SMU | Dedman School of Law

SMU Law Review

Volume 33
Issue 1 *Annual Survey of Texas Law*

Article 12

1979

Workers' Compensation

Thomas P. Sartwelle

WORKERS' COMPENSATION

by

*Thomas P. Sartwelle**

Texas compensation law has been expanded and liberalized dramatically in the past few years. Most of the activity has resulted from the legislature's attempts to modernize Texas's version of this country's oldest form of social insurance. Some of the expansion of the Act's coverage, however, has been legislated by the courts, despite the fact that compensation law is a creature born of and nourished by legislative enactments. This survey year saw even more judicial legislation than in past years, often in spite of plain, concise, unambiguous legislative directions. This judicial usurpation is not limited to Texas or to compensation law, but seems to be a nationwide trend, resulting in a society that has become litigation oriented.[1] This trend has caused legitimate concern that this nation may be ruled by a "largely unelected 'imperial judiciary.' "[2]

Some of this year's judicial rewriting of the Act[3] substantially expanded the breadth and scope of compensation coverage. This expansion, of course, continues to drive up the already outrageous cost of workers' compensation insurance.[4]

---

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

1. *See* Pike, *Why Everybody Is Suing Everybody*, U.S. NEWS & WORLD REPORT, Dec. 4, 1978, at 50-55.

2. *Id.* at 51. A distinguished 50 year member of the Texas Bar, a former president of the State Bar and the Houston Bar Association as well as numerous other organizations, in commenting upon the changes he has seen in his 50 years of legal practice has echoed the same sentiment: "[T]he fact remains the Federal Courts pervade our lives and, as some say, sincerely and with more than a little justification, we have come perilously close to government by the Federal Judiciary." Gresham, *The Houston Bar, 1930's & 40's*, 16 HOUS. LAW. 21 (1978).

3. The Sixty-fifth Legislature extensively amended the Act last year but these changes are not yet reflected in the reported appellate opinions. These amendments are noted and discussed in Sartwelle, *Workers' Compensation, Annual Survey of Texas Law*, 32 SW. L.J. 291, 293-305 (1978). Southers, *The New Workers' Compensation Venue—Run for the Money*, 12 TRIAL LAW. F., Jan.-Mar. 1978, at 3, contains an in-depth analysis of the amendment to the venue statute, TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1978-79).

4. *See* Pike, *supra* note 1. In 1976 the costs of workers' compensation insurance was estimated to be $8 billion. Odlin, *The Workers' Compensation Controversy: A Status Report*, 5 JOB SAFETY & HEALTH, Apr. 1977, at 16. In 1974 employers, insured or self-insured, were estimated to have spent $7.8 billion to insure work injuries. This figure was thought to be over one billion dollars more than the amount spent in 1973. CHAMBER OF COMMERCE OF THE UNITED STATES, ANNUAL ANALYSIS OF WORKERS' COMPENSATION LAWS 3 (1976). Some observers, while not disputing the high cost of compensation and other forms of insurance, contend that inordinate insurance company profits are a major reason for high insurance premiums. *See* Kitchens, *The Name of the Game—Numbers*, 13 TRIAL LAW. F., Oct.-Dec. 1978, at 3. For example, Texas Employers' Insurance Association is reported to have

I. SUBSTANTIVE LAW

A. *Course and Scope of Employment*

Going to and from Work. Injuries received while going to and from work are not compensable.[5] The rationale of this exclusion is partially based upon the dual requirements of article 8309, section 1,[6] which requires proof that an injury occurred while the employee was engaged in the furtherance of the employer's affairs and was of a kind and character that had to do with and originated[7] in the employer's work, business, trade, or profession.[8] Texas is in accord with virtually every other jurisdiction[9] in ex-

---

reaped "record profits in 1974, 1975, 1976, and 1977 with a 231.5 percent increase in surplus money and an increase of 371.1 percent in assets" between 1968 and 1978. *Id.*

A federal autocratic system of national workers' compensation is presently the gravest threat to the states' compensation systems. A brief history of federal workers' compensation bills in the United States Congress is noted in Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 31 SW. L.J. 259 (1977).

5. Texas Compensation Ins. Co. v. Matthews, 519 S.W.2d 630 (Tex. 1974); 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); Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 246 S.W. 72 (1922); Dishman v. Texas Employers' Ins. Ass'n, 440 S.W.2d 727 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.); Viney v. Casualty Reciprocal Exch., 82 S.W.2d 1088 (Tex. Civ. App.—Eastland 1935, writ ref'd).

6. 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 . . .
>
> . . . .
>
> . . . 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.

7. *E.g.*, 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); Texas Indem. Ins. Co. v. Clark, 125 Tex. 96, 81 S.W.2d 67 (1935).

Very early in Texas compensation law the Texas Supreme Court confronted the dual requirements of the statute in Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 246 S.W. 72 (1922). The court wrote:

> An injury has to do with, and arises out of, the work or business of the employer, when it results from a risk or hazard which is necessarily or ordinarily or reasonably inherent in or incident to the conduct of such work or business. As tersely put by the Supreme Court of Iowa: "What the law intends is to protect the employee against the risk of hazard taken in order to perform the master's task."

Id. at 110, 246 S.W. at 73.

8. It is important to note that the Texas Act differs from the majority of compensation statutes in its definition of injury in the course of employment. Almost all states adopted the coverage formula of the British Compensation Act, which covers injuries "*arising* out of and in the course of employment." 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 6.10 (1978) (emphasis added). The original Texas Compensation Act did not adopt a coverage formula. 1913 Tex. Gen. Laws ch. 179, at 429. In 1917, however, the legislature adopted what is now the current definition of injury in the course of employment. 1917 Tex. Gen. Laws ch. 103, at 292. The Texas coverage formula requires an injury to "*originate*" rather than to arise in the employment. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967). This distinction is little recognized by the Texas courts, a fact vividly illustrated by the supreme court's specific reference to "arising" in Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 110, 246 S.W. 72, 73 (1922). While the distinction between arising and originating is unimportant in the vast majority of cases, there may be subtle nuances that would make a critical difference in a close case.

9. 1 A. LARSON, *supra* note 8, § 15.11.

cluding to and from work injuries. While this majority rule admits that the journey between home and factory or office is caused by the employment, it necessarily places an arbitrary legal line beyond which the Act's protection does not extend.[10] However, since compensation coverage is not confined to the actual work nor the exact work hours nor the employer's premises,[11] a compromise in the going and coming rule has been devised: the access doctrine. Normally, an employee with fixed hours and place of employment is covered by compensation while going to and from work, but only while on the employer's premises. The access doctrine provides, however, that if an employer has evidenced an intention that a particular access route or area be used by the employee in going to and from work, and the route or area is so closely related to the employer's premises as to be fairly treated as a part of the premises, then injuries occurring on the route or in the area while going to and from work are compensable.[12]

When a legal line is drawn, cases will occur close to the compensable side of the line,[13] and demands will be made to extend coverage.[14] Such a demand occurred in *Weaver v. Standard Fire Insurance Co.*[15] and the Houston court of civil appeals held that the coming and going rule was subject not only to the established access doctrine exception but the "personal comfort doctrine" as well. This appears to be the only case in any United States jurisdiction applying the personal comfort doctrine to a "going to and from work" parking lot case.[16]

In *Weaver*, Continental Airlines, the employer, leased one floor of a Houston suburban highrise office building for its reservation sales opera-

10. The necessity for the legal line drawing is obvious. The simplistic "but for" test of work connection is probably applied by the vast majority of courts faced with a course of employment compensation problem although few would admit to such an unsophisticated legal thought. The ultimate result of applying this test is that all employee accidents become compensable. For example, an employee would not have been injured in an automobile accident on the public streets while driving to work, or would not have slipped on a bar of soap while bathing before getting dressed for work, or would not have tripped while getting out of bed to take a bath before getting dressed for work, but for the fact that he had to be at work. Each new injury raises the "but for the employment" work connection question. Clearly a legal line is necessary even if it must be arbitrary.

11. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967). The categories of cases illustrating this point are legion, including the personal comfort doctrine, travel cases, traveling salesmen, 24-hour on-call employees, dual purpose trips, deviations, recreational activities, social activities and a host of others.

12. *See* Texas Compensation Ins. Co. v. Matthews, 519 S.W.2d 630 (Tex. 1974); Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 246 S.W. 72 (1922); Dishman v. Texas Employers' Ins. Ass'n, 440 S.W.2d 727 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.); Kelty v. Travelers Ins. Co., 391 S.W.2d 558 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

13. *See* cases cited in note 12 *supra*. The cited cases all involve facts creating an intellectual controversy among the various trial and appellate judges regarding the necessity of replacing the legal line in order to compensate the individual worker involved.

14. Numerous examples are cited by Professor Larson in his discussion of the going to and from work cases. 1 A. LARSON, *supra* note 8, §§ 15.12-.54.

15. 567 S.W.2d 34 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

16. *See* 1A A. LARSON, *supra* note 8, §§ 21.10-.84.

tion.[17] The claimant was employed as a reservation sales agent.[18] The building's other floors were occupied by numerous businesses unrelated to Continental Airlines.[19] The employee, with her employer's permission, left work ten minutes early to carry out an admittedly personal errand and was injured when she slipped and fell in a parking lot behind and adjacent to but several hundred yards away from the office building.[20] At trial the employee requested that "course of employment" be defined in terms of the personal comfort doctrine.[21] The trial court refused, submitting the standard Pattern Jury Charge course of employment definition.[22] The jury failed to find that the employee was injured in the course of her employment, and the trial court entered a take-nothing judgment. The employee, having failed to plead the access doctrine exception or request the trial court to instruct the jury on the exception, had waived the doctrine as a theory of recovery. Thus, the only salvation for the employee's cause of action was the application of the personal comfort doctrine, which the court of civil appeals applied in reversing the trial court without analysis and with little discussion.

The court of civil appeals cited two "facts" to justify the application of the personal comfort doctrine. First, Continental "designated these spaces for employee parking as a convenience to its employees."[23] This convenience,[24] coupled with the second fact, that the employee was "preparing to

17. Statement of Facts at 253-56, 266-67, Weaver v. Standard Fire Ins. Co., 567 S.W.2d 34 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

18. *Id.* at 46, 327-28. Typically, the court chose to ignore certain facts which were unfavorable to its desired conclusion. Even more disturbing, however, is the court making up certain "facts" that support its desired holding even though the record clearly demonstrates that the direct opposite fact has been established by uncontradicted testimony as demonstrated by the factual assertion referred to in note 58 *infra* and accompanying text.

19. Statement of Facts at 268-69, 340-42.

20. *Id.* at 338-39.

21. 567 S.W.2d at 35. The definition requested was verbatim that contained in 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 21.31 (1970): "An act on the employer's premises necessary to the health, comfort, and convenience of an employee while within working hours, during a lunch period, or while preparing to begin work or leave the premises, is not a departure from the course of employment."

22. 567 S.W.2d at 35. The definition submitted is found in 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 21.10 (1970):

> "Injury in the course of employment" means any injury 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.

23. 567 S.W.2d at 36.

24. The court emphasized that the employee's right to park in the parking lot was derived solely from her employment and that the employee could use the lot only while performing her work duties. The court failed to note that gratuitously furnishing an employee with a parking place would be exactly the same as gratuitously furnishing the employee with transportation: "It is well settled that the mere gratuitous furnishing of transportation by the employer as an accommodation to the employee and not as an integral part of the contract of employment does not bring the employee who is injured while traveling on the streets and highways within the protection of the Workmen's Compensation Act." Texas Gen. Indem. Co. v. Bottom, 365 S.W.2d 350, 353 (Tex. 1963) (citing American Gen. Ins. Co. v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957); Oefinger v. Texas Employers' Ins. Ass'n, 243 S.W.2d 469 (Tex. Civ. App.—Fort Worth 1951, writ ref'd); Bozant v. Federal Underwriters Exch.,

leave her employer's premises,"[25] was, in the court's view, sufficient to apply the personal comfort doctrine to a classic going to and from work problem. In so doing, however, the court has created a judicial monstrosity heretofore unknown to compensation law.[26] The incorrectness of the court's personal comfort holding is easily comprehended if one analyzes the theory of, and the practical reasons for, the personal comfort doctrine as it relates to the coverage formula of the Compensation Act.[27]

The Act requires that a compensable injury occur not only within the time and space limits of the employment, but also in the course of an activity related to the employment.[28] A worker injured while standing at his work bench during working hours may not be entitled to compensation if the injury results from his construction of a homemade bomb. Thus, the particular activity being engaged in at the time of injury is of critical concern. It is not necessary, however, to establish a work connected injury to show that the activity was for the employer's direct benefit. It would be unreasonable to deny compensation because a worker momentarily

159 S.W.2d 973 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.)). Of course, there was no evidence that the employee's right to park her car in the parking lot was part of any employment contract. In fact, the court of civil appeals admitted that the only evidence available was that the parking facilities were provided "for the convenience of the [Continental] employees." 567 S.W.2d at 36.

25. 567 S.W.2d at 36. Nowhere in the opinion did the court attempt to analyze or justify its conclusion that the parking lot was part of the employer's premises. The court boldly side-stepped that rather important detail by relying on a "fact" that the court invented, *i.e.*, the parking area was part of the consideration for the written lease agreement. *See* note 58 *infra* and accompanying text. The court simply held: "Since the parking spaces were provided Continental as part of the lease agreement, it is clear that . . . it was part of the employer's premises." 567 S.W.2d at 36.

26. The court of civil appeals failed to acknowledge or distinguish two analogous cases in which compensation was denied.

Dishman v. Texas Employer's Ins. Ass'n, 440 S.W.2d 727 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.), involved an employee injured while crossing the street to the laundry building where she worked from a parking area not owned, rented or controlled by the employer. The court affirmed the carrier's summary judgment stating:

> The general rule is that injuries received by an employee while going to and from work in order to be compensable must be sustained through the use of ingress and egress actually situated on the property of the employer or in such close proximity thereto as to be for all practical purposes a part of the premises of the employer. Stated another way if the means of ingress and egress expose the employee to some risk or hazard to which the general public would not be exposed the injury is compensable.

Id. at 729. In Roberts v. Texas Employers' Ins. Ass'n, 461 S.W.2d 429 (Tex. Civ. App.—Waco 1970, writ ref'd), the employee, before punching the time clock to begin work, secured her supervisor's permission to use one of the employer's pasteboard boxes to mail various items to her son, and was injured while carrying the box to her automobile, which was parked on the employer's parking lot. The court affirmed the carrier's summary judgment because: "The accident and appellant's injuries did not arise out of her employment; they did not have to do with or originate in her employer's business; and she was not engaged in her employer's affairs of business . . . . She was engaged on a purely personal mission, and the injury was not compensable." *Id.* at 430. *Cf.* Shubert v. Fidelity & Cas. Co., 467 S.W.2d 662 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (employee waiting for place of employment to open was struck by automobile; injuries not compensable).

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

28. The time, space, and activity analysis is suggested by Professor Larson's "quantum theory of work-connection." 1A A. LARSON, *supra* note 8, §§ 29.10-.22.

stopped his work to rest and regenerate his energy. By the same token, an employee sleeping the entire work day is not engaged in any work connected activity. The principle used to place the line of demarcation between work connected activities and non-work connected activities is the personal comfort doctrine. This doctrine deals with the employee's attempt to satisfy personal, physical needs and personal, physical comforts within the hours of employment (or reasonably close thereto) and while on the employer's premises. Eating, drinking, sleeping, resting, washing, smoking, seeking fresh air, warmth, coolness, and toilet facilities, changing clothes, care of clothes and personal appearance, as well as preparatory and incidental acts a reasonable time before and after work, are the activities that are considered under the personal comfort doctrine.[29] The doctrine's foundation is the indirect benefit the employer received from the activity. For example, if the employee is allowed time to eat lunch, get a drink of water, or momentarily rest, his work will progress with greater efficiency.[30] Professor Larson suggests that the modern day inquiry in a personal comfort activity should simply be whether the particular activity, beneficial to the employer or not, was a part of the employment either because of its general nature or because of the particular customs and practices in a particular employment.[31]

Regardless of the principle used to measure a particular activity's work connection, it is evident that the doctrine assumes that the time and space requirements of course of employment are fulfilled. The sole inquiry is directed to the particular activity engaged in at the time of injury and its potential connection to the employment.[32] The very definition the claimant requested in *Weaver* restricts the doctrine's application to "an act on the employer's premises"[33] necessary to the employee's health, comfort, and convenience. The few Texas cases recognizing and applying this doctrine have restricted its use to injuries resulting from activities connected to personal physical needs or personal physical comfort.[34]

---

29. *Id.* §§ 21.10-.84.

30. *Id.* §§ 20.10-.20.

31. *Id.* Professor Larson illustrates the necessity for a more modern rationale for the personal comfort doctrine with the facts in Industrial Comm'r v. McCarthy, 295 N.Y. 443, 68 N.E.2d 434 (1946). In that case it was customary for passing waiters to give one another playful jabs and shoves. One waiter received not only a playful jab but also a knife between his ribs. Obviously, such a jab was of no benefit to the employer. Thus, such an injury would not be compensable under the indirect benefit theory. Professor Larson contends, however, that if the pushing that caused the injury was common to the employment the injury resulting thereform could be compensable because:

> The Act does not expressly say that the employee must at the time of injury have been benefitting his employer; it merely says that the injury must have arisen in the course of the employment, so that if it can be shown that the particular activity, beneficial or not, was indeed a part of this employment, either because of its general nature or because of the particular customs and practices in the individual plant, the statute is satisfied.

Id. § 20.20, at 5-3.

32. *Id.* §§ 21.00-.84.

33. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 21.31 (1970). *See* quotation of the suggested issue at note 21 *supra*.

34. In the commentary accompanying the Pattern Jury Charge Committee's personal

The *Weaver* court, confronted with the employee's waiver of the access doctrine,[35] the only viable doctrine applicable to the case, simply forced a round peg into a square hole. The court's analysis consisted of three "facts": (1) the parking lot was part of the employer's premises; (2) the employer provided parking as a convenience to its employees; and (3) the injury occurred while the employee prepared to leave the employer's premises.[36] The first logical inquiry under the personal comfort doctrine is what "act"[37] or activity that led to the employee's injury is being analyzed for its employment connection? Walking? Leaving work early? The trip and fall? Secondly, how was the employee *preparing* to leave the employer's premises? To prepare means "to make ready beforehand for some purpose: put into condition for a particular use, application, or disposition."[38] The employee was actually walking to her automobile when she slipped and fell. This would seem to be beyond mere "preparation."

More important, however, is the portent that the court's "preparing to leave" holding has two analogous factual settings. In *Weaver* the distance between the highrise office building and the parking lot was only several hundred yards and the slip and fall occurred near the employee's car. The court had no difficulty finding that the employee was "preparing to leave" the employer's premises because the employee was walking the relatively short distance to her car when the accident occurred. Thus, in the *Weaver* setting, it is not difficult to conclude that any accident between the highrise office building and the employee's car may be compensable. Suppose, however, that the highrise office building is in a downtown area and the building owner allows the employer twenty-five parking spaces in a 2,000 car multi-story parking garage ten blocks from the office building. The

comfort doctrine definition, the Committee states that the instruction is patterned after decisions such as Texas Employers' Ins. Ass'n v. Davidson, 295 S.W.2d 482 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.). In *Davidson* the court held an employee's injury due to a slip and fall while walking to a trash can to dispose of the remains of her lunch to be in the course of her employment even though she was not furthering her employer's business affairs and was not being paid during her 50 minute lunch break. The court noted that work stoppage for a noon meal does not necessarily terminate the employment relationship if the employee remains on the employer's premises at the employer's express or implied invitation.

The only other Texas cases involving the "personal comfort doctrine" include Travelers Ins. Co. v. McAllister, 345 S.W.2d 355 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.), where a fatal fall during the lunch break from a grain elevator under construction was held compensable. An injury occurring from a fall in a bathtub while bathing on the employer's premises and in accordance with the employer's knowledge and instruction was held compensable in Traders & Gen. Ins. Co. v. Ihlenburg, 243 S.W.2d 250 (Tex. Civ. App.—San Antonio 1951, writ ref'd). Mistakenly ingesting sodium nitrate rather than bicarbonate of soda to relieve an indigestion attack was held compensable in Security Mut. Cas. Co. v. Wakefield, 108 F.2d 273 (5th Cir. 1939), as was an injury occurring while the employee was seeking toilet facilities. Traders & Gen. Ins. Co. v. Boyd, 121 S.W.2d 463 (Tex. Civ. App.—El Paso 1938, writ dism'd).

35. The employee did not plead the access doctrine exception nor request the trial court to submit a definition of the exception in its course of employment instruction.

36. 567 S.W.2d at 36.

37. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 21.31 (1970).

38. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1790 (1961).

employees are allowed to park free as a convenience[39] to the employees. Some employees walk to and from the parking garage, some ride public buses, and some ride taxis.

Using the *Weaver* court's specious reasoning one would conclude that the ten block walk from the office building to the garage is "preparing to leave" the employer's premises, so that a slip and fall occurring as an employee "almost reached"[40] his automobile is a compensable injury. The question then becomes, how far is "almost"—where does "almost" begin and end?

Another inquiry is whether any part of or all of the walk on the public streets and sidewalks of a downtown area is included as a part of "preparing to leave" the employer's premises. Is an injury occurring in block one compensable? Block two, fifteen, nineteen? What about the employee who does not walk but rides the public bus or a private taxi? Are those activities covered as part of the employee's preparation to leave the premises?

If one were tempted to hold that an injury occurring on the public streets and sidewalks between blocks one and twenty is compensable, there would be a substantial conflict with the supreme court's recent holding in *Texas Compensation Insurance Co. v. Matthews*,[41] a going to and from work case. *Matthews* held that the employer's premises does not extend into the public streets where other members of the public are subjected to common hazards.[42] Will the *Weaver* court be compelled to exclude public street injuries and include only public sidewalk injuries? If so, there may be a conflict with the most liberal Texas premises holding, *Kelty v. Travelers Insurance Co.*[43] *Kelty* held that only the ten or twelve feet of public sidewalk over which the employer exercised dominion and control constituted part of the employer's premises.[44] Thus, the *Weaver* court's reasoning results in coverage for the suburban highrise office worker but none for the downtown office worker. Such discrimination between equally deserving employees because of the fortuitous location of the place of employment would be irrational.

Perhaps the most intriguing problems will be those inevitable extensions of *Weaver's* "preparing to leave" the premises holding that involve time and space deviations. Suppose the hypothetical downtown worker leaves the office building at quitting time but is not injured until one hour after he should have been at the garage. Does the employee walk out of the course of employment if not on a direct route to the parking area? If so, when does course of employment end and begin again? If time deviations are

39. One may assume that in order to avoid the *Weaver* court's holding in subsequent cases, the employer need only testify that the parking area was not provided for employee convenience. Perhaps, in some cases, employee convenience becomes a fact issue to be submitted and determined by a jury.

