pursuant to TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (Vernon 1967). Section 4 provides that at the Board's (Court's) discretion, the carrier may have the claimant examined by a physician of its choice. *See, e.g.*, Wallace v. Hartford Accident & Indem. Co., 148 Tex. 503, 226 S.W.2d 612 (1950); Universal Underwriters Ins. Co. v. Potter, 411 S.W.2d 400 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.); Jones v. Commercial Union Assurance Co., Ltd., 405 S.W.2d 207 (Tex. Civ. App.—Beaumont 1965, no writ); Boston Ins. Co. v. Palmer, 342 S.W.2d 804 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.). The Board's rule provides, however, as a condition precedent to granting a carrier's request, that the carrier must make a statement that it has "insurance coverage" of the claim under the Texas Workers' Compensation Act and this statement is an "admission of coverage by the named insurer of the named employer." Tex. Indus. Accident Bd., Emergency Rule 061.05.00.170(c), 2 Tex. Reg. 3216 (1977).

The actual wording of section (c) is innocuous even though a review of the statute and cases reveal absolutely no authority for such an "admission." Due to the ambiguous language, however, this portion of the rule could be and has been interpreted by an over-zealous prehearing examiner as requiring an admission of liability for the claimant's alleged accident before a directed medical examination will be granted. Clearly, this is not a statutory requirement. Unfortunately, carrier representatives may be unaware of the statutory wording and simply accept the denial without question. To avoid confusion and ambiguity, the requirement should be stricken. It contributes no relevant information to assist the Board in determining whether to accept or reject the request, and it has no support in the statute or case law.

132. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1978). *See generally* Comment, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 SW. L.J. 431 (1975).

Industrial Accident Board when a non-profit foundation sought to tie into the Board's computer system and extract information on every claim ever filed by a Texas employee. Despite strong opposition by the Board, the supreme court upheld the public's right to gain access to government records, including those of the Board.[133] In response to the court's decision, the legislature added section 9a to article 8307[134] providing a degree of confidentiality to Board files. The section declares that information in a workers' claim file is confidential and may not be disclosed except in specifically designated instances.[135] In essence the legislature adopted the wording of the Board's prior rule[136] which the supreme court rejected as justification for withholding information from the public under the Open Records Act.[137]

One exception to the limited confidentiality established by section 9a(a) and (b) is section (c),[138] which relates to the controversial fraudulent claim-

133. Industrial Foundation v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

134. TEX. REV. CIV. STAT. ANN. art. 8307, § 9a (Vernon Supp. 1978).

135. *Id.*

136. Tex. Indus. Accident Bd., Rule 9.040 (1974). The rule provided:

> 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.

TEX. REV. CIV. STAT. ANN. art. 8307, § 9a(b) (Vernon Supp. 1978) provides:

> If there is a workers' compensation claim for the named claimant open or pending before the Industrial Accident Board or on appeal to a court of competent jurisdiction from the Board or which is the subject matter of a subsequent suit where the carrier is subrogated to the rights of the named claimant at the time a record search or request for information is presented to the Board, the information shall be furnished as provided in this section. The first, middle, and last name of the claimant, age and social security number, and, if possible, dates of injury and the names of prior employers must be given in the request for information by the requesting party. 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; or
> (6) the State Board of Insurance.
>
> A third-party litigant in a suit arising out of an occurrence with respect to which a workers' compensation claim was filed is entitled to the information without regard to whether or not the compensation claim is still pending.

137. Industrial Foundation v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). TEX. REV. CIV. STAT. ANN. art. 8307, § 9a(n) (Vernon Supp. 1978), in a very limited recognition of the purpose of the Open Records Act, provides that any person may obtain from the Board all information in any record or file established after September 1, 1971, in statistical form, as long as the name or identity of the claimant is not disclosed except as otherwise provided in the statute.

138. TEX. REV. CIV. STAT. ANN. art. 8307, § 9a(c) (Vernon Supp. 1978). Another exception to section 9a(a) confidentiality is the section relating to employers seeking claims information on prospective employees. *Id.* § 9a(d). This section allows employers to secure written permission from a prospective employee which allows the employer to obtain from the Board the person's claim history *if* the individual has had three or more general injury claims within the preceding five years in which weekly compensation payments were made. Note that the statute only refers to *general injuries*. This reference was probably intentional and will undoubtedly be interpreted to exclude any specific injuries. As a practical matter, this restriction will likely make little difference in the accuracy of the individual's claim history since most claimants and

ant portion of the statute.[139] Actually, the statute relates not only to fraudulent claimants but to any person connected with the compensation system. The attorney general is authorized to investigate and prosecute any allegation of fraud on the part of any person, including attorneys, whether the allegations emanate from the Board or through the attorney general's own efforts. The statute also sets out a detailed prosecution procedure to be followed by the Board and the attorney general and provides the Board with broad subpoena power.

A controversial section of the fraudulent claimant statute is section 9a(e)(2).[140] It provides that when an employee makes a fifth claim for compensation within any five year period, the Board must automatically notify the attorney general who must investigate to determine if fraud was involved in *any* of the claims. If an employee is adjudicated to be a fraudulent claimant, section 9a(c)[141] becomes operational. All Board information collected on that individual becomes nonconfidential and may be furnished to any person requesting it. Workers' compensation has long needed this comprehensive investigatory scheme. While it no doubt will be exceedingly difficult to prove actual fraud in individual cases, the recognition of the problem and the adoption of specific procedures and penalities, set forth in plain language, should be an effective deterrent to fraudulent claims. Even if this comprehensive enactment results in ferreting out only one dishonest person, it will have served its purpose for the good of all concerned with the compensation system.

The last and most significant amendment to the Compensation Act in 1977 was the return of the prior injury contribution defense of section 12c.[142] Long thought dead and buried, 12c has arisen like a Phoenix from the ashes, as a result of the legislature's compensation amendments. Prior to 1971 12c allowed the insurer the defense of percentage contribution of prior injuries to a present incapacity.[143] The statute provided that if the employee had suffered a previous injury which resulted in incapacity and which contributed to the subsequent incapacity, then the association was liable only for the incapacity caused by the subsequent injury, as if there had been no prior injury.[144] In 1971, however, the legislature abolished the defense by providing "the association shall be liable for *all* compensation provided by this

attorneys overstate the results of any specific injury in an attempt to extend the injury to the body generally. Thus, if the Board has classified the injury on the basis of the employee's report of injury and claim for compensation form, then most, if not all claims should be disclosed.

139. *Id.* §§ 9a(e)(1)-(e)(3).

140. *Id.* § 9a(e)(2).

141. *Id.* § 9a(c).

142. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Vernon Supp. 1978).

143. *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.

144. 1947 Tex. Gen. Laws ch. 349, § 1, at 690-91. The statute, including the reference to the Second Injury Fund created in 1947 provided:

> 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 (Texas Employers' Insurance Association) shall be liable because of such injury only for the compensation to which the

act."[145] During the intervening years, the courts unanimously held that amended section 12c no longer allowed proof of a prior compensable injury nor reduced the recovery of a workman because of such prior injury.[146] The economic impact of this simple change in wording is incalculable. In essence, the 1971 amendment could be labeled "the workers' early retirement program." Since prior injuries and the resulting incapacity were inadmissible, it was theoretically possible for a workman to be injured on the same job five days in a row and collect five total and permanent awards. The 1977 amendment of section 12c[147] readopts the section's precise language as it existed prior to 1971.[148] In addition the legislature liberalized the employee claim procedure against the Second Injury Fund.[149]

Since the legislature has returned 12c and the Second Injury Fund to its pre-1971 status, the question arises whether the body of pre-1971 case law interpreting these sections is still viable. The answer seems to be in the affirmative. This is unfortunate because the courts in those cases both misinterpreted the legislative language and ignored the legislative purpose. The result has been a confusing mass of cases decided on a seemingly random basis. No rationale can be discovered in any of these opinions for the unnecessary complication of what could and should be a relatively straightforward concept.

In order to fully comprehend the source of this unfortunate deviation from section 12c's original purpose and to understand the section's current interpretation, it is necessary to trace the history of the section. Some of the confusion surrounding the 12c contribution doctrine results from the doctrinal entanglement of 12c with the Second Injury Fund adopted in 1947. Thus, it is necessary to review 12c's complete history both prior and subsequent to the Second Injury Fund amendment.

The original Texas compensation law[150] was enacted in 1913 but contained no provision corresponding to 12c.[151] In 1917[152] section 12c was adopted in

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subsequent injury would have entitled the injured employee had there been no previous injury; provided that there shall be created a fund known as the 'Second-Injury Fund' hereinafter described, from which an employee who has suffered a subsequent injury shall be compensated for the combined incapacities resulting from both injuries.

145. 1971 Tex. Gen. Laws ch. 316, § 1, at 1257 (emphasis added).

146. Second Injury Fund v. American Motorists Ins. Co., 541 S.W.2d 514 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.); Houston Gen. Ins. Co. v. Teague, 531 S.W.2d 457 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Haunschild, 527 S.W.2d 270 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Creswell, 511 S.W.2d 68 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).

147. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Vernon Supp. 1978).

148. *See* note 144 *supra*.

149. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Vernon Supp. 1978). Section 12c is worded exactly as in 1947 with the exception of the last sentence which is new. *See* note 144 *supra*. The last sentence states: "Provided further, however, that notice of injury to the employer and filing of a claim with the Industrial Accident Board as required by law shall also be deemed and considered notice to and filing of a claim against the 'Second Injury Fund.' " Section 12c—1 was also amended to its exact pre-1971 language, TEX. REV. CIV. STAT. ANN. art. 8306, § 12c—1 (Vernon Supp. 1978), which was originally adopted in 1947 when the Second Injury Fund was created. 1947 Tex. Gen. Laws ch. 349, § 1, at 691.

150. 1913 Tex. Gen. Laws ch. 179, at 429.

151. *Id.* at 429-38.

152. 1917 Tex. Gen. Laws ch. 103, at 269-94.

the exact wording as today, without the Second Injury Fund reference.[153]

Until 1927 there were no cases construing section 12c. In that year, however, the commission of appeals decided *Gilmore v. Lumbermen's Reciprocal Association*.[154] Gilmore lost the sight of one eye in a childhood accident. In the course and scope of his employment for Lumbermen's insured, he received a second injury and lost the sight of his other eye. The Board awarded compensation for the loss of one eye, that is sixty per cent of the average weekly wage for 100 weeks. The employee appealed contending he was entitled to statutory total and permanent benefits for the loss of sight of both eyes.[155] The district court awarded total and permanent benefits, but the court of civil appeals reversed.

The commission of appeals, faced with the task of determining 12c's purpose, delved into the history of compensation law and in an extraordinarily lucid opinion set forth the purposes behind the legislature's enactment of 12c:

> [W]e have reached the conclusion that the Texas statute under discussion and similar statutes in other states were enacted for the benefit of persons as a class who enter employment with permanent partial disability rather than to their detriment. If it were not for such legislation, then all maimed and crippled laborers would be deprived of employment in all industrial plants where workmen's compensation insurance was carried, if those plants were conducted on strictly business principles.
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> . . . .
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> . . . If it may be said that one of this class, who becomes totally and permanently disabled upon receiving a second injury, is not fairly treated unless he receives compensation for total permanent disability, then it is better that the few who happen to [sic] second accidents should so suffer, rather than the whole class should suffer by being denied employment.[156]

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153. William Cameron & Co., Inc. v. Gamble, 216 S.W. 459 (Tex. Civ. App.—Austin 1919, no writ).

154. 292 S.W. 204 (Tex. Comm'n App. 1927, jdgmt adopted).

155. 1917 Tex. Gen. Laws ch. 103, § 11a, at 275. The injury occurred in April, 1920. Lumbermen's Reciprocal Ass'n v. Gilmore, 258 S.W. 268 (Tex. Civ. App.—Texarkana 1924), *aff'd*, 292 S.W. 204 (Tex. Comm'n App. 1927, jdgmt adopted).

156. *Id.* at 206-07. The various courts thoughout the country arrived at two basic solutions to the dilemma presented by the *Gilmore* case. One was to hold the employer liable for all compensation (non-apportionment rule), the other to charge the employer only for the compensation due for the second injury (apportionment rule). The employment of handicapped workers under either rule, however, was a source of concern to all involved in the compensation system as is indicated by the great debate over the operation of various Second Injury Funds. *See, e.g., Proposed Longshoremen's and Habor Workers' Compensation Act: Hearings on S. 3170 Before the Comm. on the Judiciary of the House of Representatives*, 69th Cong., 1st Sess. (1926); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR 536 (1931); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR 577 (1933); Scurlock, *Enactment of a "State Fund" Amendment*, 14 OKLA. B.A.J. 1331 (1943); 44 MICH. L. REV. 1161 (1946).

Professor Larson comments upon the problem and the resulting solution, 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 59.31, at 10-285-88 (1976) (footnotes omitted):

> While at first glance it might appear that the apportionment rule favors the employer and nonapportionment the employee, in practice the nonapportionment rule proved the worst of the two evils from the standpoint of the handicapped worker. As soon as it became clear that a particular state had adopted a rule requiring an employer to bear the full cost of total disability for loss of the crippled worker's remaining leg or arm, employers had a strong financial incentive to discharge all handicapped workers who might bring upon them this kind of aggravated liability. When loss of a single eye might mean a compensation liability

Thus *Gilmore* only allowed an incremental recovery, that is the employee was entitled to recover compensation for the incapacity resulting from the subsequent injury alone and not for the final incapacity attributable to both the subsequent injury and the preexisting disability.

From the time of the *Gilmore* opinion in 1927 until 1951, with two undistinguished exceptions, neither the supreme court nor the commission of appeals considered 12c's implementation. Unfortunately, the interpretation and application of the statute was left without guidance to the courts of civil appeals; this resulted in confusing, random, and sometimes undecipherable opinions. The next opinion after *Gilmore* was *Texas Employers' Insurance Association v. Heuer*.[157] The carrier contended, pursuant to 12c, that it was entitled to "mitigation"[158] of the compensation owed in light of the claimant's prior injury. The court noted, however, that section 12c was inapplicable because the injuries involved in the suit were to the left hand, arm, and shoulder, whereas the prior injury was to the right arm. Thus, the court affirmed a total permanent incapacity judgment on the ground that the former injury was not a contributing factor to the present incapacity.

Several months later the Amarillo court reached the same result in a somewhat offhand manner.[159] The court held that a prior arthritic condition was not an injury as contemplated in 12c. Alternatively, the court held that 12c was inapplicable because there was no evidence that the claimant suffered from a prior disability which contributed to any subsequent incapacity. The commission of appeals simply adopted the lower court's holding that a prior disease condition was not an "injury" within the meaning of 12c.[160] Two more court of civil appeals opinions consistent with *Gilmore* were rendered in 1929.[161] It was readily apparent from the opinions that, as indicated in *Gilmore*, the 12c limitation on compensation recovery was dependent upon the showing of a causal connection, that is, cause in fact, between the previous injury's effects and the subsequent incapacity existing after the second compensable injury.

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of $5,000 for a man with two good eyes but $26,000 for a man with only one, the compensation insurance premium on the latter would naturally be markedly greater. It has been said, for example, that within the 30 days following the announcement of the nonapportionment rule in *Nease v. Hughes Stone Company* [114 Okla. 170, 244 P. 778 (1925)], between seven and eight thousand one-eyed, one-legged, one-armed, and one-handed men were displaced in Oklahoma.

157. 10 S.W.2d 756 (Tex. Civ. App.—Beaumount, writ dism'd), *second motion for rehearing denied*, 11 S.W.2d 566 (1928).

158. *Id.* at 759.

159. Texas Employers' Ins. Ass'n v. Parr, 16 S.W.2d 354 (Tex. Civ. App.—Amarillo 1929), *aff'd*, 30 S.W.2d 305 (Tex. Comm'n App. 1930, jdgmt adopted).

160. Texas Employers' Ins. Ass'n v. Parr, 30 S.W.2d 305 (Tex. Comm'n App. 1930, jdgmt adopted).

161. Texas Employers' Ins. Ass'n v. Stephens, 22 S.W.2d 144 (Tex. Civ. App.—El Paso 1929, no writ) (the court simply held, among other things, that the trial court erred in placing the burden of proof on the insurer in the special issue regarding whether the prior injury was related to the subsequent incapacity); Petroleum Cas. Co. v. Bristow, 21 S.W.2d 9 (Tex. Civ. App.—El Paso 1929, writ dism'd) (held it was error for trial court to refuse to submit 12c issue since evidence raised question whether prior injury contributed to subsequent incapacity). The second *Bristow* appeal, Petroleum Cas. Co. v. Bristow, 35 S.W.2d 246 (Tex. Civ. App.—El Paso 1931, writ dism'd), resulted in a total permanent verdict. The jury failed to find any contribution by the prior injury. The court simply affirmed the judgment noting its approval of the 12c special issue which asked if the prior injury contributed any percentage of the claimant's incapacity.

In the 1930 case of *Texas Employers' Insurance Association v. Clark*[162] confusion over the purpose and application of 12c first appeared. Clark suffered two injuries while working for the same employer on September 1, 1926 and May 26, 1927. He did not miss time from work until July 6, 1927 when, as a result of the injuries, he became paralyzed. The evidence indicated neither blow alone was sufficient to produce paralysis, but the combined effects had produced the subsequent incapacity.

The 12c question arose when the trial court submitted an issue inquiring whether either or both injuries resulted in total incapacity. For reasons that are unclear the carrier objected to the issue and relied on section 12c. After noting that the combination of the two "licks"[163] produced the paralysis, the court responded rather unintelligibly:

> Considering the provision [12c] in the light of the purposes of the Workmen's Compensation Law, we think it clear that, where the word 'injury' is used in the quoted section, the Legislature clearly intended compensative injury, or injury for which compensation is provided under the terms of the law. No other injury was the subject of the legislation. The provision, we think, has application to such cases as where two separate injuries are received at different times, the first of which within itself entitles the employee to compensation and not to a case where neither the previous nor subsequent injury was alone compensative.[164]

The court cited no authority whatsoever to support its statement on the purpose of 12c. Remarkably, neither *Gilmore*, nor any other cases or legislative history were discussed. The court's only motivation was to affirm the judgment. Yet, in its haste, the court ignored the most obvious reason why 12c was inapplicable, that is there was no evidence of any prior *incapacity* resulting from the first injury. The plain words of the statute require the first injury to produce an *incapacity* to which is then added a second injury and a greater incapacity contributed to by both injuries. The evidence in *Clark* was undisputed that the first injury did not cause an incapacity and that the claimant continued to work his regular job until paralyzed several months after the second injury. Moreover, the court's definition of "injury" was unwarranted; the term injury was defined in the Act to mean damage or harm to the physical structure of the body.[165] The Act made the definition of injury applicable to *all* sections of the compensation law.[166] Without doubt the *Clark* court was wrong in its construction of 12c.

For several years *Clark* was ignored. The courts continued to hold that the proper test in a 12c case was a "causal connection between the two injuries."[167] In 1933, one of the clearest opinions regarding 12c's application was handed down by the same court and same judge that had decided *Clark*. In *Hartford Accident & Indemnity Co. v. Leigh*[168] the jury found the claim-

162. 23 S.W.2d 405 (Tex. Civ. App.—Eastland 1930, writ dism'd).
163. *Id.* at 409.
164. *Id.*
165. 1917 Tex. Gen. Laws ch. 103, § 1, at 291.
166. *Id.*
167. Texas Employers' Ins. Ass'n v. Pugh, 57 S.W.2d 248 (Tex. Civ. App.—Dallas 1933, writ dism'd).
168. 57 S.W.2d 605 (Tex. Civ. App.—Eastland 1933, no writ).

ant suffered a prior injury to his left eye which resulted in a twenty-five per cent loss of vision. The claimant sustained another injury to his left eye resulting in total loss of left eye vision. The carrier contended the claimant was only entitled to seventy-five per cent of the compensation provided for one eye because of section 12c. In rejecting this contention Chief Justice Hickman wrote:

> Where the combined effect of the previous injury and the subsequent injury is to increase the incapacity of the employee beyond that which would have resulted from the subsequent injury alone, the statute would operate. But where, as in this case, the condition of incapacity following the subsequent injury is the same as it would have been had there been no previous injury, the statute has no application.[169]

No more concise restatement of the "but for" test of causal connection could be desired. Judge Hickman specifically relied upon and cited *Gilmore* as authority for the court's holding,[170] a citation conspicuously absent from the *Clark* opinion. There was also no reference to whether the prior injury was compensable or noncompensable. In 1935, however, the same court resurrected the "compensative injury"[171] issue in *Casualty Reciprocal Exchange v. Dawson*,[172] and added an unnecessary distinction between general and specific injuries. The claimant, as in *Clark*, received two injuries while working for the same employer. The first injury occurred on November 6, 1931, and resulted in only four days lost time. The carrier tried to prove that the first injury was responsible for all or at least a major part of the claimant's incapacity.[173] The opinion is again unclear as to how the 12c issue was raised procedurally, but apparently it was on the carrier's no evidence or insufficiency points. In any event, the court rejected the carrier's attack based only upon their own opinion in *Clark*. The court wrote:

> We think that the injuries contemplated in said provision [section 12c] are only those for which the law provides that compensation shall be paid . . . [citing *Clark*]. Where an injury is general and not specific, the liability is to compensate only for incapacity. There may be injury without incapacity, at least without such incapacity as the law requires compensation shall be paid, and such . . . was the injury of November 6, 1931. The law makes no provision to compensate for an incapacity of less than one week. . . . [T]here was less than a week's incapacity resulting from the former injury.[174]

Curiously, in an alternative holding[175] the court, although not citing *Leigh*, reverted to the causal connection test which it had correctly applied in *Leigh*. The court held that if its interpretation that 12c applied only to compensable injuries was mistaken, the carrier's position still could not be sustained because the trial court had found that the first injury had not

169. *Id.* at 607.
170. *Id.*
171. *See* quotation in text accompanying note 164 *supra*.
172. 81 S.W.2d 284 (Tex. Civ. App.—Eastland 1935), *writ dism'd*, 130 Tex. 362, 107 S.W.2d 994 (1937). Writ of error was granted by the supreme court but subsequently dismissed because the motion for rehearing in the court of civil appeals did not properly preserve petitioner's points of error. 130 Tex. at 362, 107 S.W.2d at 994.
173. 81 S.W.2d at 286.
174. *Id.* at 285.
175. *Id.*

contributed to the incapacity resulting from the second injury. Therefore it was unnecessary for the court to expound on general versus specific injuries and what was or was not compensable. *Dawson*, nevertheless, was the first case to mention a distinction between general and specific injuries and this distinction, though irrelevant, later became the foundation supporting the present day misapplication of 12c.

In 1936 the supreme court in passing acknowledged the existence of section 12c.[176] Without citing any authorities, the court simply stated that under 12c if the evidence raised the issue of previous injuries, the carrier was entitled to an issue whether the claimant's disability was "directly attributable to causes independent of the alleged injuries."[177] Clearly, this is an erroneous statement. The court confused sole cause with 12c's percentage contribution procedure.

In 1936 the San Antonio court of civil appeals, following *Clark*, added its own brand of confusion to 12c. In *Texas Indemnity Co. v. McNew*,[178] the court first correctly held that the carrier was not entitled to a 12c issue when there was no evidence that a prior injury had contributed to his subsequent incapacity: a clear statement of the causal connection test. Inexplicably, however, the court attempted to buttress its opinion by citing *Clark* and holding that the issue was properly refused since there was no evidence that the prior injury was compensable. Moreover, the court gratuitously added that since the jury had also found that the claimant's physical condition was not due solely to causes independent of his employment, the 12c issue was properly refused; an obvious reference to the supreme court's erroneous statement in *Williamson*.

Two years later the San Antonio court added to the confusion surrounding 12c in *Traders & General Insurance Co. v. Wyrick*.[179] The claimant recovered total-permanent benefits flowing from an injury suffered in May, 1936. Prior to that injury the employee had suffered a hernia, which was corrected by radical surgery and for which he received compensation benefits. He had also sustained noncompensable injuries in an automobile accident in 1935. The court remanded the case for failure to submit issues on partial and temporary total incapacity, but also addressed itself to 12c. The court held 12c inapplicable because the hernia injury had not contributed to the subsequent incapacity. The court also noted that the automobile accident injuries were noncompensable and, therefore, could not offset subsequent incapacity even if those injuries had contributed to the subsequent incapacity. In so holding, the court without any authority stated:

> *The obvious purpose of §12c is to prevent double recovery for the same incapacity*; so that, if an employee receives a prior compensable injury, and is compensated for the resulting incapacity, and afterwards receives a second or successive injury, which, together with the prior injuries, result in total and permanent incapacity, *the compensation received for the prior injury must be deducted from the final award*. But

176. Williamson v. Texas Indem. Ins. Co., 127 Tex. 71, 90 S.W.2d 1088 (1936).
177. *Id.* at 76, 90 S.W.2d at 1090.
178. 90 S.W.2d 1115 (Tex. Civ. App.—San Antonio 1936, writ dism'd).
179. 118 S.W.2d 923 (Tex. Civ. App.—San Antonio 1938, no writ).

