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Workers' Compensation

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WORKERS' COMPENSATION

by

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IMMEDIATELY after the survey period, the Texas Legislature adopted a new workers' compensation act that makes extensive reforms in the present workers' compensation system.[1] The new act takes effect January 1, 1991.[2] Although the new act will have a drastic impact on workers' compensation claims, the old act cases will continue for several years to work their way through the system. This survey, therefore, will, as in years past, deal with major developments in workers' compensation cases under the current system.

I. FEDERAL JURISDICTION

A. Diversity Jurisdiction

Federal courts have usually refused to exercise either original or removal diversity jurisdiction over workers' compensation suits.[3] The basis for refusing to entertain original diversity jurisdiction has been 28 U.S.C. § 1332(c).[4] The United States Supreme Court, however, recently recognized that original diversity jurisdiction may exist in actions brought by out-of-state insurers. In *Northbrook National Insurance v. Brewer*[5] the Supreme Court held that federal courts have diversity jurisdiction of suits brought by insurance carriers against workers' compensation claimants to set aside awards of the

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1. Texas Workers' Compensation Act, Ch. 1 § 1, 1989 Tex. Sess. law Serv. 1 (Vernon).
2. *Id.*
3. *See* authorities cited in footnote 4, *infra*.
4. 28 U.S.C. § 1332(c) (1982) provides:

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

Courts generally applied this provision to deny diversity in the commonly encountered situation where the insurance company was out-of-state, and both the employer and the worker were residents of the same state. *See, e.g.*, Fortson v. St. Paul Fire & Ins. Co., 751 F.2d 1157, 1159 (11th Cir. 1985); Torres v. Hartford Ins. Co., 588 F.2d 848, 850 (1st Cir. 1978); Hernandez v. Travelers Ins. Co., 489 F.2d 721, 723 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974).

5. 110 S. Ct. 297, 298, 107 L. Ed. 2d 223, 228 (1989).

Texas Industrial Accident Board (IAB). The court thus concluded that 28 U.S.C. § 1332(c) does not apply to actions brought by insurers, reasoning that the statute by its terms applies only to actions brought *against* insurers.[6] Moreover, the legislative history of the statute did not justify extension of the statute to actions brought *by* insurers.[7]

Workers' compensation suits originally filed in state courts are not removable to federal courts because 28 U.S.C. § 1445(c) imposes a bar to removability.[8] In *Richardson v. Owens-Illinois Glass Container, Inc.*,[9] the court held that an action brought under a Texas statute[10] alleging unlawful discharge in retaliation for filing a workers' compensation claim was properly removed to federal court on diversity grounds because the action was not one arising under the Texas Workmen's Compensation Act for purposes of Section 1445(c).[11] The court in *Soto v. Tonka Corp.*[12] reached the opposite conclusion on similar facts, holding that a suit to recover damages for discharge in alleged retaliation for filing a workers' compensation claim was not removable under Section 1445(c).[13] The *Soto* court concluded that "[t]he *Richardson* case represents too narrow a view of the scope of 28 U.S.C. § 1445(c)."[14]

B. Federal Question Jurisdiction

Attempts by insurers to establish federal question jurisdiction have been unsuccessful. In *Gibbs v. Service Lloyds Insurance Co.*[15] a workers' compensation claimant brought a state court action against the insurer, alleging that the insurer had breached its common law duty of good faith and fair dealing by mishandling a claim. The insurer removed the case to federal court on the ground that the action was preempted by the Employee Retirement Income Security Act of 1974 (ERISA).[16] Several courts have held that suits

6. *Id.* Because, under *Northbrook*, an insurer may file an appeal of an award of the Texas IAB in federal court, but an insurer may not remove an appeal of the IAB award filed by the claimant in state court, who files first may often determine whether the case is adjudicated in a federal or state forum. *Id.*

7. *Id.* at 299, 107 L. Ed. 2d at 229 (citing S. Rep. No. 1308, 88th Cong., 2d Sess. 4 (1964); H.R. Rep. No. 1229, 88th Cong., 2d Sess. 4, *reprinted in* 1964 U.S. Code Cong. & Admin. News 2778).

8. 28 U.S.C. § 1445(c) (1982) provides: "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." *See* Olivarez v. Utica Mut. Ins. Co., 710 F. Supp. 642 (N.D. Tex. 1989).

9. 698 F. Supp. 673 (W.D. Tex. 1988).

10. TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (Vernon Supp. 1990) provides:
> No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmens' Compensation Act, or has testified or is about to testify in any such proceeding.

11. 698 F. Supp. at 673.

12. 716 F. Supp. 977 (W.D. Tex. 1989).

13. *Id.* at 978.

14. *Id., see also,* Wallace v. Ryan-Walsh Stevedoring Co., Inc., 708 F. Supp. 144 (E.D. Tex. 1989) (suit alleging discharge and retaliation for asserting workers' compensation claim under the Longshoremen and Harborworker's Compensation Act (LHWCA) nonremovable on diversity grounds under 28 U.S.C. § 1445(c)).

15. 711 F. Supp. 874 (E.D. Tex. 1989).

16. 29 U.S.C. §§ 1001-2008 (1974).

involving benefits under employee group health insurance policies governed by ERISA are removable to federal court.[17] The insurer in *Gibbs* argued that ERISA governed the workers' compensation plan of the claimant's employer, thereby rendering the case removable. The claimant contended that the case was not removable in part because ERISA does not apply to any employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws."[18] The *Gibbs* court concluded that the workers' compensation insurance plan was separately administered solely to comply with Texas Workmen's Compensation Laws and thus was squarely within the statutory exemption from ERISA.[19]

An employer may seek dismissal of a state claim, once removed to federal court, on the grounds that section 301 of the Labor Management Relations Act[20] preempts collective bargaining issues. In *Lingle v. Norge Division of Magic Chef, Inc.*,[21] the Supreme Court, however, held that Section 301 preempts state law only if the court must interpret the collective bargaining agreement.[22] Accordingly, in *Wallace v. Ryan-Walsh Stevedoring Co.*,[23] a federal district court held that section 301 did not preempt employees' article 8307c[24] state court claims for wrongful discharge in retaliation for filing a workers' compensation claim.[25]

II. APPEAL OF INDUSTRIAL ACCIDENT BOARD AWARD

Rulings of the Texas IAB are final and binding unless either party serves notice of appeal of the award to the Board within twenty days of the award and files suit to set aside the award within twenty days of giving notice of appeal.[26] If notice of appeal and filing of suit are timely, the Board award is

17. *E.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (holding state court suit filed by worker against his employer's group insurance carrier for group health benefits removable to federal court under ERISA statute). Chlorox Co. v. United States Dist. Court, 779 F.2d 517, 520-21 (9th Cir. 1985) (granting writ of mandamus reversing federal district court's remand for lack of removability, finding no legislative history of statutory language in ERISA to prevent removal); Roe v. General Am. Life Ins. Co., 712 F.2d 450, 452 (10th Cir. 1983) (holding ERISA case properly removed).

18. 29 U.S.C. § 1003(b)(3) (1982).

19. 711 F. Supp. at 876-79; *See also* Foust v. City Ins. Co., 704 F. Supp. 752, 753-54 (W.D. Tex. 1989) (holding action brought against workers' compensation insurer for bad faith failure to pay benefits not governed by ERISA pursuant to 29 U.S.C. § 1003(b)(3)).

20. 29 U.S.C. § 185(a) (1982).

21. 486 U.S. 399 (1988).

22. *Id.* at 409-10.

23. 708 F. Supp. 144 (E.D. Tex. 1989).

24. *See* footnote 10, .

25. 708 F. Supp. at 157.

26. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1990):

> 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 . . . to set aside said final ruling and decision . . . .

vacated, and the case is tried de novo in the district court.[27] The *Foster v. Home Indemnity Company*[28] court imposed the additional requirement of due diligence in securing service of process in the court proceedings.[29]

In *Foster*, Home Indemnity both timely filed notice of appeal of a 1984 IAB award and instituted suit in district court. Citation, however, was not served on the claimant, and the suit was eventually dismissed for want of prosecution. Two years later, the claimant filed suit to mature the IAB award. Home Indemnity filed a motion for summary judgment claiming that the IAB ruling was vacated, as it had been appealed timely. The district court entered summary judgment in favor of the insurer. The court of appeals reversed the summary judgment, holding that a material issue of fact existed as to whether Home Indemnity diligently pursued service of process on the employee in the 1984 suit.[30] The court held that in order to vacate the award of the IAB, a party must not only file a petition within twenty days after rendition of the award, but must also have a bona fide intent that citation be issued and served or that a waiver of citation be obtained and filed promptly.[31] The court of appeals held that an issue of fact remained as to whether Home Indemnity exercised due diligence to secure service of process.[32] In the absence of due diligence, the mere filing of suit would not set aside the IAB award.[33]