40. 567 S.W.2d at 35.

41. 519 S.W.2d 630 (Tex. 1974).

42. *Id.* at 632.

43. 391 S.W.2d 558 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

44. *Id.* at 564-65.

important, how much excess time constitutes a deviation? There are additional factors involving an infinite variety of places and reasons why a particular employee may deviate from a direct path and time schedule. For example, an employee is found beaten and robbed in the garage; is that a compensable injury? In short, there is no stopping the process begun by the *Weaver* court's "preparing to leave" holding. Moreover, the workers demanding compensation will not be limited to those who park their cars in the parking garage. If, as an example, a worker rides the bus and must walk the same or a different twenty blocks to reach the bus stop, a distinction between walking to the bus stop and walking to the parking garage would seem at best arbitrary. Suppose the worker is not walking to his car or bus at all, but walking home. If home is only twenty blocks away, how can this worker be denied compensation merely because he did not need to drive to work or ride the bus. Clearly, with its preparation to leave work holding, the *Weaver* court has initiated a need for case by case analysis of an endless array of factual situations which will inevitably lead to the question whether a worker's fall down the stairway leading from his bedroom to the front door as he leaves for work is compensable.

Another consideration ignored by the *Weaver* opinion is the destruction of the "employer's premises" concept as it applies not only to the personal comfort doctrine but to the access doctrine exception to the going to and from work rule. The access doctrine was an arbitrary legal line drawn at the employer's premises as a result of the compromise between the recognition that course of employment was not strictly limited to the actual performance of employment duties nor the actual hours of work and the desire and need to extend compensation coverage to include the journey between home and factory or office.[45] Thus, injuries to employees with fixed hours and places of work, while going to and from work, are covered if they occur on the employer's premises.[46] It is suggested that an analysis of the Texas cases construing the term "premises" provides a simple key to the application of that term to either the personal comfort doctrine or the access doctrine. Stated simply, an area becomes a part of an employer's premises if the employer has created or attempted to control the hazards encountered by the employees, which hazards are not encountered by the public generally, at least at that particular location. In *Kelty v. Travelers Insurance Co.*[47] the ten or twelve feet of icy public sidewalk involved in the employee's slip and fall was held to be a part of the employer's premises because the employer had assumed the responsibility for sidewalk maintenance by "repeatedly cleaning the same and undertaking to remove the ice . . . even on the very day the accident occurred."[48] In *Texas Compensation Insurance Co. v. Matthews*,[49] however, the court specifically held that the employer had not exercised any control over the crosswalk in the

45. *See* notes 10, 11, 12 *supra* and accompanying text.
46. *Id.*
47. 391 S.W.2d 558 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).
48. *Id.* at 565.
49. 519 S.W.2d 630 (Tex. 1974).

public street where the claimant was injured, noting further that the claimant's injury resulted from a hazard faced by any member of the public traveling the same route as the employee.[50] *Dishman v. Texas Employers' Insurance Association*[51] best sums up the *Kelty-Matthews* type cases: "[I]f the means of ingress and egress expose the employee to some risk or hazard to which the general public would not be exposed the injury is compensable."[52]

A series of early cases, typically involving railway crossings or right of ways, establishes the concept that an injury occurring either on the only route or occurring on a normal route but, due to a special employment created risk, was compensable even if the route was not physically part of the employer's premises. The leading Texas case establishing this now hoary principle is *Lumberman's Reciprocal Association v. Behnken.*[53] In holding a fatality occurring on a railroad crossing adjacent to the employer's plant compensable, the supreme court emphasized the fact that the crossing was a necessary and the immediate means of access to the premises, which presented the employee with a special danger not shared by the public generally.[54] The opinion expressing this principle in the most articulate manner of any court before or since is *Texas Employers' Insurance Association v. Anderson*,[55] written by Justice Looney of the Dallas court of civil appeals in 1939.[56] The special employment created haz-

50. *Id.* at 632.

51. 440 S.W.2d 727 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.).

52. *Id.* at 729. A similar coming and going access case is Texas Employers' Ins. Ass'n v. Clauder, 431 S.W.2d 579 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.). The decedent was fatally injured in an automobile collision at the intersection of several West Texas oilfield roads leading to the employer's plant. The roads were on private property but maintained by the county and used by the public generally:

> Irrespective of the question as to whether the deceased's automobile was on a public highway . . . the record shows that it [collision] occurred upon a roadway over which the employer did not have possession or an exclusive right to possession to the exclusion of others, and that the same was used by various members of the public who had no connection whatsoever with the deceased's employer.

Id. at 583-84. *Accord*, Flores v. Employers' Fire Ins. Co., 464 F.2d 1276 (5th Cir.), *cert. denied*, 409 U.S. 1046 (1972).

53. 112 Tex. 103, 246 S.W. 72 (1922).

54. The same day the *Behnken* opinion was delivered, the supreme court decided a factually similar case, Kirby Lumber Co. v. Scurlock, 112 Tex. 115, 246 S.W. 76 (1922). Consistent with *Behnken* the supreme court held that the employee's death, resulting from being run down by the employer's train while traveling home on the employer's railroad tracks, occurred in the course of his employment because it grew out of an employment created hazard not shared by the public generally. *Kirby* is an "upside-down" case because the beneficiaries were trying to prove that the deceased was not an employee and was not covered by the Act, thus allowing a death action to be pursued against the employer which has, of course, more damage potential than a compensation action.

55. 125 S.W.2d 674 (Tex. Civ. App.—Dallas 1939, writ ref'd).

56. Other cases involving this established exception to the going to and from work rule are: Flores v. Employers' Fire Ins. Co., 464 F.2d 1276 (5th Cir.), *cert. denied*, 409 U.S. 1046 (1972); Smith v. Texas Employers' Ins. Ass'n, 129 Tex. 573, 105 S.W.2d 192 (1937); Texas Employers' Ins. Ass'n v. Clauder, 431 S.W.2d 579 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Viney v. Casualty Reciprocal Exch., 82 S.W.2d 1088 (Tex. Civ. App.—Eastland 1935, writ ref'd); Texas Employers' Ins. Ass'n v. Boecker, 53 S.W.2d 327 (Tex. Civ. App.—Dallas 1932, writ ref'd).

ard principle established by *Behnken* and other cases had two basic recurring elements. The first is the presence of the special employment created hazard not shared by the public generally, at least at the particular site involved in the injury. The second is the close association of the access route with the premises, the clearest case occurring when the route involved is the only means of access. A compensable case is not shown, however, simply because there is only one means of access. There must also be proof of the first element, a special employment created hazard not shared by the public generally.[57]

The *Weaver* court's holding that the parking lot formed a part of the employer's premises because the parking area was provided to the employer as part of the lease agreement, a "fact" unsupported by the evidence,[58] put the court into a position to apply the otherwise inapplicable personal comfort doctrine. The only real consideration is whether the employer created or attempted to control the hazard causing the accident and whether that hazard was one unique to the employment at that particular location and not one shared by the public generally. In *Weaver* the evidence was undisputed that the employer was totally deprived, legally and factually, of any control over any hazard lurking in a flat asphalt parking lot.[59] Moreover, the parking lot was used by various building tenants as well as employees of tenants, visitors, and business persons transacting business in the buildings.[60] These parking lot users were, vis-a-vis the employee and her employer, members of the public. The employee shared all the parking lot dangers with other persons using the lot. These dangers, in particular the danger of a slip and fall, were not of the employer's creation or unique to the employee because of her employment, but rather common to all who ventured into the area. The *Weaver* court chose to forsake these time-tested principles and in so doing has thrust upon any employer who provides employee parking as a "convenience" incalculable risk and undefined premium increases.

In another to and from work case the El Paso court had little difficulty in finding the employee was not in the course of employment although the court did not specifically apply the to and from work doctrine. In *Price v. American Home Assurance Co.*[61] the employee worked twenty-five hours in a total twenty-eight hour period at her employer's restaurant where she

57. Flores v. Employers' Fire Ins. Co., 464 F.2d 1276 (5th Cir.), *cert. denied*, 409 U.S. 1046 (1972).

58. Contrary to the court's assertion, 567 S.W.2d at 35-36, the written lease agreement did not provide that the building owner would furnish the parking spaces in the particular parking lot involved to Continental as "part of the consideration involved in the [lease agreement]." *Id.* at 36. The building owner provided parking immediately behind and under the building as part of the lease agreement and gratuitously allowed Continental employees to park in a lot behind an adjacent highrise office building that it also owned. Statement of Facts at 5, 10, 25-26, 69-70, 256-57, 275-82, 340.

59. It was undisputed that Continental did not own, control, lease, manage, rent, supervise, maintain, repair, or exercise any domain over the parking lot where the accident occurred. Statement of Facts at 10-11, 16-17, 68-69, 72-74, 269-73, 277-78.

60. *Id.* at 5, 10, 25-26, 69-70, 256-57, 275-82, 340.

61. 562 S.W.2d 7 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

was a waitress-cashier. While driving home after completing her last shift, she went to sleep and hit the rear of another vehicle. Since the employee's travel was not within the terms of the Act's travel provisions,[62] the employee's cause of action was necessarily governed by the definition of injury in the course of employment in article 8309, section 1.[63]

On appeal from the trial court's take-nothing judgment, the employee argued that the sleep-induced automobile accident had its origins in the long hours required by her employment and, therefore, the injuries "originated" in the employment as required by the Act.[64] The El Paso court recognized that it was arguable that the employment's long hours may have been the accident's origin such as to satisfy section 1's second requirement that the injury originate in the employer's work.[65] The court held, however, that the section's first requirement, that the accident result while the employee is engaged in or about the furtherance of the employer's affairs,[66] was not satisfied by merely showing that the injury occurred while the employee was "on a personal trip going to her home from her place of employment."[67]

The statement that the employee's trip to her home was a "personal trip" is merely a convenient conclusion necessary to support the proposition that she was not furthering the employer's affairs. Obviously, this conclusion is debatable since one must readily concede that the employee could not have performed her duties anywhere except the employer's premises and, therefore, the sole purpose of the trip to and from work was for the employer's direct benefit. Thus, it is logical to conclude that the employment-necessitated travel coupled with the employment-induced sleep resulted in an injury in the course of employment. As has already been indicated,[68] the noncompensability of the to and from work cases results from the placement of an arbitrary legal line necessitated by the virtually unanimous belief that workers' compensation is not portal to portal health insurance against all conceivable perils.[69] It is suggested, therefore, that the courts, rather than engage in mental gymnastics as in *Price*, should simply state that the denial of compensation in a to and from work case is based on the placement of a necessary legal line beyond which only the legislature may venture.

Personal Comfort Doctrine. While the personal comfort doctrine was obviously misapplied by the *Weaver* court, two other Texas courts, by accident,

62. TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967).
63. *Id.* § 1. *See* quotation of the section's pertinent provisions at note 6 *supra*.
64. *Id.*
65. *See* note 7 *supra* and cases cited therein, as well as accompanying text.
66. *Id.*
67. 562 S.W.2d at 9.
68. *See* note 10 *supra* and accompanying text.
69. *Cf.* Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972) (heart attack not compensable because not traceable to specific incident at place of employment); Houston Fire & Cas. Ins. Co. v. Biber, 146 S.W.2d 442 (Tex. Civ. App.—San Antonio 1940, writ dism'd judgmt cor.) (cerebral hemorrhage not compensable since causal relationship between employment and injury not proved).

properly sustained two compensation awards in cases involving facts clearly within the doctrine's parameters. These two opinions vividly illustrate the need for courts to hold to viable theories that produce long-term consistency rather than result oriented theories which lead to short term confusion.

In *Texas Employers' Insurance Association v. Villasana*[70] the employee took his regular work break in the foreman's office. When he arose from the chair at the end of his break, he slipped and fell, striking his head on a cabinet. Although the accident, as well as the resulting disability,[71] was vigorously contested, the jury found all issues in the employee's favor.[72]

The court's opinion does not provide any clues as to what legal issues it considered when reviewing the carrier's no evidence point attacking the jury's first three findings relating to injury, accident, and course of employment. Further, the court, having somehow avoided the personal comfort doctrine, made an assertion never before seen in Texas compensation law:

> To establish that his . . . injury occurred in the course of his employment . . . [claimant] could show that the injury arose out of, and was *causally connected* with, his employment, either through its activities, its conditions, or its environments, *Garcia v. Texas Indemnity Ins. Co.*, . . . which may include an act of a personal nature that, if reasonably done for his health and comfort, was incidental to his service and, thereby, arose out of his employment. *Insurance Company of North America v. Estep* . . . .[73]

The court neither explained nor attempted to analyze this bold assertion in relation to the claimant's injury, simply holding that the evidence was legally and factually sufficient to support the jury's verdict. Furthermore,

---

70. 558 S.W.2d 917 (Tex. Civ. App.—Amarillo 1977, no writ).

71. The carrier also contested the extent and duration of disability allegedly resulting from the accident. The admission of medical testimony constituted the carrier's attack on the jury's total permanent finding. *See* note 196 *infra*.

72. According to the court's opinion the trial court submitted and the jury answered a special issue inquiring whether the employee's injury was the result of an accident. 558 S.W.2d at 920. The submission of this issue simply illustrates a lack of sophistication concerning compensation law. Although the issue is harmless, it does require a jury's consideration and conceivably could engender conduct resulting in a mistrial.

The Compensation Act has never required that an injury result from an "accident" or be the product of an "accidental injury." These words do not now and never have appeared in any version of the Act. "Accident" and "accidental injury" are inventions of various appellate courts. They are used in contradistinction to intentional injury or other risks and hazards excluded by TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967), and to occupational disease, which is defined in *id.* art. 8306, § 20 (Vernon Supp. 1978-79). *See* 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). "Accidental injury" is simply a proof requirement. In an "accidental injury" case the claimant must produce evidence of an event traceable to a definite time, place, and cause or his cause of action fails. Unless the carrier contends that the accident is an occupational disease or resulted from some excluded risk, the submission of an issue regarding "accident" or "accidental injury" is superfluous. Naturally, if the claimant's evidence is so weak as to raise only a surmise or suspicion of the existence of an event causing an injury then an issue must be submitted regarding the occurrence of the alleged "accidental injury."

73. 558 S.W.2d at 920 (emphasis added).

not a single one of the court's citations is even remotely related to the course of employment issue, which is the focal point of the case. For example, the court cited *Garcia v. Texas Indemnity Insurance Co.*,[74] which involved an idiopathic fall.[75] By definition[76] an idiopathic fall occurs because of a pre-existing personal physical condition, disease, or weakness unrelated to the employment. Since the employee is always engaged in his employment duties at the time of injury (otherwise there could never be an idiopathic fall), the only inquiry in a Texas idiopathic fall case is the "causal connection between the conditions under which . . . [the employee's] work was required to be performed and his resulting injury."[77]

It is difficult, if not impossible, to analogize an idiopathic fall case to one involving a *Villasana*-like fact situation. The Amarillo court, however, managed to compare an even more difficult concept to the *Villasana* fact situation. To support the proposition that an employee's act, done for his health and comfort, is within the course of employment, the court cited *Insurance Co. of North America v. Estep*,[78] another Amarillo court opinion which involved an assault by a co-employee. *Estep* is highly questionable[79]for its assault holding, but it is clear that it does not involve any factual or legal issues involved in a *Villasana*-like fact situation especially since the area of employee assaults is specifically governed by statute.[80] Despite the court's obvious lack of knowledge regarding the personal comfort doctrine, the result reached was entirely correct. Unfortunately, the court attempted to solve an uncomplicated problem by inventing a new and complicated, but totally erroneous, injury in the course of employment definition. Obviously, the court's task would have been relatively easy had they but found the personal comfort doctrine.[81] In essence, the personal comfort doctrine simply says that incidental acts such as eating, drinking, resting, and washing, which occur on the employer's premises and within working hours, are not departures from the course of employment but rather recognized needs of human beings and injuries resulting from such activities are compensable.[82] Texas has recognized and applied this doctrine since at least 1933 when the Dallas court upheld an award of compensation for an employee crossing the street to purchase medicine for his

74. 146 Tex. 413, 209 S.W.2d 333 (1948).

75. Idiopathic is defined as "peculiar to the individual . . . arising spontaneously or from an obscure or unknown cause." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1123 (1961). The Texas idiopathic fall doctrine differs from that applied in the majority of jurisdictions as illustrated by the supreme court's shortsighted opinion in Texas Employers' Ins. Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977). The *Page* rationale is noted, discussed, and criticized in Sartwelle, *supra* note 3, at 335-38.

76. *See* note 75 *supra*. The supreme court also provided a definition of idiopathic taken from a medical dictionary. Texas Employers' Ins. Ass'n v. Page, 553 S.W.2d 98, 100 n.2 (Tex. 1977).

77. Texas Employers' Ins. Ass'n v. Page, 553 S.W.2d 98, 102 (Tex. 1977).

78. 501 S.W.2d 352 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

79. This opinion is noted, discussed, and criticized in Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 29 SW. L.J. 183, 204-05 (1975).

80. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(2) (Vernon 1967).

81. *See* notes 21, 29-32 *supra* and accompanying text.

82. 1A A. LARSON, *supra* note 8, §§ 21.10-.84.

supposed case of flu.[83]

Perhaps even more mystifying than the *Villasana* court's new definition of injury in the course of employment was its approval of the course of employment instruction that the trial court submitted to the jury.[84] The instruction is totally incorrect and furthermore it appears doubtful that lawyers, much less a lay jury, could apply such an instruction to a given fact situation. The instruction's second paragraph is totally foreign to article 8309, section 1[85] and the dual requirements emanating from the hundreds of cases interpreting its application to hundreds of differing factual settings.[86] The instruction's first paragraph is a poor attempt to paraphrase the personal comfort doctrine but results in a restrictive application because it limits the employee's recovery to only acts "of a personal nature."[87] Without defining "personal nature" the court runs the risk that a jury may interpret the words to include only human bodily functions of a personal nature. A correct definition of course of employment as well as the personal comfort doctrine has been contained in the Pattern Jury Charge book since its publication in 1970.[88] It is beyond comprehension that eight years after the publication of a significant milestone in Texas jurisprudence, there are still apparently some judges and lawyers unaware of the work of the Pattern Jury Charge Committee.

The second court, facing a personal comfort dilemma, fared little better

---

83. Parker v. Royal Indem. Co., 59 S.W.2d 243 (Tex. Civ. App.—Dallas 1933, no writ). The entire line of Texas personal comfort doctrine cases traceable back to *Parker* include the following: Security Mut. Cas. Co. v. Wakefield, 108 F.2d 273 (5th Cir. 1939) (mistakenly ingesting sodium nitrate rather than bicarbonate of soda to relieve an indigestion attack held compensable); Travelers Ins. Co. v. McAllister, 345 S.W.2d 355 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.) (fatal fall during lunch break from grain elevator under construction held compensable); Texas Employers' Ins. Ass'n v. Davidson, 295 S.W.2d 482 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.) (slip and fall injury on employer's premises during lunch break held compensable); Traders & Gen. Ins. Co. v. Ihlenburg, 243 S.W.2d 250 (Tex. Civ. App.—San Antonio 1951, writ ref'd) (fall in a bathtub while bathing on the employer's premises in accordance with the employer's knowledge and instruction held compensable); Traders & Gen. Ins. Co. v. Boyd, 121 S.W.2d 463 (Tex. Civ. App.—El Paso 1938, writ dism'd) (injury occurring while employee sought to toilet facilities held compensable).

84. The court quoted the instructions in the opinion:

> You are instructed that an employee may in the course of his employment do any act of a personal nature reasonably necessary to his health and comfort and an injury sustained in the performance thereof is sustained in the course and scope of employment.
>
> You are further instructed that an employee may have an accidental injury due to a cause not related to his employment, but if the injury would not have occurred except for the performance of his employment, then such an injury is sustained in the course and scope of employment.

558 S.W.2d at 921.

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

86. *See, e.g.*, notes 7 and 8 *supra* and accompanying text. The dual requirements are: (1) the injury occurred while the employee was engaged in the furtherance of the employer's affairs; (2) the injury was of a kind and character that had to do with and originated in the employer's work, business, trade, or profession. *Id.*

87. 558 S.W.2d at 921.

88. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES §§ 21.10, 21.31 (1970). *See* note 21 *supra* and the quotation of the personal comfort doctrine instruction from the Pattern Jury Charge Committee.

in its analysis than did the *Villasana* court, but again, fortunately reached the correct result. *Texas Employers' Insurance Association v. Prasek*[89] involved an employee's choking to death on a piece of steak.[90] The employee was a tool pusher on an oil rig on call twenty-four hours per day. He was free to go home to eat and sleep, but the employer provided a trailer house, stocked with food, at the rig site for employees to eat and sleep whenever they chose not to leave the rig. The evidence was undisputed that the employee frequently ate and slept in the trailer especially when his presence was required during crucial drilling operations.

On the night of the employee's death his wife, who stayed in the trailer while the employee supervised the drilling operation, prepared a steak dinner. While eating the steak the employee collapsed and died of food aspiration. The jury found all course of employment issues favorable to the widow. On appeal, the carrier argued that choking to death on a food particle was not a hazard originating in or peculiar to the employment but was a hazard common to the public generally.

The Corpus Christi court, contrary to the Amarillo court in *Villasana*, properly recognized at least some of the elements of the personal comfort doctrine but only cited one Texas personal comfort case among its string of citations,[91] that being a lunch time injury held to be compensable by the Fort Worth court of civil appeals in 1956.[92] The remaining cases involved a going to and from work case[93] and an assault by a co-employee.[94] Unfortunately, the court never analyzed the personal comfort doctrine as it applied to the undisputed facts. Rather, the court simply ignored legal principles, concluding that there was ample evidence demonstrating that the injury " 'originated in' or 'had to do with' the employer's work . . . [and was sufficient] to meet 'the two prong course of employment test.' "[95]

89. 569 S.W.2d 545 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

90. The so-called "cafe coronary" is apparently not an uncommon mode of exitus. *See* Heimlick, *A Life-Saving Maneuver to Prevent Food-Choking*, 234 J.A.M.A. 398 (1975).

91. The court wrote:

> [W]e note that an employee need not have been engaged in the discharge of any specific duty incident to his employment; rather an employee in the course of his employment may perform acts of a personal nature that a person might reasonably do for his health and comfort, such as quenching thirst or relieving hunger. Such acts are considered as incidental to the employee's service and the injuries sustained while doing so arise in the course of employment and are compensable. *Texas Employers' Ins. Ass'n v. Anderson*, 125 S.W.2d 674 (Tex. Civ. App.—Dallas 1939, writ ref'd); *Insurance Company of North America v. Estep*, 501 S.W.2d 352 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); *Texas Employers' Insurance Ass'n v. Davidson*, 295 S.W.2d 482 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.); 62 Tex. Jur. 2d, Workmen's Compensation, § 92 (1965).