> where the prior injury is not compensable and yet merely contributes to the incapacity following a subsequent injury, the employee will be entitled to full compensation for his ascertained incapacity.[180]

Although the court relied upon *Dawson* and its own decision in *McNew*,[181] neither opinion supported the statements made by the court. Despite this, the statements later became, along with other unsupported statements, the foundation for the present day misapplication of 12c and the Second Injury Fund. The most shocking aspect of *Wyrick* was the court's apparent ignorance of the commission of appeals' decision in *Gilmore*, ten years earlier. If *Wyrick* was correct in stating the purpose of 12c to be preventing double recovery for the same incapacity, then it is proper to inquire whether the prior injury was compensable. The error in *Wyrick's* hypothesis, as well as *Clark, Dawson* and *McNew*, is that the wording of the statute does not require the prior injury to be compensable and the leading case, *Gilmore*, clearly delineates the section's contemporary purpose and scope. According to *Gilmore*, the purpose of 12c is to prevent discrimination against handicapped workers by placing them, from the employers' viewpoint, on an equal basis with nonhandicapped workers as relates to compensable consequences of an industrial injury. *Wyrick's* purported rationale of preventing double recovery would only benefit those workmen handicapped by on the job injuries and exclude those equally handicapped by congenital defects, illnesses, noncompensable and nonindustrial accidents and injuries. Surely the legislature did not intend to foster that kind of discrimination.

The *Wyrick* court's statement that the compensation received for the prior injury was to be deducted from the final award otherwise recoverable for the second injury was unsupported by authority and an inaccurate oversimplification. The compensation paid for the first injury was not the same as the statutory requirement that only so much of the resulting disability as was attributable to the second injury alone be compensated. Subsequent to *Wyrick* the opinions construing 12c continued to apply the causal connection criteria required by the statute and *Gilmore* and other cases.[182] One case in particular should be noted, however, because it involved a contention which, on its face, appeared ludicrous, but which became the law after 1947. Considering the precise wording of section 12c[183] it is difficult to

180. *Id.* at 924 (emphasis added).

181. The court also cited Texas Employers' Ins. Ass'n v. Parr, 16 S.W.2d 354 (Tex. Civ. App.—Amarillo 1929), *aff'd*, 30 S.W.2d 305 (Tex. Comm'n App. 1930, jdgmt adopted), and Texas Employers' Ins. Ass'n v. Pugh, 57 S.W.2d 248 (Tex. Civ. App.—Dallas 1933, writ dism'd). Neither *Parr* nor *Pugh* are authority for the court's statement.

182. Texas Employers' Ins. Ass'n v. Fletcher, 214 S.W.2d 873 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Wright, 196 S.W.2d 837 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.); General Ins. Co. v. Hughes, 193 S.W.2d 230 (Tex. Civ. App.—Dallas 1946, no writ); Texas Indem. Ins. Co. v. Arant, 171 S.W.2d 915 (Tex. Civ. App.—Eastland 1943, writ ref'd w.o.m.); Southern Underwriters v. Mowery, 147 S.W.2d 834 (Tex. Civ. App.— Texarkana 1941, writ dism'd jdgmt cor.); Texas Employers' Ins. Ass'n v. Griffis, 141 S.W.2d 687 (Tex. Civ. App.—Galveston 1940, no writ); Texas Employers' Ins. Ass'n v. Pierson, 135 S.W.2d 550 (Tex. Civ. App.—Amarillo 1940, no writ); Traders & Gen. Ins. Co. v. Watson, 131 S.W.2d 1103 (Tex. Civ. App.—Eastland 1939, writ dism'd jdgmt cor.). The *Watson* case was the subject of a student case note in 18 TEXAS L. REV. 243 (1939). The author is able to harmonize the holdings of *Clark, McNew* and *Wyrick* but is unable to explain the *Gilmore* holding in relation to the former three cases.

183. *See* note 147 *supra* and accompanying text.

imagine a legitimate contention being advanced that 12c applies to injuries *subsequent* to the injury made the basis of the particular suit. In *Southern Underwriters v. Grimes*,[184] however, the trial court submitted an issue inquiring if a subsequent injury was the sole cause of the claimant's alleged disability. On appeal the carrier complained that the issue as submitted denied it the right to have the jury determine if the incapacity was caused partially by the subsequent injury. The court overruled this contention quoting section 12c and noting:[185]

> The provision [12c] plainly refers to injuries occurring before or concurrently with the injury for which compensation is sought and not afterward, as in the case of the injuries sustained by plaintiff on January 5, 1939 [subsequent to the injury sued upon] (Texas Employers' Ins. Ass'n v. Pierson, Tex. Civ. App., 135 S.W.2d 550), and is therefore inapplicable here.

The *Pierson*[186] case cited by the *Grimes* court was not direct authority for the proposition that 12c is inapplicable to subsequent injuries, but it is clear that *Grimes* was correct in its holding.[187]

The 50th Legislature amended section 12c in 1947[188] by adding the following clause: "[P]rovided that there shall be created a fund known as the 'Second Injury Fund' hereinafter described, from which an employee who has suffered a subsequent injury shall be compensated for the combined incapacities resulting from both injuries."[189]

A new section, 12c-1,[190] provided for the liability of the Second Injury Fund for successive specific injuries:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently and totally incapacitated through the loss or loss of use of another member or organ, the association shall be liable only for the compensation payable for such second injury provided, however, that in addition to such compensation and after the combination of the payments therefor, the employee shall be paid the remainder of the compensation that would be due for the total permanent incapacity out of the special fund known as 'Second Injury Fund' hereinafter defined.[191]

Section 12c-2[192] provided the means for the accumulation of money to be used to operate the Second Injury Fund. In an unusual emergency clause[193] the legislature suspended the constitutional rule requiring bills to be read three separate days in each House:

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184. 146 S.W.2d 1058 (Tex. Civ. App.—San Antonio 1941, writ dism'd jdgmt cor.).
185. *Id.* at 1061.
186. Texas Employers' Ins. Ass'n v. Pierson, 135 S.W.2d 550 (Tex. Civ. App.—Amarillo 1940, no writ).
187. *Pierson* is interesting in the respect that the facts are somewhat analogous to Texas Employers' Insurance Ass'n v. Clark, 23 S.W.2d 405 (Tex. Civ. App.—Eastland 1930, writ dism'd). *See* notes 188-92 *supra*. In *Pierson*, as in *Clark*, the claimant received two injuries within one month while working for the same employer. The suit was based on both injuries. The *Pierson* court, contrary to the *Clark* court, had little difficulty reaching the conclusion that section 12c was inapplicable, not because the prior injury was not compensable, but because there simply was no evidence of any prior incapacity contributing to the incapacity made the basis of the suit.
188. 1947 Tex. Gen. Laws ch. 349, § 1, at 690-91.
189. *Id.* at 691.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* § 2, at 691.

> The fact that there is an urgent need to facilitate the employment of handicapped persons including a large number of returning veterans through the establishment of a special fund out of which such persons may be compensated when they sustain a subsequent injury, creates an emergency . . . .[194]

The first case[195] interpreting the Second Injury Fund amendments was *State v. Bothe*.[196] Bothe sustained a compensable industrial injury in 1941 which resulted in the amputation of his right leg above the knee. He was paid the seemingly incredible sum of $100.00 in settlement of his workman's compensation claim.[197] In 1948 Bothe was involved in a second industrial accident loosing his left leg above the knee. He was paid $3,500.00 in workman's compensation benefits for the second amputation. He then applied to the Second Injury Fund for additional compensation and was awarded $25.00. This represented the difference between the compensation payable for the loss of each leg at 200 weeks per leg and the compensation payable for total permanent disability or 401 weeks. The trial court, however, deducted from the amount payable for total permanent incapacity (401 weeks at $25.00 per week or $10,025.00) the sums actually paid to Bothe for the two injuries ($100.00 plus $3,500.00 or a total of $3,600.00) and held the Second Injury Fund liable for the discounted lump sum balance. A third result, and, it is submitted, the correct result, was reached by Justice Norvell after carefully reviewing the legislative and social purposes of 12c and the Second Injury Fund statutes. The court isolated the phrase "that in addition to such compensation and after the combination of payments therefor, the employee shall be paid the remainder of the compensation for the combined incapacities"[198] and indicated that it was the key to the interpretation of the statute. The court held that "therefor" referred to "such compensation," "such compensation" referred to the compensation payable for the second injury, and that the phrase "combination of the payments" referred not to payments for more than one injury, but one injury only, that is, the second injury for which Bothe was entitled to receive 200 weekly payments of $25.00 or a total of $5,000.00. Thus the employee was entitled to receive from the Second Injury Fund the difference between total permanent disability, 401 weeks at $25.00 per week or $10,025.00, and the

194. *Id.*

195. During the period from June 1947 to May 1950 there were only two published appellate opinions dealing with section 12c. Neither opinion, however, discussed the Second Injury Fund amendments. Traders & Gen. Ins. Co. v. Gibbs, 229 S.W.2d 410 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.) (held the jury's negative answer to the prior injury percentage contribution issue was supported by sufficient evidence, *i.e.*, no evidence of causal connection between prior incapacity and subsequent incapacity); Texas Employers' Ins. Ass'n v. Tanner, 218 S.W.2d 277 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.) (carrier waived 12c defense by failing to request submission of special issues).

196. 231 S.W.2d 453 (Tex. Civ. App.—San Antonio 1950, no writ). Actually, the Galveston court of civil appeals had already rendered an opinion in January 1950 on the Second Injury Fund amendments in Industrial Accident Bd. v. Miears, 227 S.W.2d 571 (Tex. Civ. App.—Galveston 1950). The supreme court granted a writ of error, however, and handed down an opinion on June 28, 1950. Miears v. Industrial Accident Bd., 149 Tex. 270, 232 S.W.2d 671 (1950). *See* notes 201-05 *infra* and accompanying text. The Galveston court's opinion, although lengthy, is not particularly instructive.

197. There is no explanation in the opinion as to why this settlement was for such a small sum.

198. 1947 Tex. Gen. Laws ch. 349, § 1, at 690-91. *See* text accompanying note 191 *supra*.

"combination of the payments" for the second injury, 200 weeks at $25.00 per week or $5,000.00 which was $5,025.00. The court also stated that it was improper to compute the amount due for total permanent disability on a weekly basis, while calculating the amount payable for the second injury on a compromise or discounted lump sum basis. In speaking of the purpose of section 12c-1 as it related to 12c, the court cited and heavily quoted the *Gilmore* decision, and agreed with *Gilmore's* analysis of the social and legal policies which compelled the enactment of 12c. The court then wrote:

> Prior to the 1947 amendment, Texas was operating under a law which chose the lesser of two evils. A person who had lost an arm, foot or an eye and was then permanently disabled by the loss of another member was not adequately compensated for such loss, but it was possible for such handicapped person to obtain employment and prevent his becoming a charge upon society. The Second-Injury Fund amendment sought to correct the inadequacy of the compensation award and at the same time avoid the danger of making it difficult for a handicapped person to obtain employment. Instead of requiring the previously injured employee to carry the risk of subsequent permanent and total disability, or placing that risk upon the employer of the handicapped person (as was done in Oklahoma), the risk of second injury, resulting in total and permanent disability was placed upon all employers carrying workmen's compensation insurance within the State of Texas. Payments into the second injury fund are made by insurance carriers upon death claims in cases where no one is entitled to a compensation award under the statute. The particular employer and his insurance carrier is not directly penalized for having afforded to a handicapped person the opportunity of engaging in a gainful occupation and making his own living.[199]

It should be noted that Bothe's prior injury was a compensable injury for which he was paid workman's compensation benefits. Nevertheless, the compensability or noncompensability of the prior injury was not a determinative factor in the court's decision. Speaking to this point Justice Norvell wrote:

> In our opinion, neither the compensation provided for nor the compensation actually paid for a prior injury is to be considered in determining the amount due an injured employee out of the Second-Injury Fund. . . . It is obviously immaterial whether the prior injury be compensable under the Workmen's Compensation Act or not. This is clearly indicated by the emergency clause of the amendment.[200]

Miears v. Industrial Accident Board[201] was decided a little more than one month after *Bothe*. The *Bothe* opinion was not mentioned by the supreme court since the court was unaware of Justice Norvell's recent writings on the subject. The *Miears* facts were nearly identical with those of *Gilmore*. Miears lost one eye in a noncompensable accident in 1929. He lost the other eye in an industrial accident in 1946 and received the statutory 100 weeks compensation at $25.00 per week. The Second Injury Fund paid Miears for 201 weeks having deducted the 100 weeks which would have been paid for the first injury had it been compensable, as well as the 100 weeks actually

199. 231 S.W.2d at 457-58.
200. *Id.* at 458.
201. 149 Tex. 270, 232 S.W.2d 671 (1950).

paid for the second injury from the 401 weeks payable for total permanent incapacity. The trial court deducted only the 100 weeks actually paid, but the court of civil appeals sustained the Fund's calculation and deducted 200 weeks. In an opinion remarkably similar to *Bothe* the supreme court construed the statute in the same manner as did *Bothe* and reached the same result.[202] In addition to construing the Second Injury Fund statutes, the court also addressed the operation of section 12c. The court, however, failed to resolve the conflict between the *Gilmore* causal connection line of cases and the *Clark, Dawson, McNew* and *Wyrick* opinions.[203] The court did, however, recognize *Gilmore's* observations regarding the social and legal purposes behind 12c and noted that the "construction of the statute [12c] as announced in Gilmore . . . still controls." The court concluded that the amendments forming the Second Injury Fund did not alter the meaning of section 12c and that it was certainly operational with respect to Miears' first noncompensable specific injury just as it was in *Gilmore*. The court noted that even though the *Gilmore* opinion had never been questioned, there were cases, involving general as opposed to specific injuries, that required the first injury to be compensable before 12c was applicable. The court then cited *Clark, Parr, Dawson, McNew* and *Arant*.[204] The court, nevertheless, concluded:

> We need not attempt to resolve the apparent conflict between the cases just cited and the Gilmore case, because, in our opinion, the Gilmore case has settled the law that section 12c is applicable to cases involving specific injuries such as in this case and there is nothing in the 1947 amendment to show a legislative intent to change the law in this respect.[205]

It is unfortunate that the court avoided the issues of compensable versus noncompensable and general versus specific injury. What is the distinction between a man handicapped by an amputated limb and one handicapped by a spinal injury, or an abdominal injury, or chest injury or any number of disabling, crippling, nonspecific injuries? Moreover, could the legislature have intended to make the distinction made by *Clark, Dawson, McNew*, and *Wyrick* between a workman disabled by an industrial injury as opposed to one disabled by a congenital defect, war injury, or any other cause outside of industry? Those decisions result in a discrimination; in effect, employers are told that they will not be saddled with the economic burden of a subsequent accident only if they employ workers previously injured at work. If the prior injury was compensable, then 12c will operate to allow consideration of the prior incapacity. Employees disabled by a cause outside

202. *Id.* at 277, 232 S.W.2d at 675.

203. *See* notes 154-81 *supra* and accompanying text.

204. The court's citation to *Parr* was the Commission of Appeals opinion. Texas Employers' Ins. Ass'n v. Parr, 16 S.W.2d 54 (Tex. Civ. App.—Amarillo 1929), *aff'd*, 30 S.W.2d 305 (Tex. Comm'n App. 1930, jdgmt adopted). Neither of the *Parr* opinions, however, embrace the compensable injury premise as indicated by the supreme court.

Texas Indem. Ins. Co. v. Arant, 171 S.W.2d 915 (Tex. Civ. App.—Eastland 1943, writ ref'd w.o.m.), does not concern the compensability of a prior injury. In fact, the carrier relied upon a prior abnormal back condition which was not identified in the opinion. Although the court spoke of a prior compensable injury, the reference was dicta only since the court held that the carrier waived any complaint by failing to request a special issue. *Id.* at 918.

205. *Id.* at 276, 232 S.W.2d at 674.

of industry, however, are hired at a substantial economic risk because a subsequent injury will not invoke 12c's protection. *Miears* and *Bothe* cited and discussed a United States Supreme Court opinion involving the Second Injury Fund under the Federal Longshoremen's and Harbor Workers' Compensation Act.[206] In *Lawson v. Suwannee Fruit & S. S. Co.*[207] the employee, Davis, lost one eye in a noncompensable accident. Subsequently, he lost the vision of his remaining eye in a job related injury. He was compensated for the loss of one eye and the question before the court narrowed to whether the Second Injury Fund or employer was liable for the difference between compensation for total disability and compensation for one eye. Rejecting a contention that the statute intended a distinction between compensable job related prior injuries and noncompensable non-job related injuries, the court reviewed a mass of expert testimony[208] related to employment of handicapped workers. The court concluded: "A distinction between a worker previously injured in industry and one handicapped by a cause outside of industry has no logical foundation if we accept the premise that the purpose of the Fund is that of aid to the handicapped."[209]

Up through the *Miears* decision it was clear that in successive specific injuries it was immaterial whether the prior injury was or was not compensable. The logic of the result was unassailable and certainly fostered the legislature's purpose of encouraging employers to hire the handicapped. It would seem to follow from the precise terms of 12c that there also should not be any distinction between successive injuries, whether specific or general. That this conclusion was not accepted in subsequent opinions is probably attributable to the fact that it is sometimes conceptually difficult to trace the causal connection between two general injuries as opposed to two amputated legs or arms. When a leg is amputated, the disability is obvious and continues during the course of employment leading up to the second injury. Thus, the amputation of the second leg makes the resulting disability immediately apparent and by definition the requirements of 12c are fulfilled. It is more difficult to trace the causal connection between two general injuries. This proof problem has greatly influenced the courts. The medical testimony is more ambiguous concerning contribution of a prior general injury than a specific injury. Even so, the application of 12c depends upon the causal connection, not the compensable nature of the prior injury. The compensability issue is merely an escape route to avoid the more difficult causal connection issue.

206. 33 U.S.C. § 901 (1970).
207. 336 U.S. 198 (1949).
208. Numerous sources are quoted by the court in the text of the opinion as well as a number of footnotes. One of the more interesting and revealing comments was quoted as follows:

> Perhaps the most impressive evidence . . . is that offered by Mr. I.K. Huber of Oklahoma. *Nease v. Hughes Stone Co.*, 114 Okla. 170, 244 P. 778, held the employer liable for total compensation for loss of the second eye. After the decision, Mr. Huber reports, 'Thousands of one-eyed, one-legged, one-armed, one-handed men in the State of Oklahoma were let out and can not [sic] get employment coming under the workmen's compensation law of Oklahoma . . . . The decision displaced between seven and eight thousand men in less than 30 days in Oklahoma.'

336 U.S. at 203-04 (footnotes omitted).
209. *Id.* at 204.

From the time of the *Miears* and *Bothe* opinions in 1950 until 1961, 12c and the Second Injury Fund were the subject of several court of civil appeals decisions. The first opinion following *Miears* was *Texas Employers' Insurance Association v. Sevier*.[210] The carrier contended that a prior noncompensable car accident, which had resulted in leg injuries, contributed to the claimant's incapacity from general injuries received in the industrial accident made the basis of the suit. The jury disagreed. The court of civil appeals overruled the carrier's contention that the jury's negative answer to the contribution issue was not supported by any evidence or was against the great weight of the evidence. The court also overruled the carrier's complaint that the claimant's counsel, in jury argument, had discussed the noncompensable nature of the 1951 car accident. The court noted that no special issue had been submitted inquiring whether the 1951 accident was compensable nor had any evidence been produced on that issue. In holding that the argument was harmless, although clearly outside of the record, the court stated that it was immaterial whether the accident was compensable since the only issue involved was whether the prior accident contributed to the subsequent incapacity. "If a prior injury contributes to a disability which follows a second injury, recovery is reduced by the amount of the contribution regardless of whether or not the prior injury was compensable . . . ."[211]

Unfortunately, the Eastland court did not follow *Sevier* when it decided *Texas Employers' Insurance Association v. Upshaw*[212] four years later. In fact in *Upshaw* the court did not once refer to the *Sevier* opinion. Upshaw brought two separate suits which were consolidated for trial. The jury found he sustained an injury on April 9, 1957 resulting in 16 weeks temporary partial incapacity, but without any loss in wage earning capacity. The jury also determined that Upshaw was injured on December 9, 1957 resulting in total permanent incapacity. The jury further found that the April, 1957 injury was not the sole cause of Upshaw's incapacity after December, 1957 but that the April, 1957 injury did contribute twenty per cent to the December incapacity. Judgment was entered for the claimant for the total permanent incapacity resulting from the December accident. The amount of the judgment was reduced, however, to reflect the twenty per cent contribution of the April injury. The Eastland court's opinion can be characterized as disorganized and illogical; however, the court ultimately relied upon the authority of *Clark, Dawson* and *McNew*[213] to hold that a prior general injury must be a compensable injury in order to provide the carrier with a 12c contribution defense. The court then converted the April, 1957 on-the-job injury to a noncompensable injury by holding that since the jury had found temporary partial disability, but no diminished wage earning capacity as a

210. 279 S.W.2d 473 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.).
211. *Id.* at 478.
212. 329 S.W.2d 144 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.).
213. The court also cited the *Arant* case in its string citation. Texas Indem. Ins. Co. v. Arant, 171 S.W.2d 915 (Tex. Civ. App.—Eastland 1943, writ ref'd w.o.m.). *Arant*, however, does not appear to be authority supporting the proposition that a prior general injury must be compensable in order to provide the carrier a 12c defense. *See* note 204 *supra*.

result of the injury, the injury was noncompensable. Thus, the jury's twenty per cent contribution finding was unavailable to offset the total permanent disability judgment.[214]

During the next few years other courts of civil appeals were confronted with 12c problems.[215] The opinions reflect the continuing confusion between 12c and 12c-1. In 1961, within a week, the supreme court handed down two opinions involving the Second Injury Fund. In *Industrial Accident Board v. Guidry*,[216] the court, for the first time, held that the thirty day and six month limitations of section 4a[217] were applicable to a workman's claim against the Second Injury Fund. Since Guidry had not notified the Fund of his claim within 30 days of his accident or filed any notice of claim within six months, judgment was rendered that he take nothing. The court demonstrated its own confusion by blending together 12c and 12c-1 when it stated that Guidry's suit was filed to recover benefits from the Second Injury Fund as provided in sections 12c, 12c-1 and 12c-2.[218] Clearly, 12c has nothing to do with the operation of the Fund other than to refer to its existence.

In *Second Injury Fund v. Keaton*[219] the court construed 12c-1 to be limited in application to those cases involving specific injuries which result in total permanent incapacity. According to the court, no combination of general injuries or specific injuries resulting only in partial incapacity were compensable from the Fund.[220] The precise language of 12c-1 permitted no other construction. It is obvious that when the legislature provided for compensation from the Fund they made a difficult economic choice as to who had to bear the burden of subsequent injuries. This was the same choice made when 12c was first included in the Act. Moreover, the legislature probably intended to limit claims on the Second Injury Fund to those cases involving legitimate industrial total permanent incapacity rather than functional total permanent incapacity which is awarded by a jury. Due to the liberal interpretation of the Act, numerous workers collect total and permanent benefits without being permanently disabled as would be a double

214. The court went on to hold, however, that even though the trial court improperly reduced the claimant's recovery by 20%, the claimant failed to complain of this by cross-point, and thereby waived any complaint that the judgment was erroneous. 329 S.W.2d at 147.

215. Texas Gen. Indem. Co. v. Robison, 340 S.W.2d 74 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.); Brinkley v. Liberty Mut. Ins. Co., 331 S.W. 2d 423 (Tex. Civ. App.—Texarkana 1959, no writ). *Robison* involved two prior noncompensible injuries which were not designated as general or specific. The court held that the issues and instructions (not quoted) properly submitted the percentage contribution defense to the jury citing two cases in support of its holding, Indemnity Ins. Co. of N. America v. Carrell, 318 S.W.2d 744 (Tex. Civ. App.—Waco 1958, writ ref'd n.r.e.), and Trinity Universal Ins. Co. v. Jolly, 307 S.W.2d 843 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.). *Carrell* held that there was no evidence to support the submission of percentage contribution issues since there was no proof that the prior injuries contributed to the claimant's incapacity. This was a concise restatement of the proper 12c test, *i.e.*, causal connection. *Jolly*, on the other hand, did not even involve prior injuries. The carrier's defense was based upon pre-existing abnormalities. The court held that this defense was properly submitted by the court's sole cause issue.

Brinkley held that it was error to allow the claimant to be cross-examined concerning the amounts he was paid in settlement of 12 prior injuries especially in view of the fact that the carrier made no effort to connect the prior injuries to the present disability.

216. 162 Tex. 160, 345 S.W.2d 509 (1961).

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

218. 162 Tex. at 161, 345 S.W.2d at 510.

219. 162 Tex. 250, 345 S.W.2d 711 (1961).

220. *Id.* at 253, 345 S.W.2d at 714.

amputee or a person who is industrially blind. Thus, the court reversed and rendered judgment that the claimant take nothing.[221] Though the court recited that the intention of the legislature must be ascertained in order to interpret the statute, the court never acknowledged the legislature's emergency clause declaration or delved into the amendment's background.