In *Rather v. Travelers Insurance Co.*[34] the district court dismissed an appeal of an IAB award for lack of jurisdiction because the claimant did not file the required law suit within twenty days of the appeal notice to the IAB.[35] The claimant filed suit twenty-five days after the notice of appeal was sent to the IAB, but seventeen days after such notice was received by the IAB. The appellate court reversed, concluding that notice of appeal from an IAB ruling is filed within the meaning of the statute when it is presented to the IAB, not when the notice is placed in the mail by the claimant.[36] The

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27. *Id.* The statute further provides:

> Whenever such suit is brought, the rights and liabilities of the parties thereto shall be determined by the provisions of this law, and the suit of the injured employee or person suing on account of the death of such employee shall be against the Association, if the employer of such injured or deceased employee at the time of such injury or death was a subscriber as defined in this law. If the final order of the Board is against the Association, then the Association and not the employer shall bring suit to set aside said final ruling and decision of the Board, if it so desires, and the court shall in either event determine the issues in such cause, instead of the Board, upon trial de novo, and the burden of proof shall be upon the party claiming compensation.

Id.

28. 757 S.W.2d 481 (Tex. App.—Dallas 1988, no writ).
29. *Id.* at 482-83.
30. *Id.* at 483.
31. *Id.* at 482.
32. *Id.* at 483.
33. *Id.*
34. 769 S.W.2d 666 (Tex. App.—Houston [14th Dist.] 1989, no writ).
35. *Id.* at 667-68.
36. *Id.* at 668; *cf.* Ward v. Charter Oak Fire Ins. Co., 579 S.W.2d 909, 910-11 (Tex. 1979) (holding notice of appeal was timely filed when placed in mail by claimant within twenty days of IAB ruling, even though notice not received by IAB within twenty days of Board award).

court thus held that the claimant filed suit within twenty days of the receipt of the notice of appeal by the IAB, and the district court thereby acquired jurisdiction of the matter.[37]

The *Second Injury Fund v. Martinez*[38] court held that a claimant must file suit against the Second Injury Fund within twenty days after notifying the IAB of his intent to appeal its award in order to recover from the fund.[39] If the claimant does not file suit against the fund within twenty days after his notice of appeal, then the district court never acquires jurisdiction over the Second Injury Fund.[40] Moreover, the IAB award becomes final.[41]

III. INTENTIONAL TORTS

The Workers' Compensation Act bars an employee's claims for negligence against his employer and also any nondeath claims for gross negligence against the employer.[42] The Act, however, does not bar an employee from suing his employer for intentional torts.[43] In *Rodriquez v. Naylor Industries, Inc.*,[44] where an injured worker brought suit against his employer for an intentional tort, the court held that the employer bears the burden to negate its intent in a motion for summary judgment proceeding even if the employee raises no fact issue.[45] Rodriguez had an accident while driving his employer's truck and sustained injuries. Prior to the accident, Rodriguez alleged that he told his supervisor that the truck had several unsafe tires, but that the supervisor disregarded his concern and ordered him to drive the truck.[46] The trial court granted summary judgment in favor of the employer on the basis of an affidavit by the employer claiming no intent to harm the

37. 769 S.W.2d at 668-69. The court did not discuss the apparently conflicting holding in *Ward*.

38. 756 S.W.2d 877 (Tex. App.—Austin 1988), *writ granted*, 32 Tex. Sup. Ct. J. 178 (Jan. 25, 1989). Writ was granted on two points of error, one of which involved the appellate court holding that an injured worker must file suit within 20 days of notifying the IAB of intent to appeal the IAB ruling. *Id.*

39. 756 S.W.2d at 879.

40. *Id.*

41. *Id.*

42. TEX. REV. CIV. STAT. ANN. art. 8306, § 3(a) (Vernon Supp. 1990):

> 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.

See Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983) (holding where employee suffers intentional tort he may elect to file common law tort action or waive such right and seek benefits under Workman's Compensation Act, while act provides sole remedy for employer negligence); Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980) (holding article 8306 § 3 bars all common law negligence suits, but Texas Constitution art. I, § 13 guarantees intentional tort actions).

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

44. 763 S.W.2d 411 (Tex. 1989).