569 S.W.2d at 548.

92. Texas Employers' Ins. Ass'n v. Davidson, 295 S.W.2d 482 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.).

93. Texas Employers' Ins. Ass'n v. Anderson, 125 S.W.2d 674 (Tex. Civ. App.—Dallas 1939, writ ref'd n.r.e.).

94. Insurance Co. of North America v. Estep, 501 S.W.2d 352 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.). *See* notes 78 & 79 *supra* and accompanying text.

95. 569 S.W.2d at 548.

To bolster their holding the court cited two Texas cases,[96] neither of which were relevant to the issues involved in the appeal, and two out of state cases, both of which were relevant to the issues.[97] The court, however, failed to analyze these two cases which provided a perfect, easy ready-made solution for its dilemma.

The various courts of the United States have long recognized that on premises, lunch-time injuries are compensable even though they technically occur outside regular employment hours and the employees are generally free of the employer's control.[98] Professor Larson explains the generally accepted rationalization:[99]

> In any case, most courts have concluded that the unpaid lunch hour on the premises should be deemed to fall within the course of employment. One can arrive at this result by the following chain or argument: If going to and from work on the premises is covered, then going to and from lunch on the premises must also be covered; if going to and from lunch on the premises is in the course of employment, then simply remaining on the premises for lunch must also be. The actual eating of lunch is no more remote from the employment than the traveling to it; and both are outside strict hours and within the premises. There is no ground for distinction.

Obviously, if the journey to and from an employer's lunchroom is within the course of employment, any hazard associated with the consumption of food furnished by the employer is also within the course of employment.[100] Injuries associated with the lunch brought by the employee may also be compensable.[101] The foregoing principles are generally applicable to employees with fixed hours of employment and fixed places of employment. Even so, it is perfectly apparent that the *Prasek*

96. Campbell v. Liberty Mut. Ins. Co., 378 S.W.2d 354 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.), involved an employee's death when he jumped or fell from a boat while attending a company-sponsored picnic. While there are some vague similarities between the issues involved in the recreational-social activities cases and personal comfort cases, they are not analogous. *Compare* 1A A. LARSON, *supra* note 8, §§ 21.10-.84 *with id.* §§ 22.10-.30.

The second case, Southern Sur. Co. v. Shook, 44 S.W.2d 425 (Tex. Civ. App.—Eastland 1931, writ ref'd), involved the brutal, premeditated murder of two brothers, one of whom was employed as a 24-hour-a-day watchman. The issue involved was the assault by a third party exclusion in TEX. REV. CIV. STAT. ANN. art. 8309, § 1(2) (Vernon 1967). This exclusion is in no way analogous to choking to death while eating a meal in the employer's trailer and on the employer's premises.

97. St. Alexandre v. Texas Co., 28 So. 2d 385 (La. App. 1946), involved an injury resulting from the employee's attempt to open a soft drink bottle. The employer attempted to distinguish between drinking water which the employer furnished in recognition of the necessity to quench thirst and drinking a soft drink which the employee brought to the premises for his own pleasure. The Louisiana court rejected the argument, affirming the compensation award and recognizing that the refreshing activity need not be strictly necessary if it is reasonably incidental to the employment.

In Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 158 P.2d 511 (1945), the injury also occurred from an exploding soft drink bottle which the employee brought with him and was placing in a water cooler to cool for his lunch. The court affirmed a compensation award.

98. 1A A. LARSON, *supra* note 8, § 21.21(a).

99. *Id.* at 5-10 (footnote omitted).

100. *Id.* § 21.22.

101. *Id.* § 21.21(c).

case could easily be analyzed using the accepted analysis applicable to that class of case. Moreover, the personal comfort doctrine has been extended to employees required to live on the employer's premises as well as employees such as Prasek who are continuously on call.[102] In fact, the on-call employee is in a stronger position than the 8:00 to 5:00 employee not being paid during a lunch break because the on-call employee is being paid during the mealtime. Such was the factual situation presented to the *Prasek* court. It is submitted that the correct analysis of that factual situation is the generally accepted and understood personal comfort doctrine rather than the Texas courts' dual requirement test of course of employment.

Acts Outside Regular Duties. Modern day compensation law provides that an injury resulting from an activity undertaken by an employee, in good faith, to assist a co-employee in the latter's work is an injury sustained in the course of employment.[103] This year the Tyler court updated Texas law in this area in *Dallas County v. Romans*.[104] The employee, a "turn-key" at the Dallas County jail, arrived at the jail prior to his shift and agreed to relieve the turn-key on duty so the latter could go to the restroom. While relieving the co-employee, the claimant pushed open the steel door in the turn-key's booth and allegedly suffered a heart attack from the exertion.

The evidence revealed that the claimant was on call twenty-four hours a day, was not paid by the hour, and did not punch a time clock. In addition, the evidence revealed that the turn-keys habitually relieved each other before their shifts began and there was no evidence that the county ever objected to such procedure. It was also undenied that someone had to be in the turn-key booth at all times. Thus, whenever the turn-key on duty needed to go to the restroom, someone was required to temporarily attend to the turn-key's job. Following a jury verdict favorable to the claimant, the county appealed, contending the injury was not sustained in the course of employment. In an uninspired and confusing opinion the court concluded that the claimant was performing the job he was employed to perform, was furthering the employer's affairs, and was thus in the course of employment at the time of injury.

The court's holding as expressed in the opinion is confusing. Summarized, the holding seems simplistic but in fact is exceedingly difficult to comprehend from the court's writing. The holding, however, should be uncomplicated because the reason for the holding is simple:

> [I]t would be contrary not only to human nature but to the employer's best interest to forbid employees to help each other on pain of losing compensation benefits for any injuries thereby sustained. This is well illustrated by the cases in which the claimant, who has ceased to work at a particular machine, goes to the aid of his successor who is having trouble operating the machine. One can imagine the displeasure the claimant would incur from his employer if, in such a situation,

102. *Id.* §§ 24.10-.40.
103. *Id.* §§ 27.10-.14.
104. 563 S.W.2d 827 (Tex. Civ. App.—Tyler 1978, no writ).

he failed to bring his experience to the assistance of the new employee on the technicality that it was not within the scope of his present duties.[105]

Social Activities. The Tyler court handed down a second opinion involving course of employment in *Fidelity & Casualty Co. v. Musick*.[106] The claimant, a concrete truck driver, was working with a crew on a construction site near Greenville. The crew foreman suggested having a barbecue for the crew, purportedly to encourage them to finish the job quickly, and the claimant agreed to allow the function to be held on land he owned. On the appointed Saturday afternoon, the claimant and several co-employees dug the barbecue pit using some of the company's equipment, and then drove in the claimant's personal pickup truck to a lake located on a neighbor's property in order to "clean up." While diving into the lake, however, the claimant was injured.

The court, without deciding and in fact questioning whether the barbecue itself was within the scope of employment, held, as a matter of law, that the act of diving into the neighbor's lake was not an act within the social or recreational activities contemplated in putting on a barbecue. This was especially true, the court pointed out, because the employee left the social activity, the barbecue, to go elsewhere and engage in a "dangerous activity."[107] Thus, the court reversed and rendered judgment for the carrier.

Musick presented a factual setting somewhat different from the usual recreational-social activity case in which the only question is whether the injury resulting from the slide into second base at the annual softball game at the annual company picnic is in the course of employment. This is usually resolved by reference to the degree of employer involvement in sponsorship and encouragement of employees to attend.[108] Texas, although

105. 1A A. LARSON, *supra* note 8, § 27.12, at 5-256 to -257.

106. 562 S.W.2d 38 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

107. *Id.* at 40. The opinion notes that the evidence is unclear as to the number of times the employee dove from the diving board into the lake prior to the injury. Obviously, the court would have reached the same result whether it was dive number one or dive number twenty. It is interesting to note that the court rather arbitrarily classified diving into a lake as a dangerous activity. Swimming and diving into a lake, however, would not generally be considered to be dangerous activities, at least not until after the person is injured. The court has used this terminology, obviously, to strengthen the conclusion that the claimant left the course of his employment, if it is assumed the barbecue was part of the employment, to pursue an activity clearly unconnected with the employment.

108. Professor Larson sums up what appears to be the prevailing view on recreational and social activities:

> Recreational or social activities are within the course of employment when
> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

1A A. LARSON, *supra* note 8, § 22, at 5-71.

having few opinions in the recreational-social area, follows the analysis used by the majority of jurisdictions.[109] The difference presented by *Musick* is that the slide into second base at the annual softball game is part of the expected, planned activity from which the employer can foresee (al-

109. There are few Texas cases involving recreational-social activities. What appears to be one of the first decided cases on the subject is Commercial Cas. Ins. Co. v Strawn, 44 S.W.2d 805 (Tex. Civ. App.—Waco 1931, writ ref'd). In *Strawn* the employee was injured while on a duck hunt with his general manager and a customer. The Waco court, with little analysis, had no difficulty in holding that the injury occurred in the course of employment. The court cited a Fifth Circuit opinion, Constitution Indem. Co v. Shytles, 47 F.2d 441 (5th Cir. 1931), as well as an Illinois Supreme Court opinion. The *Shytles* case was somewhat analogous, but the Illinois case was not. *Shytles* involved a theater manager killed in a plane crash en route to attend the opening ceremonies of a new airport. It was undisputed that the employer desired the manager to attend various civic functions as a means of establishing community goodwill and, therefore, the carrier conceded that the injury originated in the employer's business and occurred while the employee was furthering the employer's affairs. The injury was excluded from coverage, the carrier argued, because the statutory definition of employee, which was the same in 1931 as the current definition in TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967), excluded employees whose work was not within the confines of the employer's usual business. Since the employer's usual business involved movies, the decedent's travel to a civic function was not within the definition. The court rejected the argument, holding that activities undertaken to advertise the employer's business were clearly a part of the employer's usual business pursuits. The analysis of *Shytles* clearly reveals that it offers no support for the *Strawn* court's holding. Nevertheless, the *Strawn* court's holding, supported by authority or not, is obviously correct.

The next recreational-social case was Texas Employers' Ins. Ass'n v. Chitwood, 199 S.W.2d 806 (Tex. Civ. App.—El Paso 1946, no writ), wherein a liquor wholesale employee was instructed to help his supervisor take a beer keg to a bar. After delivering the keg, the supervisor was giving the bar owner a ride home when the automobile was struck by a train. The court held that the employee was in the course of employment because doing the bar owner a favor was calculated to cultivate the customer's goodwill which was a part of the supervisor's employment duties. To support its holding, the court cited *Strawn* and *Shytles* as well as several other opinions which were completely unrelated to recreational-social activities.

Campbell v. Liberty Mut. Ins. Co., 378 S.W.2d 354 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e), is one of two Texas cases factually analogous to *Musick*. In *Campbell* the employee drowned while on a company-sponsored fishing trip and weekend party. The court held the injury not compensable because the employee was not required to attend, was not paid while attending, and no customers were present at the party. The court relied upon several out of state cases with similar factual settings, pointing out that it had not been referred to any Texas case dealing with company-sponsored outings.

In Employers Mut. Liab. Ins. Co. v. Sanderfer, 382 S.W.2d 144 (Tex. Civ. App.—Houston 1964, writ ref'd n.r e.), the vice president of the insured company was injured when he fell from a deer stand while hunting with several of his company's customers. The court held that since the claimant's presence at the lease was to promote customer goodwill, the injury occurred in the course of his employment. The court cited *Shytles* and *Chitwood* in support of its holding.

The second Texas opinion factually analogous to *Musick* and the most articulate, well reasoned opinion on the subject of recreational-social injuries is Clevenger v. Liberty Mut. Ins. Co., 396 S.W.2d 174 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.). The employee was injured while playing baseball at the company-sponsored picnic. The court recited the facts in detail, concluding that the trial court incorrectly granted the insurer's motion for instructed verdict. To support its holding the court relied upon Professor Larson's treatise as well as the *Sanderfer* opinion.

Although there are only a handful of Texas cases involved with the recreational-social fact situations, the results appear to be uniformly correct even though the holdings are not always supported by the cited authority. *Musick* appears to be another correctly decided recreational-social activity case albeit the facts presented compel a slightly different analysis than does a routine company picnic as was presented in *Clevenger*.

though not required as an element of proof) and expect injuries to result, whereas swimming and diving are not part of the activity expected at a simple barbecue. Thus, it appears altogether proper to inquire, as did the *Musick* court, whether the injury related activity represents a deviation from the planned activities or from activities the employer would reasonably expect to be pursued.

Intoxication. Section 1 of article 8309[110] provides that injuries caused by an act of God, an act of a third person for reasons personal to that person, and injuries received "while in a state of intoxication"[111] are not compensable. The first two exclusions are somewhat susceptible to judicial interpretation. The "intoxication" exclusion, however, has never been defined. This lack of guidance is curious to say the least because the Texas statute denies compensation for any degree of "intoxication." There is no middle ground, no room for any subtle gradations, only black or white. A good example of this "either or" dilemma occurred in *Westchester Fire Insurance Co. v. Wendeborn.*[112]

The decedent, manager of a convenience store, was accidentally shot with his own gun as he handed it to a customer who admitted that he and the decedent had been drinking beer throughout the afternoon and evening of the accident. The customer admitted that he was intoxicated.[113] Four witnesses testified that the decedent was not intoxicated. An autopsy revealed a 0.165 mg. blood alcohol content. The pathologist testified that the decedent was intoxicated when he was shot. The jury concluded that the decedent was not intoxicated and judgment was entered for the widow.

On appeal the carrier contended, among other things,[114] that a 0.165 mg. percent blood alcohol content should constitute intoxication as a matter of law. The carrier relied upon the "presumption" of intoxication set forth in the traffic regulations,[115] but the court of civil appeals rejected the argument, holding that the pathologist's testimony did not conclusively establish intoxication at the time of the shooting.

The all or nothing Texas approach to intoxication creates results similar to *Wendeborn*—a full recovery for an employee whose judgment and physical skills are obviously impaired by voluntary alcohol abuse. This all

110. TEX. REV. CIV. STAT. ANN art. 8309, § 1(3) (Vernon 1967).
111. *Id.*
112. 559 S.W.2d 108 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).
113. The opinion clearly states that the customer, Smoot, was inebriated: "Smoot stated he was intoxicated and he and . . . [the decedent] had been drinking beer during the afternoon and evening prior to the shooting." *Id.* at 109. This statement is somewhat curious since it would seem to follow that if Smoot testified that he, Smoot, was intoxicated, he probably would have also implicated the decedent as being intoxicated. The court does not note any testimony from Smoot on the issue of the decedent's intoxication. It is difficult to believe that no one asked Smoot his opinion on intoxication. Thus, if the Eastland court follows the rule of most other Texas appellate courts, it can be assumed that the failure to mention Smoot's testimony on the decedent's intoxication means that Smoot's opinion was that the decedent was intoxicated.
114. *See* notes 124-29 *infra* and accompanying text.
115. TEX. REV. CIV. STAT. ANN. art. 6701*l*—5 (Vernon 1977).

or nothing interpretation results from the statute's wording which leaves no room for any other interpretation.[116] It is submitted that the Texas statute should be legislatively rewritten to do away with the inequities which can result from the all or nothing approach. For example, the non-driving member of a long distance truck driving team who drinks one beer thirty minutes before completing the trip and is injured in a traffic accident through no fault of the driver may be denied compensation by an East Texas jury because he was "intoxicated." On the other hand, the truck driver who overturns his rig at ninety-five miles per hour is found to have a 0.390 blood alcohol level may not be intoxicated according to a Harris County jury. Different states have taken differing statutory approaches to intoxication, with none providing consistent, satisfactory results in all cases.[117] One approach apparently not considered by the various states would be to allow the fact finder to assess the percentage that the alcohol indulgence contributed to the occurrence of the accident and to the resulting injury and disability. This percentage contribution could then be used as a direct reduction of the employee's recovery. This would not eliminate all problems associated with alcohol induced injuries, but it would specifically direct the fact finder to consider pertinent factors involved in the contribution of alcohol to the entire accident-injury-disability dispute beyond that required by the nonspecific inquiry of whether someone is "intoxicated."[118]

Violation of Employer's Instructions. Injuries resulting from a violation of the employer's instructions are generally considered to be course of employment problems. For example, a machinist, contrary to his employer's rules, uses the employer's equipment to turn machine gun shells into cigarette lighters during work hours and injures his left eye when a shell explodes.[119] The employee's conduct is clearly a departure from the course

116. In Employers' Cas. Co. v. Watson, 32 S.W.2d 927 (Tex. Civ. App.—Beaumont 1930, no writ), and Hartford Accident & Indem. Co. v. Durham, 222 S.W. 275 (Tex. Civ. App.—Amarillo 1920, writ dism'd), both courts of civil appeals held that intoxication, to be a defense, must be a proximate cause of the accident and injuries. In other words, the intoxication must have contributed to the happening of the accident.

In 1933, however, the present day interpretation was articulated by the commission of appeals in Dill v Texas Indem. Ins. Co., 63 S.W.2d 1016 (Tex. Comm'n App. 1933, judgmt adopted). The *Dill* court overruled both *Watson* and *Durham* and held that proof of intoxication, whether it contributed to the accident or injury, was sufficient to bar compensation. Whether a person was intoxicated at the time of injury was held to be a jury issue.

117. *See* 1A A. LARSON, *supra* note 8, §§ 34.00-.35. Thirty-six states make intoxication a separate defense and three others provide that intoxication causes an arbitrary reduction in the amount awarded, two of the states reduce by fifteen percent and one by fifty percent. *Id.* § 34.31, at 6-62. These statutory schemes require a wide variety of causal connection factors between the intoxication and the injury. Some require a proximate causal connection, others a primary, direct, whole, or partial causal connection and a few the sole causal connection. *Id.*

118. One other intoxication case was also decided during this survey year although the court was not required to consider the intoxication issue since the employee waived, in one way or another, all of the asserted trial court errors. Farias v. Texas Gen. Indem., 565 S.W.2d 117 (Tex. Civ. App.—Corpus Christi 1978, no writ).

119. Goodyear Aircraft Corp. v. Gilbert, 65 Ariz. 379, 181 P.2d 624 (1947).

of employment because the employee is engaged in a personal activity during working hours, an activity he knows is specifically and strictly prohibited. Nothing in the employee's conduct advances the employer's work. Thus, there is no employment connection which argues for compensability. On the other hand, the mere violation of an instruction related to the method of accomplishing the employer's work does not remove an injury from the course of employment. For example, an employee operates a meat grinder with the guard removed in spite of the employer's instructions not to remove the guard.[120] This conduct is within the course of employment because at the time of injury the employee is performing the exact task he was hired to perform, albeit in a manner different from that contemplated by the employer.

The distinction between these two examples is the fact that the machinist was doing forbidden work while the meat grinder was doing work in a forbidden manner. This distinction was apparently recognized by the Texas Supreme Court in *Maryland Casualty Co. v. Brown.*[121] In *Brown v. Forum Insurance Co.*[122] the Dallas court of civil appeals applied the course of employment analysis begun in the supreme court's *Brown* case. The court held that the employee's choice of flying a private aircraft in direct violation of the employer's rule was related to the method of performing the employer's work and was not a variation in the ultimate work the employee was hired to accomplish. Although there are few Texas cases considering this course of employment problem, it appears that the Texas courts follow the distinction suggested by Professor Larson between disregarding instructions related to the ultimate work to be done (noncompensable) and disregarding instructions related to the method of accomplishing the ultimate work (compensable).[123]

Unfortunately, the Eastland court of civil appeals disregarded the distinction noted and applied in the two *Brown* cases when it decided *Westchester Fire Insurance Co. v. Wendeborn*,[124] noted in the previous section. The store manager had been drinking and was accidentally shot as he

120. Kilgore v. Fragola, 14 A.D.2d 612, 218 N.Y.S.2d 146 (1961).

121. 131 Tex. 404, 115 S.W.2d 394 (1938). The rule announced by the court was:

> While it seems to be the rule that a violation of instructions of an employer by an employee will not destroy the right to compensation, if the instructions related merely to the manner of doing work, yet it seems to be held by the weight of authority that violation of instructions which are intended to limit the scope of employment will prevent a recovery of compensation.

Id. at 409, 115 S.W.2d at 397.

122. 507 S.W.2d 576 (Tex. Civ. App.—Dallas 1974, no writ).

123. 1A A. LARSON, *supra* note 8, § 31.00, at 6-7:

> When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to *method* of accomplishing that ultimate work, the act remains within the course of employment. Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment.

124. 559 S.W.2d 108 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

handed his shotgun to a friend who had been drinking with him at the store most of the afternoon and evening.[125] Keeping firearms was a violation of the employer's rules, although the court specifically noted there was no "direct evidence that anyone told . . . [the employee] about this rule or that he was aware of the rule."[126] Thirty days prior to the fatal accident shots were fired into the store. After this incident, the decedent kept his personal shotgun at the store. The court emphasized that the store was in a secluded area and open late at night; it also focused on the testimony that there was an increased risk of violent crimes in a secluded area. The court concluded that the decedent was injured in the course of his employment because "keeping of the shotgun was incidental to the employment and performance of the deceased's duties"[127] and the violation of the employer's rule regarding firearms did not "remove the deceased from the course and scope of employment."[128] The court cited, without discussion, the two *Brown* cases in support of its holding.

Even an unsophisticated factual and legal analysis of *Wendeborn*, keeping the *Brown* cases in mind, indicates that the court erred in awarding compensation for the employee's death. While the decedent's job description was not provided by the court, it can reasonably be assumed that the manager's job consisted primarily of stocking and selling various grocery items carried by the store. Since there was an express prohibition against guns, it can also be reasonably assumed that the employer did not charge the employee with the duty to physically protect the store against intruders. Thus, the employee did not need a firearm to perform his ultimate employment function of stocking and selling groceries. At the time of his injury, the employee's activity did not contribute anything to the direct accomplishment of his duties. Thus, the employee has "stepped outside the boundaries defining, not his method of working, but the ultimate work for which he is employed."[129]

Assault by Co-employee. The term "injury" is defined by excluding four categories of injuries and including all others that originate in the employer's business while the employee is furthering the employer's affairs.[130] One excluded category is injuries caused by personal acts of a third person not motivated by the employment relationship.[131] This exception has been interpreted to be applicable to co-employees as well as third persons unconnected with the employment or the employer.[132] The exception to this

125. *See* notes 110-18 *supra* and accompanying text.
126. 559 S.W.2d at 110. The court's precise usage of the word "direct" makes one wonder how strong the circumstantial evidence was regarding the decedent's knowledge of the rule if indeed the evidence was circumstantial to begin with.
127. *Id.* at 111.
128. *Id.*
129. 1A A. LARSON, *supra* note 8, § 31.14(a), at 6-15 to -16.
130. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).
131. *Id.*
132. *See, e.g.*, United States Cas. Co. v Hardie, 299 S.W. 871 (Tex. Comm'n App. 1927, judgmt adopted); Vivier v. Lumbermen's Indem. Exch., 250 S.W. 417 (Tex Comm'n App. 1923, judgmt adopted); Texas Indem. Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App.—

exception, however, is that an injury arising out of disputes and altercations over the manner in which the employer's work is performed is compensable, even though the altercation itself is not a part of the work.[133] In *United Pacific Insurance Co. v. Farley*[134] the court of civil appeals slightly expanded the co-employee assault rule to include assaults arising out of arguments over the correct amount of wages to be paid to the employee.[135]

B. *Compensable Employee*

Independent Contractor Versus Employee. An employee[136] is generally distinguished from an independent contractor by control of or the right to control the details of the work.[137] The distinction, however, can be difficult, as illustrated by the court's affirmance of a jury's "employee" finding in *Texas Employers' Insurance Association v. Bewley*.[138]

The claimant was the owner of a heavy equipment company, supplying backhoes, tractors, trenchers, and trucks, with trained operators, to various construction companies. A backhoe and operator was supplied to Lambert Construction Company. Lambert was charged a fixed hourly amount which included the rental for the equipment as well as the fee for the operator's services. The claimant paid the operator, withholding all applicable taxes. The court admitted that operating the equipment demanded special skill and that no one told the claimant or his operator how to operate the machinery. The court also conceded that the Lambert superintendent could not terminate the operator without the claimant's consent. On the other hand, the court listed several factors supporting the claimant's status as an employee: (1) the claimant did not furnish materials; (2) he could not come or go at his discretion;[139] (3) he was paid by the hour, not the job;

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 judgmt 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).