Little more than one year later the supreme court in *St. Paul Fire & Marine Insurance Co. v. Murphree*,[222] made the pronouncement which effectively nullified the legislature's efforts to encourage the employment of disabled workers. In affirming the trial court and the court of civil appeals, the court ignored the conflict in the case law as well as the plain wording of 12c and held that a prior general injury must be compensable in order to reduce a carrier's liability pursuant to 12c:

> We hold that the word injury as used in section 12c . . ., as related to a general injury, means *compensative* injury. Unless the prior general injury is one for which compensation is provided under the terms of the statute, the insurer's or carrier's liability cannot be reduced by reason thereof.[223]

In support of this unique interpretation of the statute, the court cited *Texas General Indemnity Co. v. Bledsoe*,[224] *Texas Employers' Insurance Association v. Upshaw*,[225] *Southern Underwriters v. Grimes*,[226] and *Texas Employers' Insurance Association v. Clark*.[227] The court's reliance upon these "authorities" is demonstrative of the ill-considered manner in which courts sometimes string citations together without any research into the holdings of the particular cases. The *Bledsoe* court did not even mention 12c. The point raised by the carrier in *Bledsoe* concerned the jury's negative answer to a sole cause special issue and not a percentage contribution issue. *Upshaw* relied upon *Clark* as authority for its holding[228] but directly conflicted with the *Sevier* opinion written by the same court less than four years earlier.[229] There the court held that, "if a prior injury contributes to a disability . . . recovery is reduced by the amount of the contribution regardless of whether or not the prior injury was compensable."[230] *Grimes* did not involve a prior injury at all; it involved a *subsequent* injury. In an alternative holding, the *Grimes* court, relying upon *Wyrick*,[231] did state that a further reason the subsequent injury was not available as an offset under section

221. Second Injury Fund v. Keaton, 337 S.W.2d 841 (Tex. Civ. App.—Amarillo 1960), *rev'd*, 162 Tex. 250, 345 S.W.2d 711 (1961). In allowing recovery the court liberally interpreted the statute in a manner similar to the United States Supreme Court in Lawson v. Suwannee Fruit & S. S. Co., 336 U.S. 198 (1949). *See* notes 206-09 *supra* and accompanying text.

222. 163 Tex. 534, 357 S.W.2d 744 (1962).

223. *Id.* at 542, 357 S.W.2d at 749 (emphasis added).

224. 344 S.W.2d 527 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.).

225. 329 S.W.2d 144 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.). *See* notes 212-14 *supra* and accompanying text.

226. 146 S.W.2d 1058 (Tex. Civ. App.—San Antonio 1941, writ dism'd jdgmt cor.). *See* notes 184-85 *supra* and accompanying text.

227. 23 S.W.2d 405 (Tex. Civ. App.—Eastland 1930, writ dism'd). *See* notes 162-66 *supra* and accompanying text.

228. *See* note 213 *supra* and accompanying text.

229. *See* notes 210-14 *supra* and accompanying text.

230. Texas Employers' Ins. Ass'n v. Sevier, 279 S.W.2d 473, 478 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.).

231. 146 S.W.2d at 1062.

12c was because it was not compensable. It is incredible that the supreme court cited *Grimes* as authority because *Grimes'* primary holding was that 12c was inapplicable to subsequent injuries. In *Murphree* the carrier contended that both prior and *subsequent* injuries were responsible for the claimant's disability and the supreme court held that a subsequent compensable general injury is available as a percentage offset under 12c![232] *Grimes* and *Murphree*, therefore, are in direct conflict.

It was most unfortunate that the supreme court adopted the adjective "compensative"[233] to limit the word injury. This adjective first appeared in the *Clark* opinion[234] and was as irrelevant to section 12c in 1962 as it was thirty-two years earlier in *Clark*. There is no court opinion to date analyzing, justifying or rationalizing the reasons for inserting the concept of "compensative" general injury in 12c. The express wording of the statute certainly does not refer to compensability. Even liberal rules of statutory construction do not provide any implication or suggestion that the statute refers to compensable injuries. Insight into the legislative and socio-economic background of 12c strongly suggests the opposite conclusion.[235] Analysis of the *Clark* opinion reveals no reasoning behind the adoption of the concept other than that it was necessary in order to achieve the result desired in that case.[236] Moreover, the compensative injury concept is contrary to the legislative definition of the word injury which was made *mandatory* for use in *all* sections of the Compensation Act. At the time of the *Clark* opinion, injury was deemed by the legislature to mean damage or harm to the physical structure of the body, including diseases and infections naturally resulting from such damage or harm.[237] In 1962, the term "injury" was defined by the legislature to mean:

> Whenever the terms injury or personal injury are used in the workmen's compensation law . . ., such terms *shall be construed* to mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom . . . .[S]uch terms shall also be construed to mean and include occupational diseases. . . . The following diseases only shall be deemed occupational diseases.[238]

Thus, if the phrase "shall be construed to mean" is given effect, section 12c would read as follows:

> If an employee who has suffered a previous . . . [damage or harm to the physical structure of the body] shall suffer a subsequent . . . [damage or harm to the physical structure of the body] which results in a condition of incapacity to which both . . . [damage and harm to the physical structure of the body] or their effects have contributed, the Association . . . shall be liable because of such . . . [damage or harm to the physical structure of the body] only for the compensation to

232. *See* text accompanying note 185 *supra*.
233. St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 542, 357 S.W.2d 744, 749 (1962). *See* note 223 *supra* and quotation in text.
234. *See* note 164 *supra* and quotation in text.
235. *See* notes 154-56 *supra* and accompanying text.
236. *See* notes 162-66 *supra* and accompanying text.
237. *See* text accompanying note 153 *supra*.
238. 1947 Tex. Gen. Laws ch. 113, § 2, at 177 (emphasis added). Thereafter followed a list of specific occupational diseases. In 1955 the list was amended, without any other changes, to include psittacosis. 1955 Tex. Gen. Laws ch. 233, § 1, at 662-63.

> which the subsequent . . . [damage or harm to the physical structure of the body] would have entitled the injured employee had there been no previous . . . [damage or harm to the physical structure of the body].[239]

The manner in which the supreme court transformed this definition of injury into "compensative injury" is a feat of magic worthy of Houdini, and literally defies the imagination. Even more amazing, however, was the court's ability to deduce from the words in section 12c that the legislature had determined that *subsequent* compensable general injuries also were to be used to reduce a workman's recovery. Prior to *Murphree*, no Texas court had ever held that 12c was applicable to subsequent injuries, whether compensable or not. In fact one of the cases cited by the supreme court specifically held that the statute referred only to injuries occurring before or concurrently with the injury for which compensation was sought, and not to subsequent injuries.[240] The supreme court, however, without discussion or citation wrote, "it is the extent of the prior and subsequent injuries that reduces the insurer's liability . . . ."[241] There is no hint in the opinion why the court transformed the 12c words "previous injury" into "prior and subsequent injuries."[242] It is obvious from *Gilmore's* exploration of the intent behind section 12c that the legislature did not intend subsequent injuries to reduce a workman's recovery. The statute logically contemplates that each successive injury be litigated in order, with prior injuries reducing the subsequent recovery.

More disappointing than the court's compensative and subsequent injury holdings was the complete disregard for the discriminatory impact resulting from the distinction created between prior specific and prior general injuries; this distinction still exists today. *Miears* and *Bothe* held that 12c was operational for prior specific injuries whether compensable or not.[243] *Murphree* held that prior and subsequent general injuries come within the purview of section 12c only if they are compensative injuries. Thus, Texas employers are placed in a dilemma: hire those persons disabled by specific injuries, no matter how the injury occurred, and secure the law's protection from paying full benefits should they be injured again; or hire those persons disabled by noncompensative general injuries resulting from disease, illness, congenital defect or injury, and risk uncertain economic consequences if they are injured again. Employers concerned with escalating compensation insurance premiums based on injury experience ratings, will quickly

239. 1947 Tex. Gen. Laws ch. 349, § 1, at 690-91. The definition of injury is no different today except that the legislature has repealed the list of occupational diseases and substituted a broad definition which encompasses any disease arising out of and in the course and scope of employment and which causes damage or harm to the physical structure of the body. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978).

240. Southern Underwriters v. Grimes, 146 S.W.2d 1058 (Tex. Civ. App.—San Antonio 1941, writ dism'd jdgmt cor.). *See* notes 184-85 *supra* and accompanying text.

241. St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 540, 357 S.W.2d 744, 748 (1962).

242. "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* . . . have contributed, the association . . . shall be liable because of *such injury* [the *subsequent injury*] only for the compensation to which the *subsequent injury* would have entitled the injured employee had there been no *previous injury* . . . ." TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Vernon Supp. 1978) (emphasis supplied).

243. *See* notes 195-205 *supra* and accompanying text.

conclude that they may not be able to hire nonindustrially, generally disabled workers, despite affirmative action programs of the government for the hiring of the handicapped.

Equally important to the Second Injury Fund statute and its effect on the hiring of handicapped workmen is the Fund's present limitation to specific loss of limbs and eyes. This restriction ignores a vast array of pre-existing impairments and effectively impedes employment of disabled persons. Since employers are liable for the aggravation of previously existing conditions, whether congenital, accidental or otherwise, it is no wonder that a prospective employee with a known cardiac disease, prior degenerative disc disease with resulting laminectomy and/or fusion, or a history of spinal arthritis, finds it difficult, if not impossible to secure gainful employment. Part of the discrimination that now exists against workers afflicted with these types of general problems would vanish if the legislature would amend 12c and 12c-1 to allow a broader range of claims against the Second Injury Fund thereby reducing the individual employer's economic burden.

Plainly, the prior contribution—Second Injury Fund concept is fraught with difficult problems, social, economic, moral, legal and business, but above all, human. As Justice Norvell said in *Bothe*: "It is generally recognized that the failure of society to make use of the services of handicapped persons is not only an injustice to the individuals involved but also constitutes an economic waste and is the mark of an inefficient social and economic organization."[244] The point is the wording of the current Texas statute, even if the courts had not construed it illogically, is insufficient to solve the realities existing in today's industrial world. Added to this initial problem is the fact that the Texas courts have construed the statute in such manner as to further limit an already archaic remedy. The solution, however, will probably not come from courts reluctant to admit past mistakes and correct results already explained by hyperbolic, verbose rationalizations.

Although legislative change in the current statutes is a possibility, in order to determine the manner in which 12c and 12c-1 will function now that they have returned to their pre-1971 status, the decisions occurring after *Murphree* must be analyzed.

In 1962 after the surpeme court's decision in *Murphree*, it was clear that with respect to 12c and specific injuries, it was immaterial whether the prior specific injury was or was not compensable.[245] Based on *Murphree*, it was equally clear that with respect to general injuries and 12c, only those prior general injuries for which compensation was provided were available to reduce the carrier's liability.[246] Section 12c was also applicable to both prior and subsequent injuries "inasmuch as it is the extent of the prior and

244. State v. Bothe, 231 S.W.2d 453, 458 (Tex. Civ. App.—San Antonio 1950, no writ). *See generally*, 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 59.31-.43 (1976).

245. *See, e.g.*, Miears v. Industrial Accident Bd., 149 Tex. 270, 232 S.W.2d 671 (1950); Gilmore v. Lumbermen's Reciprocal Ass'n, 292 S.W. 204 (Tex. Comm'n App. 1927, jdgmt adopted); State v. Bothe, 231 S.W.2d 453 (Tex. Civ. App.—San Antonio 1950, no writ).

246. St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 542, 357 S.W.2d 744, 749 (1962); Texas Employers' Ins. Ass'n v. Clark, 23 S.W.2d 405, 409 (Tex. Civ. App.— Eastland 1930, writ dism'd).

subsequent injuries that reduces the insurer's liability."[247] It was established that the Second Injury Fund only applied in cases of successive specific injuries resulting in total permanent incapacity.[248] Moreover, the employee's claim against the Fund was subject to the same time limitations applicable to any other compensation claim.[249]

In 1962 section 12c had been part of the Compensation Act for 45 years. Despite numerous court opinions interpreting the section, confusion among the courts persisted. There were numerous unanswered questions regarding the application of 12c. Did compensable mean any type of compensation such as collecting a judgment against a negligent automobile driver or store owner who caused the prior injury? Did compensable mean actually collecting money? For example, suppose the employee is clearly entitled to compensation benefits but fails to file a timely claim, is this injury compensable? How does a carrier prove compensability or an employee disprove compensability? What specific mathematical calculation is required to reduce an employee's benefits if a prior injury contributed twenty-five, thirty-five, fifty-five or ninety-five per cent to his present disability? Is the calculation the same for total incapacity as it is for partial incapacity and for specific injuries? Fortunately, before the legislature reversed section 12c in 1971, some of these questions were answered, others, however, remain unanswered.

In both *St. Paul Fire & Marine Insurance Co. v. Murphree*[250] and *Hartford Accident & Indemnity Co. v. McCardell*,[251] the supreme court addressed the problem of documentary evidence that a prior or subsequent injury was compensable. *Murphree* held that under a 12c defense, proof of the monetary amount paid to a claimant in a compensation settlement had no bearing on the extent of injury or disability and was, therefore, inadmissible.[252] In *McCardell* the court considered the admissibility of petitions, affidavits,

247. St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 540, 357 S.W.2d 744, 748 (1962). *Contra*, Southern Underwriters v. Grimes, 146 S.W.2d 1058, 1061 (Tex. Civ. App.—San Antonio 1941, writ dism'd jdgmt cor.).

248. Second Injury Fund v. Keaton, 162 Tex. 250, 254, 345 S.W.2d 711, 714 (1961).

249. Industrial Accident Bd. v. Guidry, 162 Tex. 160, 164, 345 S.W.2d 509, 512 (1961).

250. 163 Tex. 534, 357 S.W.2d 744 (1962).

251. 369 S.W.2d 331 (Tex. 1963).

252. In *Murphree* the carrier also contended that the jury's finding that the claimant's subsequent accident contributed 5% to the disability he suffered as a result of the accident being litigated was in irreconcilable conflict with the finding that the accident made the basis of the suit resulted in total permanent incapacity. The court avoided the question by holding the carrier waived any potential conflict by failing to assign the alleged error in its motion for new trial. 163 Tex. at 539-40, 357 S.W.2d at 748-49. In a similar case involving one *prior* injury, the Dallas court of civil appeals held that such findings were not conflicting. In General Ins. Co. v. Hughes, 193 S.W.2d 230 (Tex. Civ. App.—Dallas 1946, no writ), the claimant was injured on June 28, 1944. The jury found temporary total incapacity for 16 weeks and temporary partial incapacity for 66 weeks. The jury further found that a prior injury in March 1943 contributed 50% to the incapacity existing after the June 28, 1944 injury. The trial court granted the employee's motion for mistrial alleging a fatal conflict in the jury's findings. The carrier sought mandamus to compel the trial court to enter judgment based on the jury's answers to the special issues. The court held that there was no conflict in the jury's findings because the June 1944 injury was only *a* producing cause of the subsequent incapacity not the *sole* producing cause. *Id.* at 232. An incapacity may result from more than one producing cause and the jury's finding of incapacity simply meant that the disability existing after the June 1944 injury was the result of the June injury and whatever other physical conditions existed. The jury found the incapacity from the prior injury to be a 50% disability and the trial court was directed to enter judgment on the verdict.

notices of injury, and claims for compensation arising out of five prior accidents. In a lengthy opinion the court concluded that the admissibility of such documentary evidence was governed by the rules of evidence relating to impeachment and admissions of a party opponent. Thus, the court allowed the introduction of documentary evidence in those instances when they were inconsistent with the claimant's testimony, and condemned the introduction of such documents when there was no inconsistency demonstrated between the documents and the employee's testimony.

In *Sowell v. Travelers Insurance Co.*[253] the supreme court held that a prior compensable specific injury was available as a section 12c percentage offset to a general injury. The court also discussed special issue submissions in 12c cases. Sowell injured his back in November, 1960. He had suffered a natural arthritic condition "in his back"[254] for several years prior to the 1960 injury, broken his left leg in a compensable accident in 1950, and injured his back in another compensable accident in 1956. The jury answered 25% to a special issue inquiring as to the percentage of the disability due solely to the November, 1960 injury.[255] On appeal, the claimant contended that the word "solely" in the percentage issue did not allow the jury to consider the aggravation of the pre-existing arthritic condition in assessing the incapacity from the November, 1960 injury. Based upon the well-established proposition that an employee is entitled to compensation notwithstanding the fact that a pre-existing disease or condition may have contributed to the resulting incapacity, the court held that the percentage issue prevented the jury from considering the arthritic condition in assessing disability. In order to protect the claimant's right to a consideration of a pre-existing disease or condition and the carrier's right to a percentage defense the issue should have inquired as to what percentage of the incapacity resulted from the prior injuries.[256] The issue submitted would have been appropriate had there not been any evidence of aggravation of a previously existing disease.

Since the case was to be remanded for new trial, the court also considered Sowell's contention that it was inappropriate to set off a prior compensable specific injury against a subsequent general injury.[257] The court rejected this contention and held that there was some evidence that the prior specific injury had contributed to the incapacity after November, 1960. The court further stated: "Section 12c makes no distinction between specific and general injuries, and we are unwilling to write such a distinction into the statute. The fact that the legislature has applied different methods in compensating general and specific injuries cannot be said to alter the clear terms of §12c."[258]

253. 374 S.W.2d 412 (Tex. 1963).
254. *Id.* at 413.
255. The issue was: "From a preponderance of the evidence, what percentage, if any, of plaintiff's incapacity, if any you have found, is due solely to the alleged injury of November 12, 1960? Answer by stating the percentage, if any." *Id.*
256. *Id.* at 415.
257. *Id.* at 415-16. The basis of the contention was that the legislature provided that general injuries were to be compensated on a loss of earning capacity theory while specific injuries were compensated according to the schedule of injuries regardless of any loss of earning capacity. Thus, the legislature could not have intended a prior specific injury to offset a general injury since they involved two different concepts.
258. *Id.* at 416. The court's rejection of the claimant's argument regarding the distinction

The meaning of this statement is unclear. Obviously, 12c does not make a distinction between the two types of injuries. The courts, however, have judicially legislated such a distinction. Thus, the only meaning the statement could possibly have is that specific injuries may be used to offset disabilities resulting from general injuries and vice versa; and a combination of general and specific injuries may be used to offset disabilities from general or specific injuries or disabilities from combinations of general and specific injuries, subject to the court's "compensative" rule.

The supreme court's final opinion on 12c came in *Transport Insurance Co. v. Mabra*.[259] The employee injured his back in 1969 and underwent surgery. He had previously injured his back in 1958 while working for the same employer and had undergone surgery on that occasion as well. The jury found that permanent partial incapacity had resulted from the 1969 injury, with the 1958 injury contributing fifty per cent to that incapacity. The trial court reduced the employee's recovery in accordance with the jury's finding; the court of civil appeals, however, found no evidence that the prior injury was compensable and accordingly, awarded full benefits to the claimant.[260] The supreme court agreed with the trial court and held that there was evidence that the prior injury was compensable. In the course of the opinion, the court quoted rather meager testimony elicited from the claimant on cross-examination concerning the compensability of the prior general injury.[261] The testimony was that the employee had been injured on the job, had been paid some weekly compensation while off work and had received a "little" lump sum compensation settlement after returning to work. The claimant contended that the reference to compensation could easily have referred to compensation other than workmen's compensation. The supreme court rejected this argument because the jury could have reasonably inferred from the testimony, the pleadings, and the context of the questions that the compensation referred to was workmen's compensation. Thus, the court held that there was some evidence on the issue of compensability.

A more difficult problem for the court was that the jury had not been requested to find whether the prior injury was compensable. The only issues submitted regarding the prior injury were whether the prior injury had contributed to the present disability and the percentage of the contribution. The court held, however, that since the claimant had not specifically objected to the court's failure to submit an issue on compensability, the missing issue would be deemed to support the judgment rendered. Thus, the trial court's jugment reducing compensation was affirmed.

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between specific and general injuries actually reinforces *Gilmore's* original causal relation concept of 12c. In essence the *Sowell* court held that the label placed on the prior injury is irrelevant as is the manner and amount in which it was compensated. Thus the only relevant inquiry is the contribution the incapacity from the prior injury might have made to the incapacity existing after the subsequent injury. This is nothing more than a causal relation inquiry.

259. 487 S.W.2d 704 (Tex. 1972). The opinion was handed down subsequent to the legislative amendment reversing the operation of 12c which was effective September 1, 1971. 1971 Tex. Gen. Laws ch. 316, § 1, at 1257.

260. Mabra v. Transport Ins. Co., 474 S.W.2d 627 (Tex. Civ. App.—Dallas 1971), *rev'd*, 487 S.W.2d 704 (Tex. 1972).

261. The testimony is quoted in question and answer form as it appeared in the statement of facts. 487 S.W.2d at 706-07.

The court's holding on the special issue question is vitally important to the operation of 12c in a procedural setting. It is clear from the *Mabra* opinion that percentage contribution is an affirmative defense upon which the carrier has the burden of pleading, proof, and persuasion.[262] Thus, *Mabra* clarified a conflict among several courts of civil appeals relating to burden of proof.[263]

A few years before, and for several months after the *Mabra* opinion various courts of civil appeals added to the extensive writings concerning 12c and its application to a variety of factual settings. In *Jones v. Specific Employers Insurance Co.*,[264] the Eastland court was faced with the problem of justifying the supreme court's *Murphree* holding allowing an offset for *subsequent* compensable injuries. In view of 12c's unambiguous language, the Eastland court had a very difficult problem which the opinion does not satisfactorily solve.

Jones was injured November 17, 1963. A jury found that the injury resulted in total permanent incapacity and fifty per cent of the incapacity was contributed to by three prior injuries. The jury also found that a subsequent injury on February 10, 1964 contributed to the incapacity from the November, 1963 injury to the extent of forty per cent. The trial court reduced the award by ninety per cent and the claimant appealed. The only issue on appeal was the forty per cent reduction because of the subsequent injury. The court of civil appeals examined the *Murphree* opinion which had allowed a reduction for a subsequent injury. The Eastland court was troubled, however, by the supreme court's statement that prior and subsequent injuries reduce a carrier's liability for a present incapacity[265] and labeled the statement dictum.[266] Despite obvious misgivings, the Eastland court held that "such dictum and the language in the first part of section 12c tend to support . . . deducting the 40% incapacity contributed by the subsequent injury . . . ."[267] The court did not specify the language in 12c that allows a subsequent injury to reduce a present incapacity. Realizing the conceptual difficulties of inserting the word "subsequent" into 12c, the Eastland court abandoned reliance upon *Murphree* and in an incomprehenable manner compared the Second Injury Fund's legislative purpose relative to prior injuries with its own socioeconomic theories. The court then

262. The court's only reference to the burden of pleading, proof and persuasion, other than the inference to be drawn from the holding relating to the issue deemed found in support of the trial court's judgment, was this statement: "In order to reduce the recovery of a workman because of a previous injury under the above statute [12c], the insurance carrier must prove (1) that the previous injury was compensable, (2) contributed to the present incapacity, and (3) the amount or percentage of such contribution." 487 S.W.2d at 707. Since this particular fact situation was related to a prior injury, it can only be assumed that the same burden is on the carrier when a subsequent compensable injury is involved.

263. *Compare* Texas Gen. Indem. Co. v. Robison, 340 S.W.2d 74 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.), *and* Texas Employers' Ins. Ass'n v. Tanner, 218 S.W.2d 277 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.), *and* Texas Indem. Ins. Co. v. Perdue, 64 S.W.2d 386 (Tex. Civ. App.— Amarillo 1933, writ ref'd), *with* Texas Employers' Ins. Ass'n v. Van Pelt, 68 S.W.2d 514 (Tex. Civ. App.—Amarillo 1934, no writ), *and* Texas Employers' Ins. Ass'n v. Stephens, 22 S.W.2d 144 (Tex. Civ. App.—El Paso 1929, no writ).

264. 416 S.W.2d 580 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.).

265. *See* text accompanying note 241 *supra*.

266. 416 S.W.2d at 582.