45. *Id.* at 413.

46. The supervisor told the employee: " 'You damn Mexicans, all you do is just bitch

worker. The Texas Supreme Court reversed the summary judgment, holding that an issue of fact remained because the employer could not conclusively negate its own intent.[47]

IV. NOTICE ISSUES

The Workers' Compensation Act requires a claimant to file for workers' compensation benefits within one year of the date of injury, unless good cause exists for late filing.[48] The Act also requires the employer to file a report of injury with the IAB after the occurrence of an accident or injury in the course of employment resulting in the employee's absence from work for more than one day.[49] The employer's failure to file the mandatory report tolls claimant's one year filing requirement.[50]

In *Masuccio v. Standard Fire Insurance Co.*[51] parents brought suit as claimants to set aside a finding by the IAB that their daughter was not acting in the course and scope of her employment at the time of her death. Their daughter had attended a business meeting related to her employment in San Antonio, Texas, that adjourned at 10:15 p.m. At approximately 3:00 a.m. the next morning, before returning to her home and driving in the opposite direction from her home, she was involved in a fatal automobile accident.

. . . . That truck has to go to Port Lavaca and then . . . to Corpus Monday morning . . . . Either take it or walk.' " *Id.* at 412.

47. *Id.* at 413.

48. TEX. REV. CIV. STAT. ANN. art. 8307, § 4(a) (Vernon Supp. 1990):
[N]o proceeding for compensation for injury under this law shall be maintained . . . unless a claim for compensation with respect to such injury shall have been made within one (1) year 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 one (1) year 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.

49. TEX. REV. CIV. STAT. ANN. art. 8307 § 7(a) (Vernon Supp. 1990):
Every subscriber shall keep a record of all injuries, fatal or otherwise, sustained by his employees in the course of their employment. 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 after the employee notifies the employer of a definite manifestation of an occupational disease, a written report thereof shall be made within eight (8) days following the employee's absence from work and notice thereof to the employer or notice of manifestation of an occupational disease to the Board on blanks to be procured from the Board for that purpose. The subscriber shall deliver a copy of the report to the association. Upon the termination of the incapacity of the injured employee, or if such incapacity extends beyond a period of sixty (60) days, the subscriber shall make a supplemental report upon blanks to be procured for that purpose.

50. *Id.* The statute further 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 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.

51. 770 S.W.2d 854 (Tex. App.—San Antonio 1989, no writ).

Almost two years later, the parents filed their claim for workers' compensation benefits. The employer filed no report of injury until eight months after the parents filed their claim.

The district court granted summary judgment for the insurer on the basis of claimants' failure to file their claim timely. The court of appeals reversed and remanded, holding that the employer had a duty to file a report of injury when the daughter failed to report to work.[52] The court further held that, where the accident is sufficiently serious to reasonably anticipate a workers' compensation claim, the one year period for filing a workers' compensation claim is tolled until the employer files its first report of injury.[53] The majority, however, concluded a fact issue remained as to whether the injury occurred in the course and scope of employment.[54] The dissent argued that an accident report was not necessary because the statute requires an employer to file a report only when the injury occurs in the course and scope of employment.[55] In the dissent's view the injury did not occur within the course and scope of employment as a matter of law.[56]

In *Toma v. Ahders*[57] the worker filed his notice of injury more than two years and nine months after its occurrence. The IAB denied the claim on the ground that the evidence failed to establish a compensable injury in the course of employment. The plaintiff then filed a legal malpractice action against the attorney who had represented him before the IAB alleging negligent failure to notify him that his claim had been denied or that he had a right to appeal from the adverse ruling. The trial court rendered summary judgment against plaintiff finding the sole proximate cause of plaintiff's damages was his failure to file his compensation claim timely. In reversing the summary judgment and remanding the case, the court of appeals held that evidence that the employee had relied upon the employer's assurances that the employer would take care of the claim created a fact issue—whether a reasonably prudent person of plaintiff's background should have relied on his employer's representations before filing his own claim.[58]

The Workers' Compensation Act requires an employee to give notice to his employer of a work-related injury within thirty days of the injury as a prerequisite to making a claim.[59] The notice requirement, however, is sub-

52. *Id.* at 857.
53. *Id.* at 856-57.
54. *Id.* at 857, 857 n.3.
55. *Id.* at 858-59.
56. *Id.*
57. 769 S.W.2d 614 (Tex. App.—El Paso 1989, writ dism'd).
58. *Id.* at 616.
59. TEX. REV. CIV. STAT. ANN. art. 8307, § 4(a) (Vernon Supp. 1990):
> 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 .... 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.