133. Texas Indem. Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App.—Amarillo 1950, writ ref'd). *Cheely* is the authoritative statement on this area of Texas compensation law. The opinion is well written and the legal analysis is cogent. Unfortunately, the same Amarillo court of civil appeals, twenty-three years after *Cheely*, chose to ignore the *Cheely* opinion, the statute, and common sense in rendering their opinion in Insurance Co. of North America v. Estep, 501 S.W.2d 352 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.). The *Estep* opinion is reviewed and criticized in Sartwelle, *supra* note 79, at 204-05.

134. 566 S.W.2d 677 (Tex. Civ. App.—Waco 1978, no writ).

135. *Id.* at 681.

136. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967) defines "employee" as "every person in the service of another under any contract of hire, expressed or implied, oral or written."

137. *See, e.g.*, Continental Ins. Co v. Wolford, 526 S.W.2d 539 (Tex. 1975); Anchor Cas. Co. v. Hartsfield, 390 S.W.2d 469 (Tex. 1965); Newspapers, Inc. v Love, 380 S.W.2d 582 (Tex. 1964); Hartford Accident & Indem. Co. v. Hooten, 531 S.W.2d 365 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

138. 560 S.W.2d 147 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). The case was reversed and remanded because of insufficient evidence on the wage rate issue. *See* notes 297-300 *infra* and accompanying text.

139. The court stated this as an undeniable fact even though the undisputed evidence revealed that the claimant's son had operated the backhoe on the particular job in question.

(4) he was not furnished with copies of the plans and specifications of the building under construction; and (5) he did the jobs requested by the contractor that were within the machine's capability.[140]

The accident occurred when the claimant, operating the backhoe and front-end loader in place of his son, who normally operated the equipment, drove the rig into a partially constructed building and struck a joist, which caused several beams to fall on him. The court of civil appeals, after reviewing the evidence summarized above, held that "[c]ontradictory reasonable conclusions can be reached from"[141] the evidence. Thus, the claimant's status was a jury question.

The court's holding is totally objectionable. Even the claimant, having been self employed many years, admitted that he had "not been on anybody's payroll since 1960."[142] The court's five factors allegedly arguing in favor of employee status are nothing more than an ephemeral judicially created image. To support the verdict, the court emphasized that the claimant furnished no material for the project, yet ignored the obvious fact that he was not in the business of supplying construction materials, only expensive tractors, graders, backhoes, and front-end loaders, along with a trained operator who "is a member of a skilled trade."[143] The court emphasized payment by the hour, ignoring the proven fact that the claimant's usual charge to all customers was "by the hour."[144] The court noted that the claimant was not able to work his own hours but had to conform to the hours of Lambert's workers. This comment seems to ignore the evidence, including the fact that the claimant replaced his son as the operator on several occasions, including the day of the accident. Moreover, the realities of construction work dictate that various building phases be completed chronologically. Thus, with uncertain weather and material delays, heavy equipment must be available as and when needed. The same is true for the court's notation that the claimant was not furnished "with the plans and specifications of the job to be done."[145] It is doubtful that the claimant needed architectural or engineering plans to perform the excavation and trash loading work that he performed for Lambert.

The result in this case is exceedingly difficult to understand. It appears to be another result oriented opinion strongly suggesting that the law is what the court of civil appeals says it is only because of the limitations on factual review in the supreme court.[146] It is submitted that had this case

---

This operator interchangeability by itself would seem to conclusively demonstrate that no employee-employer relationship existed, such as when the employee has fixed hours and days of employment and is expected to be at the employer's job every day unless he has a valid excuse.

140. 560 S.W.2d at 149-50.

141. *Id.* at 150.

142. *Id.* at 149.

143. *Id.*

144. *Id.*

145. *Id.*

146. TEX. REV. CIV. STAT. ANN. art. 1820 (Vernon 1964) provides that the courts of civil appeals are the final arbiters of "factual" matters.

arisen on a cause of action asserted by Bewley against Lambert because Bewley was negligently injured by Lambert's employee (rather than his own negligence) and Lambert was asserting Bewley to be an employee (exclusiveness of remedy protection) this same court would favor Bewley being an independent contractor[147] and not an employee.[148]

Borrowed Servant.[149] A "borrowed servant" is a general employee of one employer who becomes the special or borrowed servant of another employer in performing acts on behalf of the latter, such that the borrowing employer becomes responsible for the workers' injuries and liability.[150] Although there were two borrowed servant cases decided this year, only one, *Guerrero v. Standard Alloys Manufacturing Co.*[151] is of interest.[152] Guerrero was hired by a contract labor supplier and sent to work on Stan-

147. One other independent contractor versus employee case was decided during this survey year. In Guzman v. Aetna Cas. & Sur. Co., 564 S.W.2d 116 (Tex. Civ. App.— Beaumont 1978, no writ), the claimant's primary contention involved the trial court's exclusion of the carrier's statement of position before the Industrial Accident Board wherein the carrier admitted that the claimant was an employee of the insured. The court held that the exclusion was proper because the claimant failed to offer proof as to the person's identity and authority to sign the letter. The court also overruled the claimant's factual points of error holding there was no evidence to establish that the claimant was an employee of the subscriber. *See* notes 355-57 *infra* and accompanying text.

148. A pseudo independent contractor problem was involved in United States Fidelity & Guar. Co. v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.). As the court noted, however, the inquiry was not whether the claimant was an employee or independent contractor because the evidence clearly compelled the conclusion that he was an employee. The question was whether he was the employee of a subscriber or a nonsubscriber. Since the nonsubscriber was hired by the subscriber as an independent contractor the court's analysis quickly reverted to the typical independent contractor test of the evidence.

Although the evidence clearly indicated that the claimant was never the subscriber's employee, the court thoroughly discussed all of the evidence as well as the applicable law. In a very persuasive, well-written opinion, the court concluded that judgment would be rendered in the subscriber's favor.

149. Last year the supreme court decided Dodd v. Twin City Fire Ins. Co., 545 S.W.2d 766 (Tex. 1977). In an opinion "devoid of legal principle" the supreme court solved a borrowed servant case by "ignoring established legal principles and past precedence." Sartwelle, *supra* note 3, at 339. This year the claimant took his second bite at the apple and brought a third party suit against the company that appeared to be his actual employer at the time of the accident, Texas Farm Products. Dodd v. Texas Farm Prods., 567 S.W.2d 919 (Tex. Civ. App.—Tyler 1978, writ granted). Although the jury returned a verdict favorable to Dodd, the trial court granted the defendant's motion for judgment non obstante veredicto, which was affirmed by the Tyler court of civil appeals. The supreme court has again intervened, however, and granted a writ of error. Dodd v. Texas Farm Prods., 22 Tex. Sup. Ct. J. 65 (Nov. 4, 1978).

150. *See* J.A. Robinson Sons v. Wigart, 431 S.W.2d 327 (Tex. 1968); Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963); Insurors Indem. & Ins. Co. v. Pridgen, 148 Tex. 219, 223 S.W.2d 217 (1949); Home Indem. Co. v. Draper, 504 S.W.2d 570 (Tex. Civ. App.— Houston [1st Dist.] 1973, 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).

151. 566 S.W.2d 100 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

152. Aetna Cas. & Sur. Co. v. Almuina, 571 S.W.2d 398 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.). This opinion represents no more than an appellate review of the evidence wherein the court found some evidence to support the jury finding that the claimant was not a borrowed servant. The factual setting was very similar to Dodd v. Twin City Fire Ins. Co., 545 S.W.2d 766 (Tex. 1977), in that the two companies involved had some common ownership interest.

dard Alloys' premises. Pursuant to a contract, Standard Alloys paid the supplier the hourly wage of all laborers supplied plus thirty percent. The supplier in turn paid the laborers and withheld applicable taxes and other deductions.

Guerrero received a hand injury and settled his workers' compensation claim against the supplier's compensation insurance carrier, but subsequently filed a third party suit against Standard Alloys. The trial court granted Standard Alloys' motion for summary judgment on the theory that Guerrero was Standard Alloys' employee at the time of the accident since it had direct supervision and control of his work.

The court of civil appeals reversed and remanded the case for trial. The court's opinion is not particularly instructive because it is simply a review of the summary judgment evidence and its deficiencies. One observation by the court, however, is noteworthy: "[I]n order to establish an employer-employee relationship between an employee and a borrowing employer, the employee must know or be charged with knowledge of the lending agreement."[153]

This holding appears insignificant until compared with the supreme court's holding in *J.A. Robinson Sons v. Wigart*[154] that it is erroneous to instruct a jury that the borrowed servant must consent to the borrowed employee relationship.[155] While these holdings appear to conflict, they are individually correct, although no Texas court has attempted to explain the harmony. The correctness of each holding arises from the fact that there can be no workers' compensation liability in the absence of an employer-employee "contract of hire, expressed or implied, oral or written."[156] Common law vicarious liability, as pointed out by the *Wigart* court, concerns only the contractual relationship between the two employers and which employer controlled or had the right to control the employee. The employee's rights, as a practical matter, are generally uninvolved in the typical common law vicarious liability borrowed servant case. Not so, however, with respect to workers' compensation.

In the compensation arena, the focus of the inquiry is the employee's contract with the special employer. A contract of hire is, of course, a requirement of the compensation statute[157] and must be satisfied before any person can be classified as one particular employer's employee. If it is found that the employee consented to an employment relationship with a special employer, then the test concerning right of control becomes relevant to determine the employer responsible for compensation.[158]

The Texas courts have never articulated the rationale for requiring em-

153. 566 S.W.2d at 102.
154. 431 S.W.2d 327, 334 (Tex. 1968).
155. While unclear, it seems that the terms consent and knowledge are used interchangeably in this context.
156. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967). *See* 1B A. LARSON, *supra* note 8, §§ 48.00-.10.
157. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).
158. The various tests are set forth in the cases cited in note 150 *supra*.

ployee consent in borrowed servant compensation cases. According to Professor Larson, however, the reason is simple:

> [T]he employee loses certain rights along with those he gains when he strikes up a new employment relation. Most important of all, he loses the right to sue the special employer at common law for negligence; and when the question has been presented in this form, the courts have usually been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit.[159]

This consent requirement, although not formally articulated by Texas courts, can be traced to *Missouri, K. & T. Railway Co. v. Ferch*,[160] wherein the court approved a jury instruction that the employee must consent to a change in the employment relation, whether the consent was expressed or implied. Through the years other courts have occasionally made reference to the employee knowledge requirement,[161] although it has not been uniformly recognized as part of a compensation borrowed servant case.[162]

Employee Versus Volunteer. By definition, an employee is a person under a contract of hire, expressed or implied, oral or written.[163] All other persons are excluded from compensation. The key element in distinguishing an employee from all other persons, including volunteers, is remuneration of some nature.[164] This well established principle was reaffirmed by the Beaumont court in *Texas Employers' Insurance Association v. Burrell*.[165] The jury found the deceased to have been his son's employee, a finding the carrier attacked on grounds of legal and factual insufficiency. *Burrell* was a full-time Atlantic Richfield employee. On his days off he had, for several years, helped in his son's logging business, working along side the son's employees two or three days per week. Although the father received no cash payment, the son supplied the father with gasoline, parts, and tires. There was also evidence that the father was working in the son's business to assure himself a job when he retired from Atlantic Richfield.

The court recognized the applicable case law relating to the issue of re-

159. 1B A. LARSON, *supra* note 8, § 48.10, at 8-206.

160. 44 S.W. 317 (Tex. Civ. App. 1898, writ ref'd).

161. Mercury Life & Health Co. v. DeLeon, 314 S.W.2d 402 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Neely, 189 S.W.2d 626 (Tex. Civ. App.—Amarillo 1945, no writ); Traders & Gen. Ins. Co. v. Jaques, 131 S.W.2d 133 (Tex. Civ. App.—Austin 1939, writ dism'd judgmt cor.); Chicago, R.I. & G. Ry. Co. v. Trout, 224 S.W. 472 (Tex. Civ. App.—Amarillo 1920, writ dism'd).

162. The Pattern Jury Charge Committee has failed to recognize employee knowledge as a potential issue in a borrowed servant case. The only issue suggested by the Committee involves the right of control concept. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 21.05 (1970 & Supp. 1976). The 1976 supplement suggests no change in the issue. The cases referred to in the supplement also overlook the employee's consent as being a possible issue. *Id.* (Supp. 1976).

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

164. *See* Nobles v. Texas Indem. Ins. Co., 24 S.W.2d 367 (Tex. Comm'n App. 1930, judgmt adopted); Travelers Ins. Co. v. Gilliland, 459 S.W.2d 500 (Tex. Civ. App.—El Paso 1970, no writ); Associated Employers Lloyds v. Gibson, 245 S.W.2d 738 (Tex. Civ. App.—Eastland 1951, writ dism'd).

165. 564 S.W.2d 133 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

muneration to an employee, holding that the receipt of gasoline, parts, and tires was some evidence of an employee relationship. In reviewing the entire record as required by the carrier's factual insufficiency point[166] the court noted the absence of any compensation agreement between the father and son in addition to the fact that the father worked when he pleased. The court also considered the son's testimony that he did not consider his father to be an employee and his father did not have to work in order to "earn" a job upon retirement. Based upon this evidence the court held the evidence factually insufficient to support the jury's verdict. Thus, the case was remanded[167] for new trial.

C. *The Claim*

Timely Filing of Claim With Industrial Accident Board. To perfect a claim for compensation, an employee must not only give notice of the injury to the employer or compensation carrier but must file a compensation claim with the Industrial Accident Board within six months of the injury.[168] The employer is required to keep records of all injuries and file a written report with the Board if an injury causes an employee to be absent from work more than one day during the first eight days after injury.[169] These provisions did not conflict until the legislature added section 7a of article 8307[170] to allow a claimant additional time in which to meet the six month limitation when the employer fails or neglects to file an injury report as

166. The court used the now familiar *In re King's Estate* citation in support of the obligatory reference to its duty in passing upon a factual insufficiency point of error. *In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

167. The court reluctantly remanded the case for new trial, stating: "We realize that remanding this case may accomplish nothing. However, the appellate court's duty to remand is absolute where there is some evidence, but it is insufficient to support the finding." 564 S.W.2d at 135.

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

> Unless the Association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the Association or subscriber within thirty (30) days after the happening of an injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of the injury or of the first distinct manifestation of an occupational disease; or, in case of death of the employee or in the event of his physical or mental incapacity, within six (6) months after death or the removal of such physical or mental incapacity. For good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the Board.

169. *Id.* § 7. The pertinent portion of the statute is as follows:

> Every subscriber shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employees in the course of their employment. Within eight (8) days after the occurrence of an accident resulting in an injury to an employee, causing his absence from work for more than one (1) day, or within eight (8) days after the employee notifies the employer of a definite manifestation of an occupational disease, a written report thereof shall be made to the Board on blanks to be procured from the Board for that purpose.

Id.

170. *Id.* § 7a (Vernon Supp. 1978-79).

required by section 7. Section 7a[171] was added in 1971,[172] but incredibly no case arose before this survey year involving the statutes' conflicting provisions. This year the conflict was resolved by not one but two opinions.

In *Lowe v. Pacific Employers Indemnity Co.*[173] the claimant alleged that a back injury had occurred in March, 1974, although the claimant missed no time from work. While advised of the accident within thirty days, the employer did not file an injury report with the Board. Several months later (October and November, 1974) the claimant experienced low back pain and finally underwent surgery. The claimant's notice of injury and claim for compensation, however, was finally filed with the Board February 11, 1976. The trial court granted the carrier's motion for summary judgment. The employee conceded that she did not have good cause for late filing but argued that the six month limitation in section 7a did not begin to run because the employer, concededly notified of the accident, failed or refused to file an injury notice as section 7 requires. Thus, she argued, section 7a tolled the six month filing limitation and her claim was not barred because the six month limitation never began to run.

The Dallas court, affirming the take-nothing judgment, construed section 7 to require an employer to file an accident report with the Board only if the injured employee had been absent from work for more than one day out of the first eight days following the accident. The court noted: "No provision is made for a report if the employee is not absent from work until after the expiration of the eight-day period."[174] Section 7a operates to extend the six month time period, the court held, only when the employer is required to file a section 7 report. Since the employee was not absent more than one day in the first eight following the accident, the employer was under no section 7 duty to file an injury report and the provisions of section 7a were inapplicable.

As a parting comment, the court noted that the compensation reporting and filing requirements were designed to prevent assertion of stale claims and provide for prompt investigation of accidents, the same as with any statute of limitation. A claim such as the claimant asserted, wherein she believed the injury to be minor until many months later, would be protected by the good cause provision allowing late filing of claims. The only benefit a late maturing injury claimant would not have would be the additional time provided by section 7a. In view of the liberal interpretation of

171. Section 7a provides:

> Where the association or subscriber has been given notice or the association or subscriber has knowledge of an injury or death of an employee and fails, neglects, or refuses to file a report thereof as required by the provisions of Section 7 of this Article, the limitation in Section 4a of this Article in respect to the filing of a claim for compensation shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the association or subscriber until such report shall have been furnished as required by Section 7 of this Article.

Id.

172. *Id.*

173. 559 S.W.2d 370 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

174. *Id.* at 372.

good cause, however, it is submitted that late maturing injuries do not need more.

The second case involving section 7a was *Robicheaux v. Aetna Casualty & Surety Co.*[175] The claimant asserted the same argument asserted in *Lowe*. The Houston [14th District] court adopted *Lowe's* statutory interpretation in its entirety, affirming the trial court's take-nothing judgment.[176]

Third Party Suit—Subrogation. The statutory scheme encompassing the rights to collect damages from third parties responsible for injuries to workers was revised in 1973 when the legislature amended section 6a of article 8307.[177] Contrary to the pre-1973 law, the amended statute provides that an employee may simultaneously pursue his compensation claim and any potential third party action or pursue one to conclusion and then assert the other without waiving any rights he may have with respect to either claim.[178] The question arose, however, whether the carrier is entitled to an offset or credit for sums recovered in third party suits if the employee pursued the third party action prior to the compensation action. The answer was provided this year in *Granite State Insurance Co. v. Firebaugh*.[179]

Firebaugh lost the sight of an eye in an automobile accident. He was a member of an oil well drilling crew and was on the way to the rig at the

175. 562 S.W.2d 568 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

176. Three "good cause" cases were decided during the survey year but added nothing significant to the law of good cause other than three more individual fact situations.

Lewis v. Texas Employers' Ins. Ass'n, 563 S.W.2d 375 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.), involved, amazingly enough, a summary judgment for the carrier on the issue of good cause affirmed on appeal. The fact situation will probably never be repeated, and the carrier's summary judgment proof must be read to be believed.

Miles v. Commercial Ins. Co., 568 S.W.2d 912 (Tex. Civ. App.—Waco 1978, no writ), involved a jury finding favorable to the carrier on the issue of 30 day reporting. The court reviewed all of the evidence and in a questionable holding remanded the case for new trial because the jury's finding was against the great weight and preponderance of the evidence.

In a lengthy opinion, minutely reviewing and analyzing the evidence, the Corpus Christi court upheld a jury's good cause finding favorable to the claimant in Texas Employers' Ins. Ass'n v. Herron, 569 S.W.2d 549 (Tex. Civ. App.—Corpus Christi 1978, no writ). The claimant's good cause excuse involved his reliance upon the company to file a claim, such belief being fostered by periodic compensation payments and verbal assurances from a vice president who also happened to be a personal friend.

177. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1978-79).

178. *Id.* The pertinent portion of the statute provides:

> Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may proceed either at law against that person to recover damages or against the association for compensation under this law, and if he proceeds at law against the person other than the subscriber, then he shall not be held to have waived his rights to compensation under this law.

Id.

In view of the allowance of simultaneous suits, it has been held that the two year statute of limitation applicable to the third party suit begins to run on the date of the claimant's injury. Burkhart v. Concho Indus. Supply, Inc., 549 S.W.2d 469 (Tex. Civ. App.—Austin 1977, no writ). *See* Campbell v. Sonford Chem. Co., 486 S.W.2d 932 (Tex. 1972).

179. 558 S.W.2d 550 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

time of the accident. The automobile in which the employee was a passenger was being driven by the driller, Tipton, who was apparently paid by the employer to furnish transportation to and from the well site for members of his drilling crew. The employer's compensation carrier, Granite State, denied liability, contending that the claimant was not in the course of employment.[180] The claimant filed a claim against Tipton alleging that his negligence caused both the accident and resulting injuries. Tipton's automobile insurance carrier settled the claim for $12,500.00, the claimant executing a general release. The employee then asserted his compensation claim against Granite State, recovering compensation benefits without any offset or credit for the third party settlement.