267. *Id.*

concluded it would simply not be right for the law to allow a double recovery for the same incapacity:

> In this case . . . the trial court knew that . . . [the employee] had previously settled . . . with another employer's . . . carrier for that subsequent injury . . . . If the court had included said 40% in the recovery granted, it would have allowed a double recovery for the same accident and incapacity. Furthermore, it would cause . . . [the carrier] to pay for 40% of [the employee's] incapacity caused by a subsequent injury while he was employed by a different employer and insured by a different insurer.[268]

The Eastland court was obviously attempting to produce what it believed would be a just result in that particular case. This opinion, however, cannot be justified. No matter how unfair the result, section 12c does not refer to any allowable reduction because of a subsequent incapacity. Try as they might, the courts will never be able to justify the judicial insertion of the word subsequent in the provisions of 12c. Moreover, the long range effects of *Murphree* and *Jones* will undoubtedly produce still more confusion. For example, in both *Murphree* and *Jones* the subsequent injuries were compensable, and final settlements were made before the suits which gave rise to the appeals were tried. Suppose the court is faced with a subsequent compensable injury wherein the employee has received no compensation payments. Will the court's justification, or rationalization, be the same? Probably not, because the conceptual situation will be entirely different. Assume, for example, a jury finding of a ninety per cent contribution and a total permanent disability. The recovery will be reduced by ninety per cent. When a subsequent injury is tried before a different jury, the prior compensable injury is admissible to offset the incapacity resulting from the subsequent injury. If the second jury finds total permanent incapacity from the second injury, but also finds that the prior injury contributed eighty per cent to the present incapacity, in theory, the claimant will only have recovered ten per cent of the total due for the first injury's incapacity and twenty per cent of the total due for the second injury's incapacity. This totals only thirty per cent of what both juries found to be total permanent incapacity. Thus, it appears that the courts will be compelled to further confuse this area by attempting to legislate and rationalize a method whereby the claimant can recover at least once the total due for his total permanent incapacity.

In *Alvarez v. Texas Employers' Insurance Association*[269] the court was concerned with proof that the prior injury was compensable. The employee worked for the same employer for seventeen years. In 1966 he sustained the injury involved in the appeal. Nine years earlier he had fallen off of a truck but testified that he had not been injured, although he had seen the company doctor and had undergone three weeks of physical therapy. There was no

268. *Id.* The reference to preventing a double recovery is only the second time that rationalization has appeared in an appellate opinion. The first such reference was in Traders & Gen. Ins. Co. v. Wyrick, 118 S.W.2d 923, 924 (Tex. Civ. App.—San Antonio 1938, no writ). The *Wyrick* court's statement concerning double recovery is unsupported by any authority, as is the *Jones* court's similar statment. Curiously, *Jones* did not cite *Wyrick* for support and *Jones* used the double recovery rationale to aid the *carrier* in a *subsequent* injury situation whereas *Wyrick* used the same rationale to *defeat* the *carrier* in a *prior* injury situation.

269. 450 S.W.2d 114 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).

evidence of any missed time from work or that a claim for compensation had been made. In fact, the court emphasized there was not even evidence that the employer was a subscriber to the Act at the time of the prior injury. The court held that there was no evidence that the prior injury was compensable and that the trial court should have disregarded the jury's finding that the prior injury had contributed to the claimant's incapacity.

The opinion is not instructive as to what proof is needed to demonstrate compensability and, in fact, conflicts with the supreme court's subsequent opinion in *Mabra*[270] on the issue of proving whether an employer involved in both accidents is a subscriber. The *Alvarez* opinion is, however, consistent with the restrictive holdings of *Upshaw*,[271] *Dawson*[272] and *Clark*[273] as to what type of disability constitutes a compensable disability available as a percentage offset under section 12c.

A few months later *Alvarez* was cited and followed in *Charter Oak Fire Insurance Co. v. Dewett*.[274] The facts were similar to *Alvarez*. Dewett, however, testified that the prior injury to his back troubled him from time to time and forced him to seek first aid from the company nurse or stay home for a few days. This difficulty persisted until the occurrence of the second injury. The court held the prior injury to be noncompensable relying on the fact that there was no evidence that the claimant had been incapacitated for even a week, no evidence that he had filed a claim for benefits, and no evidence that the employer was a subscriber at the time of the prior injury.[275]

In *Millers Mutual Fire Insurance Co. v. Monroe*[276] the court placed an impossible burden on the carrier regarding the percentage that the prior injury contributed to the present disability. In affirming the trial court's

270. Transport Ins. Co. v. Mabra, 487 S.W.2d 704 (Tex. 1972). *See* notes 259-63 *supra* and accompanying text.

271. Texas Employers' Ins. Ass'n v. Upshaw, 329 S.W.2d 144 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.). *See* note 212 *supra* and accompanying text.

272. Casualty Reciprocal Exch. v. Dawson, 81 S.W.2d 284 (Tex. Civ. App.—Eastland 1935), *writ dism'd*, 130 Tex. 362, 107 S.W.2d 994 (1937). *See* notes 172-75 *supra* and accompanying text.

273. Texas Employers' Ins. Ass'n v. Clark, 23 S.W.2d 405 (Tex. Civ. App.—Eastland 1930, writ dism'd). *See* notes 162-64 *supra* and accompanying text.

274. 460 S.W.2d 468 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

275. In Bituminous Cas. Corp. v. Martin, 478 S.W.2d 206 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.), the carrier attempted to introduce hospital records of eight prior hospitalizations for various physical and mental problems: 1948—factured cervical vertebra; 1951—alcoholism; 1952—injuries received in an automobile-motorcycle accident; 1956— knee injury from an automobile accident; 1957—psychopathic personality; 1960—alcoholic gastritis; 1963—broken ankle from an automobile accident; and 1964—shotgun wound to left leg. The court held that the records related to the noninjury hospitalizations were inadmissible because there was no evidence that any or all were the sole cause of the present disability. *Id.* at 208-09. The hospital records relating to the prior injuries were likewise inadmissible, according to the court, because there was no evidence that the prior injuries were compensable and no evidence of any causal connection between the prior injuries and the disability resulting from the on-the-job injury. *Id.*

Wright v. Excalibur Ins. Co., 486 S.W.2d 130 (Tex. Civ. App.—Dallas 1972, no writ), appears to be in conflict, in one of its holdings, with both Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331 (Tex. 1963), and St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 357 S.W.2d 744 (Tex. 1962). In *Wright* the court stated that a petition relating to a prior injury was inadmissible hearsay unless it was supported by proof that the attorney signing the instrument was acting on the employee's behalf with the express or implied authority to file the petition. 486 S.W.2d at 134. The opinion does not indicate if the claimant's testimony was inconsistent with the contents of the petition, but if it was, then the court's statement regarding hearsay clearly conflicts with *McCardell* and *Murphree*.

276. 495 S.W.2d 625 (Tex. Civ. App.— Waco 1973, writ ref'd n.r.e.).

denial of percentage contribution issues with respect to a prior injury the court said: "Although the record contains evidence that the injury of December 1st [prior injury] contributed to Monroe's incapacity, we find no evidence of the amount or percent of such contribution. For this reason the defendant's requested issues were properly refused."[277]

In support of this statement, the court cited *Transport Insurance Co. v. Mabra*.[278] In *Mabra* the supreme court listed "the amount or percentage of such contribution" as one element of proof required of a carrier.[279] The supreme court did not, however, discuss the evidence submitted by the carrier which supported the jury's finding that fifty per cent of Mabra's disability was due to the prior injury. The *Monroe* court literally interpreted the *Mabra* statement and misapplied the requirement. If the *Monroe* court is correct, then a carrier is required to produce an expert who is willing to quantitatively and qualitatively reduce his opinion to a percentage figure, for example, 53.58%, 85.6384%. Such testimony is not binding on a fact finder because it is the opinion of an expert and will only create a fact issue.[280] Thus, while evidence of a specific percentage may be helpful to the fact finder, it certainly should not be mandatory to support the submission of an issue. If the court were called upon to review the sufficiency of the evidence to support a percentage finding, it would have to review *all* of the evidence, not just a portion thereof.[281] Thus, all circumstances surrounding the prior injury, including extent of the injury, medical treatment, work record after the injury, reduction in wages, and all other relevant testimony, should be considered as part of the evidence bearing on the ultimate percentage contribution of the prior injury to the present incapacity.[282]

The last published opinion regarding the operation of 12c prior to its amendment in 1971 was *Hartford Accident & Indemnity Co. v. Haddock*.[283] The opinion illustrates the confusion which will again abound when the appellate courts begin writing on 12c with its myriad of problems. Haddock

277. *Id.* at 627.
278. 487 S.W.2d 704 (Tex. 1972). *See* notes 259-62 *supra* and accompanying text.
279. *Id.* at 707.
280. *See, e.g.*, Board of Fireman's Relief & Retirement Fund Trustees v. Marks, 150 Tex. 433, 242 S.W.2d 181 (1951); Hood v. Texas Indem. Ins. Co., 146 Tex. 522, 209 S.W.2d 345 (1948); Blackmon v. Piggly Wiggly Corp., 485 S.W.2d 381 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.).
281. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361 (1960).
282. Subsequent to *Monroe*, the Houston [1st Dist.] court also used the absence of evidence of the amount of percentage of incapacity to avoid a difficult *subsequent* injury problem. In Hartford Accident & Indem. Co. v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.), the court recognized the inherent difficulties lurking in the subsequent injury dilemma created by the *Murphree* holding. In order to avoid these obvious difficulties, the court held, citing *Mabra* and *Monroe*, that the carrier waived the § 12c subsequent injury defense by failing to request an issue as to whether the injury was compensable. *Id.* at 428. The court further said that although the carrier tendered the issues to the trial court, which were based upon the issues found in 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 25.05 (1970), the issues were improper since they placed the burden of proof upon the claimant and not the carrier as required by *Mabra*. 498 S.W.2d at 428. Almost as an aside, the court stated that there was no evidence of the amount or percentage of the present incapacity attributable to the subsequent injury. *Id.* It can only be assumed that this is a reference to *Monroe* since there was no citation to any authority or any other hint that could be used to place this seemingly extraneous comment into the context of the opinion.
283. 511 S.W.2d 102 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

was a mechanic who developed a severe contact dermatitis to petroleum products. The dermatitis spread to the various parts of his body making it a general injury. One of the numerous points raised by the carrier on appeal concerned the jury's failure to find that a prior injury was compensable. The carrier alleged that several weeks prior to the injury the employee had injured his *hands* and that that injury had contributed to the present incapacity. The court's only discussion of this prior injury concerned whether the injury was compensable. The court held that the evidence did not conclusively demonstrate the injury to be compensable or that the jury's answer to the special issue was against the preponderance of the evidence.

It is disturbing that the court and the carrier assumed that the prior injury had to be compensable *even though it is clear from the opinion that the prior injury was a specific injury!* If the opinions in *Miears*[284] and *Sowell*[285] are considered together, then a prior specific injury, whether compensable or not, should be available to offset disabilities arising from general injuries. This assertion must be qualified, however, because *Sowell* involved a prior *compensable* specific injury contributing to a general injury while *Miears* involved two successive specific injuries. Thus, it is conceivable that the *Haddock* court, unintentionally announced a new 12c rule that noncompensable prior specific injuries cannot be used to offset disabilities arising from subsequent general injuries.

The court-made rules applicable to 12c are confusing and irrational. Based upon the court opinions to date, there are a total of twenty-four possible combinations of injuries which may or may not affect an employee's recovery. This does not include those rare situations in which the employee seeks to recover for both general and specific injuries arising out of the same accident.

What are the rules of the game? To determine the rules, general and specific injuries must be considered separate from each other. If an employee sues to recover disability from a general injury, prior and subsequent *compensable* general injuries may be used to offset recovery.[286] This statement, however, must be limited to include only those subsequent general injuries for which *compensation has been paid* since *Murphree*[287] and *Jones*[288] both involved subsequent general injuries for which the claimant had received a compensation settlement. Prior specific compensable injuries may be used to offset disabilities from a general injury,[289] but it is question-

284. Miears v. Industrial Accident Bd., 149 Tex. 270, 232 S.W.2d 671 (1950).

285. Sowell v. Travelers Ins. Co., 374 S.W.2d 412 (Tex. 1964).

286. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 357 S.W.2d 744 (1962); Jones v. Specific Employers Ins. Co., 416 S.W.2d 580 (Tex. Civ. App.— Eastland 1967, writ ref'd n.r.e.); Texas Gen. Indem. v. Savell, 348 S.W.2d 202 (Tex. Civ. App.—San Antonio 1961, no writ); Traders & Gen. Ins. Co. v. Wyrick, 118 S.W.2d 923 (Tex. Civ. App.—San Antonio 1938, no writ); Texas Indem. Co. v. McNew, 90 S.W.2d 1115 (Tex. Civ. App.—San Antonio 1936, writ dism'd); Casualty Reciprocal Exch. v. Dawson, 81 S.W.2d 284 (Tex. Civ. App.—Eastland 1935), *writ dism'd*, 130 Tex. 362, 107 S.W.2d 994 (1937); Texas Employers' Ins. Ass'n v. Clark, 23 S.W.2d 405 (Tex. Civ. App.—Eastland 1930, writ dism'd). *Contra*, Southern Underwriters v. Grimes, 146 S.W.2d 1058 (Tex. Civ. App.— San Antonio 1941, writ dism'd jdgmt cor.).

287. St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 357 S.W.2d 744 (1962).

288. Jones v. Specific Employers Ins. Co., 416 S.W.2d 580 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.).

289. Sowell v. Travelers Ins. Co., 374 S.W.2d 412 (Tex. 1964).

able whether prior noncompensable specific injuries are accorded the same status.[290] There are not yet any guidelines as to whether subsequent specific injuries, whether compensable or noncompensable, can be used to reduce recovery for general injuries.

All that is really known about specific injuries is that prior specific injuries, whether compensable or noncompensable, reduce recovery for disabilities arising from subsequent specific injuries.[291] The broad nature of this rule is questionable, however, because the rule is derived from those cases in which the prior specific injury and the specific injury made the basis of the claim involved loss of vision or extremity amputation. There are not yet any rules for the remaining specific injury situations. Does a prior compensable or noncompensable general injury affect recovery for a specific injury? Does a subsequent compensable specific injury reduce recovery in a specific injury claim? Does a noncompensable specific injury reduce recovery for a specific injury? These questions must await future court consideration.

It is now clear, though, that the burden of pleading, proof, and persuasion are on the carrier with respect to compensability and contribution of injuries to present incapacities.[292] The carrier is also frequently required to produce specific proof of the exact percentage that the prior or subsequent injury contributed to the present incapacity.[293] The nature of the proof required to demonstrate the compensative nature of the prior or subsequent injury is somewhat obscure. The courts appear to have proceeded on an ad hoc basis and this has provided no useful rationale for analyzing and reconciling the decisions.[294] The courts, however, go to greater lengths in an individual case to find a particular injury in question noncompensable and it is probable that most of the unanswered questions regarding what constitutes a compensable injury will be resolved in favor of claimants and not carriers.

Thus far, the problem of mathematically reducing the claimant's recovery because of a contributing incapacity has been ignored. Strangely enough, until 1964 the courts had never definitively approached the problem. A few cases mentioned the manner in which a trial judge computed the reduction in recovery, but none established any guidelines to be followed. It can only be

290. Hartford Accident & Indem. Co. v. Haddock, 511 S.W.2d 102 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

291. Miears v. Industrial Accident Bd., 149 Tex. 270, 232 S.W.2d 671 (1950); Gilmore v. Lumbermen's Reciprocal Ass'n, 292 S.W.204 (Tex. Comm'n App. 1927, jdgmt adopted); State v. Bothe, 231 S.W.2d 453 (Tex. Civ. App.—San Antonio 1950, no writ).

292. Travelers Ins. Co. v. Mabra, 487 S.W.2d 704 (Tex. 1972).

293. *Id.*; Hartford Accident & Indem. Co. v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.); Millers Mut. Fire Ins. Co. of Texas v. Monroe, 495 S.W.2d 625 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).

294. *E.g.*, 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.); Alvarez v. Texas Employers' Ins. Ass'n, 450 S.W.2d 114 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.); Brinkley v. Liberty Mut. Ins. Co., 331 S.W.2d 423 (Tex. Civ. App.—Texarkana 1959, no writ); Texas Employers' Ins. Ass'n v. Upshaw, 329 S.W.2d 144 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.); Traders & Gen. Ins. Co. v. Wyrick, 118 S.W.2d 923 (Tex. Civ. App.—San Antonio 1938, no writ); Casualty Reciprocal Exch. v. Dawson, 81 S.W.2d 284 (Tex. Civ. App.—Eastland 1935), *writ dism'd*, 130 Tex. 362, 107 S.W.2d 994 (1937); Texas Employers' Ins. Ass'n v. Clark, 23 S.W.2d 405 (Tex. Civ. App.—Eastland 1930, writ dism'd).

assumed that the claimants, carriers, and trial courts agreed upon the method of deduction, and no one thought to complain.

The very first case to mention the computation involved in the reduction formula was *Jones v. Travelers Insurance Co.*[295] In *Jones* the court held, without discussion or citation to authority, that the claimant would recover for permanent partial disability ninety per cent (the prior injuries contributed ten per cent) of sixty per cent of the difference in the average weekly wage before injury and the average weekly earning capacity during the period of partial incapacity. In *Aetna Casualty & Surety Co. v. Depoister*[296] the carrier complained that the trial court erred in disregarding the jury's findings that two prior injuries contributed twelve per cent to the claimant's incapacity. The court of civil appeals agreed, but held that the error was harmless because the result would not change. The court reasoned that the claimant's average weekly wage was to be reduced *before* computing the compensation rate, that is reduce the average weekly wage by twelve per cent, then use sixty per cent of that reduced figure to determine the compensation rate. In *Depoister*, the claimant's compensation rate was in excess of the maximum under all calculations, therefore, the court affirmed an award for total permanent benefits at the maximum compensation rate. The carrier of course argued that the twelve per cent should be deducted from the maximum compensation rate to which the claimant's average weekly wage entitled him before calculating the total permanent award, that is, twelve per cent of $35.00 multiplied by 401 weeks. The court rejected this contention stating that there was no authority for the argument. In support of its calculations the court cited *Associated Indemnity Corp. v. McGrew*,[297] *Texas Employers' Insurance Association v. Upshaw*[298] and *Traders & General Insurance Co. v. Robinson*.[299] These cases, however, fail to support the court's holding. *McGrew* involved a wage rate issue, not a contention that another injury had contributed to the employee's incapacity. *Upshaw* held that the trial court erred in reducing the recovery because the prior general injury was noncompensable; however, since the claimant had not complained of the trial court's judgment, it was affirmed. Thus, the *Upshaw* court's discourse on the reduction of the claimant's recovery amounts to nothing more than dicta. *Robinson* was also a case that did not involve a prior injury contributing to a present incapacity. In *Robinson* the trial court required the jury to find the amount of partial incapacity in terms of percentage rather than the accepted method of the difference between average weekly wages and average weekly earning capacity during the period of partial incapacity. *Robinson* furnishes absolutely no support for the *Depoister* court's proposition. Despite the lack of authority supporting

295. 374 S.W.2d 779 (Tex. Civ. App.—Beaumont 1964, writ ref'd n.r.e.). This case and following cases were tried before the compensation factor was changed in 1973 to 66 2/3% of the average weekly wage. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 8a, 10, 11, 12 (Vernon Supp. 1978). Prior to 1973 the compensation factor had always been 60% even in the original Act. 1913 Tex. Gen Laws ch. 179, § 1, at 431-32.

296. 393 S.W.2d 822 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

297. 138 Tex. 583, 160 S.W.2d 912 (1942).

298. 329 S.W.2d 144 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.).

299. 222 S.W.2d 266 (Tex. Civ. App.—Texarkana 1949, no writ).

its conclusions, *Depoister* has now become the authority followed by all courts of civil appeals considering the question. The supreme court has not yet written on the subject.

In *Consolidated Casualty Insurance Co. v. Jackson*[300] the court considered the mathematical computation necessary to reduce a recovery for partial disability. To date *Jackson* is the only opinion that discusses the partial calculation in explicit detail. Jackson had suffered four prior compensable general injuries which the jury found contributed a total of twenty-five per cent to his present incapacity. The jury also found that the claimant had been temporarily totally incapacitated for ninety-six weeks as a result of the current injury and later awarded permanent partial incapacity. Jackson's average weekly wage was $150.00, and his earning power while partially incapacitated was $100.00 per week. The trial court disregarded the prior injury findings and entered judgment for the full amount of compensation due the employee. After concluding that the trial court had erred in disregarding the contribution of the prior injuries, the court of civil appeals was faced with the problem of reforming the judgment.

The court held that the compensation for the ninety-six weeks of total incapacity should amount to $150.00 per week, the difference between the employee's average weekly wage and his average weekly earning capacity of zero dollars. The court's conclusion as to total incapacity is unclear. The court stated:

> Since 60% of $150.00 per week exceeds the maximum compensation rate of $35.00 per week, the [trial] court's allowance of the maximum rate during that unpaid portion of the period of his total incapacity is consistent with our computation of his compensation rate during his partial incapacity.[301]

With respect to the partial disability calculations, the court reasoned that the claimant's incapacity was the difference between his average weekly wage before the injury and his average weekly earning capacity during the partial incapacity. The jury found this figure to be $50.00. Since the prior compensable injuries contributed twenty-five per cent to his partial incapacity, the $50.00 difference was reduced by twenty-five per cent; this made the claimant's wage earning capacity during the period of partial incapacity $37.50. Following the formula, the court calculated sixty percent of $37.50 and arrived at a weekly compensation rate of $22.50 for the period of partial incapacity. In support of this calculation, the court merely cited *Jones v. Travelers Insurance Co.*[302] despite its meager discussion and authority. *Jackson* did mention the *Depoister* decision, but stated that nothing in the opinion or the "authorities" cited by *Depoister* was inconsistent with its calculations.

In *Northwestern National Insurance Co. v. Kirchoff*[303] the jury found that the employee was totally permanently disabled and that a prior compensable

300. 419 S.W.2d 232 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).
301. *Id.* at 237.
302. 374 S.W.2d 779 (Tex. Civ. App.—Beaumont 1964, writ ref'd n.r.e.). *See* note 295 *supra* and accompanying text.
303. 427 S.W.2d 638 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

back injury had contributed seventy-five percent to the incapacity. The appellate court held, on the authority of *Jackson* and *Depoister*, that the trial court correctly determined the compensation rate to be $21.60 per week. The calculation was performed as in *Depoister*, that is twenty-five per cent, 100% minus seventy-five per cent, times the stipulated average weekly wage of $144.00 times sixty percent equals $21.60, the compensation rate.

In *Jones, Depoister, Jackson,* and *Kirchoff* all involved general injuries which resulted in either total permanent or partial permanent disabilities. In addition, both the prior and current injuries were litigated. These decisions furnish no guidance for the calculation of percentage offset in specific injury situations. Compensation for total disability is governed by section 10,[304] partial disability by section 11[305] and specific injuries by section 12.[306] Each section provides a different method for computing the compensation rate, though the total and partial sections are somewhat similar. The only guidance offered by the Texas courts on the subject of percentage offset for specific injuries is found in cases involving the total loss of vision or amputation of an extremity.[307] There are no cases providing a method of calculation for a specific injury resulting in, for example, a ten per cent permanent disability to the arm or a sixty per cent partial disability with a prior specific injury contributing fifty per cent to the current incapacity. Nor are there guidelines available regarding computation of a percentage offset for a prior compensable general injury contributing to a current specific incapacity, or a subsequent compensable general or specific injury contributing to a current specific disability.[308] The courts will undoubtedly soon be forced to face these along with other problems associated with section 12c.

An analysis of the court decisions interpreting 12c and the Second Injury Fund statutes clearly reveals that the legislature's principle purpose of aiding the handicapped has been progressively impeded, debased, or completely ignored. Moreover, only convoluted, hyperbolic, enigmatic rationalizations have been offered by the courts to justify this frustration of the legislature's intent. In order to effectuate the original stated purpose of the statutes, the legislature must do more than merely change the statutes to their pre-1971 wording. To compensate for the courts' distorted interpretations and escape from the present chaos, a comprehensive statutory rewriting is necessary.

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304. TEX. REV. CIV. STAT. ANN. art. 8306, § 10 (Vernon Supp. 1978).
305. *Id.* § 11.
306. *Id.* § 12.
307. Miears v. Industrial Accident Bd., 149 Tex. 270, 232 S.W.2d 671 (1950); Gilmore v. Lumbermen's Reciprocal Ass'n, 292 S.W.204 (Tex. Comm'n App. 1927, jdgmt adopted); State v. Bothe, 231 S.W.2d 453 (Tex. Civ. App.—San Antonio 1950, no writ).
308. One writer has set forth an analysis of the mathematical calculations related to section 12c as well as reviewing some of the other court doctrines applicable to this section. *See* Davis, *The Legal Effect of Prior and Subsequent Injuries in a Texas Workmen's Compensation Lawsuit*, 11 S. TEX. L. J. 191 (1969). The calculations as well as the various authorities cited throughout the article are questionable and should be carefully considered. Other articles dealing with 12c and the Second Injury Fund have not fully developed the confused nature of the statute as it has been applied by various court decisions and should be considered in light of the entire body of case law surrounding these statutes. *See* Doran, *Second Injury Fund*, 27 Texas B.J. 231 (1964); Korioth, *Workers' Compensation: A Refresher Course in Contribution*

III. SUBSTANTIVE LAW

Idiopathic[309] *Falls*. The Texas Supreme Court faced the troublesome concept of idiopathic falls in one of the few opinions it wrote in the compensation area during the survey year. Unfortunately, the court chose a short sighted, artificial rationale to solve the dilemma, a rationale which will undoubtedly be subject to future exaggerated extensions. In *Texas Employers' Insurance Association v. Page*[310] the claimant worked as a bank security guard. Each morning he was required to walk from the main bank building, across the bank parking lot to open the motor bank teller windows. One morning as the employee proceeded across the parking lot, his right knee "buckled" and he fell to the pavement allegedly striking his right knee and wrist, and left arm. Three and one half years earlier, while working for another employer, the employee had sustained a compensable right knee injury. Two weeks before his second accident the claimant had taken two weeks sick leave to rest his swollen right knee. Subsequent to the second accident, the employee underwent a total knee implant operation.