ject to a good cause exception.[60] The *Texas Employers' Insurance Association v. Mathes*[61] court examined the form of the notice issues in the jury charge in a repetitious trauma case with no single date of injury. In such a case, a court should conditionally submit notice issues on a jury's finding of total or partial incapacity.[62] The *Mathes* jury found the employer had not received notice within thirty days of injury. Nevertheless, the trial court entered judgment for the worker. The court of appeals reversed and rendered for the insurance company, holding that while the facts evidenced that the worker had a back condition, had received treatment, and had given timely notice to the employer of that condition and treatment, the employee had not provided his employer with the necessary notice that his back condition was work related.[63]

V. DISCOVERY/EVIDENCE

A. Discovery of Insurer's Files

Courts significantly eroded the party communications privilege[64] as it applies to confidential communications of the insurer in workers' compensation matters. The *Flores v. Fourth Court of Appeals*[65] court held that confidential information of an insurer, including information regarding claim reserves, prepared after the claimant had filed a claim with the IAB was not privileged from discovery.[66] In this mandamus proceeding Flores sought investigative reports prepared by a claims supervisor after notice of injury to the IAB but before appeal to the district court. The evidence at the hearing for protective order established that the workers' compensation insurer routinely prepared such a report in every case set for pre-hearing conference. The trial court therefore determined that until the notice of appeal of the IAB award was received, no facts demonstrated that litigation would

60. *Id.*

61. 771 S.W.2d 225 (Tex. App.—El Paso 1989, writ denied).

62. *Id.* at 229. The *Mathes* court approved the following language in the charge regarding notice:

> Find from a preponderance of the evidence the date of the first distinct manifestation of [claimant's] back condition.
>
> You are instructed that by first distinct manifestation is meant the time when a reasonable person, under the same and similar circumstances as [claimant] would recognize the nature, seriousness, and work related nature of the injury.
>
> Answer by stating the month, day, and year.

Id.

63. *Id.* at 230.

64. TEX. R. CIV. P. 166b(3) provides, in pertinent part:

> The following matters are protected from disclosure by privilege:
>
> (d) *Party Communications.* With the exception of discoverable communications prepared by or for experts, and other discoverable communications, between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the claims made a part of the pending litigation. For purpose of this paragraph, a photograph is not a communication.

65. 777 S.W.2d 38 (Tex. 1989).

66. *Id.* at 42.

ensue, thereby rendering reports prepared in anticipation of the pre-hearing conference not privileged. Consequently, the supreme court held that the trial court did not abuse its discretion in ordering production of the records, and vacated the court of appeals ruling.[67] The supreme court further held that the terms "litigation," "suit," and "lawsuit," as used in Texas Rules of Civil Procedure 166b(3)(d), did not encompass proceedings before the IAB and referred only to court proceedings.[68]

In *Morris v. Texas Employers Insurance Association*[69] the claimant appealed, following an adverse jury verdict, the granting of a protective order to the insurer. The court held that the mere hiring of an attorney by an injured worker alone did not justify an insurer's belief that litigation would necessarily ensue.[70] Because the only evidence offered in support of the protective order was the date of hiring of the claimant's attorney, the court held that the trial court had abused its discretion in issuing a protective order based upon the party communications privilege.[71] The court, however, refused to reverse the jury verdict as the disputed evidence was not made a part of the record on appeal, and thus could not be evaluated under the harmless error rule.[72] To preserve error the claimant should have filed a mandamus action against the trial court requesting the disputed items before trial.[73]

B. Failure to Designate Witnesses

In *National Standard Insurance Co. v. Gayton*[74] the court held that in a workers' compensation case, a claimant's failure to list treating physicians as expert witnesses whom he may call at trial in response to the insurer's interrogatories did not preclude admission of medical records prepared by those physicians.[75] A party need not list as an expert witness the identity of those treating physicians whose medical records may be offered by affidavit.[76]

In *Gee v. Liberty Mutual Fire Insurance Co.*[77] the supreme court dealt

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67. *Id.*

68. *Id.* at 39-42 (6-3 opinion). The report at issue in *Flores* was printed on a standard form and contained the following information:

> (1) whether there was a question of coverage, claimant's employment, compensable injury, whether the injury occurred in the course and scope of employment; (2) the average weekly wage on the date of the accident; (3) the amount of temporary total disability paid claimant; (4) any advance payments; (5) whether the claim had been previously heard at a prehearing conference; (6) summary of medical findings; (7) whether claimant had returned to work; (8) calculations of the claimant's injuries; (9) current indemnity reserves; (10) attorney for the claimant; and (11) claims examiner.