The Eastland court thoroughly explored the history and philosophy behind the subrogation statute, quoting liberally from various venerable cases. The court's holding and its reasoning for rendering judgment in the carrier's favor is best summed up by quoting part of the opinion's last paragraph:

> [W]e hold the claimant may not be permitted to pursue to conclusion a third party claim and then seek workmen's compensation without accountability to the carrier for sums recovered. To hold otherwise would render totally ineffective the other sections of section 6a as amended and permit a double recovery by the employee.[181]

The court's holding in *Firebaugh* is in keeping with the philosophy expressed by a majority of jurisdictions confronting the reimbursement issue.[182] That philosophy allows the loss associated with an injury to fall upon the ultimate wrongdoer, if that wrongdoer is not a part of the compensation system that assumes financial responsibility for the injured worker. The concomitant philosophy is that the employee should reimburse the employer out of the third party recovery rather than receive the benefits of a compensation recovery and a tort recovery for the same injury. In this manner the employer, who is normally innocent of wrongdoing, is reimbursed, the employee is made whole, and the guilty third party is made to pay for the loss he has caused.[183] In fact, however, the implementation of the entire third party scheme is nothing more than a series of temporary bookkeeping entries until the ultimate "wrongdoer" is reimbursed by passing the cost on to the public. By the time this supposed wrongdoer is reimbursed, however, the cost of the original injury has been multiplied many fold because of the increasing expense factor associated with each step up the litigation ladder. Thus, it is the public that pays for the ever more expensive third party "fault" philosophy that has as its only quest the pursuit, capture, and punishment of the ultimate "wrongdoer."

180. Based upon three recent opinions in factually analogous cases, this contention was not viable. *See* Texas Employers' Ins. Ass'n v. Adams, 555 S.W.2d 525 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); 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.).

181. 558 S.W.2d at 553.

182. *See* 2A A. LARSON, *supra* note 8, §§ 71.00-.30.

183. *Id.*

The focus of this philosophy, which is solely on the wrongdoer's capture, is in need of refraction. The focus should be upon the rehabilitation of the injured worker. If the assets devoted to third party actions and the pursuit of the ephemeral "wrongdoer" were channeled into the compensation system in the form of increased benefits and increased rehabilitation and retraining, the problems surrounding industrial injuries could be resolved and the system modernized, streamlined, and made many times more efficient.

A prime example of the waste often associated with the third party scheme is the negligence claim made by Firebaugh against his fellow employee who was driving the vehicle at the time of the accident. In spite of article 8306, section 3, which provides that an employee has no cause of action for personal injuries against his employer or "against any agent, servant or employee of said employer,"[184] Firebaugh was allowed to collect from a co-employee a substantial sum as damages for personal injuries. Firebaugh's windfall results from judicial sleight of hand used to create the impression that the courts have arrived at a rational, reasonable result, when in fact the result is nothing more or less than raw resultism. As construed by the supreme court in *McKelvy v. Barber*,[185] an article 8306, section 3 employee is one "for whose conduct the employer would, aside from the Workmen's Compensation Act, be legally responsible under the doctrine of respondeat superior."[186] Thus, as in *Ward v. Wright*,[187] when two employees' automobiles collided while maneuvering to exit the employer's parking lot to go to lunch, the aggrieved employee is allowed to sue the employee "wrongdoer" because the wrongdoer is not in the course of employment for liability purposes, *i.e.*, the employer is not legally liable by the doctrine of respondeat superior. Even more incredible, however, is the fact that both employees are entitled to collect full compensation benefits from the employer because of the broad interpretation given to the term "employer's premises," as well as the liberal definition of "course of employment" in compensation cases which includes the employee's going and coming as long as he is on the premises, as in *Weaver v. Standard Fire Insurance Co.*[188] Thus, the logical conclusion of a simple employee parking lot accident is complicated, costly litigation.

Assume two employees leave the employer's parking lot at the end of the

184. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967):
> The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for.

185. 381 S.W.2d 59 (Tex. 1964).

186. *Id.* at 62.

187. 490 S.W.2d 223 (Tex. Civ. App.—Fort Worth 1973, no writ).

188. 567 S.W.2d 34 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.). *See* notes 15-60 *supra* and accompanying text.

workday. Employee "Do Wrong" hits employee "Do Right" from the rear, injuring both. The litigation picture would be as follows. Both Do Right and Do Wrong claim compensation which the carrier disputes both as to course of employment and extent and duration. Both claims are appealed to the district court and tried to jury. At the same time Do Right sues Do Wrong to collect common law damages. Do Wrong's insurance carrier also disputes liability and extent and duration. The compensation carrier intervenes in the common law suit to assert its subrogation interest. The suit is also tried to a jury. If everyone recovers on all causes of action, Do Right has collected workers' compensation, less attorney's fees and expenses, held that money temporarily, and then repaid those benefits to the compensation insurance carrier, less more attorney's fees and more expenses, when Do Wrong's liability carrier paid the common law damage judgment. Do Wrong has collected compensation benefits less attorney's fees and expenses. The compensation carrier has recovered part of its payments less attorney's fees and expenses. The employer has gained nothing except an increased compensation premium which it passes on to the consumer as Do Wrong's liability insurance carrier passes on its loss when it asks the Insurance Board for a rate increase. Surely there must be a philosophy of compensation which emphasizes efficiency and cost consciousness which would work as well or better than the pursuit of the "wrongdoer" philosophy which has been blindly pursued for so many years.[189]

Causation. In recent years the supreme court has diligently chopped away at the formerly required medical testimony standard of "reasonable medical probability." Today the only requirement necessary to prove causal connection appears to be a hired testifier willing to engage in surmise, suspicion, and speculation.[190] The El Paso court of civil appeals, however, still requires at least some semblance of "reasonable medical probability" to connect the alleged event with the resulting injury.[191] In *Texas Employers' Insurance Association v. Stodghill*[192] the employee fell from a drilling

189. If the "wrongdoer" philosophy is to be continued then it would seem to be more satisfactory to solve employee versus employee suits by using the regular workers' compensation course of employment standard. As Professor Larson observes: "After all, there are troubles and complications enough administering one course of employment test under the act, without adding a second. By adopting the compensation test, a court has at hand a ready-made body of cases with which to dispose of most borderline situations." 2A A. LARSON, *supra* note 8, § 72.20, at 14-43.

190. Lucas v. Hartford Accident & Indem. Co., 552 S.W.2d 796 (Tex. 1977), *reviewed in* Sartwelle, *supra* note 3, at 357-60; Western Cas. & Sur. Co. v. Gonzales, 518 S.W.2d 524 (Tex. 1975), *reviewed in* Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 30 SW. L.J. 213, 222-24 (1976); Griffin v. Texas Employers' Ins. Ass'n, 450 S.W.2d 59 (Tex. 1969); *see* Steakley, *Expert Medical Testimony in Texas*, 1 ST. MARY'S L.J. 161 (1969).

191. This same insistence on more than mere guess, speculation, surmise, and suspicion was not demonstrated by the Texarkana court of civil appeals when it concluded that a jury's common experience and knowledge was sufficient to decide if a particular movement of a man's body was sufficient to produce an inguinal hernia. Northern Assurance Co. of America v. Taylor, 540 S.W.2d 832 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.), *reviewed in* Sartwelle, *supra* note 3, at 359-60.

192. 570 S.W.2d 398 (Tex. Civ. App.—El Paso 1978, writ filed).

rig, suffering multiple but not life-threatening injuries. Exactly forty-seven days later, he suffered a fatal heart attack. The treating physician testified that the injury and the heart attack were unrelated. The widow produced a physician witness who had never treated the employee. He testified, based upon the medical and hospital records, that the initial accident aggravated a pre-existing hypertension condition. He was then asked whether the injury hastened the employee's death. The response, quoted by the court, was utterly unintelligible.[193] Convinced that the widow's causation testimony did not meet a reasonable medical probability standard, the El Paso court sustained the carrier's no evidence point of error and reversed and rendered judgment that the widow take nothing.[194] The El Paso court, in attempting to require a reasonable modicum of medical evidence on the causation issue, is probably not in step with the supreme court's recent holdings[195] which encourage plaintiffs to seek out a doctor willing to stretch credibility to the absolute limit of propriety in order to gamble on a favorable jury verdict. Although the El Paso court may well be tilting with windmills in its effort to return a degree of sanity to causation testimony, its jousting has created a refreshing breath of air.[196]

Wrongful Discharge or Discrimination. Article 8307c provides that an employer may not discharge or in any manner discriminate against an employee because the employee files a compensation claim, hires an attorney to represent him, or testifies in any compensation proceeding.[197] This statute has been held to be inapplicable to public employees included within the coverage of article 8309h[198] because the legislature failed to designate

193. "Q. If you assumed the things that show in the record, and that I have asked you to assume about his history, is there any question in your mind but what the injury that he got in April hastened his death?

. . . .

"THE WITNESS: I have a strong belief that a man that has been injured, a man of this age, 49 years old with a previous history of arterial hypertension, and had been involved in an accident, any kind of accident which produced a bodily injury, will trigger any complication in hypertension, and basis—and the cause of death or death. The same thing that could be if a heart failure, could be renal failure, a blood clot, miocardial [sic] infarction; anything could be the fault, of it, but the main thing here, the man was injured, and the injury could produce probably some kind of shortening of the life span."

Id. at 400.

194. The rendition was accomplished with great difficulty. The carrier's points of error were not entirely correct with respect to the proper procedural predicates. Nevertheless, the court, after a lengthy discussion of appellate procedure, determined that rendition was indeed proper. *See id.* at 401-04.

195. *See* cases cited at note 190 *supra.*

196. The Amarillo court in Texas Employers' Ins. Ass'n v. Villasana, 558 S.W.2d 917 (Tex. Civ. App.—Amarillo 1977, no writ), followed the supreme court's writing in Western Cas. & Sur. Co. v. Gonzales, 518 S.W.2d 524 (Tex. 1975), holding that its review of the medical testimony revealed that the substance of the testimony established a "reasonable probability of causal connection" between injury and the alleged disability. 558 S.W.2d at 920.

197. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1978-79).

198. *Id.* art. 8309h.

that statute as one applicable to public employees.[199] In *Thompson v. Monsanto Co.*,[200] a case of first impression, the question was whether substantive federal law, the Taft-Hartley Act,[201] preempted the field of labor policy to the exclusion of a state remedy once the employee chose to exercise his rights under federal law.[202] The suit resulted following the employee's spinal injuries for which he received total, permanent benefits. Monsanto terminated the employee, who then filed a grievance alleging that he had been terminated for pursuing his compensation claim and recovering a favorable verdict. The arbiter found the discharge justified because the employee's injuries prevented the safe performance of any job within his classification and seniority. The collective bargaining agreement provided that the arbiter's decision was final and binding. Thus, Monsanto defended the article 8307c suit on the ground that the employee was estopped to assert the suit since he elected to pursue arbitration. The employee argued, however, that arbitration could not divest a Texas court of the jurisdiction conferred by article 8307c and thereby deprive him of a legal determination of his claim.

The court of civil appeals, thoroughly reviewing the extensive judicial writing and analyzing the complex competing factors involved in the interaction between federal and state law, concluded that, where applicable, federal law preempted state law on the labor versus management issue. The court did note, however, two exceptions to the rule requiring an employee to abide by the collective bargaining agreement. One exception is if the union wrongfully refuses to pursue the claim through arbitration, then the employee may look to the courts for relief and not be subject to the defense of failure to exhaust contractual remedies. The other recognized exception is one created by the Supreme Court's holding in *Alexander v. Gardner-Denver Co.*[203] that an employee can bring a racial discrimination suit under Title VII of the 1964 Civil Rights Act[204] even after submitting to final arbitration.[205] In *Thompson* the employee did not complain of the union's failure to represent him nor did he complain of discrimination.

199. Gates v. City of Fort Worth, 567 S.W.2d 871 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

200. 559 S.W.2d 873 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

201. 29 U.S.C. § 185(a) (1976).

202. The court may have overlooked a recent opinion apparently involving a similar issue. In Brown v. Brookside Div. of Safeway Stores, Inc., 517 S.W.2d 619 (Tex. Civ. App.—Waco 1974, no writ), the employee alleged wrongful discharge. It is not specifically stated in the opinion that the cause of action is based on art. 8307c, but this would be the logical assumption. Nevertheless, the employer's motion for summary judgment was granted. The employer argued that the employee failed to comply with the terms of a written contract between his union and the employer and, therefore, he had failed to exhaust his contractual remedies thereby making the suit premature.

The court of civil appeals affirmed. The summary judgment evidence disclosed that the employee had been terminated for absenteeism and had filed a grievance which was denied. The labor contract provided for arbitration but none was ever requested. The court held that the contract was the employee's exclusive method for redress and failure to exhaust the grievance procedure barred the maintenance of a suit to litigate the same controversy.

203. 415 U.S. 36 (1974).

204. 42 U.S.C. § 2000e (1976).

205. The court noted that the United States Supreme Court has also held that arbitration

Thus, the court held that the trial court properly sustained the employer's affirmative defense of final arbitration.

Section 12c—Contribution of Prior and Subsequent Injuries. Section 12c of article 8306[206] has undergone a legislative metamorphosis in the past several years. Current section 12c is a verbatim resurrection of the original section 12c adopted in 1917[207] and readopted in 1947 when the Second Injury Fund became law.[208] In theory section 12c reduces a carrier's liability for a present incapacity if the incapacity is contributed to by a previously existing incapacity. For reasons which cannot be fathomed, the courts have judicially rewritten section 12c to suit their own purposes in each individual case.[209] The legislature briefly interrupted the courts' hyperbolic debasement of section 12c when, in 1971, it amended the section to provide that a carrier would no longer be entitled to have a prior incapacity considered as a possible reduction of liability for a present incapacity, but rather would be liable for all compensation due for the combined effects of both incapacities.[210]

From 1971 to 1977, when section 12c was returned to its pre-1971 version, the courts unanimously interpreted section 12c to mean exactly what the legislature had written, *i.e.*, the carrier could no longer offer proof of a prior injury to reduce the employee's recovery for a present incapacity.[211] Although the 1971 change in the wording of section 12c was seemingly insignificant, the economic impact on the compensation system was noted to be of major proportion.[212] In analyzing the operation of the 1971 version of section 12c, it was also noted that it was theoretically possible for a worker to be injured on the same job five days in a row and collect five total and permanent verdicts.[213] The hypothetical example was only slightly exaggerated in order to make the point. There is now available an example which unfortunately is neither an exaggeration nor hypothetical. In *Liberty Mutual Insurance Co. v. Graves*[214] the jury found the employee totally and permanently incapacitated as a result of a July, 1973 injury and a January, 1975 injury, both incapacities beginning on January 4, 1975. The trial court entered judgment for total permanent benefits for each injury. The court of civil appeals affirmed.

---

would not preclude review by the National Labor Relations Board, citing Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964). 559 S.W.2d at 876.

206. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Vernon Supp. 1978-79) (adopted in 1977).

207. 1917 Tex. Gen. Laws ch. 103, at 269-94.

208. 1947 Tex. Gen. Laws ch. 349, § 1, at 690-91.

209. *See* Sartwelle, *supra* note 3, at 304-34.

210. 1971 Tex. Gen. Laws ch. 316, § 1, at 1257.

211. 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.).

212. Sartwelle, *supra* note 190, at 237-39.

213. Sartwelle, *supra* note 3, at 305.

214. No. 1289 (Tex. Civ. App.—Corpus Christi, Oct. 19, 1978, writ filed).

The court rejected the carrier's first contention that two awards could not be rendered when the separate incapacities began on the same day. Although the opinion does not refute the carrier's argument, it is not meritorious under current Texas compensation law. The definition of total incapacity,[215] as interpreted by the appellate courts, means that an employee may be totally and permanently incapacitated even if after an injury he continues to work at the same job for higher wages than he received before the injury.[216] Thus, the fact that the claimant continued to work during the period between the occurrence of his first and second injuries was not a sufficient reason to deny compensation or overturn a jury verdict. There is nothing in current Texas compensation theory except common sense which denies a worker compensation for two concurrent disabilities resulting from two separate injuries.[217]

The carrier's second argument was that the 1971 version of section 12c did not apply because the employee did not sustain a prior compensable injury as section 12c requires and thus section 12c was inapplicable. No prior compensable injury existed because the Act[218] requires incapacity to exist for at least one week after an injury occurs before the injury becomes compensable. Since there was no incapacity until after the second injury, the first injury was not a prior compensable injury as required to make section 12c applicable. The court disposed of this argument by noting that no court had ever held that the prior injury referred to in section 12c had to be a compensable injury before the second injury occurred. Nevertheless, the court freely admitted that the result, while unavoidable, allowed the claimant an undeserved double recovery. Thus, as previously predicted,[219] the court was compelled to allow the claimant a windfall.

In a factual setting similar to *Graves*, the Eastland court of civil appeals made a remarkable holding partially limiting the recovery obtainable by a worker with separate general injuries. In *Texas General Indemnity Co. v. Lee*[220] the claimant's first back injury occurred in December, 1973 and the second, while working for the same employer, occurred in October, 1975.

215. The definition submitted by most trial courts is found in 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 22.02 (1970).

216. This proposition is so well established and has been written by so many courts that no citation is really necessary to support this statement. For the sake of form, however, a reference will be made to a normally dubious secondary authority which just happens to correctly cite a good many of the cases supporting the statement. 63 TEX. JUR. 2d *Workmen's Compensation* § 140 (1965 & Supp. 1978).

217. The incapacities can be limited only by the artificial 401 week limitation on total permanent disability benefits. TEX. REV. CIV. STAT. ANN. art. 8306, § 10 (Vernon Supp. 1978-79). This limitation may provide another limit to full benefits in a case involving a so-called delayed disability such as in *Graves*. This limitation would result from the fact that the 401 weeks begin with the date of injury and not incapacity. *Id.*; Indemnity Ins. Co. of N. America v. Williams, 129 Tex. 51, 99 S.W.2d 905 (1937); Texas Employers' Ins. Ass'n v. White, 129 Tex. 659, 99 S.W.2d 904 (1937); Jones v. Texas Employers' Ins. Ass'n, 128 Tex. 437, 99 S.W.2d 903 (1937); Texas Employers' Ins. Ass'n v. Guidry, 128 Tex. 433, 99 S.W.2d 900 (1937).

218. TEX. REV. CIV. STAT. ANN. art. 8306, § 6 (Vernon 1967).

219. *See* note 212 *supra* and accompanying text.

220. 570 S.W.2d 231 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

The claimant filed two separate claims for total, permanent incapacity. The first trial involved the October, 1975 injury. The claimant recovered total, permanent lump sum benefits. The second trial, involving the December, 1973 injury, also resulted in an award of total, permanent lump sum benefits. On appeal, the carrier argued that the claimant was judicially estopped to recover total permanent benefits from the December, 1973 injury because of his testimony in the first trial. The claimant's testimony in the first trial, quoted at length by the court,[221] was in essence that his incapacity at the time of the first trial was total and permanent and caused completely by the October, 1975 injury.

The court observed that judicial estoppel merely bars a party who has made a sworn statement in the course of a judicial proceeding from later taking a contrary position, unless the statement is made inadvertently or by mistake, fraud, or duress. In the second trial the claimant asserted that he was totally, permanently incapacitated as a result of the 1973 injury which was contrary to the testimony in the first trial. Thus, the court held that the claimant was estopped to assert total, permanent disability arising out of the 1973 injury but could assert a claim for temporary incapacity. Of course, temporary incapacity includes temporary, total incapacity which could last at least 401 weeks. Thus, while the carrier may have won the battle, the war still hangs in the balance.[222]

---

221. *Id.* at 233-34.

222. Two other cases also involved the issue of prior injuries. In New York Underwriters Ins. Co. v. Upshaw, 560 S.W.2d 433 (Tex. Civ. App.—Beaumont 1977, no writ), the insurance carrier complained that the trial court would not permit cross-examination of the claimant regarding several prior back injuries. The court noted that the case was governed by the 1971 version of § 12c which precluded the use of prior injuries to offset liability for a present incapacity. Thus, the prior injuries that the carrier sought to prove were applicable to a sole cause issue only. The record, according to the court, did not reveal that the carrier attempted to connect the prior injuries to sole cause. Thus, the exclusion of the prior injuries was not error and the court affirmed the judgment.

In Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.—Texarkana 1977, no writ), the jury failed to find that the claimant sustained an accidental injury. The claimant complained that the trial court had given a sole cause instruction which somehow induced the jury to negatively answer the accidental injury issue. The court summarily overruled the contention as well as several others affirming the trial court's take-nothing judgment.

There are two interesting aspects to the *Presley* case. The first is the fact that the carrier apparently made a movie showing the claimant working very diligently in connection with the landscaping business that he operated. This is one of the few cases where the stereotyped image of the big powerful insurance company using millions of dollars to investigate one poor little claimant is perhaps half truth. In this case, however, it apparently worked.

The second interesting aspect is the trial court instruction on the sole cause issue raised by the claimant's previous injury. Since TEX. R. CIV. P. 277 outlaws inferential rebuttal issues, sole cause must be submitted as part of an instruction. The instruction quoted by the court in *Presley* appears to be a correct instruction and one that can readily be understood and applied by a jury. The instruction reads:

> "You are instructed that if an employee has suffered a previous on the job injury and suffers a subsequent on the job injury which resulted in a condition of incapacity to which both injuries or their effects have contributed, you shall consider the combined effects of the injuries in determining whether or not the employee has sustained any total and/or partial disability. On the other hand, if you find that the defendant has established by a preponderance of the evidence that the injury of May, 1969, was the sole cause of the present alleged

Suits to Mature Awards. In *Twin City Fire Insurance Co. v. Cortez*[223] the supreme court allowed death benefits to be "accelerated" and paid in a lump sum despite the legislature's specific, plain, unambiguous directive that death benefits shall be paid weekly and not in a lump sum. Since the legislature is in session this year, one can only hope that this unfortunate judicial rewriting of the Act can be rectified by a specific amendment clarifying the legislature's intent.

The Industrial Accident Board awarded Anita Cortez and her six minor children death benefits. The payments were to be made weekly. The attorneys' fee portion of the award was paid in a lump sum pursuant to the parties' agreement and the Board's approval. The carrier made weekly payments for fifteen months. Due to a bookkeeping error, no payments were made between June 14 and July 25, 1976. The widow filed suit to mature the Board's award and to accelerate the death benefits into a lump sum payment as well as to collect a twelve percent penalty and attorney's fees. Neither Mrs. Cortez nor her attorneys ever contacted the insurance company regarding the resumption of the payments.[224] Upon learning of the filing of suit, however, the company immediately issued drafts for the seven delinquent weekly payments and continued to tender weekly drafts until the date of trial, but Mrs. Cortez refused to accept payment.

The trial judge found that even though the payments were stopped because of mere clerical oversight, that did not justify the payment stoppage. Thus, the trial court matured the entire claim based upon the widow's 27.6 year life expectancy, allowed no discount for present payment, assessed a twelve percent penalty, and awarded attorneys' fees.[225] The court of civil appeals affirmed.[226]

The trial court's judgment was based upon article 8307, section 5a,[227]

> incapacity, then you may not find that the alleged injury of February, 1974, was a producing cause of any alleged incapacity."

557 S.W.2d at 613.

223. 22 Tex. Sup. Ct. J. 156 (Dec. 20, 1978).

224. The supreme court's majority opinion conveniently left out this fact along with the fact that drafts were tendered each week until the date of trial. These facts are noted in the court of civil appeals' opinion. 562 S.W.2d 940, 942-43 (Tex. Civ. App.—Amarillo 1978).