The trial court granted the carrier an instructed verdict. The court of civil appeals reversed and remanded and the supreme court affirmed the court of civil appeals judgment. Because *Page* reached the appellate court on an instructed verdict the court only examined the claimant's evidence to determine whether there was probative force to raise a fact issue.[311]

The question before the supreme court was whether there was any evidence that Page's injury was sustained in the course of his employment as defined in article 8309, section 1.[312] Course of employment in Texas requires the employee to meet two prerequisites: (1) the injury must have occurred while the employee was engaged in or about the furtherance of his employer's business; and (2) the injury must have been of a kind and character

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for Prior Injuries, 12 TRIAL LAW. F., Oct.-Dec. 1977, at 21; Comment, *Prior "Compensable" Injury and Section 12c of the Texas Workmen's Compensation Act—What is a "Compensable" Injury?*, 8 HOUS. L. R. 610 (1971). An excellent article, analyzing the court decisions up to the Supreme Court's opinion in *Miears*, is Clark, *Second Injuries in Texas: The Bothe and Miears Decisions*, 3 BAYLOR L. REV. 497 (1951).

309. Idiopathic is defined as: "Peculiar to the individual. . . . Arising spontaneously or from an obscure or unknown cause. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1123 (1966). The Supreme Court relied upon the AMERICAN ILLUSTRATED MEDICAL DICTIONARY (22d ed. 1951) and defined idiopathic fall as: "a fall due to a diseased state of spontaneous origin which is neither sympathetic nor traumatic; that which is self-originated; of unknown causation." Texas Employers' Ins. Ass'n v. Page, 553 S.W.2d 98, 100 n.2 (Tex. 1977).

310. 553 S.W.2d 98 (Tex. 1977).

311. *Id.* at 102. It made little difference in the result, but the instructed verdict required the appellate courts to consider only the evidence and reasonable inferences therefrom in the most favorable light supporting the claimant's position, disregarding all contrary evidence and inferences. *Id.*; *see also* Henderson v. Travelers Ins. Co., 544 S.W.2d 649 (Tex. 1976).

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

> The term 'injury sustained in the course of employment,' as used in this Act, shall . . .
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> . . . .
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> . . . include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere.

The Texas coverage formula differs significantly from most other states. Other jurisdictions adopted the "*arising* out of and in the course of employement" formula. *See* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 6.10 (1976). The *arising* concept is primarily concerned

having to do with and originating in the employer's business.[313] Obviously, the employee was engaged in his employment duties at the time of the incident. Thus, the court focused upon the question of whether the injury originated in the employment.[314] In deciding that there was a fact issue presented as to the "causal connection between the conditions under which . . . [Page's] work was required to be performed and his resulting injury,"[315] the court relied upon and discussed the three prior Texas cases dealing with idiopathic falls, *Garcia v. Texas Indemnity Co.*,[316] *General Insurance Corp. v. Wickersham*[317] and *American General Insurance Co. v. Barrett*.[318]

In *Garcia* an employee standing on a driveway leading to the employer's loading dock suffered an epileptic seizure causing him to fall and strike his head on a post.[319] The supreme court held the injury arose out of his employment since the employment had a " 'causal connection with' his injuries, 'either through its activities, its conditions, or its environment.' "[320]

In *Wickersham* a janitor fell on a level tile floor in his employer's restaurant and expired because of head injuries. The court specifically noted that the cause of the fall was unknown, but assumed it was because of a dizzy spell.[321] The court of civil appeals affirmed a judgment for the beneficiary and did not distinguish between falls on level floors, falls from heights, and falls against posts, tables, and machines.[322]

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with causal connection. The "originating" concept in the Texas formula should have alleviated many of the conceptual problems faced by courts interpreting the arising concept. But the Texas courts did not seem to appreciate the distinction between the Texas formula and the arising formula. A good example is a court of civil appeals' opinion wherein the court confused the crucial question, *i.e.*, origin of the accident, with an irrelevant inquiry into the moment of manifestation. American Motorists Ins. Co. v. Steel, 229 S.W.2d 386 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

313. 553 S.W.2d at 99. The court cited the standard cases supporting these two prerequisites: 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); Smith v. Texas Employers' Ins. Ass'n, 129 Tex. 573, 105 S.W.2d 192 (1937).

314. The court first disposed of the carrier's contention that the knee *injury* was noncompensable because it resulted solely from the pre-existing injury to the same knee, citing the well established proposition that a prior injury, unless it is the sole cause of the disability, cannot defeat an employee's claim for compensation. Since there was no evidence that the prior injury was the sole cause of the disability, and since the carrier failed to plead sole cause, the contention was overruled. 553 S.W.2d at 100. This sole cause contention and the court's disposition of the point on a no evidence, no pleading ground completely misses the vital issue in an idiopathic fall case. By definition, an idiopathic incident is solely caused by the employee's pre-existing physical or mental weakness whether resulting from a prior compensable or noncompensable accident, injury or disease or from a congenital condition or illness. The focal point of such a case, therefore, is whether the admittedly personal origin of the accident is overcome by some *employment contribution to the end result, i.e., the incapacity*, which then makes the injury compensable. To contend that the *accident or injury* resulted solely from a pre-existing condition seems to place the cart before the horse.

315. 553 S.W.2d at 102.

316. 146 Tex. 413, 209 S.W.2d 333 (1948).

317. 235 S.W.2d 215 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

318. 300 S.W.2d 358 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.).

319. The facts recited in the supreme court's opinion are vague and extremely confusing. The court of civil appeals' description of the employee's position vis-a-vis the concrete post is much clearer. Garcia v. Texas Indem. Ins. Co., 205 S.W.2d 803 (Tex. Civ. App.—Galveston 1947), *aff'd*, 146 Tex. 413, 209 S.W.2d 333 (1948).

320. 146 Tex. at 419, 209 S.W.2d at 336 (quoting Industrial Comm'n v. Nelson, 127 Ohio 41, 186 N.E. 735, 736 (1933)).

321. 235 S.W.2d at 217.

322. Falls from heights and falls on level floors should be distinguished because of the probable contribution to injury attributable to the work related height.

In *Barrett* a workman struck his head after blacking out while walking on his employer's shell and gravel road. The employee fractured his skull and died from a subarachnoid hemorrhage. The appellate court affirmed a death benefits award because the "hard-surfaced road was an instrumentality essential to the work of the employer and falling against it was a hazard"[323] to which the employee was exposed because of his work.

The supreme court in *Page* expressly held the three cases to be indistinguishable and to have properly applied the Texas law of idiopathic falls. Since there was a fact question existing whether the "parking lot surface contributed to Page's injury and if so, whether the surface represented . . . a hazard within the scope of Page's employment as to allow recovery for the fall and resultant injury,"[324] the court affirmed the court of civil appeals judgment and remanded the case for a new trial.

The *Page* court did not attempt to identify any particular doctrinal theory to explain its holding. The language used by the court, however, is suggestive of what Professor Larson describes as the "contact-with-the-premises" exception in act-of-God cases.[325] This contact-with-the-premises doctrine is that a claimant cannot recover for injuries directly resulting from lightning, tornados, et cetera, unless the force of the event first causes a wall, for example, to fall, and the wall falls on the employee.[326] This doctrine has been extended to other areas, such as idiopathic falls, where causation has been divided into two parts: (1) the initial cause, that is the fall due to an idiopathic reason such as epilepsy or heart attack; and (2) the final event producing the injury, that is the impact with some part of the employer's premises. The last event, the fall of the body upon the premises, is sufficient employment contact to render the entire event compensable.[327]

On the other hand, the court's approval of the *Wickersham* and *Barrett* opinions and the court's own holding, indicates that it may have opted for some type of pseudo-positional risk doctrine. This pseudo-positional risk doctrine says that but for the fact that the employee suffered the idiopathic event on the job, he would not have suffered the precise injury received, therefore, the employment contributed something to the resulting injury, and the injury is compensable. Regardless of the court's basis, the fact remains that Page's fall occurred because of a condition intensely and admittedly personal to him which he brought to his employer's premises without the employer's knowledge, permission or acquiescence. What, therefore, did the employment contribute to the fall and the resulting injuries? It is not a satisfactory answer to suggest that the injury would not have occurred when it did had the employee not been at work. This suggestion simply restates the known fact that the injury did occur at work. Additionally, this answer does not identify the contribution that the employment made to the fall or the injuries. Followed to its logical conclusion, this rationale allows any event to become compensable if it occurs at work.

323. 300 S.W.2d at 363.
324. 553 S.W.2d at 101.
325. 1. A. LARSON, *supra* note 244, § 8.30.
326. *Id.*
327. *Id.* Consider the *Page* court's approval of *Garcia's* causal connection language as well

An even more unsatisfactory answer is *Wickersham's* rationale, adopted by the *Page* court, that refused to distinguish between a fall from a height and a fall on level ground. Professor Larson has observed:

> [O]nce it is decided to compensate idiopathic, level-floor falls, how is the basic principle which connects such an injury with the employment to be phrased? This entire line of cases is based on one simple theory: although the cause of the fall was originally a personal one, employment conditions contributed some hazard that lead to the final injury. This theory can be stretched to the breaking point, as it indeed has . . . but having reached that point by virtue of this theory, one then cannot throw away the entire test because it is painful to have to draw the final line, and because the stretching of the test has made it difficult to defend the ultimate distinctions that must be made.
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> . . . [I]f a general statement of the rule applied should ever be attempted, it would have to be this: when an employee falls, solely because of an internal disease or weakness, the effects of the fall arise out of the employment even if the conditions of employment reduce the hazards of such a fall below what they would otherwise be. This, of course, few courts would be willing to say; but several have already in effect said that the effects of such a fall arise out of the employment even if the conditions of employment add nothing to the hazards that would otherwise be encountered.[328]

The majority of courts[329] have rejected the illogical result of the Texas idiopathic fall cases. These courts require that the employment really contribute to the hazard causing the fall.[330] The fact question of how great the added hazard must be remains open and leaves room for legitimate differences of judgment. The requirement of an added hazard is simply a recognition of Professor Larson's categories of risk causing injuries as risks associated with the employment, risks personal to the employee, and neutral risks.[331] The personal risk is noncompensable unless the employment adds enough to the risk to compel the employer to bear the cost of injury through compensation. Granted this doctrine is difficult to apply to real world facts, but it at least allows a court to draw a legal line based on common sense. It is submitted that Professor Larson and the vast majority of courts have contributed a great deal more logic and reason than have the Texas courts. Texas will eventually be required to draw a legal line, and it will be interesting to observe where the line is drawn as well as the justification proffered for its location.

Borrowed Servant. The supreme court's second foray into the compensa-

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as its own statement: "the trial court's order . . . [does not dispense] with the issue of whether the parking lot surface contributed [caused?] to Page's injury . . . ." 553 S.W.2d at 101.

328. 1 A. LARSON, *supra* note 244 § 12.14, at 3-270-271.

329. *Id.* §§ 12.10, 12.11.

330. The contribution required to convert the idiopathic fall, initiated by a personal noncompensable heart attack, epileptic fit, fainting spell, weakened joint, *et cetera*, into a compensable event is a contribution which places the employee in a position that increases the dangerous effects of a fall. Examples include falls from heights, falls near machinery or objects with sharp unyielding corners and falls from moving vehicles. While this contribution of employment concept does not always result in a satisfactory conclusion, it is certainly better suited to rational, logical results than is the Texas approach. *See id.* §§ 12.11-.14.

331. *Id.* § 7.

tion field during the last survey year produced an opinion devoid of legal principle and a result only slightly less satisfactory than *Page*. In *Dodd v. Twin City Fire Insurance Co.*[332] the court was confronted with a simple borrowed servant problem but solved the problem by ignoring established legal principles and past precedents. Dodd was employed as a general laborer by Lone Star Phosphate Company which was insured, for compensation purposes, by Twin City Fire Insurance Company. The other corporation involved, Texas Farm Products Company, did not have workmen's compensation insurance. The two corporations were located adjacent to each other, occupied the same business office, and had the same owners, officers, personnel manager, and except for two individuals, the same board of directors. Lone Star manufactured phosphate which was "moved next door"[333] to be used in the manufacture of its primary product, fertilizer. One individual, McShan, supervised laborers at both plants. Employees, foremen and supervisors, were frequently interchanged by the companies, but Texas Farm reimbursed Lone Star for the employees' time. Dodd always received his paycheck from Lone Star, and he was carried on Lone Star's books as an employee for income and social security tax purposes. Dodd testified, however, that his immediate superior was McShan, and he was subject to McShan's control and did whatever McShan told him to do. Prior to the injury, Dodd had worked on the Texas Farm premises on several occasions.

On the day of Dodd's injury, he worked at Lone Star performing his regular duties. McShan requested Dodd to terminate his work and go next door to Texas Farm to move potash. While Dodd was moving the loosened potash with a payloader he was partially buried. At trial the jury found that Dodd was a Lone Star employee, and the trial court entered judgment against Twin City. The court of civil appeals reversed and rendered judgment for the carrier holding there was no evidence to support the jury's employee finding.

The only borrowed servant principle referred to by the supreme court was that in the absence of a written contract the test is which of the two employers had the right to control the manner and details of the employee's work. The only borrowed servant cases cited by the court were in support of this well established proposition.[334] In reviewing the evidence the supreme court made several undeserved critical observations with respect to numerous *uncontradicted* details of the carrier's proof. For example, McShan, the foreman, testified, without contradiction, that on the day of the accident, both he and Dodd were working for Texas Farm. The court, however, noted, "as will be indicated below, in view of McShan's testimony and the interlocking workings of the two companies, we are of the view that reasonable minds could differ as to whether McShan had been working on the day of the accident for Lone Star or Texas Farm."[335] The court never

332. 545 S.W.2d 766 (Tex. 1977).
333. *Id.* at 768.
334. *Id.* at 768-69. The cases were Robinson Sons, Inc. v. Wigart, 431 S.W.2d 327 (Tex. 1968), and Insurors Indem. & Ins. Co. v. Pridgen, 148 Tex. 219, 223 S.W.2d 217 (1949).
335. 545 S.W.2d at 769.

indicated why reasonable minds could differ with respect to the uncontroverted evidence. The court did note that McShan had also testified that he [McShan] was working as the foreman for Lone Star on the day of the injury and had entered Dodd on the time records as working for Lone Star. The supreme court, however, dismissed uncontroverted testimony of the personnel director that Texas Farm reimbursed Lone Star for the time Lone Star employees spent doing Texas Farm work. The court simply said, as if the testimony would disappear, "[n]o records were produced to substantiate this testimony, and there was no corroborating proof that Texas Farm actually reimbursed Lone Star on this occasion."[336]

Countering the carrier's uncontroverted testimony was the claimant's admittedly contradictory testimony wherein he stated "they [Texas Farm] borrowed me up there."[337] The court noted that this testimony was corrected on redirect examination when Dodd made it clear that he did not mean to imply that he was a borrowed servant in the legal sense. Based on this review of the evidence, the court concluded there was some evidence to support the jury's finding that Dodd was Lone Star's employee at the time of the accident.

The court's opinion and reasoning was, to say the least, unsatisfactory. Although the court recited the well established principle that the determinative factor in borrowed servant cases is the right to control and direct the details of the employee's work at the time of the incident in question,[338] it simply dismissed conclusive evidence of the actual exercise of control by Texas Farm in order to reach the desired result. The real reason for the result can be gleaned from a portion of the opinion immediately preceding the court's conclusion that there was some evidence to support the jury verdict:

> It is possible, and legally permissible by the use of corporate veil, for a group of people to operate separate companion corporations and to protect the workers of only one of its 'departments' with workmen's compensation. No imputation of improper conduct is intended to be cast here. It is disturbing that it elects not to carry compensation coverage on the part of the operation which engages in the use of dynamite and other dangerous activities, and then 'borrows' workmen from its protected department to go do its dangerous work without insurance coverage. It is understandable that the courts would look carefully at such 'borrowed servant' operations.[339]

A review of the court of civil appeals opinion[340] makes one wonder whether the two courts passed upon the same case. Overall, the court of civil appeals opinion is much more astute and considerably more persuasive.

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336. *Id.*
337. *Id.*
338. *See, e.g.*, Robinson Sons, Inc. v. Wigart, 431 S.W.2d 327 (Tex. 1968); Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963); Hilgenberg v. Elam, 145 Tex. 437, 198 S.W.2d 94 (1946); 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).
339. 545 S.W.2d at 769-70.
340. Twin City Fire Ins. Co. v. Dodd, 535 S.W.2d 416 (Tex. Civ. App.—Tyler 1976), *rev'd*, 545 S.W.2d 766 (Tex. 1977).

Perhaps the impact of the supreme court's opinion will be diluted by the fact that it reached the court as a no evidence case.

Death Benefits—Beneficiaries. The statute[341] provides an exact list of the persons entitled to recover death benefits in the event of the employee's death from an accidental injury. One class of beneficiaries, who may claim benefits should preceding classes be absent,[342] is dependent adult children. Cases involving this beneficiary class rarely reach the appellate courts. When they do, the issues generally involve the meaning of the term "dependent" and the proof necessary to demonstrate dependency.[343] In *Industrial Accident Board v. Lance*[344] two married adult daughters of a deceased workman were vying with the Second Injury Fund[345] for death benefits. The evidence revealed "small but regular cash contributions from the deceased to his married daughters, . . . over a period of several years and up to the time of his death."[346] In addition the deceased father had occasionally provided various gifts and larger cash contributions for rent, tires and on one occasion, a baby bed.

The Fund's primary complaint on appeal was that the evidence was legally and factually insufficient to support the trial court's findings that the adults had depended upon the contributions from their father to *increase* their standard of living.[347] A secondary complaint was that the admission of evidence of the decedent's support, gifts and contributions to the daughters prior to the year of his death was impermissable. The court of civil appeals overruled both complaints and held that the evidence was sufficient to support the trial court's finding of dependency and that when support is continuous and uninterrupted, evidence of prior support is admissible.[348]

The court did not provide a sufficient summary of the evidence to allow a critical analysis of the opinion. Based upon the meager evidence recited, it appears that the court correctly decided the case, though it failed to articulate the elements of dependency. The Texas courts have uniformly subscribed to the test that the would-be dependent must have *relied*, in whole or in part, upon contributions or assistance of the deceased employee.[349] The focus of the examination to ascertain dependency, therefore, is aimed at the

341. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 8, 8(a) (Vernon Supp. 1978).
342. *Id.* § 8a.
343. *See, e.g.*, Stanaland v. Traders & Gen. Ins. Co., 145 Tex. 105, 195 S.W.2d 118 (1946); Federal Underwriters Exch. v. Hall, 143 Tex. 36, 182 S.W.2d 703 (1944); Lumbermen's Reciprocal Ass'n v. Warner, 245 S.W. 664 (Tex. Comm'n App. 1922, opinion adopted); Aetna Cas. & Sur. Co. v. Cassavaugh, 486 S.W.2d 815 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); Postal Mut. Indem. Co. v. Penn, 165 S.W.2d 495 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.).
344. 556 S.W.2d 101 (Tex. Civ. App.—Amarillo 1977, no writ).
345. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 12c—2 (Vernon Supp. 1978). Dependent adult children are, of course, limited to 360 weeks in death benefits as opposed to lifetime benefits for a widow or widower. *Id.* § 8(b). If there are no beneficiaries, the carrier must pay 360 weeks to the Second Injury Fund. *Id.* § 12c—2.
346. 556 S.W.2d at 103.
347. The fund's contention that the dependent must produce evidence of reliance and dependency to *increase* their standard of living is incorrect. *See* Federal Underwriters Exch. v. Hall, 143 Tex. 36, 182 S.W.2d 703 (1944).
348. The court cited and relied upon Georgia Cas. Co. v. Campbell, 266 S.W. 854 (Tex. Civ. App.—Amarillo 1924, writ dism'd).
349. Stanaland v. Traders & Gen. Ins. Co., 145 Tex. 105, 195 S.W.2d 118 (1946); Federal Underwriters Exch. v. Hall, 143 Tex. 36, 182 S.W.2d 703 (1944); Lumbermen's Reciprocal

alleged dependent and not the deceased employee.[350] Additionally, the alleged dependent must establish that the contributions relied upon were necessary for support.[351] Thus, without evidence of the alleged dependent's *reliance* or the character of the contributions, it would be mere speculation to assume dependency. In *Federal Underwriters Exchange v. Hall*[352] the supreme court ruled, as a matter of law, that a regularly employed sister of a deceased employee, though receiving twenty percent of her brother's salary each week "was not relying upon her minor brother at the time of his death to furnish any part of the support requisite to enable her to live consistent with her position in life."[353]

Third Party Actions—Statute of Limitations. The statutory scheme of subrogation and recovery from third parties was completely rewritten in 1973 when the legislature amended section 6a of article 8307.[354] The amended statute provides that a compensation claimant can simultaneously pursue his compensation claim and any potential third party action without waiving his right to compensation. Prior to 1973 an employee was required to conclude his compensation claim before filing a third party suit or waive compensation benefits. The statute of limitations on a third party claim, however, did not begin to run until the compensation claim was concluded.[355] The question naturally arose whether, under the amended statute allowing simultaneous filing of the compensation of third party suits, the two year statute of limitation on the third party action began to run on the date of the injury. The supreme court intimated as much in *Campbell v. Sonford Chemical Co.*,[356] an opinion construing the pre-1973 subrogation statute. The court strongly urged the legislature to amend the statute to allow simultaneous suits in order to avoid the injustice inherent in delaying the third party action.[357]

The first court confronted with the statute of limitation question raised by amended section 6a held that the two year statute of limitation did begin to run on the date of the employee's injury. In *Burkhart v. Concho Industrial Supply, Inc.*[358] the employee was injured on September 14, 1973. The compensation suit was settled on March 8, 1974, and the third party action commenced on December 12, 1975. The Austin court, relying in part on *Campbell*, concluded that the two year statute of limitations began to run at the time of the claimant's injury. The employee argued that the *Campbell* pronouncement was merely dicta and not binding upon the court; the Austin

Ass'n v. Warner, 245 S.W. 664 (Tex. Comm'n App. 1922, jdgmt adopted); Postal Mut. Indem. Co. v. Penn, 165 S.W.2d 495 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.).

350. *Id.*

351. Federal Underwriters Exch. v. Hall, 143 Tex. 36, 43, 182 S.W.2d 703, 706 (1944).

352. *Id.*

353. *Id.* at 707.

354. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1978).

355. *See* Campbell v. Sonford Chem. Co., 486 S.W.2d 932 (Tex. 1972); Fort Worth Lloyds v. Haygood, 151 Tex. 149, 246 S.W.2d 865 (1952); Texas Employers Ins. Ass'n v. Brandon, 126 Tex. 636, 89 S.W.2d 982 (1936); Yeary v. Hinojosa, 307 S.W.2d 325 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.).

356. 486 S.W.2d 932 (Tex. 1972).

357. *Id.* at 934.

358. 549 S.W.2d 469 (Tex. Civ. App.—Austin 1977, no writ).

court, however, replied: "[I]n our judgment, it is dicta that we would be prudent to heed."[359]

Two other cases arose during the survey year involving the statute of limitations and its application to third party suits. In both *Potter v. Crump*[360] and *Robinson v. Buckner Park, Inc.*,[361] the injuries occurred prior to September 1, 1973, the effective date of section 6a.[362] The question in both cases was whether amended 6a applied retroactively causing the two year statute to begin to run on the accident date and thus terminating the third party causes of action. Both courts, relied in part on the general legislative savings clause in section 3b, article 8309,[363] and held that amended section 6a applied prospectively.[364]

Accidental Injury Versus Occupational Disease. In 1971 the legislature expanded the concept of occupational disease by transforming the previous specific and exclusive list of compensable diseases[365] into a broad definition. This new occupational disease definition included any disease arising out of

359. *Id.* at 470.
360. 555 S.W.2d 206 (Tex. Civ. App.—Fort Worth 1977, no writ).
361. 547 S.W.2d 60 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).
362. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1978).
363. *Id.* art. 8309, § 3b:

> No inchoate, vested, matured, existing or other rights, remedies, powers, duties or authority, either of any employee or legal beneficiary, or of the board, or of the association, or of any other person shall be in anyway affected by any of the amendments herein made to the original law hereby amended, but all such rights, remedies, powers, duties and authority shall remain and be in force as under the original law just as if the amendments hereby adopted had never been made, and to that end it is hereby declared that said original law is not repealed, but the same is, and shall remain in full force and effect as to all such rights, remedies, powers, duties and authority; and further this law in so far as it adopts the law of which it is an amendment is a continuation thereof, and only in other respects a new enactment.