Id. at 41.

69. 759 S.W.2d 14 (Tex. App.—Corpus Christi 1988, writ denied).

70. *Id.* at 15.

71. *Id.* at 15-16.

72. *Id.* at 16.

73. *Id.*

74. 773 S.W.2d 75 (Tex. App.—Amarillo 1989, no writ).

75. *Id.* at 77.

76. *Id.* at 76-77 (citing TEX. R. CIV. EVID. 803(6), 902(10)).

77. 765 S.W.2d 394 (Tex. 1989).

with the problem of testifying witnesses not disclosed in answers to interrogatories. Prior to trial the insurer filed a motion in limine to exclude testimony from any fact or expert witness not identified by the claimant in response to interrogatories propounded by the insurer. The trial court overruled the motion and allowed the claimant to present testimony of two undisclosed fact witnesses and two undisclosed expert witnesses. The supreme court noted that nothing in the record indicated that the claimant had showed good cause to present the testimony of the undisclosed witnesses, and thus held that the trial court erred in allowing the testimony of those witnesses.[78] The supreme court further held, however, that all of the improperly admitted testimony was either cumulative or not relevant to the issues in the case, thereby rendering the trial court's error harmless.[79] The supreme court remanded the case to the court of appeals to reconsider the insurer's factual sufficiency points of error.[80]

VI. Duty of Good Faith and Fair Dealing

In *Service Lloyds Insurance Co. v. Greenhalgh*[81] the court held that the duty of good faith and fair dealing created by *Aranda v. Insurance Co. of North America*[82] applied retroactively to cases not yet final when *Aranda* was decided.[83] The insurer in *Greenhalgh* complained of the court's refusal to submit its requested issues regarding plaintiff's contributory negligence. The jury found that the defendant's acts constituting a breach of its duty of good faith and fair dealing were knowledgeable and malicious. The court held that, as contributory negligence does not apply to claims based on intentional torts, the trial court did not err in refusing to submit defendant's requested special issues relating to contributory negligence.[84]

VII. Partial Incapacity as a Defense

In *Lumbermans Mutual Casualty Co. v. Garcia*[85] the appellate court stated that, in a workers' compensation case, a trial court is not required to submit to the jury a defendant's requested jury question on partial incapacity when asserted as a defense to the plaintiff's claim of total incapacity.[86] Because partial incapacity is an inferential rebuttal issue, the court noted that a defendant who pleads it as a defense and presents supportive evidence would normally be entitled to an instruction on partial incapacity.[87] The court held in this case, however, that defendant had waived the right to submission

78. *Id.* at 396.
79. *Id.* at 396-97.
80. *Id.* at 397.
81. 771 S.W.2d 688 (Tex. App.—Austin 1989), *writ granted on other grounds*, 33 Tex. Sup. Ct. J. 110 (Jan. 3, 1990).
82. 748 S.W.2d 210 (Tex. 1988) (creating legally enforceable duty of good faith and fair dealing owing from workers' compensation insurer to worker's compensation claimant).
83. 771 S.W.2d at 212-13 (*Aranda* decided on March 23, 1988).
84. 771 S.W.2d at 692-93.
85. 758 S.W.2d 893 (Tex. App.—Corpus Christi 1988, writ denied).
86. *Id.* at 895.
87. *Id.*

of the instruction and definition because it stipulated that the claimant suffered " 'total incapacity for some time.' "[88] The appellate court, like the trial court, interpreted the stipulation to mean that only the duration of total incapacity was at issue in the case.[89]

VIII. PRIOR COMPENSABLE INJURY

The Workers' Compensation Act provides a defense to the insurer to the extent that it can establish the percentage of claimant's present disability which is due to a prior compensable injury.[90] During the survey period, the courts struggled with the sufficiency of evidence necessary to support a jury finding on the prior compensable injury defense. In *Transamerican Insurance Co. v. Hernandez*[91] the trial court disregarded a jury finding that ninety percent of the plaintiff's present disability was caused by a prior compensable injury and entered judgment for the full amount of benefits. The Corpus Christi court of appeals affirmed, holding that the insurer had failed to present any competent evidence showing even a percentage range that the preexisting injury contributed to the worker's disability, and thus that the jury had no competent evidence upon which to base its ninety percent finding.[92]