225. The supreme court opinion provides none of this information. The court of civil appeals' opinion, however, recites that judgment was rendered for $90,417.60, being $63.00 per week for 1,435.2 weeks (Mrs. Cortez's 27.6 year life expectancy), without discount, a 12% penalty of $10,850.11, and attorney's fees of $37,139.20 subject to a $7,000.00 remittitur if no appeal was perfected to the court of civil appeals and a $3,500.00 remittitur if no appeal was taken to the supreme court. *Id.* at 943.

226. *Id.*

227. TEX. REV. CIV. STAT. ANN. art. 8307, § 5a (Vernon 1967). This section provides, in pertinent part as follows:

> Where the board has made an award against an association requiring the payment to an injured employé or his beneficiaries of any weekly or monthly payments, under the terms of this law, and such association should thereafter fail or refuse, without justifiable cause, to continue to make said payments promptly as they mature, then the said injured employé or his beneficiaries, in case of his death, shall have the right to mature the entire claim and to institute suit thereon to collect the full amount thereof, together with twelve per cent penalties and attorney's fees, as herein provided for.

Id.

which provides that if the carrier fails or refuses to make weekly or monthly payments as required, then the claimant, or in a death case, the beneficiaries, may sue to mature the entire award and collect a twelve percent penalty plus attorneys' fees. The carrier contended that an award of a future lump sum was impermissible in a death case because article 8306, section 8 specifically provides for payments to beneficiaries and attorneys to be periodic and not in a lump sum except in the event of remarriage or when there is a bona fide dispute as to the carrier's liability for the death.[228]

The majority opinion is almost impossible to analyze because a careful study reveals that a substantial portion of the opinion does not relate to the substantive, practical issue involved in the case. That issue, in simple terms, is how does a court mature death benefits when the benefits payable to the widow and children are uncertain and incapable of being ascertained with any degree of certainty.[229] The majority opinion failed to discuss this question, other than to agree with the trial court's judgment as to the lump sum amount, although the majority did allow a four percent discount on the matured award. Thus, the case was remanded to the district court "for the entry of a judgment in accordance with this opinion."[230]

The only recognition the majority gave to the indefinite nature of a death award was to observe that the statute allowed lump sum awards in cases of bona fide disputes as to liability. Thus, according to the majority:

> The Legislature itself . . . specifically allows original lump sum awards when there is a bona fide dispute as to liability. Thus, even in

228. *Id.* art. 8306, § 8 (Vernon Supp. 1978-79). The statute provides:

> (b) The weekly benefits payable to the widow or widower of a deceased employee shall be continued until the death or remarriage of the beneficiary. In the event of remarriage a lump sum payment equal in amount to the benefits due for a period of two (2) years shall be paid to the widow or widower. The weekly benefits payable to a child shall be continued until the child reaches eighteen (18) years of age, or beyond such age if actually dependent, or until twenty-five (25) years of age if enrolled as a full-time student in any accredited educational institution. All other legal beneficiaries are entitled to weekly benefits for a period of three hundred and sixty (360) weeks.
>
> (c) Upon the termination of the eligibility of any child to receive benefits, the portion of compensation paid to such child shall thereafter be paid to any remaining child or children entitled to benefits under the provisions of this Act. If there is no other eligible child then such benefits shall be added to those being paid to the surviving spouse entitled to receive benefits under the provisions of this Act.
>
> (d) The benefits payable to a widow, widower, or children under this section shall not be paid in a lump sum except in events of remarriage or in case of bona fide disputes as to the liability of the association for the death. Any settlement of a disputed case shall be approved by the board or court only upon an express finding that a bona fide dispute exists as to such liability.
>
> Upon settlement of all cases where the carrier admits liability for the death but a dispute exists as to the proper beneficiary or beneficiaries, the settlement shall be paid in periodic payments as provided by the law, with a reasonable attorney's fee not to exceed twenty-five per cent (25%) of the settlement. The attorney's fee shall be paid periodically and not in a lump sum.

Id.

229. *Id.*

230. 22 Tex. Sup. Ct. J. at 159.

> original proceedings, both the Board and the courts may face the problem of calculating an award based on the life and remarriage expectancy of a widow or widower. The means of calculating the remarriage expectancy of a widow or widower admittedly create problems for the Board and for the courts. Nevertheless, the Legislature has expressly provided that lump sums of death benefits may be awarded when liability is disputed and has given no indication of an intent to abolish the right to a lump sum award under the enforcement statute. The fact that the Legislature has provided no specific guidelines for calculating remarriage expectancy in the event of a lump sum award is no basis for refusing to award a lump sum when the propriety of such an award is specifically provided for by the Act.
>
> . . . The Legislature will soon be in session; and if this opinion does not comport with its intent, it may, of course, clarify the matter.[231]

This challenge to the legislature ignores a very practical problem of determining, for example, the lump sum to be paid to a widow or widower so old as to have no life expectancy according to a published table. Moreover, the majority ignores the obvious fact that a settlement when there is a bona fide dispute as to liability is not a settlement of a weekly obligation extending into the future but rather a legislatively authorized lump sum settlement of the disputed liability for the death. The law encourages settlements and the legislature provided for a lump sum settlement in disputed cases rather than dictating that the parties "roll the dice" and go for all or nothing.

The minority opinion, written by Justice Barrow,[232] pointed out that the legislative provision for lifetime death benefits was designed to replace the wages of the deceased wage earner. Except in two narrowly defined and precise instances, the legislature commanded that benefits be payable in weekly amounts. This legislative intent was clearly illustrated by the fact that the legislature provided no means to determine the amount of any future benefits. As to life expectancy, remarriage, and children, the dissent noted:

> Life expectancy tables, although not mentioned in the statute, do give a guide for the life expectancy of a surviving spouse. However, there probably is nothing more uncertain than the chances of, or the time for, the remarriage of a widow or widower. Furthermore, as long as there are minor children there is a possibility that one child might become dependent and thus entitled to benefits for the balance of that dependent child's life. A prior lump sum payment would deprive that child of benefits it otherwise would receive.[233]

As to how the statutes could be harmonized, the dissent wrote:

> I agree wholeheartedly with the legislative intent of Article 8307, section 5a, that the association should be penalized for failing to make the weekly payments on time. However, if the 12% penalty on the

231. *Id.* at 158.

232. *Id.* at 159-61 (dissenting opinion by Barrow, J., joined by Steakley, Pope, & Daniel, J.J.).

233. *Id.* at 160.

> weekly payments which were not timely paid plus reasonable attorney's fees is not an adequate penalty, the legislature should amend the statute to increase the penalty. I do not believe we should attempt to do so by a judicial construction of the death benefits statute contrary to the expressed intent of the legislature in Article 8306, section 8. I would limit the penalty and attorney's fee to the weekly payment benefits which were not timely paid by petitioner.[234]

The dissenting opinion is without question the only logical approach to the construction and harmonizing of the statutes. The difficulty with the majority's approach to the construction of these statutes becomes most painfully obvious when considered in light of the dissent's observations regarding the uncertainty not only of remarriage but more importantly the benefits destined for a minor child or children, benefits that are simply ignored and voided by the majority holding. For example, when the trial court apportioned the Cortez judgment, was it assumed that the six minor children would not attend college? If so, each child's participation would terminate at age eighteen, even though the legislature has provided for continued payments to each child enrolled as a full time college student. Suppose one or more of the six minor children should become a quadriplegic, paraplegic, or mental handicap and thus dependent upon the mother for support for the rest of its life. This child or these children have been cut off from funds which would continue to be paid to them without regard to the mother's life expectancy. If the mother has frittered away the lump sum award, the child may become another public charge. What would occur if the widow or widower outlives the trial court's life expectancy estimate? Does the widow or widower have a right to make the carrier reinstitute payments? Perhaps there would be a cause of action against the district judge who calculated, or rather miscalculated, the amount of the judgment.

Lump Sum Awards. Fortunately, at least at this writing, the district courts' ability to prognosticate with certainty will only be tested in a suit to mature an award and, according to one court, awarding lump sum attorneys' fees. The Beaumont court wisely rejected the opportunity to engage in perilous speculation in *Walden v. Royal Globe Insurance Co.*[235] In *Walden* the accrued weekly payments were ordered paid with interest and the future benefits paid weekly. The claimant appealed solely on the point of whether the trial court correctly sustained the carrier's special exceptions to the claimant's lump sum allegations. The court, speaking through Justice Keith, in a thorough and persuasive opinion, held that the claimant was not entitled to submit issues regarding lump sum because the statute[236] only allowed lump sum payments upon remarriage and in cases involving bona fide disputes as to liability. Justice Keith noted the *Cortez* opinion but also noted that the court's holding was in keeping with both

234. *Id.* at 161.
235. No. 8127 (Tex. Civ. App.—Beaumont, Dec. 28, 1978).
236. TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon Supp. 1978-79).

the majority and minority opinions in *Cortez*. In a case involving a related issue the Fort Worth court somehow was able to reach a conclusion almost directly opposite to that reached by Justice Keith and the Beaumont court. In *Texas Employers' Insurance Association v. Flores*[237] the court affirmed a judgment awarding weekly benefits to a widow and two minor children but also awarding attorney's fees in a lump sum. The trial court's judgment provided that the carrier should pay a twenty-five percent attorney's fee on the unaccrued death benefits. The unaccrued benefits were calculated by use of an unspecified pension table.[238] The unpaid death benefits were calculated to have a present value of $58,582.16 and the attorney's fee was calculated to be $14,645.54. The carrier appealed only from that portion of the judgment awarding the lump sum attorney's fee, contending that section 7(d),[239] relating to attorney's fees, and section 8,[240] relating to death cases, allowed attorney's fees to be paid as the compensation accrued and became payable. The carrier argued that to allow a lump sum attorney fee while weekly payments remained contingent upon the death or remarriage of the widow or the dependency of a minor child made the carrier an insurer against these contingencies, something not contemplated by the legislature.[241]

The court of civil appeals, without any legal analysis, overruled the carrier's point of error upon the "authority" of an El Paso court of civil appeals decision allowing lump sum attorney's fees, *Liberty Mutual Insurance Co. v. Ramos*,[242] and upon the supreme court's opinion in *Texas Employ-*

237. 564 S.W.2d 831 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

238. A finding of "fact" was made by the trial court as follows:

> "(b) The Court takes judicial knowledge of the tables and formulae certified correct by the Industrial Accident Board of Texas in its manual dated the 1st day of August, 1973, for use in the years 1974-1975, and of Widow's Pension Table based on the 1960 U.S. Life Tables for White Females and U.S. Employees used to calculate compensation with the expectancy of death and remarriage, and of the life expectancy of Guadalupe Flores and her children. Based thereon the Court finds that there is a present value and sum certain of $58,582.16 that can be placed on claimants' case after proper discounts."

Id. at 832.

239. TEX. REV. CIV. STAT. ANN. art. 8306, § 7(d) (Vernon Supp. 1978-79).

240. TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon Supp. 1978-79).

241. The carrier apparently relied upon an Alabama case to support its argument. The court noted the argument as follows:

> By reason of the foregoing, says Texas Employers' to allow her attorney his fees in a lump sum would be to compel it to pay such attorney when under the law it is the obligation of the client to pay them out of her recovery.
>
> The argument is quite rational. Were the case controlled by Alabama law there would be probability that Texas Employers' should prevail. See *Woodward Iron Co. v. Bradford*, 206 Ala. 447, 90 So. 803, 806 (1921) where in a case having analogy the court wrote: "These words do not authorize the judge to make the employer, in effect, an insurer against the death or remarriage of a dependent widow before the maturity of the last payment, or the death or termination of the dependency of the child before the maturity of said last payments, and which would be the result by requiring the employer to pay these fees in advance and look to the last periodical payments for reimbursement."

564 S.W.2d at 833.

242. 543 S.W.2d 392 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

ers' Insurance Association v. Motley.[243] The El Paso court in *Ramos* also relied upon the *Motley* decision. *Motley*, however, is clearly distinguishable and offers no support for either *Flores* or *Ramos*.

In *Motley* the claimant was injured on February 18, 1970, some three and one-half years before the legislature's amended death statute became effective on September 1, 1973.[244] A jury found Motley totally, permanently disabled but refused to award compensation in a lump sum. The trial court ordered the carrier to make weekly payments to Motley and further ordered the attorney be paid twenty-five percent of the total amount recovered, discounted, in a lump sum.[245] The supreme court affirmed the lump sum attorney fee, noting the difference between an award made by the Board and a final court judgment. In so doing, it articulated the precise reasoning which it ultimately ignored in *Cortez*—the fact that attorney's fees could not be awarded on a lump sum basis if based on an award of benefits short of a final judgment, as such award is incapable of being ascertained with any degree of certainty because the claimant's death terminated the right to unaccrued weekly benefits. A final judgment on the other hand cannot be modified or reduced and is payable even after the claimant's death and, therefore, is capable of specificity with regard to the total amount recoverable.[246] Thus, the attorney's fees are also capable of being ascertained.[247]

A cursory reading of *Motley* reveals that it does not support the *Flores* court's holding, a fact the *Flores* court obviously must have known when it

---

243. 491 S.W.2d 395 (Tex. 1973).

244. TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon Supp. 1978-79), became effective on September 1, 1973.

245. These facts were gleaned from the court of civil appeals opinion. 483 S.W.2d 709, 710 (Tex. Civ. App.—Austin 1972).

246. The court wrote:

> The statute thus spells out that when the workman is to receive his compensation in installments as a result of an order of the Board, so is his lawyer.
>
> One reason for this is that when there is no death claim and when recovery is based on an award of the Board for a general injury, the total amount that the insurance company is to pay in installments may not be definitely ascertainable at the time of the award. The Board retains the right to modify the award. Moreover, if the employee dies before he receives all of the compensation awarded him in weekly payments, the cases say that the liability of the insurance company ceases; i.e., the unmatured portions of the claim are extinguished by his death. . . . Since this is so, the portion recoverable by the attorney may not be ascertainable with certainty at the time of the Board's award. Hence a lump sum recovery to the attorney would present problems.
>
> On the other hand, if the compensation is based upon a *judgment* in court, which judgment has either become final or is affirmed, the amount awarded by the court does survive the workman's death and is not subject to modification or reduction. . . . The attorney's fees, therefore, may be fixed or approved with certainty by the trial court in the light of the amount which will be recovered by the workman or those claiming under him.

491 S.W.2d at 396.

247. The other opinion cited by the *Flores* court as supporting this holding was Texas Employers' Ins. Ass'n v Garces, 492 S.W.2d 723 (Tex. Civ. App.—San Antonio 1973, no writ). This was also a pre-September, 1973 injury involving the same contentions argued in *Motley*. Thus, the court of civil appeals correctly applied *Motley* and affirmed the lump sum award of attorney's fees.

quoted, out of context, the supreme court's comments regarding final judgment.[248] More shocking than the court's out of context quotation, however, is the following statement of an appellate court:

> Rationale of all the cases [*Motley*, *Ramos*, and *Texas Indemnity Insurance Co. v. Bush*,[249]] seemingly stem from the observation in *Bush*, *supra*, that where there the allowance of a lump sum as the attorney's fee has neither increased the liability of the insurance company or the recovery against it, it is not entitled to complain.[250]

Suffice it to say that the court of civil appeals completely failed to reveal the method to be used to determine the precise amount that Ms. Flores and the two minor children recovered against the carrier. Certainly if Ms. Flores and her two children are tragically killed one week after the judgment is final, recovery against the carrier will have been increased manyfold because of the attorney's lump sum recovery of more than $14,000.00. Incredible as it may seem, the court of civil appeals held that despite all of the contingencies that could occur, the trial court was indeed a "soothsayer" when it found as a fact that "there is a present value and *sum certain* of $58,582.16 that can be placed on claimants' case after proper discounts."[251]

There are questions left unanswered by the court of civil appeals opinion. What if the district court is wrong and Ms. Flores remarries the week after the attorney's fees are paid, before she has collected $800, let alone an amount in excess of $58,000.00? Does the carrier have a cause of action against the attorney for unjust enrichment? On the other hand, suppose the widow is eighty years old with a life expectancy of only 6.53 years?[252] If the attorney's fees are awarded in a lump sum, but the widow lives for twenty years collecting weekly benefits, does the attorney have a cause of action for additional attorney's fees? If so, when does the cause of action accrue, at the end of 6.53 years? What would be the statute of limitation applicable to the claim? Where does it all end? It seems that the courts, in their haste to be liberal and progressive, have not really thought through some of the obvious problems engendered by their far-reaching opinions. A prediction that the above mentioned problems will eventually be liti-

248. *Compare* the *Flores* court's partial quotation from *Motley*, 564 S.W.2d at 833-34, *with* the full quotation in note 246 *supra*.

249. 163 S.W.2d 224 (Tex. Civ. App.—Amarillo 1942, writ ref'd). This case simply held that the carrier had no standing to complain regarding the percentage of the award apportioned to the attorney as his fee as long as its liability or the amount it was required to pay was not increased.

250. 564 S.W.2d at 834.

251. *Id.* at 832 (emphasis added). The district court must not only gaze into the future regarding remarriage but must also predict the widow's life expectancy without the benefit of a physical examination or the answers to a health questionnaire. The use of a life expectancy table presupposes that the person inquired about is in good health. Since the district court has no statutory manner in which it can determine the person's state of health, one can only guess at how this fact is to be ascertained.

252. *See, e.g.*, Flahive & Ogden, *Texas Workers' Compensation Manual, Life Tables* (1978).

gated will be at least as accurate as a district court's prediction regarding the date of a widow's death or remarriage.

Postal Service as Agent for Filing Notices. Section 5 of article 8307[253] requires that a party not willing to abide by the Board's final ruling file a notice with the Board that the party will appeal the ruling to the district court. This notice must be filed within twenty days of the date of the Board's ruling. Prior to *Ward v. Charter Oak Fire Insurance Co.*[254] the statute was strictly construed. It had been held for many years that if a party chose to deliver the required notice by mail, then the post office became the party's agent and if a delay by the post office resulted in late delivery of the notice, the party would not have perfected an appeal.[255]

Ward has now revoked that rule because, according to the supreme court, applying the rule "would lead to a harsh and inequitable result in this case."[256] The court held that if the notice of intention to appeal from a Board ruling is sent by first class mail, properly addressed and stamped, and the notice is deposited in the mail one day or more before the twenty day period expires and the Board receives the notice not more than ten days after the twenty days expires, then the notice is timely filed. The court wrote: "In the interest of uniformity, this construction of Section 5 of Article 8307 coincides with the notice provisions of Rule 5 of the Texas Rules of Civil Procedure. To the extent that any cases conflict with this construction of Section 5, they are overruled."[257]

This opinion is a matchless example of an exercise of raw judicial power resulting in nothing less than a judicial rewriting of a legislative enactment. The fact that the law has been consistently interpreted and applied strictly for fifty-two years by Texas's past jurists,[258] and the fact that the

253. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1978-79) provides in pertinent part as follows:

> Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board shall, within twenty (20) days after the rendition of said final ruling and decision by said Board, file with said Board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred, or in the county where the employee resided at the time the injury occurred (or, if such employee is deceased, then in the county where the employee resided at the time of his death), to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided.

254. 22 Tex. Sup. Ct. J. 184 (Jan. 10, 1979).

255. *E.g.*, American Motorists Ins. Co. v. Box, 531 S.W.2d 401 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); American Gen. Ins. Co. v. Kohn, 425 S.W.2d 688 (Tex. Civ. App — Austin 1968, no writ); Yancy v. Texas Gen. Indem. Co., 425 S.W.2d 683 (Tex. Civ. App.— Tyler 1968, writ ref'd n.r.e.); Fidelity & Cas. Co. v. Millican, 115 S.W.2d 464 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

256. 22 Tex. Sup. Ct J. at 185.

257. *Id.*

258. The original Compensation Act only provided that suit could be brought to set aside the Board's award but did not specify a time limit. 1913 Tex. Gen. Laws ch. 179, § 5, at 433. In the 1917 revision, however, § 5 was amended to require notice to the Board within 20 days as well as filing of suit within 20 days of the date of notice to the Board. 1917 Tex. Gen. Laws ch. 103, § 5, at 283.

legislature has not amended the statute in spite of this consistent, strict construction, demands that the court present at least some explanation for any change in what is now perceived as the legislative intent.[259] The lack of any analysis, let alone persuasive analysis, to justify the break with fifty-two years of judicial and legislative thinking, stands as a sad commentary on our court system and an affront to the American system of government.

Moreover, the supreme court failed to explain how the language of section 5 allowed such elastic construction as given to it by the court. Section 5 provides that notice *shall* be filed with the Board within twenty days after the Board's award is rendered. The statute does not provide for any excuse or enlargement as does the elastic "good cause" clause in section 4a,[260] which provides that for good cause the Board may "waive the *strict* compliance with the foregoing limitations as to notice, and the filing of the claim before the Board."[261] The supreme court also conveniently ignored the fact that the legislature specifically spoke to the issue of enlargement when it added section 5b[262] in 1937[263] to provide extra time to file both notice and suit if the last day fell on a legal holiday or Sunday. The legislature has never evidenced any inclination to change the statute to conform to rule 5[264] even though rule 5 became effective March 1, 1950.[265]

It should be noted that this new judicially legislated time period in which to file appeal notice is limited to filing notice and does not include filing suit to set aside the award which must be filed within twenty days of the date of filing notice of intent to appeal.[266] The filing of suit has been held to be jurisdictional and to constitute a general statute of limitation.[267] Thus, the court must eventually answer the question it overlooked in its haste—what date is to be used to calculate the twenty day period in which to file suit? Rule 5 simply provides that if the item being mailed is received not more than ten days "tardily"[268] it shall "be deemed filed in time."[269] Does "in time" mean the same as if filed on the last day of the original period or the day actually received and filed by the Board? Actually, the court's language does not even coincide with that of rule 5. Where rule 5 provides that the item will be deemed "filed in time," [270] the court writes "the notice shall be deemed timely filed."[271] Is there a distinc-

259. 22 Tex. Sup. Ct. J. at 185.
260. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon 1967).
261. *Id.* (emphasis added).
262. *Id.*, § 5b.
263. 1937 Tex. Laws, 2nd Spec. Sess., ch. 19, § 1, at 1890.
264. TEX. R. CIV. P. 5.
265. *Id.*
266. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1978-79). *See* note 253 *supra.*
267. Oilmen's Reciprocal Ass'n v. Franklin, 116 Tex. 59, 286 S.W. 195 (1926); Richards v. Consolidated Underwriters, 411 S.W.2d 436 (Tex. Civ. App.—Beaumont 1967, writ ref'd); Crain v. Davis, 411 S.W.2d 437 (Tex. Civ. App.—Beaumont 1966, writ ref'd); Braden v. Transport Ins. Co., 307 S.W.2d 655 (Tex. Civ. App.—Dallas 1957, no writ).
268. TEX. R. CIV. P. 5.
269. *Id.*
270. *Id.*
271. 22 Tex. Sup. Ct. J. at 185.

tion? Perhaps not. Under any of the language, the question still remains as to when the last twenty day period begins to run. Does it begin the last day of the statutory period or the day the Board files the notice? It could be an important distinction.