364. Potter v. Crump, 555 S.W.2d 206 (Tex. Civ. App.— Fort Worth 1977, no writ), also involved what would appear to be a unique argument. The employee, in a third party action, sued several doctors and a hospital for allegedly negligent medical care resulting from surgery to repair a right inguinal hernia sustained in an on-the-job accident. In addition to asserting the two year statute of limitation defense, the physicians argued that a medical malpractice action was not a third party action within the meaning of § 6a. The court went to great length to dispose of the contention. The issue had not previously been raised directly although it had been decided by inference. *See* McKelvy v. Barber, 381 S.W.2d 59 (Tex. 1964); Hoffman v. Houston Clinic, 41 S.W.2d 134 (Tex. Civ. App.—Galveston 1931, writ dism'd); Pedigo & Pedigo v. Croom, 37 S.W.2d 1074 (Tex. Civ. App.—Eastland 1931, writ ref'd). It is well settled that an employee is entitled to recover for any disability resulting from consequences and sequelae of the medical treatment initiated to cure or relieve the effects of the injury on the theory that the disability is considered to be proximately caused by the original injury and is, therefore, compensable. *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.); 1 A. LARSON, *supra* note 244, §§ 13.00-.11. Thus, it would seem to follow that the liberal terms of § 6a unquestionably encompassed a medical malpractice claim as a third party suit and allows the carrier to pursue its subrogation claim.

The subrogation issue was decided favorably to the carrier in a 1974 opinion by the Eastland court of civil appeals. That court found, without difficulty, that the carrier had a right of subrogation to the employee's recovery in a malpractice case arising out of treatment for an on-the-job injury. The more difficult and interesting portion of the opinion concerned the amount of the subrogation claim that the carrier was entitled to recover. Unfortunately, the court withdrew this excellent opinion from publication after the writ of error was dismissed by agreement. Weishman v. Herron, formerly in advance sheets, Texas edition, at 512 S.W.2d 789 (Tex. Civ. App.—Eastland 1974, writ dism'd by agr.) (opinion withdrawn from publication at request of court).

365. 1947 Tex. Gen. Laws ch. 113, § 2, at 176.

the employment situation and diseases induced by repetitious physical traumatic activity.[366] Unaccountably, the expanded occupational disease concept has generated very little litigation. From 1971 to this survey year, only three cases directly construed the disease portion of the statute,[367] and only five other cases inferentially involved even an interpretation of the definition.[368]

The 1971 occupational disease amendment raised the question whether the long recognized distinction between accidental injuries and occupational diseases had been abolished by the legislature. On the surface, one might be tempted to conclude that there is no distinction. In fact in 1974 one court gratuitously commented, "it is no longer necessary to allege and prove either an event traceable to a definite time, place and cause or a listed compensable occupational disease."[369] The last comment was correct, but the former was never a requirement of an occupational disease. Nevertheless, the comment was subject to a construction that no distinction is to be made under the amended statute between accidental injury and occupational disease. The court's comment remained unchallenged until 1976 when the Waco court of civil appeals held that occupational diseases were an exception to the specificity and tracing requirements of accidental injury.[370] The holding directly contradicted the dictum appearing in the prior opinion, but it is doubtful that the Waco court was aware of the significance of its holding. This year, however, in *Aetna Casualty & Surety Co. v. Shreve*,[371] a court of civil appeals directly confronted the issue and held that the previous distinction between accidental injuries and occupational diseases is indeed viable.

Shreve involved conflicting jury findings that the claimant sustained not only an accidental injury but an occupational disease as well. The claimant alleged that he was saturated with a diluted acid compound on October 11, 1974. Several days later he began experiencing breathing problems and chest pain. Controverted medical testimony supported the employee's claim that

366. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978).

367. Standard Fire Ins. Co. v. Ratcliff, 537 S.W.2d 355 (Tex. Civ. App.—Waco 1976, no writ); Mueller v. Charter Oak Fire Ins. Co., 533 S.W.2d 123 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). Both of these cases are reviewed by Sartwelle, *supra* note 7, at 272-76. The third case is Employers Commercial Union Ins. Co. v. Schmidt, 509 S.W.2d 398 (Tex. Civ. App.—Eastland), *writ ref'd n.r.e. per curiam*, 516 S.W.2d 117 (Tex. 1974), *reviewed by* Sartwelle, *supra* note 5, at 193-94.

368. English v. American & Foreign Ins. Co., 529 S.W.2d 810 (Tex. Civ. App.—Texarkana 1975, no writ); Aetna Cas. & Sur. Co. v. Luker, 511 S.W.2d 587 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.); 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.); Texas Employers' Ins. Ass'n v. Murphy, 506 S.W.2d 312 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); Travelers Ins. Co. v. Rowan, 499 S.W.2d 338 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.). Two other opinions have cited amended § 20 but held it was not applicable because the case under consideration arose prior to the effective date of the statute. 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.).

369. Charter Oak Fire Ins. Co. v. Hollis, 511 S.W.2d 583, 584 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.). The comment was clearly dictum since the carrier's contention on appeal was only that the evidence was legally and factually insufficient to support the jury's finding of injury occurring on the particular day in question. *Id.* at 584-85.

370. Standard Fire Ins. Co. v. Ratcliff, 537 S.W.2d 355, 360 (Tex. Civ. App.—Waco 1976, no writ).

371. 551 S.W.2d 79 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

the inhalation of the acid fumes during the October 11 incident caused chronic obstructive lung disease. In defense of this accidental injury claim, the carrier asserted that the employee did not suffer disability from any accidental injury, but rather that his chronic obstructive lung disease resulted from forty years of cigarette smoking. The carrier produced extensive expert medical testimony supporting its position. Alternatively, the carrier ingeniously asserted that if the claimant's lung condition was not due solely to cigarette smoking, then it was caused by the prolonged breathing of various toxic fumes while working in his employment. In other words the carrier alleged the employee suffered from a *compensable occupational disease*![372] At first blush, this defense may seem absurd; that is pleading an affirmative theory that will result in the claimant recovering a judgment if the defense is successful. It must be remembered, however, that one of the distinguishing factors between the two theories of recovery is that section 22,[373] which was not repealed in 1971, provides that the occupational disease must be the sole cause of the disability in order to make a full recovery. If the occupational disease is aggravated by any noncompensable condition or if a noncompensable condition is aggravated by the occupational disease, recovery can be reduced. In *Shreve* the carrier elicited testimony from the claimant's doctor as well as its own medical expert regarding the harmful effects of forty years of cigarette smoking and proceeded to convince the jury to answer special issues to the effect that only seventy-five per cent of the claimant's permanent partial disability was due to an occupational disease. Thus, had the trial court correctly submitted the accidental injury definition and had the jury answered only the occupational disease issue, the judgment against the carrier for permanent partial disability would have been seventy-five per cent of $70.00 per week for 300 weeks rather than full benefits. It was not to be, however, because the jury affirmatively answered both the accidental injury issues and the occupational disease issues.

Special issue 1 inquired whether the employee had sustained an accidental injury on October 11, 1974.[374] The definition of injury submitted with the issue, however, simply defined injury as damage or harm to the physical structure of the body, including the concept of aggravation.[375] Special issue 2 inquired whether the employee incurred an occupational disease during his employment, defining occupational disease in terms of the statutory defini-

372. This resourceful defense is reminiscent of the old "occupational disease" defense used before occupational disease became compensable. 1947 Tex. Gen. Laws ch. 113, §§ 2-9, at 176-180. Prior to 1947 only accidental injuries were compensable, *i.e.*, events traceable to a definite time, place and cause. Thus, any other injury, sickness or disease acquired other than by accidental injury was a complete defense. *See* Barron v. Texas Employers' Ins. Ass'n, 36 S.W.2d 464 (Tex. Comm'n App. 1931, jdgmt adopted).

373. TEX. REV. CIV. STAT. ANN. art. 8306, § 22 (Vernon 1967). The obvious distinction between accidental injury and occupational disease because of § 22 was clearly pointed out by Mr. Justice Garwood in Texas Employers' Ins. Ass'n v. Etheredge, 154 Tex. 1, 12-13, 272 S.W.2d 869, 876 (1954). *See* note 395 *infra*.

374. Brief for Appellant at 5, Aetna Cas. & Sur. Co. v. Shreve, 551 S.W.2d 79, 83 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

375. Brief for Appellant, *supra* note 374, at 20. The definition submitted was verbatim the definition of injury contained in 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 20.01 (1970).

tion.[376] Neither issue was dependent upon the answer to the other.[377] Special issue 20 inquired as to the percentage of the employee's incapacity attributable to his employment.[378] The jury answered virtually every issue finding that the employee sustained an accidental injury, incurred an occupational disease in his employment, sustained a permanent partial disability and that only seventy-five percent of his permanent partial disability was related to the occupational disease. The trial court, nevertheless, without any party filing a motion to disregard or motion for judgment n.o.v.[379] entered judgment for full permanent partial benefits at the maximum compensation rate.

On appeal the carrier contended that because of the obvious distinction between accidental injury and occupational disease the jury's affirmative finding with respect to both theories constituted an irreconcilable conflict. The conflict resulted, the carrier argued, because a different judgment would have to be entered if the accidental injury finding was used rather than the occupational disease finding.[380] The court of civil appeals specifically recognized the inherent difference between accidental injury and occupational disease under the amended statute:

> There is a distinction between an accidental injury and an occupational disease. An industrial accident can always be traced to a definite time, place and cause, whereas an industrial disease is a slow and gradual development, and the time, place and cause thereof are not susceptible of definite ascertainment.[381]

Despite the recognition of this clear, logical distinction, the court of civil appeals held that there was no conflict in the verdict. Thus, in the court's view the employee was entitled to recover for the longest period of incapacity that could be supported by the jury's findings, that is the period which produced the largest money judgment.

The court began its analysis of the conflict by observing that the jury could have believed the claimant suffered from an occupational disease which was aggravated or accelerated by the occurrence of the accidental injury. Therefore, the fact that Shreve experienced a nondisabling occupational disease prior to the accidental injury would not prevent his recovery for the injury which may have aggravated the previously existing disease. Clearly, this is a correct legal proposition. The case cited by the court in support of this proposition, *Texas Employer's Insurance Association v. Bradford,*[382] however, does not support the court's conclusion. *Bradford* specifically stated that the case was tried and submitted to the jury on the theory of accidental injury and not occupational disease.[383] The case involved section 27,[384] repealed in 1971, which concerned a disease or allergy

376. Brief for Appellant, *supra* note 374, at 5-6. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978).
377. Brief for Appellant, *supra* note 374, at 6.
378. *Id.*
379. *Id.* at 17-18.
380. This is the famous conflict test set forth in Little Rock Furniture Mfg. Co. v. Dunn, 148 Tex. 197, 205-06, 222 S.W.2d 985, 991 (1949).
381. 551 S.W.2d at 81-82.
382. 381 S.W.2d 234 (Tex. Civ. App.—Beaumont 1964, writ ref'd n.r.e.).
383. *Id.* at 235.
384. 1947 Tex. Gen. Laws ch. 113, § 9, at 179.

which could be arrested by a change in employment or medical treatment and provided for compensation only during the acute stage of the disease or allergy. The *Shreve* court may have found more support for their statement in the well-settled proposition that a disease may become an accidental injury if it is traceable to a specific event as in *Guthrie v. Texas Employers' Insurance Ass'n*.[385] The fact remains that the *Shreve* jury found both accidental injury and occupational disease existing at the same time and causing the same incapacity, though to a different degree, that is accidental injury 100% and occupational disease seventy-five percent.

The court's ultimate holding on the conflict issue was that when the jury findings support a judgment for both a general injury and occupational disease, the employee is entitled to receive compensation for the longest period of incapacity. This statement is unique to Texas compensation law, particularly in view of the jury findings in the case.

In order to justify this peculiar holding the court quoted a phrase from an *unidentified* section of article 8306. Perhaps the failure to identify the particular section was an oversight, however, it is obvious that the phrase is from section 12[386] which *exclusively* applies to specific injuries, not general injuries or occupational disease. This phrase is the portion of section 12 dealing with concurrent specific injuries and providing that for concurrent injuries resulting in concurrent incapacities, the employee shall receive compensation only for the injury producing the longest period of incapacity. The last portion of the phrase, which the court failed to quote indicates the true purpose of the statute; that is that section 12 does not affect liability for concurrent loss of specific members which are cumulative as to time but not concurrent.[387]

The portion of section 12 quoted by the court of civil appeals has been construed by the Texas Supreme Court as applying only to cases involving "temporary loss or loss of use of specific members resulting from injuries received in one accident . . . ."[388] The unquoted portion of section 12, according to the supreme court, applies only to total loss, permanent partial loss, or permanent total loss of use of specific members.[389] Obviously, section 12 is irrelevant to any statement or holding in the *Shreve* opinion. In fact the court's incomplete quotation and failure to identify the section quoted, appears to be an attempt to bolster an anemic, unsupported holding and amounts to nothing more than intellectual deception.

The court of civil appeals also cited that portion of the injury definition which states that the term injury means damage and harm to the physical structure of the body, et cetera, and includes occupational disease as later

385. 146 Tex. 89, 203 S.W.2d 775 (1947); *accord*, Consolidated Underwriters v. Wright, 408 S.W.2d 140 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Robison, 241 S.W.2d 339 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Wade, 197 S.W.2d 203 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.).

386. TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (Vernon 1967).

387. *Id.*

388. United States Fidelity & Guar. Co. v. London, 379 S.W.2d 299, 302 (Tex. 1964).

389. *Id. Cf.* Goldman v. Torres, 161 Tex. 437, 341 S.W.2d 154 (1960) (involving concurrent injuries to the same specific member); Herrin v. Standard Fire Ins. Co., 466 S.W.2d 798 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) (involving finger and hand injury on the same extremity).

defined.[390] It is impossible to determine how the injury definition supports the court's holding on the conflict issue or even leads to an analogous conclusion. The court merely quotes the statute without referring to its language or attempting to analyze how it might affect the outcome of the decision. In other words the definition of injury was immaterial to the issues that were before the court.

In support of its holding, the court of civil appeals cited the supreme court opinions in *McCartney v. Aetna Casualty & Surety Co.*[391] and *Texas General Indemnity Co. v. Scott*.[392] Neither case offers even vague support for the court's holding. Both opinions involved recovery for incapacity resulting from the *combined effects of a specific injury and a general injury received in the same accident*. Even a cursory review of either opinion reveals the cases are not even remotely similar to the *Shreve* case. In holding that the jury findings were not in conflict, the court of civil appeals not only miscited its alleged authority, but it also ignored its own holding distinguishing the two concepts, as well as several other cases declaring analogous findings to be in conflict.

Occupational disease has long been recognized to be a disease which is acquired in the usual and ordinary course of employment, normally over a period of time.[393] This in itself distinguishes an occupational disease from an accidental injury because an accidental injury must be traceable to a definite time, place, and cause.[394] A more important distinction, which was ignored by the *Shreve* court, is that section 22[395] is only applicable to occupational disease cases. Thus by definition it would appear that accidental injury and occupational disease are mutually exclusive. In *Shreve* section 22 was applied and the jury found that only seventy-five percent of the permanent partial incapacity was related to Shreve's employment. It is obvious that the *Shreve* jury's answers to the special issues are irreconcilable if one requires the entry of a judgment different from the judgment actually entered.[396] Thus, if the accidental injury finding is excluded and judgment entered on the occupational disease and section 22 findings, the judgment would be for

390. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978).
391. 362 S.W.2d 838 (Tex. 1962).
392. 152 Tex. 1, 253 S.W.2d 651 (1952).
393. *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. 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.).
394. *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).
395. TEX. REV. CIV. STAT. ANN. art. 8306, § 22 (Vernon 1967). In Texas Employers' Ins. Ass'n v. Etheredge, 154 Tex. 1, 12, 272 S.W.2d 869, 876 (1954), the significant distinction between the two theories as involves § 22 was pointed out:

> This section [section 22] appears to make a deliberate and radical difference between the law applicable to occupational disease and that concerning industrial accident, where the erstwhile compensable event or disability may be affected by a noncompensable factor. There is no comparable provision in the law concerning industrial accident.

396. *See* Little Rock Furniture Mfg. Co. v. Dunn, 148 Tex. 197, 222 S.W.2d 985 (1949).

only seventy-five per cent permanent partial benefits. The actual judgment entered by the trial court, however, was for full permanent partial benefits.

In *Traders & General Insurance Co. v. Murphree*[397] the jury found that the employee would have lost the sight of one eye due to a compensable injury even had he not suffered a noncompensable subsequent injury to the same eye. In answer to other issues, however, the jury found that the employee would have lost only eighty-five percent of his vision had he not subsequently injured the eye. The court held these answers to be in conflict since the jury's verdict could have supported either a judgment for a 100% loss or an eighty-five per cent loss. In *Fidelity & Casualty Co. v. McLaughlin*[398] the jury found the employee sustained fifty-nine weeks of temporary total incapacity prior to trial, fifty-two weeks of temporary total incapacity after the trial began and seventy-five per cent permanent partial disability. The trial court entered judgment for the seventy-five per cent permanent partial disability benefits without including any temporary total benefits. The supreme court noted that the findings were in conflict because the finding of total incapacity was 100% disability while the permanent partial incapacity was only seventy-five per cent. Since the claimant in the supreme court agreed to accept a judgment based on seventy-five percent incapacity, the trial court judgment was affirmed. Had the employee not agreed to the judgment, however, the court noted that the case would have been remanded for new trial.

Shreve can be distinguished from both *Murphree* and *McLaughlin* and involved jury findings unique to Texas compensation law. Applying established conflict principles to the findings indicates that the jury's answers were inconsistent with the trial court's final judgment.[399] This conflict would not have arisen had the trial court defined the term accidental injury, used in special issue 1, to include accidental injuries traceable to a definite time, place and cause. As submitted, special issue 1 simply used the term accidental injury as it is usually defined in the routine compensation case.[400] The carrier contended throughout the trial that the employee did in fact inhale fumes on the day in question, but that such inhalation occurred during normal work days. The claimant, of course, recognized that it was tactically more advantageous to proceed on the single accident theory in order to

397. 88 S.W.2d 744 (Tex. Civ. App.—Fort Worth 1935, writ dism'd).

398. 134 Tex. 613, 135 S.W.2d 955 (1940).

399. The trial court's judgment was entered based upon the jury's finding that the employee sustained an accidental injury resulting in permanent partial disability. The trial court disregarded the jury's finding of occupational disease as well as the 75% finding in the § 22 issue. No motion to disregard or motion for judgment *non obstante veredicto* was filed by either party. Brief for Appellant, *supra* note 374, at 17-18. It is, of course, well established that a court may not simply disregard material answers to special issues or pick and choose among conflicting issues those that the court approves nor render judgment n.o.v. on its own motion. TEX. R. CIV. P. 301. *See* Annotation to Rule 301, 3 TEXAS RULES ANNOTATED (Vernon 1977). The court of civil appeals, however, ignored this minor procedural error and never held the occupational disease answers to be immaterial. The court did state, at the beginning of the opinion, that the trial court apparently disregarded the findings as immaterial. In the trial court's judgment, however, there is no such finding set forth. Brief for Appellant, *supra* note 374, at 18.

400. Brief for Appellant, *supra* note 374, at 20. The usual definition of injury, as submitted in *Shreve*, is found in Pattern Jury Charges. *See* 2 STATE BAR OF TEXAS, PATTERN JURY CHARGES § 20.01.

avoid the effect of section 22. While the accidental injury phrase is normally used only in contradistinction to intentional injury, other excluded risk or hazards not arising out of the employment, and occupational disease, normally need not be submitted to the jury,[401] it must be distinguished from occupational disease under facts similar to *Shreve* in order to properly submit the carrier's defense. Otherwise, a jury has no guidance whatsoever in distinguishing between accidental injury and occupational disease.

Occupational Disease—Repetitious Physical Traumatic Activity. The first case to consider the ordinary diseases of life exception in the occupational disease definition[402] was *Teague v. Charter Oak Fire Insurance Co.*[403] Teague claimed compensation for a back injury allegedly resulting from repetitious physical traumatic activities during sixteen years of employment. Teague's work primarily consisted of heavy lifting, digging and operating an air hammer. He claimed he experienced back pains on the job on several occasions but did not become disabled until April, 1975. After consultation with physicians, his condition was diagnosed as a chronic lumbosacral strain superimposed on degenerative disc disease. The jury failed to find that Teague sustained an injury as defined by the trial court and the court entered a take nothing judgment. On appeal Teague's sole complaint was that the trial court's injury definition did not allow the jury to consider, as an injury, the incitement, acceleration or aggravation of an ordinary disease of life. The claimant's physician testified that degenerative disc disease is an ordinary disease of life to which all people are exposed regardless of their particular job. The doctor never testified that Teague's work incited, accelerated or aggravated his degenerative disc disease. The trial court submitted the following injury definition:

401. A similar controversy arose in Texas Employers' Ins. Ass'n v. Murphy, 506 S.W.2d 312 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). The *Murphy* court, the same court writing the *Shreve* opinion, in order to allow the claimant to avoid § 22, came to the conclusion that the claimant had sustained a three day accidental injury.

See Continental Ins. Co. v. Marshall, 506 S.W.2d 913 (Tex. Civ. App.—El Paso 1974, no writ); Aetna Ins. Co. v. Hart, 315 S.W.2d 169 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Mincey, 255 S.W.2d 262 (Tex. Civ. App.—Eastland 1953, writ ref'd n.r.e.); Texas Employers Ins. Ass'n v. Agan, 252 S.W.2d 743 (Tex. Civ. App.—Eastland 1952, writ ref'd).

402. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978):

> Wherever the terms 'Injury' or 'Personal Injury' are used in the Workmen's Compensation Laws of this State, such terms shall be construed to mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom. The terms 'Injury' and 'Personal Injury' shall also be construed to mean and include 'Occupational Diseases,' as hereinafter defined. Whenever the term 'Occupational Disease' is used in the Workmen's Compensation Laws of this State, such terms 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.

403. 548 S.W.2d 957 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

> 'Injury' means 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 such diseases or infection as naturally result therefrom, or the incitement, acceleration, or aggravation of any disease, infirmity or condition, previously or subsequently existing, by reason of such damage or harm.
>
> 'Injury' does not include ordinary condition [sic] of life to which the general public is exposed outside of the employment except where such conditions follow as an incident to an injury as defined herein.[404]

The court of civil appeals overruled the claimant's point of error affirming the trial court's judgment. The court acknowledged that it could find no authority on point, but held that based on an examination of the wording of section 20 the trial court's definition was proper. The court summarized its holding as follows:

> The jury was permitted to find as an injury the incitement, acceleration, or aggravation of a previously existing ordinary condition of life so long as Teague could show that such incitement, acceleration, or aggravation resulted from repetitious physical traumatic activity. The jury was not instructed that an ordinary condition of life, though aggravated by work activity, was not an injury. To the contrary, the jury was instructed that ordinary conditions of life are not injuries, *unless* damage or harm to the physical structure of the body results from the incitement, acceleration, or aggravation of that previously existing condition.[405]

The court of civil appeals' holding that an ordinary disease of life is compensable when there is an incitement, acceleration or aggravation of the disease by repetitious physical traumatic activity was erroneous. The explicit wording of section 20 provides that an ordinary disease of life is compensable *only* if it follows as an incident to an occupational disease or injury. In fact, the Compensation Act does not deal with discovery for the aggravation-acceleration of any pre-existing condition. The aggravation-acceleration doctrine is a judicial creation stemming from a liberal interpretation of the Compensation Act. Moreover, this doctrine is limited in application to accidental injury, not occupational disease.

The only statutory reference to aggravation-acceleration is section 22, which draws a clear distinction between accidental injury and occupational disease.[406] Section 22, rather than allowing recovery for the aggravation of an occupational disease by a noncompensable condition or for the aggravation-acceleration of a noncompensable condition by an occupational disease, in fact *reduces* recovery. Thus, an ordinary disease of life aggravated by repetitious physical traumatic activity is not compensable. Only that portion of the total disability due *solely* to the repetitious physical traumatic activity is compensable.[407]

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404. *Id.* at 957.
405. *Id.* at 959.
406. TEX. REV. CIV. STAT. ANN. art. 8306, § 22 (Vernon 1967). *See* Texas Employers' Ins. Ass'n v. Etheredge, 154 Tex. 1, 12-13, 272 S.W.2d 869, 876 (1954). The *Etheredge* case is quoted in note 395 *supra*.
407. Section 22 provides:

> Where an occupational disease is aggravated by any other non-compensable disease or infirmity, or where incapacity or death from any other non-compensable cause, is aggravated, prolonged, accelerated or in anywise contributed to by an occupational disease, the number of weeks of compensation payable by the

The trial court's error in defining the term injury resulted from its inclusion of the court-made aggravation-acceleration claim which is not a part of the statutory definition of occupational disease. In a case where the claimant's theory of recovery is repetitious physical traumatic activity, such as in *Teague*, the aggravation-acceleration doctrine is a *defense* not a ground of recovery. Such defense is implemented by proof that the claimant's condition is an ordinary disease of life which is not compensable, or that such ordinary disease of life was aggravated by repetitious physical traumatic activity thus raising a section 22 apportionment issue.