The Eastland court of appeals reached a somewhat inconsistent result in *Lumbermans Mutual Casualty Co. v. Martinez*.[93] The jury in *Martinez* found that a prior compensable injury contributed fifty percent to the employee's present total disability. The insurer presented no medical opinion testimony as to the degree of contribution of the past injury, but did present lay evidence from the plaintiff and his family regarding disability prior to the present injury. In addition, the insurer presented expert testimony that plaintiff was totally disabled following his previous injury. The trial court disregarded the jury's finding and entered judgment for the claimant based upon total and permanent disability. The appellate court reversed and remanded the case to the trial court to enter judgment on the verdict, holding that the insurer was not required to submit medical opinion testimony on the percentage contribution of the prior injury in order to support the jury finding.[94] Lay testimony from the plaintiff and his family that since the prior injury plaintiff had been limited in the type of work he could do and had not

88. *Id.*
89. *Id.*
90. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c(a) (Vernon Supp. 1990):
> If an employee who has suffered a previous injury shall suffer a subsequent injury which results in a condition of incapacity to which both injuries or their effects have contributed, the association shall be liable because of such injury only for the compensation to which the subsequent injury would have entitled the injured employee had there been no previous injury. . . .

See generally Mathis v. Charter Oak Fire Ins. Co., 707 S.W.2d 234, 238 (Tex. App.—Tyler 1986, writ ref'd n.r.e.) (holding article 8306 § 12(c) sole limitation on claimant's rights to double recovery where two injuries cause physical disability).
91. 769 S.W.2d 608 (Tex. App.—Corpus Christi 1989, writ denied).
92. *Id.* at 612.
93. 763 S.W.2d 621 (Tex. App.—Eastland 1989, writ denied).
94. *Id.* at 623-24.

held a steady job was thus sufficient to support the jury finding.[95]

In *American Motorists Insurance Co. v. Lynn*[96] the El Paso court of appeals held that the doctor who treated the claimant after a prior injury could testify regarding the percentage of current incapacity attributable to the first injury even though the doctor did not examine or treat the claimant after the second injury.[97] The appellate court thus reversed the judgment of the trial court because the trial court refused to submit to the jury the defendant's proffered jury questions on the incapacity resulting from the prior injury. The *American Motorist* decision therefore indicates that a medical expert is not required to examine the claimant after a second injury in order to render competent expert testimony on the prior compensable injury defense.

IX. SUBROGATION: FEE REIMBURSEMENT

The Workers' Compensation Act provides that an insurer has a subrogated interest in the amount it has paid to the claimant out of the first dollars recovered by the claimant in a third party suit.[98] As compensation for bringing the suit the court may award the employee's counsel attorneys' fees from the insurer's recovery in an amount up to one third of the insurer's lien.[99] In *Aetna Casualty & Surety Co. v. Harjo*[100] a workers' compensation insurer intervened in a personal injury case. Upon settlement of the suit, the law firm representing the plaintiff sought and received attorneys' fees and out-of-pocket litigation expenses from Aetna's recovery reimbursement.[101] The court of appeals reversed the award of litigation expenses, holding that, under the Workers' Compensation Act, the plaintiff has no right to reimbursement for litigation costs from an intervening carrier in a third party action.[102]

X. EXCLUSIVITY OF REMEDY

A basic tenet of the Workers' Compensation Act is that the employee gives up his common law rights to sue his employer for negligence in return

95. *Id.*
96. 762 S.W.2d 229 (Tex. App.—El Paso 1988, writ denied).
97. *Id.* at 231-32.
98. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1990). Generally, manufacturers are defendants in such suits.
99. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a(b) (Vernon Supp. 1990).
> If the association obtains an attorney to actively represent its interests and if the attorney actively participates in obtaining a recovery, the court shall award and apportion an attorney's fee allowable out of the association's subrogation recovery between such attorneys taking into account the benefit accruing to the association as a result of each attorney's service, the aggregate of such fees not to exceed thirty-three and one-third percent (33⅓%) of the subrogated interest.