Mrs. Ward will not be the last claimant to claim that equity should intervene to prevent section 5 from barring a claim. The next case will involve the notice dropped in the mail box on the next to the last day but undelivered by the postal service until the eleventh day because it became "lost in the mail." The undelivered letter is not the fault of the claimant, and it will be harsh and inequitable not to allow relief even though the claimant did choose the mail as the instrument of delivery. The supreme court legislated a ten day period in *Ward*, but why should one day make any difference since the undelivered notice was not the fault of either claimant? No rational distinction can be made. Thus, an exception will be made for this claimant. The next case will involve twelve days, then fifteen, then twenty-five and so on. There will also be cases on the other end of the mail process. Since the notice must be deposited in the mail one day or more before the expiration of the twenty day period,[272] the court will soon face the issue involving the secretary who is on her way to the post office at 11:55 p.m. on the last day to post the notice, when, through no fault of her own, she is injured in a car accident. Naturally the notice is not posted until five hours, one day or two days later. Shall another exception be made? Each exception increases the probability that broader exceptions will follow in order to prevent an unjust result. Each time an exception is made there will inevitably arise another case which is only slightly beyond the last line that was drawn. Once more, the cry of inequitable result will be heard because it is unfair to make a distinction for one case and refuse to in another case which is only slightly different.

Suit to set Aside Award. As previously noted,[273] the procedure to set aside a Board award is governed by article 8307, section 5,[274] which requires a suit to be filed in a court of competent jurisdiction twenty days after filing an appeal notice with the Board. Section 5 also requires, however, that the

272. *Id.* One example of the real-life situations which will continue to assault the courts begging to be an exception to the rule is Texas State Bd. of Pub. Accountancy v. Fulcher, 515 S.W.2d 950 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). The question confronting the court was whether it could consider appellee's motion for rehearing. The opinion was delivered on Sept. 19, 1974. The envelope containing the motion for rehearing was not postmarked until Oct. 4, 1974, and not received until Oct. 7, 1974. The last day to mail the motion, under rule 5, was Oct. 3, 1974.

Based upon affidavits filed with the court of civil appeals it appeared that a secretary for the law firm representing appellee placed the envelope in a mail slot at the San Benito post office on Oct. 2, 1974. The mail was sent from San Benito without postmark to McAllen to be postmarked and delivered. The truck transporting the mail from San Benito to the McAllen post office normally delivered the mail to McAllen the same day. On Oct. 3, 1974, the truck broke down, and the mail was delivered to McAllen five hours late. The court of civil appeals found as a fact based upon the affidavits that the envelope was "mailed" on Oct. 2, 1974. Thus, the motion for rehearing was considered and overruled.

273. *See* notes 253 & 267 *supra* and accompanying text.

274. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1978-79).

suit be both instituted and prosecuted within the twenty day period.[275] Fortunately, the courts have held that this dual requirement is satisfied when a claimant files a petition within twenty days with the bona fide intent that citation shall issue and be served at once or that a waiver of citation will be obtained and filed at once.[276] This rule was reaffirmed in *Wilborn v. Texas Employers' Insurance Association*.[277] The carrier properly and timely gave its appeal notice and filed suit to set aside the Board's award. On the day suit was filed citation for service was issued but was returned unexecuted because the claimant could not be found since he "[l]eft Lubbock about two months ago. Destination unknown."[278] Several days later, the carrier's attorney filed suit in county court on another but different claim involving the claimant. The claimant's attorney filed an answer. Thereafter, the claimant's oral deposition was set by agreement in the county court suit, the carrier's attorneys intending to secure service on the claimant at the deposition. This deposition was postponed, however, after the claimant's attorney admitted he could not find his client. The claimant's deposition was later noticed, but there was no appearance. Based upon these facts, the court of civil appeals concluded that the carrier had established an affirmative and continuing intent to prosecute the district court suit and had, therefore, complied with section 5's filing and prosecution requirements.

In recent years, the most common reason for dismissing compensation suits has been the claimant naming the wrong carrier as defendant or the carrier naming the wrong claimant as defendant or the carrier misnaming itself.[279] Fortunately, the courts have recently shown mercy upon claimants and carriers making inadvertent mistakes which do not mislead the other party.[280] Such was not the case, however, in *Cormier v. Texas Em-*

275. *Id.*

276. Maryland Cas. Co. v. Jones, 129 Tex. 392, 104 S.W.2d 847 (1937); Ocean Accident & Guar. Corp. v. May, 15 S.W.2d 594 (Tex. Comm'n App. 1929, judgmt adopted); Buffalo Ins. Co. v. McLendon, 402 S.W.2d 559 (Tex. Civ. App.—Texarkana 1966, no writ); Traders & Gen. Ins. Co. v. Spillers, 88 S.W.2d 738 (Tex. Civ. App.—Fort Worth 1935, writ ref'd).

277. 558 S.W.2d 65 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

278. *Id.* at 68. At this point in the evidence recitation, the court wrote: "These facts are sufficient, as a matter of law, for us to conclude that the . . . [carrier] has complied with the requirements of § 5 of 8307, *supra*, to perfect its appeal to set aside the award of the Industrial Accident Board." *Id.*

This holding is perhaps somewhat premature since the carrier attempted service only once. If there were no other facts to demonstrate continuing efforts to serve the claimant, it is doubtful that the court would be so kindly disposed to an insurance company.

279. *See, e.g.*, Sanchez v. Aetna Cas. & Sur. Co., 543 S.W.2d 888 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.); 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.) (carrier misnamed claimant); Charter Oak Fire Ins. Co. v. Square, 526 S.W.2d 635 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.) (carrier misnamed self); Garcia v. Employers Cas. Co., 519 S.W.2d 685 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) (claimant misnamed carrier); Carpenter v. Gulf Ins. Co., 515 S.W.2d 60 (Tex. Civ. App.—San Antonio 1974, no writ) (claimant misnamed carrier); Commercial Standard Fire & Marine Ins. Co. v. Martin, 501 S.W.2d 430 (Tex. Civ. App.—Texarkana 1973), *judgmt modified per curiam*, 505 S.W.2d 799 (Tex. 1974) (claimant misnamed carrier).

280. Sanchez v. Aetna Cas. & Sur. Co., 543 S.W.2d 888 (Tex. Civ. App.—San Antonio

ployers' Insurance Association.[281] Plaintiff, volunteer fireman for the City of Port Neches, was injured fighting a fire. Plaintiff filed suit naming Texas Employers' Insurance Association as the defendant. The carrier answered with an "unsworn denial."[282] Two months later, the plaintiff amended and joined the city as a defendant. The city answered, admitting it was self-insured under the Texas Municipal League[283] and denying that TEIA had issued it a compensation policy. The trial court granted a judgment non obstante veredicto in favor of TEIA and the city.

Plaintiff conceded that his suit should have named the city as the defendant. He relied upon two recent supreme court opinions, *Continental Southern Lines, Inc. v. Hilland*[284] and *Price v. Estate of Anderson*[285] to excuse his mistake. In each case, the plaintiff misnamed the defendant and failed to correct the mistake until after the statute of limitation had expired. In *Price* the court held the statute inapplicable because the defendant had not been misled or prejudiced with respect to its defense, while in *Continental* the court remanded for a determination whether the defendant had been mislead. Plaintiff also relied on *Sanchez v. Aetna Casualty & Surety Co.*[286] In *Sanchez* the carrier named Aetna Life and Casualty Company (parent company) as the plaintiff when it should have named Aetna Casualty and Surety Company (subsidiary company). The court refused to dismiss the appeal because the claimant had not been mislead or prejudiced. The *Cormier* court distinguished these three cases, noting that

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.).

281. 564 S.W.2d 177 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

282. *Id.* at 178. It is unclear from the opinion whether the carrier filed anything more than a general denial. One can only assume the court means general denial when it speaks of an "unsworn denial."

283. TEX. REV. CIV. STAT. ANN. art. 8309h (Vernon Supp. 1978-79), effective July 1, 1974, provides that all political subdivisions shall become "either self-insurers, provide insurance under workmen's compensation insurance contract or policies, or enter into interlocal agreements with other political subdivisions providing for self-insurance, extending workmen's compensation benefits to their employees." A political subdivision is defined as "a county, home rule city, a city, town or village organized under the general laws of this state, a special district, a school district, a junior college district, or any other legally constituted political subdivision of the state." *Id.* Many political subdivisions have become self-insured through a self-insurance program established through the Texas Municipal League. The League, in turn, contracts with Texas Employers' Insurance Association to be the servicing contractor for each self-insured entity and provide claim adjusters to investigate and handle each claim. In the event of litigation, Texas Employers' retains their regular defense counsel to represent the political subdivision involved. The wording of the statute makes it plain, however, that Texas Employers' is not a party to the claim. Section 3(b) of art. 8309h provides that in any adopted provision of the Compensation Act the words "association," "subscriber," or "employer," or their equivalents shall be construed to and shall mean "a political subdivision." *Id.* Thus, any suit brought by a claimant to set aside an award involving a self-insured political subdivision would be required to be brought against the political subdivision specifically and not the Texas Municipal League, Texas Association of School Boards Workmen's Compensation Self-Insurance Fund, Texas Employers' Insurance Association, or any similar organization.

284. 528 S.W.2d 828 (Tex. 1975).

285. 522 S.W.2d 690 (Tex. 1975).

286. 543 S.W.2d 888 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

in all three the true party defendant knew the lawsuit had been filed whereas there was no evidence that the City of Port Neches ever knew of the appeal until it was made a party to the suit. Moreover, the court noted that there was no evidence showing any connection between TEIA and the city as there was shown between the parties in *Continental*, *Price*, and *Sanchez*. Thus, the trial court's take-nothing judgment was affirmed.

Payment of Board Award. Carriers, when paying Board awards, should carefully note the Houston [14th District] court's opinion in *Sanchez v. Liberty Mutual Insurance Co.*[287] A Board's award favoring the employee was timely appealed by the employee. The carrier, unaware that the employee had filed suit, paid the award, sending a draft to the claimant and her attorney. The claimant promptly negotiated the draft retaining seventy-five percent and the attorney retaining twenty-five percent as his fee. The carrier, undoubtedly chagrined, answered the suit and moved for summary judgment contending that the claimant's acceptance of payment of the Board's award barred an appeal of the same award. The trial court, believing the carrier's position to be logical, sustained the motion for summary judgment.

The court of civil appeals reversed the judgment, holding that as of the date suit was filed, the Board's award was vacated and was of no significance.[288] Thus, the carrier's subsequent payment of the nonexistent award was a voluntary contribution to be credited against any judgment that the claimant recovered.[289] Perhaps the greatest shock was received by the claimant's attorney. The court held that the attorney wrongfully retained a portion of the voluntary compensation payment as a legal fee because the district court had not approved the fee as required by article 8306, section 7d.[290] Thus, the court held that the claimant was entitled to recover from her attorney the portion he withheld.

Death Benefits—Beneficiaries. In *Griffith v. Christian*[291] a deceased worker had two children by a prior marriage who had subsequently been adopted by their stepfather prior to the death of the decedent. After his divorce, the deceased had remarried and fathered two more children. The children, both minors, by the first marriage claimed entitlement to a portion of the compensation death benefits awarded the second wife and the children, both minors, by the second marriage. The adopted children contended that the Dallas court's opinion in *Dickerson v. Texas Employers' Insurance Association*[292] was controlling over the supreme court's opinion

287. 570 S.W.2d 44 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

288. This is a well established proposition for which the court cited Latham v. Security Ins. Co., 491 S.W.2d 100 (Tex. 1972), and Buffalo Ins. Co. v. McLendon, 402 S.W.2d 559 (Tex. Civ. App.—Texarkana 1966, no writ).

289. The court cited no authorities to support this proposition.

290. TEX. REV. CIV. STAT. ANN. art. 8306, § 7d (Vernon Supp. 1978-79).

291. 564 S.W.2d 170 (Tex. Civ. App.—Tyler 1978, no writ).

292. 451 S.W.2d 794 (Tex. Civ. App.—Dallas 1970, no writ).

in *Patton v. Shamburger*[293] and the El Paso court's opinion in *Banegas v. Holmquist*.[294] The unadopted children argued that the adopted children did not qualify as "minor children" under the terms of the compensation death benefits statute[295] because *Patton* held that while adopted children could inherit from their natural parents, worker compensation death benefits were not derived by inheritance but by statute. Thus, upon adoption the relationship between a natural parent and the children ceased, and they were no longer natural children of the parent for compensation purposes. This holding was followed in *Zanella v. Superior Insurance Co.*,[296] and in *Holmquist*, wherein both courts held that a parent or parents should receive the death benefits to the exclusion of the decedent's natural children who had been adopted before their father's death.

In *Dickerson* one of the deceased worker's five children had been adopted prior to his death, but the others had not. The Dallas court held that the exclusion of the adopted child amounted to an invidious discrimination between two equal classes of children without fault on the part of the adopted child who had no choice in the matter. The court in *Griffith*, however, chose to follow the *Patton*, *Zanella*, *Holmquist* line of cases. The court held that the minor adopted children had not been deprived of any rights but had simply transferred their rights from one parent to another and thus were not entitled to share in death benefits under the Texas Workers' Compensation Act.

Wage Rate. The statutory scheme used to compute a worker's monetary recovery in compensation cases is contingent upon the worker's wage rate.[297] Wage rate is a technical issue referred to by one commentator as a "three-horned devil."[298] This devil grappled with another claimant during the survey year and converted a permanent partial verdict into a new trial. In *Texas Employers' Insurance Association v. Bewley*[299] the claimant, the owner of a heavy equipment rental business, alleged that he worked at least 210 days in the year preceding his injury and earned an average weekly wage of $320. He alleged no alternative grounds for determining average weekly wage. The jury found that the claimant did work at least 210 days and earned an average daily wage of $64.00. The carrier contended the evidence was legally and factually insufficient to support the jury's average daily wage answer. The court of civil appeals agreed, reversing the trial court's judgment and remanding the case for a new trial.

293. 431 S.W.2d 506 (Tex. 1968).
294. 535 S.W.2d 410 (Tex. Civ. App.—El Paso 1976, no writ).
295. TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (Vernon Supp. 1978-79).
296. 443 S.W.2d 95 (Tex. Civ. App.—Eastland 1969, writ ref'd).
297. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10, 11, 12 (Vernon Supp. 1978-79); *id.* art. 8309, § 1 (Vernon 1967).
298. Molberg, *Workers' Compensation—The Importance of Average Weekly Wage*, TRIAL LAW. F., July-Sept. 1978, at 3.
299. 560 S.W.2d 147 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). This opinion also involves a substantial independent contractor question. *See* notes 138-48 *supra* and accompanying text.

The claimant testified that he worked as a heavy equipment operator at least 210 days in the year preceding his injury and most of that work was on an hourly rate. He did not pay himself a weekly wage or salary but simply drew checks on the company account in order to pay his expenses. The claimant's income tax returns were placed in evidence showing his gross income as well as his labor costs. The claimant did not produce his various invoice records which would have revealed the times that he worked as an operator.

The court of civil appeals opinion contains a lengthy evidence recitation as well as numerous liberal quotes from prior cases. In summary, the court remanded the case for a new trial because while the claimant produced evidence that he worked and earned money as an operator, he failed to produce evidence that he was paid any specific sum as wages. The court also noted the evidence establishing the scale paid a union operator, such as the claimant's son who worked as an operator for his father, and noted that this testimony would have supported a just and fair finding under paragraph 3.[300] Unfortunately, as the court held, such evidence would not support a paragraph 1 finding that the claimant actually earned a specific daily wage. The moral of *Bewley*—don't grapple with three-horned devils unless you plead that you are possessed of a trident with at least two and preferably three sharp prongs capable of a successful kill.

Medical Expenses. Last year the Fifth Circuit held that an employee covered by the Texas Compensation Act is entitled to recover from the carrier the cost of medical treatment rendered to him by the Veterans' Administration for an on-the-job injury.[301] This year, on petition for rehearing,[302] the court held that the employee's assignment to the Veterans' Administration of his rights against the compensation carrier was not void because of the Texas anti-assignment statute.[303] The court noted that the assignment was made pursuant to a Veterans's Administration regulation that had the force of federal law. Since the federal regulation was only a "minor trespass"[304] on the state scheme and since the Constitution's supremacy clause prevented a state from conditioning the operation of a workers' compensation statute in a manner which frustrated the purpose of a national statute, the petition for rehearing was denied.

Nursing Services. An important but little known aspect of a nursing services claim was successfully litigated by the carrier in *Finch v. Texas Employers' Insurance Association*.[305] The primary issue involved in the appeal was the breadth and scope of a wife's claim for nursing services rendered to her husband.

300. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(3) (Vernon 1967).
301. Texas Employers' Ins. Ass'n v. United States, 558 F.2d 766 (5th Cir. 1977), *reviewed in* Sartwelle, *supra* note 3, at 365-66.
302. Texas Employers' Ins. Ass'n v. United States, 569 F.2d 874 (5th Cir. 1978).
303. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).
304. 569 F.2d at 875.
305. 564 S.W.2d 807 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e).

As a result of a compensable injury Finch was rendered a paraplegic. A compromise settlement agreement was negotiated whereby the carrier agreed to pay all future medical expenses related to the original injury. The carrier later refused to pay Mrs. Finch for her nursing services. After a jury trial, the claimant and his wife appealed alleging several errors but in particular complaining of the trial court's instruction accompanying the special issue inquiring into the value of nursing services rendered by Mrs. Finch. The instruction provided: "You are instructed in your consideration of this issue that you are not to take into consideration any services performed by Netta Finch as usual domestic services performed by a wife, but are to only consider the services usually performed by a person engaged in such activity."[306]

The claimant argued that the instruction assumed that a wife's domestic services cannot be nursing services and, therefore, misinformed the jury. The claimant asserted that the issue and instructions submitted in *Home Indemnity Co. v. Draper*[307] should have been submitted. That instruction stated as follows:

> Special Issue No. 1
>
> What do you find from a preponderance of the evidence to be the reasonable cost of the services rendered for William Draper for his reasonably required nursing care from the date of his injury to the present?
>
> You are instructed that the term "nursing care", as used above, includes all those services, if any, performed by Mrs. Draper as required by Mr. Draper's condition resulting from the injury in question.
>
> Answer in dollars and cents, if any.[308]

The Dallas court held that the *Finch* instruction was in accord with the leading case involving a wife's right to recover for nursing services rendered to her husband, *Transport Insurance Co. v. Polk*.[309] In *Polk* the supreme court carefully distinguished between a wife's usual domestic duties and the wife's extraordinary nursing services, describing nursing services as follows:

> [L]ike those services performed by Mr. Tejada [a licensed vocational nurse[310]], but during the time he was not on duty. Those are such services as cutting up his food, holding a glass or cup while he drinks, turning him over in bed every two hours, raising and lowering him in bed, seeing that he does not become malpositioned in bed, keeping him and the bed clean and dry to avoid ulcers, rubbing his skin with alcohol, keeping him covered at night, providing medication for him during his sleepless nights, draining his urine bag, and cleaning Mr. Polk and changing the bed linens following his bowel move-

306. *Id.* at 809.
307. 504 S.W.2d 570 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).
308. *Id.* at 572.
309. 400 S.W.2d 881 (Tex. 1966).
310. Polk was a quadriplegic. The physicians testified that he needed constant care and attention. Mr. Tejada, the nurse, worked 10 hours per day, six days per week and four hours on Sunday. Mrs. Polk performed the needed services the remainder of the time.

ments. These are services that three doctors said were necessary and which Mr. Tejada performed when he was present.[311]

Based upon the *Polk* distinction the Dallas court held that an instruction such as submitted by the trial court was necessary in order to enable the jury to delineate between compensable nursing services and noncompensable domestic services that would be routinely performed even if the husband were not disabled. The court also distinguished the *Draper* opinion pointing out that in that case the carrier did not complain that the instruction allowed the jury to award money for domestic services and the court did not specifically approve the issue and definition.

The *Finch* opinion points up a problem regarding proper jury instructions. If one were unfamiliar with the special issues to be submitted in a compensation case involving nursing services, one would be tempted to consult the state bar's Pattern Jury Charge book.[312] The suggested issue contained in the Pattern Jury Charge book,[313] however, is not only biased, but is totally erroneous. The issue suggested by a supposedly impartial state bar committee is taken verbatim from the *Draper* opinion,[314] an opinion which only cited the *Polk* case one time in the course of the opinion and which never discussed *Polk's* limitations on the wife's reimbursement for nursing services rendered to her husband. In turn, the Pattern Jury Charge Committee either ignored or was unaware of *Polk* because *Polk* is never cited or referred to in any part of the committee's lengthy comment regarding the *Draper* instruction. As the Dallas court cogently pointed out in *Finch*, a wife cannot recover for domestic services that would normally be rendered to an able-bodied husband, and a jury must be informed of this distinction in order to render an intelligent and legally correct verdict. The *Draper* instruction simply advises the jury that nursing services include "all those services . . . required by . . . [claimant's] condition resulting from the injury."[315] It is submitted that the Pattern Jury Charge Committee should amend the suggested issue in nursing services cases to properly reflect the state of the law as enunciated by the supreme court.[316]

Concurrent Coverage. Congress extensively amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) in 1972.[317] Numerous interpretation problems were generated by the Act's unique language[318] not the least of which concerned concurrent coverage of a

311. 400 S.W.2d at 884.
312. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1970).
313. *Id.* at 17-18 (Supp. 1976).
314. *See* note 308 *supra* and accompanying text.
315. 504 S.W.2d at 572.
316. This is only one example of several suggested issues which are one-sided and biased. Another example involves heart attacks and strokes. *See* Sartwelle, *supra* note 190, at 243-53. This is a criticism of the current Texas approach to heart attack-stroke cases including the special issues suggested by the Pattern Jury Charge Committee.
317. 33 U.S.C. §§ 901-950 (1976). Additional amendments were enacted in 1978. Pub. L. No. 95-251, § 2(a)(10), 92 Stat. 183 (1978).
318. *See generally* 4 A. LARSON, *supra* note 8, §§ 89.00-.70.

state's worker compensation law and the LHWCA.[319] This concurrency issue arose in *Johnson v. Texas Employers' Insurance Association*.[320] Unhappily, the solution the majority chose to follow appears to sink the controversy deeper into confusion and thrust Texas into an uncharted land of Oz.