Course and Scope of Employment—Deviation. In *Ranger Insurance Co. v. Valerio*[408] the deceased employee was employed by Newcomer Butane & Oil Company whose principle business was home delivery of butane and butane tanks. On the day of the occurrence the deceased employee and two co-workers were directed to pick up ten or so large butane tanks from a local farm. The three employees were of equal status, none of them having been designated as supervisor or foreman. The employer testified that he allowed his employees to take coffee breaks when and where they desired, without supervision.

After arriving at the farm the three workers secured one tank, placing it on one of the employer's trucks. While the employees were lifting the second tank, a rabbit ran from under the tank and into an irrigation pipe forty or fifty yards away. After securing the second tank, the deceased employee and one of his co-workers lifted the irrigation pipe in order to dislodge the rabbit. The pipe contacted an overhead power line and electrocuted the deceased. The employer testified that the workers had not been instructed to move any pipe and shaking the rabbit out of an irrigation pipe was not part of their assigned duties.

The court analyzed the fact situation in view of the two well known requirements of course and scope: (1) the injury must be of a kind and character that has to do with and originates in the employer's business; and (2) at the time of injury, the employee must be engaged in or about the furtherance of his employer's affairs or business.[409] The beneficiary argued that the employee was on the job immediately prior to the incident and was simply engaged in an innocent form of relaxation similar to taking his employer-approved coffee break. Furthermore, the deviation, if any, was so slight both in time and distance as to be no deviation from the employment at all.

The court of civil appeals recognized that slight deviations and common habits of people in general are frequently held not to be material deviations.

> Association shall be reduced and limited to such proportion only of the total number of weeks of compensation that would be payable if the occupational disease were the sole cause of the incapacity or death, as such occupational disease, as a causative factor, bears to all the causes of such incapacity or death, such reduction in compensation to be effected by reducing the number of weekly payments of compensation for which the Association is liable.

TEX. REV. CIV. STAT. ANN. art. 8306, § 22 (Vernon 1967).

408. 553 S.W.2d 682 (Tex. Civ. App.—El Paso 1977, no writ).

409. *See* cases cited at note 313 *supra*.

After analyzing several such Texas cases the court rejected the beneficiary's position and held that the risk involved in raising the irrigation pipe was a personal risk foreign to the employee's employment duties.

Course and Scope of Employment—Travel. Generally injuries suffered by employees while traveling on public streets and highways while going to and returning from work are not compensable.[410] An exception to this general rule is found in article 8309, section 1b.[411] In addition to section 1b, the employee must prove that his injuries originated in and related to the employer's business and were suffered while the employee was engaged in the furtherance of the employer's affairs. In other words, the employee must come within the terms of section 1 of article 8309.[412] Last year the El Paso court of civil appeals decided two factually similar cases involving transportation of oilfield workers to and from rig sites.[413] In both cases the court upheld awards of compensation finding that the employees met all the requirements of section 1 and 1b.

In *Texas Employers' Insurance Association v. Adams*[414] the mother of a deceased oilfield worker sought death benefits as a result of a one vehicle accident on the way to a drilling site in which her son was killed. The dispute involved a $10.00 per day payment to the driller, who was the driver of the vehicle, and the purpose for which he was paid. The carrier, of course, argued the payment was not related to travel expense, while the beneficiary contended the payment was for driving time and expenses for the seventy mile trip to the rig site. The Amarillo court of civil appeals, relying upon the El Paso opinions, upheld the jury verdict in favor of the beneficiary.

Course and Scope of Employment—Assault by Co-employee. The Texas Compensation Act defines the term "injury" by excluding from its coverage four classes of injuries and including all other injuries that originate in the employer's business and occur while the employee is in the furtherance of the employer's affairs.[415] One excluded class of injuries is injuries caused by personal acts of third persons which are not motivated by the employment relationship.[416] The Texas courts have construed this exclusion to be applicable to co-employees as well as third persons unconnected with the employment or the employer.[417] Another excluded class of injuries are those

410. *See, e.g.*, American Gen. Ins. Co. v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957).

411. TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967):

> Unless transportation is furnished as a part of the contract of employment or is paid for by the employer, or unless the means of such transportation are under the control of the employer, or unless the employee is directed in his employment to proceed from one place to another place, such transportation shall not be the basis for a claim that an injury occurring during the course of such transportation is sustained in the course of employment.

412. *Id.* § 1. *See, e.g.*, Agricultural Ins. Co. v. Dryden, 398 S.W.2d 745 (Tex. 1965); Shelton v. Standard Ins. Co., 389 S.W.2d 290 (Tex. 1965); Janak v. Texas Employers' Ins. Ass'n, 381 S.W.2d 176 (Tex. 1964); Texas Gen. Indem. Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963).

413. Texas Employers' Ins. Ass'n v. Byrd, 540 S.W.2d 460 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.); Liberty Mut. Ins. Co. v. Chesnut, 539 S.W.2d 924 (Tex. Civ. App.— El Paso 1976, writ ref'd n.r.e.).

414. 555 S.W.2d 525 (Tex. Civ. App.—Amarillo 1977, writ filed).

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

416. *Id.*

417. *See, e.g.*, United States Cas. Co. v. Hardie, 299 S.W.871 (Tex. Comm'n App. 1927,

caused by the employee's willful intention to unlawfully injure some other person.[418]

In *Chatman v. Texas Employers' Insurance Association*[419] the origin of the fight between the employee and his foreman was disputed. The employee contended that the fight arose out of a dispute over the manner in which the work was being done. The foreman testified, however, that while there was some pushing and shoving as a result of a verbal altercation concerning work, that disagreement had been concluded and later, while the foreman was getting a drink of water, the claimant attacked him with a Coke bottle. A fight ensued and the claimant lost it as well as the jury verdict.

The carrier defended solely on the statutory provision excluding injuries resulting from an employee's attempt to injure a third person. The trial court submitted a special issue defining injury in the usual terms and including the statutory language on which the carrier's had based exclusion. The court of civil appeals upheld this submission and overruled the claimant's legal and factual insufficiency points of error.

In *Moore v. Means*[420] the employee collected compensation benefits for injuries received in an assault by a co-employee and then instituted a common law damage suit against the co-employee for personal injuries. The trial court granted defendant's motion for summary judgment. The employee-plaintiff, an administrative assistant to the county judge of Hardin County, also operated a small newspaper. In a news story the plaintiff made what the co-employee-defendant, a county commissioner, considered insulting remarks relating to kickbacks. Heated words were later exchanged, and the co-employee-defendant assaulted the employee-plaintiff. The employee-plaintiff filed a claim for compensation since Hardin County was a subscriber to the Act. After collecting compensation benefits by way of a final Industrial Accident Board award, he filed the personal injury suit against the co-employee-defendant. On appeal, the employee-plaintiff asserted that his damage suit was not barred by the fact that he had accepted compensation benefits unless the co-employee was acting in the course and scope of his employment at the time of the assault. Since there was, according to the employee-plaintiff, a fact issue as to whether the co-employee-defendant was acting in the course and scope of his employment at the time of the altercation, the summary judgment was improper.

The court of civil appeals, in affirming the trial court's judgment, took the position that the employee-plaintiff, in order to recover compensation benefits, had admitted that his injury occurred as a result of an assault directed at him by a co-employee in the course and scope of his employment or at least

jdgmt adopted); Vivier v. Lumbermen's Indem. Exch., 250 S.W. 417 (Tex. Comm'n App. 1923, jdgmt adopted); Texas Indem. Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App.—Amarillo 1950, writ ref'd); Associated Employers Lloyds v. Groce, 194 S.W.2d 103 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.); Consolidated Underwriters v. Adams, 140 S.W.2d 221 (Tex. Civ. App.—Texarkana 1940, writ dism'd jdgmt cor.); Traders & Gen. Ins. Co. v. Mills, 108 S.W.2d 219 (Tex. Civ. App.—Beaumont 1937, writ dism'd); Richardson v. Texas Employers' Ins. Ass'n, 46 S.W.2d 439 (Tex. Civ. App.—Beaumont 1932, writ ref'd).

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

419. 555 S.W.2d 181 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

420. 549 S.W.2d 417 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

for reasons connected to the employment. Thus, the employee-plaintiff could not, after recovering money benefits as a result of his admission, take an inconsistent position. This was especially true because the Industrial Accident Board's award was judicial in nature, and the employee-plaintiff would be estopped from asserting inconsistent positions in two judicial proceedings. The majority relied primarily upon article 8306, section 3,[421] which provides that if the employer is a subscriber, then the employee has no right of action against the employer or any fellow employees, but must look solely to the Association for compensation. This section has been interpreted to bar employee suits in similar situations, and the majority cited two analogous cases to support its holding.[422]

Specific Injury—Extent and Affect. To convert a specific injury, compensated by a specified, limited, weekly benefit,[423] into a more lucrative general injury compensable as either total or partial incapacity,[424] the employee must follow the precise guidelines set forth in a number of supreme court opinions handed down through the years.[425] With only one notable exception,[426] the supreme court has consistently applied the same concepts to this somewhat complex area of compensation law; a pattern which the San Antonio court of civil appeals followed in *Gallegos v. Truck Insurance Exchange*.[427]

Gallegos sustained almost complete loss of vision in his left eye as the result of battery acid dripping into it. Subsequent to the injury, the employee complained of frequent severe headaches and occasional "watering" of the right eye. Expert medical testimony revealed that Gallegos' injury was a condition of chronic uveitis limited to the left eye. The symptoms of uveitis, however, include pain, headaches, swelling and spasms around the affected eye as well as tearing and blinking of both eyes. Although the jury had found that the eye injury extended to and affected Gallegos' head and had resulted in total permanent incapacity, the court of civil appeals affirmed the trial court's judgment of loss of one eye only.[428] The court recognized that Gallegos' evidence was almost identical to that presented in *Texas Employ-*

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

422. The court cited Heibel v. Bermann, 407 S.W.2d 945 (Tex. Civ. App.—Houston 1966, no writ), and Jones v. Jeffreys, 244 S.W.2d 924 (Tex. Civ. App.—Dallas 1951, writ ref'd). 549 S.W.2d at 419.

423. TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (Vernon Supp. 1978).

424. *Id.* §§ 10, 11.

425. *See* Texas Employers Ins. Ass'n v. Wilson, 522 S.W.2d 192 (Tex. 1975); Texas Employers' Ins. Ass'n v. Shannon, 462 S.W.2d 559 (Tex. 1970); 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); Consolidated Underwriters v. Langley, 141 Tex. 78, 170 S.W.2d 463 (1943).

426. The exception is the supreme court's recent opinion in Western Cas. & Sur. Co. v. Gonzales, 518 S.W.2d 524 (Tex. 1975), *aff'g* 506 S.W.2d 303 (Tex. Civ. App.—Corpus Christi 1974). A thorough study of the evidence recited in both the supreme court opinion and the court of civil appeals opinion indicates that the supreme court's result is undoubtedly correct, but it is based on very poor reasoning. *Gonzales* represents one explainable aberration in a long line of consistent supreme court opinions on the extend to and affect doctrine.

427. 546 S.W.2d 667 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

428. The carrier stipulated that the claimant was entitled to compensation for total, permanent loss of vision in the left eye. *Id.* at 668.

ers' Insurance Association v. Espinosa[429] where the supreme court held that subjective complaints of pain following a specific injury are insufficient to extend the injury to other parts of the body. Thus, the court of civil appeals held that Gallegos failed to sustain his burden of proving an extension of his left eye injury to his head so as to convert the specific injury into a general injury.

Specific Injury—Pleading. The importance of the employee to specifically plead a specific injury is illustrated by *Morales v. Texas Employers Insurance Association*,[430] where due to lack of a specific pleading, the claimant almost lost the compensation due him for permanent partial loss of use of his right leg. In the claimant's petition, he alleged an injury to "his right knee, back and general health . . . resulting in an imbalance of the back from limping on the knee."[431] The trial court submitted general as well as specific injury issues overruling the carrier's objection that there was no pleading to support the specific injury issues. The jury found that the claimant's only injury was to his right knee, but the trial court overruled the employee's motion for judgment for the compensation due for the knee injury and resulting disability. Instead, the trial court entered a take nothing judgment, apparently concluding that the carrier's no pleading objections to the specific injury issues were well taken. Forunately for the claimant, the court of civil appeals, as the general rule requires, construed the pleadings liberally in the pleader's favor. Although noting that the petition was "hardly a model plea,"[432] the court held the pleading sufficient to support the submission of specific injury issues.

Specific Injury Versus General Injury. It is well settled that a claimant is entitled to recover compensation for the total effects of *concurrent* specific and general injuries, subject to the proviso that the recovery be limited to the longest period of incapacity to which the employee would be entitled to recover.[433] It is equally well settled that a carrier may limit a claimant's recovery in concurrent injury situations by pleading and proving that the effects of any concurrent injuries are confined to an injured specific member.[434] The same is true when the claimant seeks to extend a specific injury to a greater member, or the body generally.[435]

In *Heard v. Houston General Insurance Co.*[436] the Waco court of civil appeals either became confused over the application of these rules or ignored them altogether. In any event, the carrier was compelled to pay approximately 201 weeks of compensation it did not owe. The sparse evidentiary record indicated that the claimant injured his left leg and/or knee "which injury necessitated surgery, and a prosthesis applied to his left

429. 367 S.W.2d 667 (Tex. 1963).
430. 554 S.W.2d 51 (Tex. Civ. App.—Austin 1977, no writ).
431. *Id.* at 52.
432. *Id.* at 53.
433. McCartney v. Aetna Cas. & Sur. Co., 362 S.W.2d 838 (Tex. 1962).
434. *Id.*
435. Travelers Ins. Co. v. Marmolejo, 383 S.W.2d 380 (Tex. 1964).
436. 553 S.W.2d 830 (Tex. Civ. App.—Waco 1977, no writ).

knee."[437] The claimant asserted a claim for a specific injury to his left knee, as well as injuries to his body generally. The jury found that the injury was a producing cause of permanent total incapacity. In answer to extension issues, the jury found that the injury to the left leg did not affect any other part of the body and was *confined to the left leg*. The trial court granted the carrier's motion for a take nothing judgment, the carrier having already paid full benefits for the loss (or loss of use?) of the leg.

The claimant appealed, contending the trial court should have entered a judgment for total permanent incapacity. According to the court, the carrier in response to the claimant's argument, asserted only legal and factual insufficiency points to the jury's total permanent finding. In a three paragraph opinion, the court of civil appeals reversed the trial court's judgment and remanded with instructions to render judgment for the claimant for total permanent incapacity.

The court first held that the jury's answers to the first four issues relating to general incapacity entitled the claimant to a total permanent judgment, while the jury's answer to the fifth issue, the confinement issue,[438] *entitled the claimant to a judgment for the loss of his leg*. How the court concluded that the answer to the confinement issue entitled the claimant to a judgment for the loss of a leg is a mystery. The court cited no authority and did not elaborate on the holding. Having concluded that the claimant was entitled to one of two judgments, the court cited *McCartney v. Aetna Casualty & Surety Co.*,[439] to support the conclusion that the claimant was entitled to the largest sum recoverable under the jury's verdict, that is, total permanent incapacity.

The court's holding is, in short, erroneous. While it is true that a claimant may recover for concurrent general and specific injuries, the special issues quoted by the court do not indicate that the jury found any concurrent injuries. Moreover, the jury's answer confining the injury to the left leg is a complete defense to any other incapacity the jury found in previous issues.[440]

Causation. In recent years the supreme court has slowly diluted the reasonable medical probability test of causation; the evidentiary link required

437. *Id.* at 831 (emphasis added). Perhaps it makes little difference to an analysis of the holding, but this statement by the court that the prosthesis was *applied to the left knee* is illustrative of the difficulty encountered in attempting to analyze this opinion. Did the court mean that the claimant's leg was amputated? If so, was the amputation above or below the knee? Did the court perhaps mean that the knee joint itself was replaced with a knee implant? Did the court refer to a prosthetic device when it actually intended to indicate that a permanent knee brace was applied to the knee? Did the court really mean that the distal femur was fractured or perhaps the tibial plateau was fractured which in turn required orthopedic screws or a plate?

438. For the fifth issue the court asked: "Did the injury to the left leg of Mike Heard extend to and affect any part of his body other than his left leg, or was such injury confined to his left leg?" To which the jury answered: "It was confined to his left leg." *Id.*

439. 362 S.W.2d 838 (Tex. 1962).

440. *Id.*; Banks v. Millers Mut. Fire Ins. Co. 476 S.W.2d 768 (Tex. Civ. App.—Texarkana 1972, no writ); Hardegree v. American & Foreign Ins. Co., 449 S.W.2d 554 (Tex. Civ. App.—Fort Worth 1969, no writ); Coleman v. Hartford Accident & Indem. Co., 297 S.W.2d 236 (Tex. Civ. App.—Fort Worth 1956, writ ref'd).

to establish the connection between the injury and the resulting disability.[441] In 1975 in *Western Casualty & Surety Co. v. Gonzales*[442] the court crushed any remaining vitality from this concept and now only requires surmise, suspicion, speculation or guesswork from any hired testifier to link the injury to the disability. The plaintiff in *Lucas v. Hartford Accident and Indemnity Co.*[443] was a diabetic. For several years prior to the injury he was frequently treated by his personal physician for foot and toe infections, twice resulting in surgery. Eighteen months before the accident, Lucas' doctor told him he could only work at a sedentary job because of the foot and toe problems. Lucas changed jobs and was doing light work on the day of the incident when he accidentally scratched his left ankle. The scratch became infected and he was treated by his personal physician, but subsequently developed thrombophlebitis in both his left leg and right leg.[444] The jury rendered a total permanent incapacity verdict. The court of civil appeals reversed and rendered judgment holding that the testimony of one physician regarding the connection between the original scratch and the thrombophlebitis amounted to no evidence.[445] The court of civil appeals quoted the doctor's testimony at length,[446] noting that there was no allegation of aggravation of any pre-existing disease or injury. Summarizing the testimony, the court of civil appeals observed: "As to the causal connection between the injury in question and the thrombophlebitis, the doctor's testimony is couched in terms of 'I think,' 'I thought,' 'possible,' 'who knows' and 'it can.' "[447]

The supreme court brushed aside the doctor's qualiying phrases, and held that the testimony satisfied the reasonable medical probability criteria. The court did not cite any of its prior opinions, but only the McCormick and Ray Evidence treatise.[448] Despite the supreme court's attempt to dignify the inept conclusions offered as medical evidence in *Lucas*, it is apparent that the testifying physician was less than candid in his approach to the causal connection problem. While it is true that the doctor's ineptness affects the weight given his testimony by the jury, once allowed to go to the jury, the carrier has no protection except for factual insufficiency arguments which are not often sustained. Moreover, the court's recent holdings in the area of

441. Western Cas. & Sur. Co. v. Gonzales, 518 S.W.2d 524 (Tex. 1975); Griffin v. Texas Employers' Ins. Ass'n, 450 S.W.2d 59 (Tex. 1969); Insurance Co. of N. America v. Kneten, 440 S.W.2d 52 (Tex. 1969); Parker v. Employers Mut. Liab. Ins. Co., 440 S.W.2d 43 (Tex. 1969); Otis Elevator Co. v. Wood, 436 S.W.2d 324 (Tex. 1968); Insurance Co. of N. America v. Myers, 411 S.W.2d 710 (Tex. 1966); *see* Steakley, *Expert Medical Testimony in Texas*, 1 ST. MARY'S L. J. 161 (1969).

442. 518 S.W.2d 524 (Tex. 1975), *reviewed in* Sartwelle, *supra* note 6, at 222-24.

443. 552 S.W.2d 796 (Tex. 1977).

444. The supreme court's factual recitation is meager. The facts set forth herein have been gleaned from the court of civil appeals' first opinion. Hartford Accident & Indem. Co. v. Lucas, 547 S.W.2d 386 (Tex. Civ. App.—Tyler 1977), *rev'd*, 552 S.W.2d 796 (Tex. 1977).

445. 547 S.W.2d at 386.

446. *Id.* at 389-90.

447. *Id.* at 390.

448. 552 S.W.2d at 797. The court used "see" to introduce the citation which was to 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 531 (2d ed. 1956). The court did refer to two of its prior opinions apparently relied upon by the carrier. This reference was only a notation of the carrier's position, however, and not a reference to the holdings of the cited cases. 552 S.W.2d at 797.

causation are not limited in application to compensation cases. They apply generally to any causation problem and encourage plaintiffs to seek out a doctor who is willing to venture guesses and speculate as to cause. The court is encouraging plaintiffs to gamble on a favorable verdict through purchased expert testimony thus substantially increasing the cost of litigation and increasing the time required to try the case. While the phrase "reasonable medical probability" may not deter those determined to prove a causal connection at any cost, it would provide a reasonably understandable guideline to those concerned with the propriety of gambling on a favorable outcome based on mere guess and speculation.

The subsequent history of the *Lucas* case exemplifies the cost increasing effect of the supreme court's liberalized causation rule. After reversing the court of civil appeals the supreme court remanded the case for a consideration of the carrier's factual insufficiency points. On remand,[449] the court of civil appeals again reviewed the doctor's testimony, as well as all of the evidence and concluded that the verdict was against the great weight and preponderance of the evidence. Thus, the case was remanded for a new trial.

In *Northern Assurance Co. of America v. Taylor*[450] the issue was whether a hernia was job related. The jury concluded that it was, that the surgery was unsuccessful, and that the employee was totally permanently disabled. Even the court of civil appeals candidly admitted that *there was no medical testimony connecting the hernia to the employment*. Taylor had sustained two prior on the job hernias, both surgically repaired. On the occasion in question, he was seated in the company pickup truck. As he got out of the truck he felt a sharp pain, examined himself, and discovered a knot in his groin which was subsequently diagnosed as a hernia.

The carrier's attack on the jury verdict was centered on the lack of evidence that Taylor sustained an accidental injury, that is an undesigned event traceable to a definite time, place and cause.[451] The court of civil appeals correctly recognized that "accidental" is a creature of the courts not the compensation statute. In fact there has never been a statutory requirement that an injury be accidental in order to be compensable.[452] The only reason "accidental" crept into Texas law was to distinguish injuries resulting from occupational diseases before occupational diseases became compensable. Thus, the inquiry in *Taylor* should be whether the employee's job related activity led to the resulting injury. The court of civil appeals recognized this issue when it observed: "The question in this case narrows itself to whether or not the hernia was in any way job related . . . . Was . . . [claimant's] raising up out of the seat with the left foot down on the

449. Hartford Accident & Indem. Co. v. Lucas, 556 S.W.2d 104 (Tex. Civ. App.—Tyler 1977, no writ).

450. 540 S.W.2d 832 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

451. *See generally* cases cited note 394 *supra*.

452. Aetna Ins. Co. v. Hart, 315 S.W.2d 169 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Mincey, 255 S.W.2d 262 (Tex. Civ. App.—Eastland 1953, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Agan, 252 S.W.2d 743 (Tex. Civ. App.—Eastland 1952, writ ref'd).

pavement . . . a producing cause of the hernia and total and permanent incapacity?"[453]

The court concluded that jurors should be entitled to decide causation problems "with or without medical testimony *in areas of common experience*."[454] Thus, without medical evidence on causation, the court upheld the jury's verdict arrived at by the jury's "common experience and knowledge." The unanswered question is just how much medical experience and/or knowledge did these twelve jurors possess? The only information any juror could possibly have regarding a medical causation connection would be rank hearsay. Moreover, the court failed to indicate why causation as related to hernias is a common experience when causation related to heart attacks, cancer, strokes and other maladies common to mankind in general are not decided without medical proof of causation.[455]

Causation—Heart Attack. As usual, a heart attack case reached the appellate courts during the survey year and as usual, the beneficiary's recovery was affirmed. What was unusual about *Travelers Insurance Co. v. Allen*[456] was that it was tried and submitted to the jury on the basis of what is, at the present time, the minimum criteria for a compensable heart attack, that is overexertion and strain.[457] In recent years the special issues submitted in many heart attack cases have been in the form contained in Texas Pattern Jury Charges.[458] These issues define heart attack as occurring in the scope of employment if precipitated by the employee's work or the conditions of his employment.[459] The pattern jury issues were not submitted in *Travelers Insurance Co. v. Allen*,[460] but the beneficiary still recovered death benefits. *Allen* is a typical heart attack death opinion premised upon the overexertion theory. It differs from other recent opinions, however, because the issues submitted to the jury appeared to have compelled the jury to consider overexertion in determining if the heart attack was job related.[461] Unfortunately, the opinion does not indicate whether a definition of overexertion was also given in the charge. It is essential to submit a definition of this term because implicit in the term overexertion is a comparison of the employee's usual employment exertion with the exertion causing the heart attack. Thus, if the exertion is unusual, the injury is compensable,[462] whereas if there is no more

453. 540 S.W.2d at 834.
454. *Id.* at 835 (emphasis added).
455. *See* Henderson v. Travelers Ins. Co., 544 S.W.2d 649 (Tex. 1976); Insurance Co. of N. America v. Kneten, 440 S.W.2d 52 (Tex. 1969); Parker v. Employers Mut. Liab. Ins. Co., 440 S.W.2d 43 (Tex. 1969); Carter v. Travelers Ins. Co., 132 Tex. 288, 120 S.W.2d 581 (1938).
456. 554 S.W.2d 808 (Tex. Civ. App.—Tyler 1977, no writ).
457. *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., 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.).
458. 2 STATE BAR OF TEXAS, PATTERN JURY CHARGES §§ 20.02, 21.11, 29.02, 29.04 (1970).
459. *Id.*
460. 554 S.W.2d 808 (Tex. Civ. App.—Tyler 1977, no writ).
461. The jury's answers to the special issues are summarized by the court rather than being quoted verbatim. *Id.* at 810.
462. *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,

than usual exertion, it is not compensable.[463] If overexertion is not defined in terms of usual versus unusual, a heart attack or stroke case is not properly submitted in accordance with the established minimum compensable factors required to render a heart attack compensable.

Partial Incapacity—Conflict. A recurring problem in the trial of compensation cases is a jury finding that partial incapacity exists, but that the claimant's wage earning capacity after the injury is the same as the average weekly wage before injury. This results in a mistrial because of the conflict in the issues.[464] Partial incapacity is defined as a loss of wage earning capacity, therefore, such a finding presupposes a loss of earning capacity. If the jury finds that a partial incapacity exists but that there was no loss of earning capacity, one of the answers is wrong, and a mistrial results. Such was the holding by the San Antonio court of civil appeals in an original mandamus proceeding in *Home Indemnity Co. v. McKay*.[465] Under the issues and definitions submitted[466] the court could reach no other result than to uphold the mistrial order entered by the trial court. A significant concurring opinion was written by Justice Cadena.[467] The opinion is a scholarly criticism of the supreme court's arbitrary "judicial rewriting"[468] of section 11 of article 8306[469] governing compensation for partial incapacity. It is unlikely that the supreme court will rectify this error though it potentially plagues every compensation trial. It is at least some solace to know that one appellate judge is sensitive to this problem.

Compromise Settlement Agreement—Suit to Set Aside. The law has traditionally favored voluntary settlements. The general rule is that in order to set aside a compromise settlement agreement, a claimant must prove (1) a meritorious claim for compensation in an amount greater than the amount paid; (2) false representations made to him even if made in good faith; (3) reliance upon the false representations; and (4) inducement to participate in the settlement agreement by reason of the false representations.[470] The Industrial Accident Board has never had the authority to set aside a compro-

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).

463. *See, e.g.*, Whitaker v. General Ins. Co., 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.).

464. *See, e.g.*, Employers Reinsurance Corp. v. Holland, 162 Tex. 394, 347 S.W.2d 605 (1961); Indemnity Ins. Co. v. Craik, 162 Tex. 260, 346 S.W.2d 830 (1961).

465. 543 S.W.2d 171 (Tex. Civ. App.—San Antonio 1976, no writ).

466. The issues and definitions were those found in 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 22.02 (1970). 543 S.W.2d at 172.

467. Home Indem. Co. v. McKay, 543 S.W.2d 171, 174 (Tex. Civ. App.—San Antonio 1976, no writ) (Cadena, J., concurring).

468. *Id.* Justice Cadena is, of course, criticizing the majority opinion in Employers Reinsurance Corp. v. Holland, 162 Tex. 394, 347 S.W.2d 605 (1961).

469. TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (Vernon Supp. 1978).

470. *See, e.g.*, Brannon v. Pacific Employers Ins. Co., 148 Tex. 289, 224 S.W.2d 466 (1949); Inter-Ocean Cas. Co. v. Johnston, 123 Tex. 592, 72 S.W.2d 583 (1934); Alvarez v. Employers' Fire Ins. Co., 531 S.W.2d 218 (Tex. Civ. App.—Amarillo 1975, no writ); Mullens v. Texas Employers' Ins. Ass'n, 507 S.W.2d 317 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.); Bullock v. Texas Employers' Ins. Ass'n, 254 S.W.2d 554 (Tex. Civ. App.—Dallas 1952, writ ref'd).

mise settlement agreement.[471] Despite these well settled rules, the claimant in *Luersen v. Trans-America Insurance Co.*,[472] after the Board approved his compromise settlement agreement, returned to the Board, seeking to set aside the settlement on the ground that there had been a change of condition. The Board properly rejected the claim, as did the district court. On appeal, the claimant asserted that the Board's power to set aside a compromise settlement agreement arose from section 12(d) of article 8306.[473] This section allows the Board to change an award or order under certain circumstances, but has no relevance to compromise settlement agreements since approval of a compromise settlement agreement is not an award or order of the Board.[474] The court of civil appeals in *Luersen* followed these well established principles affirming the trial court's judgment. In *Texas Employers' Insurance Association v. Baeza*[475] the claimant alleged he was induced to enter into a compromise settlement agreement by a promise from the carrier's adjuster that the employer would provide the claimant steady employment as long as he wanted the job. The court of civil appeals upheld the jury verdict in the claimant's favor.

In *Home Insurance Co. v. Dickey*,[476] a plea of privilege appeal, the court sustained the trial court's order overruling the carrier's plea of privilege. The court reaffirmed the proposition that the false statement relied upon by the employee need not be made with actual knowledge of its falsity or with malicious intent or in bad faith.[477] The court also acknowledged the rule that a physician's false statements are not attributable to the carrier if the claimant chose the doctor who is ultimately charged with the false statement.[478] On the other hand, if the employer or carrier chose the doctor or if the doctor is the agent of either, the false statement is chargeable to the carrier.[479] In *Dickey* the employee testified he chose the treating doctor from a list of three doctors whose names were on the employer's bulletin board, and he would not have consulted that doctor had his name not been listed. Based upon the fact that the insurance adjuster specifically used the doctor's incorrect report to induce the claimant to enter into the settlement, the court held that the doctor's report was attributable to the carrier insofar as its use in the settlement was concerned.

Texas Employers' Insurance Association v. Oliverez[480] also involved the issue of false representations made by a doctor. Oliverez, however, was

471. *See, e.g.*, Brannon v. Pacific Employers Ins. Co., 148 Tex. 289, 292, 224 S.W.2d 466, 468 (1949); Commercial Cas. Ins. Co. v. Hilton, 126 Tex. 497, 500, 87 S.W.2d 1081, 1082 (1935), *modified*, 89 S.W.2d 1116 (1936).
472. 550 S.W.2d 171 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).
473. TEX. REV. CIV. STAT. ANN. art. 8306, § 12(d) (Vernon 1967).
474. *See, e.g.*, Brannon v. Pacific Employers Ins. Co., 148 Tex. 289, 292, 224 S.W.2d 466, 468 (1949); Lowry v. Anderson-Berney Bldg. Co., 139 Tex. 29, 34-35, 161 S.W.2d 459, 463 (1942); Commercial Cas. Ins. Co. v. Hilton, 126 Tex. 497, 501, 87 S.W.2d 1081, 1082 (1935); Pearce v. Texas Employers Ins. Ass'n, 403 S.W.2d 493, 498 (Tex. Civ. App.—Dallas 1966), *writ ref'd n.r.e. per curiam*, 412 S.W.2d 647 (Tex. 1967).
475. 552 S.W.2d 862 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).
476. 552 S.W.2d 552 (Tex. Civ. App.—Amarillo 1977, no writ).
477. *Id.* at 556 and cases cited therein.
478. *Id.*
479. *Id.*
480. 550 S.W.2d 742 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

referred to the physician by his employer. The carrier did not question the fact that the referral by the employer charged it with responsibility for the incorrect report, but rather attacked the sufficiency of the evidence to support the jury findings that the claimant relied upon the representations and was induced to settle his case by reason of that reliance. The court reviewed the claimant's testimony, which was somewhat contradictory, and affirmed the judgment setting aside the compromise settlement agreement.

Suit to Set Aside Board Award. In recent years the most frequently litigated issue in compensation law has been the propriety of dismissing suits to set aside the Board's award when one of the parties has named the wrong claimant or carrier as the defendant.[481] Fortunately the courts have shown mercy on those claimants and carriers making inadvertent mistakes which are not misleading to the other party. Such was the result in *Sanchez v. Aetna Casualty & Surety Co.*[482] where the carrier misnamed itself. Although Aetna Casualty & Surety Co. was the proper carrier named in the Board award, the suit to set aside the award was filed in the name of the parent company, Aetna Life & Casualty Company. A copy of the Board's award which was sought to be set aside and which referred to the proper company was attached to the petition and referred to in the body of the petition. Subsequently, after both parties filed pleadings naming the correct carrier, the claimant sought a dismissal of the suit because it had been instituted by a company who was not a party to the Board award. The claimant contended the award was final since the trial court never acquired jurisdiction over the award entered by the Board. The claimant's motion was overruled and after a jury trial a take nothing judgment was entered. The employee appealed solely on the ground that the trial court never acquired jurisdiction to set aside the Board's award.

The court of civil appeals analogized the facts in *Sanchez* to those in two recent supreme court opinions, *Continental Southern Lines, Inc. v. Hilland*[483] and *Price v. Estate of Anderson*.[484] In each case, the plaintiff misnamed the defendant and did not correct the mistake until after the expiration of the statute of limitation. In *Price* the court held the statute inapplicable because the defendant had not been mislead or prejudiced with respect to its defense, while in *Continental* the court remanded for a determination as to whether the defendant had been mislead. The court of civil appeals found that in *Sanchez* the claimant had not been mislead or prejudiced with respect to the prosecution of his affirmative claim for benefits. Accordingly, the court held that the original petition filed by Aetna Life & Casualty

481. *See, e.g.*, Transport Ins. Co. v. Jaegar, 534 S.W.2d 389 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.); Texas Employers Ins. Ass'n v. Sarver, 531 S.W.2d 411 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); Charter Oak Fire Ins. Co. v. Square, 526 S.W.2d 635 (Tex. Civ. App.— Waco 1975, writ ref'd n.r.e.); Garcia v. Employers Cas. Co., 519 S.W.2d 685 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); Carpenter v. Gulf Ins. Co., 515 S.W.2d 60 (Tex. Civ. App.—San Antonio 1974, no writ); 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).

482. 543 S.W.2d 888 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

483. 528 S.W.2d 828 (Tex. 1975).

484. 522 S.W.2d 690 (Tex. 1975).

Company did indeed vest the trial court with jurisdiction to determine the merits of the controversy.

Extraterritorial Injury—Venue. As previously noted, the legislature expanded the Act's extraterritorial coverage to include employees recruited in Texas as well as those hired in the state.[485] The legislature did not change the separate venue portion of section 19[486] except to add a phrase which includes those employees recruited in Texas.[487] Thus, the appealing party has three choices as to venue of a suit to set aside an award involving extraterritorial injury: (1) the county where the contract of hiring was made or the employee was recruited; (2) the county where the employee or beneficiary resides at the time of filing suit; or (3) the county where the employee or employer resided when the contract was made or employee recruited.[488] A question left unanswered by the legislature, which has engendered conflict among the courts of civil appeals, is whether the statute's provisions are mandatory and jurisdictional or simply subject to a plea of privilege.[489] This survey year the El Paso court of civil appeals has held that section 19 is a matter of venue and should be raised by a plea of privilege rather than a motion regarding jurisdiction.[490]

Federal Court—Diversity Jurisdiction. Section 1332(c)[491] of the United States Code provides that in a direct action against a liability insurer, when the insured is not joined as a party defendant, the insurer is deemed a citizen of the state of which the insured is a citizen as well as any state in which the insurer has been incorporated or has its principal place of business. In 1974 an unwary Texas claimant filed suit to set aside an award of the Industrial Accident Board in a federal district court. The Fifth Circuit held that the statute was applicable to workers' compensation insurers thereby making the carrier a Texas resident; since diversity of citizenship did not exist, the employee's complaint was dismissed.[492] Moreover, since the appeal was not filed in a court of competent jurisdiction, the claimant forfeited his right to compensation because of the failure to file his appeal within twenty days of the date notice was given to the Board.[493] This year an insurance carrier also attempted to file suit in federal district court to set aside an Industrial Accident Board award and ran afoul of the same statute. In *Campbell v.*

485. *See* notes 37-52 *supra* and accompanying text.
486. TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (Vernon Supp. 1978).
487. *Id.*
488. *Id.*
489. *Compare* Baker v. Highway Ins. Underwriters, 209 S.W.2d 979 (Tex. Civ. App.—El Paso 1947, writ ref'd n.r.e.), *and* Davis v. Petroleum Cas. Co., 70 S.W.2d 649 (Tex. Civ. App.— El Paso 1934, no writ), *with* Texas Employers' Ins. Ass'n v. Thomas, 415 S.W.2d 18 (Tex. Civ. App.—Fort Worth 1967, no writ), *and* Texas Employers' Ins. Ass'n v. Nardman, 376 S.W.2d 891 (Tex. Civ. App.—El Paso 1964, no writ).
490. Texas Employers' Ins. Ass'n v. Ellis, 543 S.W.2d 397, 400 (Tex. Civ. App.—El Paso 1976, no writ).
491. 28 U.S.C. § 1332(c) (1971).
492. Hernandez v. Travelers Ins. Co., 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974).
493. Although the precise subsequent history of the *Hernandez* case is unknown, probably any attempt to refile the appeal in state court was unsuccessful as was the claimant in Castillo v.

Insurance Co. of North America[494] the carrier attempted to distinguish the prior case asserting that the suit it filed was not a direct action against an insurer as provided in the statute since it initiated the suit against the employee. The court rejected this distinction as being "valid, but too thin"[495] and diversity jurisdiction was destroyed.

Medical Expenses. If an employee sustains an on-the-job injury and receives treatment at a Veteran Administration hospital, is he entitled to recover the cost of that treatment from the compensation carrier? Suppose the Veterans' Administration takes an assignment of the employee's potential claim against the carrier for medical services, can the Veterans' Administration recover the amount of its subrogation interest from the carrier? These heretofore unanswered questions were answered affirmatively by the Fifth Circuit in *Texas Employers' Insurance Association v. United States*.[496]

The injured workman, Adams, was admitted to the Veterans' Administration Hospital after his injury. He was admitted as a veteran with a non-service connected disability which meant that the Administration determined he was unable to pay the expense of necessary medical care. After surgery at a private hospital, Adams recuperated in the Veterans' Administration Hospital for two weeks. The VA obtained an assignment of his claim against the compensation carrier to the extent of the cost of the medical and hospital services. The carrier negotiated a settlement with Adams whereby it became obligated to pay all accrued medical and hospital expenses. The settlement was approved by the Board, and the carrier promptly paid the private hospital bill but refused to pay the VA claim. The Board ordered payment of the bill, the carrier appealed and the government removed the suit to federal court. The district court entered judgment for the carrier.

The Fifth Circuit noted that section 7 of article 8306[497] clearly provided the employee the sole and exclusive right to select the persons and facilities to furnish medical aid and hospital services and was equally clear in providing that the carrier was obligated to pay for such services. Since there was no question that the Texas Compensation Act applied to Adams' injury, and the purpose of the Act was to provide medical care for injured workers, and since the Veterans' Benefit Act was only intended to provide free care to those unable to pay, the court held that the employee could recover from the

Allied Ins. Co., 537 S.W.2d 486 (Tex. Civ. App.— Amarillo 1976, writ ref'd n.r.e.). Castillo's federal court suit was also dismissed because of the lack of diversity of citizenship resulting from the operation of the statute. Castillo's state district court suit was also dismissed for lack of jurisdiction. On appeal the claimant attempted to invoke the provisions of TEX. REV. CIV. STAT. ANN. art. 5539a (Vernon 1958), which provides that if a suit is dismissed for want of jurisdiction and refiled in a court of proper jurisdiction within 60 days, the period between the first filing and second filing shall not be counted as a part of the period of limitation. The claimant further argued, in the alternative, that TEX. REV. CIV. STAT. ANN. art. 8307a (Vernon 1967), was applicable. This part of the Act simply provides that a suit may be transferred to the county of injury if it is originally filed in another county without disturbing the jurisdiction of either court. The court of civil appeals rejected both arguments holding that neither statute was applicable. Thus, the dismissal of the claimant's cause of action was affirmed.

494. 552 F.2d 604 (5th Cir. 1977).

495. *Id.* at 605.

496. 558 F.2d 766 (5th Cir. 1977).

497. TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Vernon Supp. 1978).

carrier the cost of the medical care furnished by the VA and the VA in turn was entitled to recover the cost from the employee pursuant to the assignment.

In *Aetna Life Insurance Co. v. Wells*[498] a workman was allowed to recover twice for the same medical and hospital expenses. The court of civil appeals seemed most anxious to hold otherwise, but the insurance carrier did not preserve the proper legal theories which would have assisted the court to favorably dispose of the issues.

The injured employee, Wells, suffered a heart attack allegedly resulting from job connected overexertion and strain. After undergoing open heart surgery, the claimant's group major medical carrier, Aetna Life Insurance Company, paid a portion of the medical and hospital expenses. When the employee filed a compensation claim, however, Aetna refused to pay any additional expenses because of an exclusion in the policy limiting coverage to nonoccupational conditions for which the insured is entitled to recover workers' compensation benefits. The employee prosecuted his claim for compensation benefits through the Board and into district court after the carrier, Highlands Insurance Company, filed an appeal from the Board's award. The compensation suit was subsequently settled with the approval of the court. The employee was paid $15,000.00 in compensation in addition to $5,368.01 as past medical and hospital expenses and the medical account was left open for one year. The employee then filed suit against Aetna seeking recovery for the same medical and hospital bills for which he had received payment from the compensation carrier. The jury found that the employee's heart attack was not an accidental injury incurred in the course and scope of the claimant's employment. Judgment was entered in favor of the employee for the total of the medical expenses plus penalty and attorneys' fees.

On appeal, Aetna's only argument was that the employee's contentions, pleadings, and "testimony" during the various stages of his compensation claim, at the Board level and in district court, were judicial admissions that the heart attack was an accidental injury in the course and scope of his employment and, therefore, he was, as a matter of law, judicially estopped from asserting that the heart attack was nonoccupational. As the court of civil appeals specifically noted, Aetna did not assert, on appeal, or in the trial court, estoppel by judgment, collateral estoppel or equitable estoppel. Nor did Aetna complain that the jury verdict was against the overwhelming weight and preponderance of the evidence.

Because Aetna only raised judicial estoppel, the court was powerless to intervene and correct an obvious injustice. As the court noted, judicial estoppel is applicable to sworn statements made in a judicial proceeding such as verified pleadings, affidavits, sworn testimony in open court, or oral depositions. Despite numerous claim forms, pleadings and judgments wherein the employee asserted that his heart attack occurred in the course and scope of his employment, none of these items were sworn to or verified.

498. 557 S.W.2d 144 (Tex. Civ. App.—San Antonio 1977, writ filed).

Moreover, although the employee testified that he believed he gave sworn testimony at his pre-hearing conference, the court noted that the pre-hearing statute[499] specifically provides that pre-hearing officers are not empowered to take testimony. Thus, the pre-hearing conference could not be construed as a judicial proceeding. Since Aetna failed to establish the basis for invoking the doctrine of judicial estoppel, the court was forced to conclude that the employee's inconsistent positions amounted to no more than prior inconsistent statements which did nothing more than raise a fact issue which was resolved in the claimant's favor.

IV. PROCEDURAL LAW

Evidence—Formal Statement of Position. As noted,[500] the Amarillo court of civil appeals affirmed the beneficiary's award of death benefits in *Texas Employers' Insurance Association v. Adams*,[501] a case involving travel to and from work. In the course of the trial, the beneficiary introduced into evidence, as an admission against interest, a portion of the carrier's formal statement of position filed with the Industrial Accident Board while the case was pending at the Board level. Article 8307, section 10(b)[502] requires the carrier and the claimant, if represented by an attorney, to file a response to the pre-hearing officer's recommendations formally setting forth their respective factual and legal positions. In *Adams* the carrier's formal position statement quoted from a written statement allegedly taken from the driller involved in the accident wherein the driller alleged he was paid for driving the crew to and from the rig site. The carrier's position at trial was that the driller's payment was for other things, not driving the crew members. The trial court admitted the carrier's formal statement over the carrier's hearsay objection.

The court of civil appeals held that the admission of the formal statement was proper in view of the fact that the carrier was taking a position at trial contrary to that reflected in its statement to the Industrial Accident Board. Thus, since the statement was an admission against interest, the carrier's hearsay objection was invalid. This holding reiterates what has been established by prior cases,[503] that is both carriers and claimants must carefully evaluate their positions before filing any written instruments at the Board. Presumably, oral statements made during Board proceedings are also admissible. The lone exception is the pre-hearing conference. In order to establish a candid atmosphere in which to discuss settlement, the legislature specifically provided that nothing occurring during the pre-hearing conference is admissible against any party or the subscriber except in other proceedings

499. TEX. REV. CIV. STAT. ANN. art. 8307, § 10 (Vernon Supp. 1978).
500. *See* notes 410-14 *supra* and accompanying text.
501. 555 S.W.2d 525 (Tex. Civ. App.—Amarillo 1977, writ filed).
502. TEX. REV. CIV. STAT. ANN. art. 8307, § 10(b) (Vernon Supp. 1978).
503. *See* Texas Gen. Indem. Co. v. Scott, 152 Tex. 1, 253 S.W.2d 651 (1952); Charter Oak Fire Ins. Co. v. Adams, 488 S.W.2d 548 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); Transamerica Ins. Co. v. Beseda, 443 S.W.2d 915 (Tex. Civ. App.— Corpus Christi 1969, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Weber, 386 S.W.2d 835 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.); Liberty Universal Ins. Co. v. Burrell, 386 S.W.2d 323 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.).

before the Board.[504]

Frivolous Appeal. Recently, employees have been seeking damages for appeals which are allegedly made without sufficient cause and for delay only, pursuant to the provisions of rules 435 and 438.[505] Additionally, the courts of civil appeals have been awarding damages against carriers for frivolous appeals.[506] During this survey year substantial damages were assessed against the carrier in *Texas Employers' Insurance Association v. Thornton*.[507] The court of civil appeals in awarding damages, noted that even the testimony of the doctors called on the carriers' behalf supported the jury's total permanent finding. Thus, the court awarded more than $2,300.00 to the employee because of the delay caused by the carrier's groundless appeal.

Sufficiency of Evidence on Appeal. There were a number of cases during the survey year involving the legal and factual sufficiency of the evidence. A majority of the cases were appealed by carriers from substantial awards in favor of claimants[508] and were affirmed. There were two cases appealed by employees which were reversed and remanded[509] and surprisingly three appeals by employees in no injury and insufficient incapacity finding cases which were affirmed.[510] These cases were affirmed or reversed on a seemingly random basis, and thus it seems that the Beaumont court of civil appeals was correct in observing that it would be virtually impossible to reconcile all of the decisions of the various courts of civil appeals that have written opinions on factual sufficiency points of error in workers' compensation cases.[511]

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504. TEX. REV. CIV. STAT. ANN. art. 8307, § 10(b) (Vernon Supp. 1978).

505. TEX. R. CIV. P. 435, 438.

506. *See* Texas Employers' Ins. Ass'n v. Dempsey, 508 S.W.2d 858 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); Charter Oak Fire Ins. Co. v. Adams, 488 S.W.2d 548 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

507. 556 S.W.2d 393 (Tex. Civ. App.—Fort Worth 1977, no writ).

508. *See* Texas Employers' Ins. Ass'n v. Thornton, 556 S.W.2d 393 (Tex. Civ. App.—Fort Worth 1977, no writ) (affirming total and permanent verdict); Texas Employers' Ins. Ass'n v. Moore, 549 S.W.2d 37 (Tex. Civ. App.—El Paso 1977, no writ) (affirming permanent partial verdict); University of Tex. System v. Haywood, 546 S.W.2d 147 (Tex. Civ. App.—Austin 1977, no writ) (affirming total and permanent verdict); Texas Gen. Indem. Co. v. Cox, 544 S.W.2d 766 (Tex. Civ. App.—Dallas 1976, no writ) (affirming temporary total, permanent partial verdict).

509. Robinson v. Charter Oak Fire Ins. Co., 551 S.W.2d 794 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (no injury verdict against great weight and preponderance of evidence); Macias v. Texas Employers' Ins. Ass'n, 546 S.W.2d 359 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (no injury verdict against great weight and preponderance of evidence).

510. Macias v. Charter Oak Fire Ins. Co., 545 S.W.2d 20 (Tex. Civ. App.—El Paso 1976, no writ) (take nothing judgment affirmed after jury found 23 weeks of temporary total incapacity and carrier had previously paid 25 weeks); Mejia v. Liberty Mut. Ins. Co., 544 S.W.2d 690 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (no injury verdict affirmed); Martinez v. Travelers Ins. Co., 543 S.W.2d 911 (Tex. Civ. App.—Waco 1976, no writ) (no injury verdict affirmed).

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