Johnson asserted a Texas compensation claim because of an injury that he received while working for Bethlehem Steel Corporation at its Beaumont shipyard located on an island near the city. The fabrication shop, where plaintiff worked as an assistant crane operator fabricating marine vessels, was 75 to 100 feet from navigable waters. In the trial court the carrier asserted a plea to the court's jurisdiction, contending that the employee's injuries were solely within LHWCA coverage, which the court sustained.

The majority of the court of civil appeals had no difficulty in determining that the claimant satisfied the LHWCA dual employee requirements of status and situs, and was an employee within the Act's coverage. Upon this issue, everyone was in agreement, the employer, the carrier, the majority and dissenting[321] justices—everyone except the employee. To say that the employee's argument was unusual is an understatement when it is remembered that the LHWCA paid $318.38 per week and the Texas Act paid $70.00 per week at that time.[322] The majority then analyzed the primary issue of concurrent jurisdiction, concluding that since LHWCA was not exclusive before 1972 and there was nothing in the 1972 amendments to indicate that Congress intended the LHWCA to be exclusive, Texas had concurrent jurisdiction with LHWCA over the employee's injury.

The majority's concurrency holding created a pressing problem: double recovery for the same injury, one under LHWCA and one under the Texas Act. To this delicate problem the majority had a quick, simple answer: "[S]hould plaintiff below, Tom Johnson, recover any award under the Texas Act, the entire amount awarded under L. H. W. C. A. shall be deducted from that award."[323] Thus, the case was reversed and remanded for trial.

Justice Keith, one of Texas's most able and articulate appellate judges, offered what can only be termed a brilliant dissenting opinion which must be read in its entirety to be appreciated. To begin with, Justice Keith noted the unusual aspects of the case and in so doing provided additional historical detail omitted by the majority:

> Plaintiff's employer determined that he was an employee within the

319. *Id. See also* Larson, *The Conflicts Problem Between the Longshoremen's Act and State Workmen's Compensation Act Under the 1972 Amendments*, 14 HOUS. L. REV. 287 (1977); Larson, *The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts*, 45 S. CAL. L. REV. 699 (1972).

320. 558 S.W.2d 47 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) (Keith, J., dissenting).

321. *Id.* at 52.

322. *Id.* at 53.

323. *Id.* at 52.

> meaning of . . . [LHWCA]; the plaintiff agreed in this determination by accepting some $3,000.00 from Bethlehem in payment of benefits under LHWCA; and, now this Court has agreed that the parties made the correct determination of coverage: plaintiff was, indeed, covered as a beneficiary under LHWCA when he was injured.
>
> . . . .
>
> . . . Plaintiff has invoked the jurisdiction of the state district court to collect the weekly compensation payments which he claims are due by reason of his injury. In so doing, to paraphrase one of the writers on the subject, he walked out of a $318.38 Act [LHWCA] into a $70.00 Act [Texas]. I will comment upon possible motivation later. To say the least, this is a most unusual move by a claimant of money benefits.[324]

Justice Keith then analyzed the competing concurrency arguments and authorities, concluding that the employee's claim for compensation was exclusively governed by LHWCA. He then turned to the majority's solution of the double recovery problem, pointing out a myriad of pitfalls that one encounters when confronted by the reality of the majority's judicially created offset system. As to why a claimant would be tempted to foresake the LHWCA's high weekly payments for the lower weekly benefits offered in Texas, Justice Keith observed:

> To encourage the injured workman to "walk". . . from one act to the other, there must be some strong and persuasive reason. I speculate that it possibly may be attributable to two concurrent factors: (a) the prevalent and widespread practice [of which I take judicial notice] of lump-sum settlement agreement being concluded between the compensation carrier and the injured workmen under the Texas practice, even when the claim is for temporary partial incapacity; and (b) the difference in the method of affixing (and the amount of) the fees of the injured workman's counsel. As to the first, the attractiveness of a lump sum payment to the injured workman may well outweigh the advantages of a much larger sum dribbled out over a long period of time.
>
> As to the second factor, an examination of the two Acts reveals a vast difference in the treatment of such fees. Whereas, under the State Act, an award of one-fourth of the benefits payable is practically standard since authorized by the Act . . . , under LHWCA fees may be charged against the employer or insurer or fixed by the Board or court under other circumstances . . . .[325]

II. PROCEDURAL LAW

Special Issues. The special issue submission of a workers' compensation

---

324. *Id.* at 52-53 (footnotes omitted).

325. *Id.* at 57. Justice Keither specifically disavowed any implication that one forum might offer a more favorable factual determination than another as being a factor in the employee's choice of coverage. He also specifically disavowed any intent to ascribe certain motives to the employee's counsel who, he noted, had an outstanding reputation for ability, probity, and professional ethics. *Id.*

case can often prove complicated beyond imagination,[326] and the supreme court has with *Select Insurance Co. v. Boucher*[327] added another opinion to further complicate the area. In that case plaintiff pled for total disability only, and the defendant pled partial incapacity as a defense. The trial court refused to submit issues or instructions on partial incapacity, submitting only the issues inquiring about total incapacity. The jury found that the injury resulted in six and three-quarter years temporary total incapacity. The trial court entered judgment for the claimant, which the court of civil appeals affirmed.

The supreme court held that the partial incapacity issue tendered by Select[328] was an inferential rebuttal issue because it was relied upon as a defense and not an alternative ground of recovery. Since rule 277[329] outlaws inferential rebuttal issue submission, the court held that the trial court correctly refused to submit the partial incapacity issues to the jury. Select argued that even if partial incapacity was an inferential rebuttal issue the trial court should have at least submitted its tendered definition of partial incapacity[330] in order that the jury could consider partial incapacity as a defense to total incapacity. The court noted, however, that Select's partial incapacity definition was incorrect because of the insertion of an extra word[331] and the failure to define earning capacity. Thus, the carrier's instruction was not in "substantially correct"[332] form, and the trial court properly rejected the instruction. The court did note, however:

> We hold, under the posture of the instant case, that the defensive issue of partial incapacity is an inferential rebuttal issue and that by virtue of Rule 277 Select Insurance Company was not entitled to its submission. Select Insurance Company would have been entitled to the submission of a definition of "partial incapacity" if one in substantially correct form had been requested.[333]

---

326. *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); Home Indem. Co. v. McKay, 543 S.W.2d 171 (Tex. Civ. App.—San Antonio 1976, no writ); Texas Employers' Ins. Ass'n v. Loesch, 538 S.W.2d 435 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); Western Cas. & Sur. Co. v. Webb, 512 S.W.2d 65 (Tex. Civ. App.—Amarillo 1974), *rev'd per curiam*, 517 S.W.2d 529 (Tex. 1975); Gulf Ins. Co. v. Hodges, 513 S.W.2d 267 (Tex. Civ. App.—Amarillo 1974, no writ).

327. 561 S.W.2d 475 (Tex. 1978).

328. The issue was quoted by the court. *Id.* at 476. The issue was taken from the "short form" compensation charge suggested by the Pattern Jury Charge Committee. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES 10 (1970). The missing issue, issue 2C, commented upon by the supreme court, was the issue regarding earning capacity which was superfluous under the circumstances. *Id.* at 476.

329. TEX. R. CIV. P. 277.

330. The definition submitted to the trial court was quoted by the court as follows: " 'Partial Incapacity' means any degree of incapacity less than total incapacity; or whereby a person suffers a reduction in earning capacity. A person cannot have both total and partial incapacity at the same time." 561 S.W.2d at 478. This definition is obviously erroneous because it adds a semicolon after the third "incapacity" and adds the word "or" before the phrase related to earning capacity. *See* 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES 62 (1970).

331. *See* note 330 *supra*.

332. TEX. R. CIV. P. 279.

333. 561 S.W.2d at 479 (emphasis added).

This parting statement by the supreme court became the basis for a disagreement among the judges of the El Paso court of civil appeals in *Texas Employers' Insurance Association v. Marsh.*[334] As in *Boucher*, the employee alleged he was totally, permanently disabled without any alternative partial incapacity allegations. The carrier, however, only filed a general denial. Although the trial court submitted a complete compensation charge,[335] including partial incapacity issues, the jury answered only the total incapacity issues and found that the employee sustained total, permanent incapacity. The carrier objected to the receipt of this "incomplete verdict"[336] because the jury was not required to answer the partial issues. The trial court, however, entered judgment for the claimant on the basis of the jury's answers.

The court of civil appeals affirmed, citing *Boucher* for the proposition that the partial issues should not have been submitted. The majority noted, however, that neither party objected to the submission of the issues. Nevertheless, the majority held that the unanswered issues did not render the verdict incomplete because the trial court's written jury instructions advised the jury that total and partial incapacity could not exist at the same time. "Thus, it would appear . . . that the jury logically concluded that"[337] since the claimant was totally, permanently incapacitated, he could not, under the trial court's instructions, be partially incapacitated to any degree and they had answered all issues required to be answered.

Chief Justice Preslar noted his dissent not with the result reached but rather with the reason given by the majority to support the result. The majority had stated: "Under the decision in [*Boucher*], a compensation carrier is not entitled to submit special issues as to partial incapacity as inferential rebuttal issues."[338] The chief justice noted that the majority's statement was not necessary to the decision in the case and was a blanket proposition without support in the *Boucher* opinion because *Boucher*'s holding was expressly limited to the facts of that case.[339] The chief justice further argued that *Boucher* did not abolish partial incapacity issues in all cases in which total incapacity issues were submitted.

The dissent is perhaps splitting hairs. The majority conclusion that partial incapacity issues cannot be submitted as inferential rebuttal issues seems correct, but the dissent was correct in pointing out that the discussion of *Boucher* was not necessary to the disposition of the issue facing the court. In fact, the entire case easily could have been disposed of in four or five paragraphs instead of five pages. Chief Justice Preslar echoed this feeling and isolated the real issue involved in *Boucher* and *Marsh* and other similar cases when he wrote:[340]

334. 567 S.W.2d 832 (Tex. Civ. App.—El Paso 1978, no writ).
335. The charge is quoted in its entirety by the court. *Id.* at 833.
336. TEX. R. CIV. P. 295.
337. 567 S.W.2d at 834.
338. *Id.* (Preslar, C.J., dissenting).
339. *See* note 333 *supra* and accompanying text.
340. 567 S.W.2d at 835.

> Aside from all the philosophical discussions of whether issues are "inferential rebuttal" or "defensive," a trial is a search for the truth. If the truth is that the disability is partial, there should be a method of determining that, even though there is a claim of total incapacity. The all-or-nothing approach would be bad public policy—bad for the workman who is in fact partially disabled. Insurers should be encouraged to admit partial incapacity where it exists and thus plead it and get a determination of it by the jury.[341]

Medical Examination—Rule 167a. In the past it has been the practice of some trial courts to allow the following types of questions to unfairly bolster a plaintiff's case: " 'Q. 'Did the insurance company ever ask you to be examined by any doctor they chose? 'A. No'. . . 'Q. 'Have you ever refused to be examined by anybody for anything since you have made this claim following your injury . . . ? 'A. No sir.' "[342] This type of interrogation has now been held to be impermissible and reversible error in a compensation case,[343] just as it is in a liability case.[344]

Request for Admissions—Lump Sum. Lump sum payments in lieu of weekly compensation are authorized by the Act[345] if the parties agree and the Board or court either approves or finds that manifest hardship and injury would result to the worker if compensation were paid weekly.[346] It has been routine practice for many years for the worker's attorney to request a carrier (and now self-insured political subdivisions) to formally admit, by request for admissions,[347] that whatever compensation is due to be paid to the worker should be paid in a lump sum because otherwise manifest hardship would result. In *Texas General Indemnity Co. v. Lee*[348] the court held that such a request was not a "fact" properly within the scope of rule 169.[349] This holding should not curtail the continued prac-

341. The *Marsh* opinion was cited and relied upon by the Eastland court in Texas Gen. Indem. Co. v. Lee, 570 S.W.2d 231 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.). The facts in *Lee* were a mirror image of *Marsh* insofar as the jury's failure to answer the partial incapacity issues was concerned. The Eastland court, following *Marsh*, and relying upon the partial cannot exist at the same time as total instruction, held that the verdict was not incomplete.

342. Texas Employers' Ins. Ass'n v. Henson, 569 S.W.2d 516, 517 (Tex. Civ. App. — Beaumont 1978, no writ).

343. *Id.*

344. C.E. Duke's Wrecker Serv. Inc. v. Oakley, 526 S.W.2d 228 (Tex. Civ. App. —Houston [1st Dist.] 1975, writ ref'd n.r.e.).

345. TEX. REV. CIV. STAT. ANN. art. 8306, § 15 (Vernon 1967).

346. The Board routinely approves lump sum settlements and routinely orders compensation paid in a lump sum whenever a final award is entered. Most district courts also routinely approve lump sum settlements. This liberal lump sum settlement policy is one of the reasons cited by Justice Keith as influencing a worker to pursue a Texas worker compensation claim rather than a longshoremen harbor worker claim. *See* quotation and text accompanying note 325 *supra*.

347. TEX. R. CIV. P. 169.

348. 570 S.W.2d 231 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

349. TEX. R. CIV. P. 169.

tice of requesting carriers or self-insureds to admit manifest hardship, however, because the *Lee* holding is simply that it was error for the trial court to deem an unanswered hardship request for admission admitted. If a carrier or self-insured employer desires to reduce the issues to be tried to a minimum, they may still admit that hardship will occur and thereby eliminate lump sum payment as a special issue to be submitted to the jury.

Evidence—First Report of Injury—Formal Statement of Position. Section 7 of article 8307[350] requires the employer to file with the Board a first report of injury[351] anytime an employee is injured and is caused to be absent from work for one full day. This report is normally filled out by the employer's personnel and sometimes contains legal conclusions regarding the status of a particular person as an employee or independent contractor as well as other erroneous information. Naturally, if a carrier attempts to take a position contrary to a "fact" contained in the employer's first report, the claimant's attorney would attempt to impeach this contrary position by introducing the employer's report. It must be remembered, however, that the legislature has specifically declared that the employer's first report shall not be deemed as "admissions and evidence" against the employer or carrier in any proceedings before the Board or elsewhere.[352] Despite this clear, unequivocal legislative mandate, the trial court in *Texas Employers' Insurance Association v. Henson*[353] allowed the claimant's attorney to read into evidence against the carrier a portion of the employer's first report of injury. The Beaumont court had no difficulty finding the trial court to be in error in allowing the statement into evidence in violation of the statute, reversing and remanding the case for new trial.[354]

The carrier's formal statement of position required[355] to be filed with the Industrial Accident Board differs considerably from the employer's first report of injury. In the formal statement the carrier is required to respond to the pre-hearing officer's recommendations by formally setting forth its factual and legal position.[356] Assertions made in the formal statement of

350. TEX. REV. CIV. STAT. ANN. art. 8307, § 7 (Vernon 1967).

351. This report is normally made on a Board approved form referred to as the "E-1."

352. TEX. REV. CIV. STAT. ANN. art. 8309, § 5 (Vernon 1967). The statute reads as follows:

> The reports of accidents required by this law to be made by subscribers shall not be deemed as admissions and evidence against the association or the subscriber in any proceedings before the board or elsewhere in a contested case where the facts set out therein or in any one of them is sought to be contradicted by the association or subscriber.

Id.

353. 569 S.W.2d 516 (Tex. Civ. App.—Beaumont 1978, no writ).

354. The trial court not only ignored the plain provisions of the statute but hornbook evidence law as well. The statement admitted into evidence was a statement by the *employer, not the carrier.* The employer is not a party to the suit and, therefore, any oral or written statement by the employer would be inadmissible hearsay as far as the carrier is concerned. Such a statement would not be an admission of a party because again the employer is not a party to the suit. *See* 2 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1121 (2d ed. 1956).

355. TEX. REV. CIV. STAT. ANN. art. 8307, § 10(b) (Vernon Supp. 1978-79).

356. *Id.*

position contrary to that asserted at trial are admissible as admissions against interest if properly proven.[357] It is the "properly proven" that defeated the claimant in *Guzman v. Aetna Casualty & Surety Co.*[358] In that case the claimant sought to introduce the carrier's formal statement of position, which was filed with the Board on the carrier's letterhead of stationery, because in it the carrier admitted that the claimant was the insured's employee. This was contrary to the carrier's trial position wherein it asserted that the claimant was an independent contractor.

The court of civil appeals recognized that the statement normally would be admissible, if properly authenticated as being a statement made by the carrier's authorized representative or agent. The court held, however, that there was no evidence that the statement had been written by someone authorized to make admissions binding on the carrier. Accordingly, the court held that the trial court properly excluded the carrier's written statement from evidence.

Sufficiency of Evidence on Appeal. A Texas court once aptly observed that it is impossible "to reconcile all of the decisions of the Courts of Civil Appeals passing upon the sufficiency and great weight questions arising as to total and permanent disability findings in compensation cases."[359] Reviewing just a handful of the numerous factual insufficiency opinions reinforces the fear that, like equity, law is being dispensed according to the length of the judge's foot.[360] This is a sad commentary on the courts' inability to provide a predictable standard by which either party may be able to measure the strength or weakness of the evidence as against the jury's result and advise the client accordingly. In most areas of law predictability of result may well be a will-o'-the-wisp. Compensation cases, however, are factually the same; only the parties' names change occasionally. Thus, a relative degree of predictability could be obtained. Rather than predictability, however, what Texas has achieved is a crazy patchwork quilt of affirmances or reversals on a seemingly random basis. The only predictable factor common to any of these factual insufficiency opinions is the

357. *See* Texas Gen. Indem. Co. v. Scott, 152 Tex. 1, 253 S.W.2d 651 (1952); Texas Employers' Ins. Ass'n v. Adams, 555 S.W.2d 525 (Tex. Civ. App.—Amarillo 1977, 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.); 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.).

358. 564 S.W.2d 116 (Tex. Civ. App.—Beaumont 1978, no writ).

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

360. Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a 'foot' a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.

J. BARTLETT, FAMILIAR QUOTATIONS 317 (14th ed. 1968) (quoting J. SELDEN, TABLE TALK (1689)).

ultimate result that will be reached based upon the knowledge of the court in which the case is pending. Unfortunately, a client's rights appear to boil down to the client's luck in having the case decided in one court of civil appeals rather than another. This survey year was no exception as a comparison of three opinions will illustrate.

The Houston [14th District] court affirmed a total permanent verdict[361] for a claimant who had sustained a neck injury while working as a pipefitter. Despite the injury, he continued working at numerous jobs as a pipefitter foreman and his income increased each year. In contrast, the El Paso court reversed and remanded a total permanent verdict[362] for a laborer who had sustained a back injury but subsequently obtained and retained various jobs, including that of a truck driver, which was the job he held at the time of trial. Finally, the Fort Worth court[363] split over the affirmance of a total permanent judgment, Chief Justice Massey writing a strong dissent.[364] In that case the claimant continued working for the same employer for three and one-half years following the injury, doing the same work and receiving periodic wage increases. Prior to trial the claimant voluntarily obtained new employment paying a higher hourly wage.

If the escalation in the cost of insurance was not so serious, and if the cases did not involve the lives of individual workers, a comparison of the analysis applied in each of the foregoing cases would be humorous. For example, the El Paso court relied upon several cases in support of its remand that the Houston court expressly rejected because, "we disagree with the holdings in those cases."[365] The majority of the Fort Worth court fell back on the venerable but trite "our . . . compensation law should be liberally construed in favor of Texas employees."[366] Strange as it may seem, this mandatory citation about liberal interpretation is absent from the El Paso opinion as well as Judge Massey's dissent.[367]

361. Liberty Mut. Ins. Co. v. Mariner, 567 S.W.2d 69 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

362. Texas Employers' Ins. Ass'n v. Ontiveros, 570 S.W.2d 98 (Tex. Civ. App.—El Paso 1978, no writ).

363. Texas Employers' Ins. Ass'n v. Wilson, 563 S.W.2d 685 (Tex. Civ. App.—Fort Worth 1978, no writ) (Massey, C.J., dissenting).

364. *Id.* at 690.

365. 567 S.W.2d at 70.

366. 563 S.W.2d at 688.

367. The "liberal construction" citation is often used by the courts to justify a multitude of obviously gross statutory misconstructions of the compensation law. Most courts, however, misuse the liberal construction mandate because they have and do apply it not only to a liberal statutory construction but a liberal attitude toward the interpretation of the evidence and the "reasonable" inferences to be drawn from the evidence. In short, most courts use "liberal construction" as a substitute for evidence of an injury and disability. On a prior occasion, however, the supreme court has specifically held that even though the workmen's compensation law is to be liberally construed, it does not follow that the rules of evidence applicable in compensation cases are to be applied any differently than in any other case. Truck Ins. Exch. v. Michling, 364 S.W.2d 172 (Tex. 1963):

> In the first place, while the workmen's compensation law is to be liberally construed and administered in favor of the employee, this does not mean that the rules of evidence generally in the workmen's compensation case are to be applied differently than they would be in cases arising under common law.

The same luck of the draw involved in the review of a total permanent verdict is, to a lesser extent, involved in a "no injury" or "injury but no disability" verdict, as is illustrated by five opinions written during the last survey year.[368] The same is true of the verdicts involving limited, total and limited or permanent, partial disability.[369] One may dismiss the absurd lack of rationality and consistency daily demonstrated by the factual insufficiency opinions raining down out of the various courts of civil appeals by flippantly hoping to be "lucky" enough to draw a liberal or conservative court in the next appeal or, for that matter, trial. Yet after explaining to the client that all other things being equal, the result of the client's case depends upon the philosophical attitude of the court he was lucky or unlucky enough to draw, an attorney must be prepared to answer the inevitable question, "Why does the result of my case depend on luck?"

Id. at 173.

368. Abeyta v. Travelers Ins. Co., 566 S.W.2d 708 (Tex. Civ. App.—Amarillo 1978, writ dism'd) (no injury verdict affirmed); Lewis v. Commercial Ins. Co., 566 S.W.2d 98 (Tex. Civ. App.—Beaumont 1978, no writ) (injury but no disability verdict reversed and remanded for new trial); Ramsey v. Sentry Ins., 564 S.W.2d 463 (Tex. Civ. App.—Waco 1978, no writ) (injury but no disability verdict reversed and remanded for new trial); Fillyaw v. City of Beaumont, 564 S.W.2d 139 (Tex. Civ. App.—Beaumont 1978, no writ) (no injury verdict affirmed); Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.—Texarkana 1977, no writ) (no injury verdict affirmed).

369. Wootan v. American Motorists Ins. Co., 570 S.W.2d 572 (Tex. Civ. App.—Corpus Christi 1978, no writ) (temporary partial verdict affirmed); Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.—Amarillo 1978, no writ) (limited temporary, total and temporary, partial verdict affirmed); Fields v. Texas Employers' Ins. Ass'n, 565 S.W.2d 327 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.) (limited temporary, total and temporary, partial resulting from epididymitis and a subsequent epididymectomy affirmed); Whaley v. Transport Ins. Co., 559 S.W.2d 451 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (limited permanent partial loss of use of leg affirmed).