It is well settled that the apportionment of attorneys' fees lies within the sound discretion of the trial court. *See* Hartford Ins. Co. v. Branton & Menhelsohn, Inc., 670 S.W.2d 699, 703-04 (Tex. App.—San Antonio 1984, no writ) (holding article 8307 § 6a(b) allows recovery of attorneys' fees whether fee arrangement contingent or hourly basis).
100. 766 S.W.2d 583 (Tex. App.—Beaumont 1989, no writ).
101. *Id.* at 583.
102. *Id.* at 583-84.

for speedy and ascertainable compensation for on-the-job injuries regardless of employer fault.[103] In *Holt v. Preload Technology, Inc.*[104] the appellate court rejected an employee's contention that the exclusive remedy provision of the Texas Workers' Compensation Act was unconstitutional.[105] The *Holt* plaintiff had argued that the exclusivity provision deprives employees of property without due process of law and violates the open courts provision of the Texas Constitution.[106]

In *Denison v. Haeber Roofing Co.*[107] the plaintiff unsuccessfully attempted to avoid the exclusivity provision claiming he was not an employee. The plaintiff was a temporary employee who brought an action against his employer for negligence. The employer moved for summary judgment on the ground that the temporary employee was a "borrowed servant," and as a workers' compensation subscriber, it could not be liable to the temporary employee. The district court held that the summary judgment evidence showed that when the employee was injured, he was under the control of his temporary employer. The appellate court affirmed summary judgment in favor of the employer.[108] It held that the focus in determining the status of employer/employee is on the right of control and not upon whether another employer may have carried workers' compensation insurance or gratuitously paid benefits to the employee.[109] The plaintiff also claimed to have raised a fact question based upon the allegation that the employer refused to accept responsibility after the worker's fall. The appellate court however held that post-accident conduct of the employer is irrelevant to determining whether the employee was under the control of the employer when he sustained the injury.[110]

The Workers' Compensation Act provides that a subscribing employer has no liability to reimburse or hold other persons harmless on a judgment or settlement resulting from injury or death of his employee "in the absence of a written agreement expressly assuming such liability, executed by the subscriber prior to such injury or death."[111] In *Parker v. Ensearch Corp.*[112]

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103. TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967):
> An employee of a subscriber shall be held to have waived his right of action at common law or under any statute of this State to recover damages for injuries sustained in the course of his employment if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed said right or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within five days of notice of such subscription.

104. 774 S.W.2d 806 (Tex. App.—El Paso 1989, no writ).

105. *Id.* at 809.

106. *Id.* TEX. CONST. art. I, § 13 provides that "[a]ll courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law".

107. 767 S.W.2d 862 (Tex. App.—Corpus Christi 1989, no writ).

108. *Id.* at 866.

109. *Id.*

110. *Id.*

111. TEX. REV. CIV. STAT. ANN. art. 8306, § 3(d) (Vernon Supp. 1990).

112. 776 S.W.2d 638 (Tex. App.—Corpus Christi 1989), *writ granted*, 33 Tex. Sup. Ct. J. 148 (Nov. 29, 1989).

the court held that contractual language in which an independent contractor (employer) indemnified an owner was insufficient to satisfy the exception to the employer's general immunity under the workers' compensation law.[113] A wrongful death action was brought against a pipeline owner for the asphyxiation death of the independent contractor's employees while working on a pipeline. The owner asserted a contractual indemnity claim against the independent contractor. The district court granted summary judgment in favor of the owner on both the wrongful death and indemnity claim. In reversing the summary judgment on the indemnity claim, the appellate court held that a contract need not specifically state that it covers injuries to the indemnitor's own employees nor specifically mention the words "workers' compensation" to satisfy the exception to the employer's general immunity under workers' compensation law.[114] Rather, the parties' intent as expressed in the contract determines whether the indemnitor has waived general immunity.[115] In this case, the court found that the indemnity contract contained no provisions indicating an intent by the parties that the indemnitor assume liability for injuries to its employees.[116] Consequently, the indemnitor did not waive its right to immunity under the Workers' Compensation Act.[117] The court granted the indemnitor's motion for summary judgment against the owner on the indemnity claim.[118]

XI. COURSE AND SCOPE OF EMPLOYMENT

The Workers' Compensation Act provides compensation only for injuries sustained in the course and scope of employment.[119] If the worker is intoxicated at the time of injury, he is not within the course and scope of employment.[120] *March v. Victoria Lloyds Insurance Co.*[121] involved a workers' compensation suit for the death of a truck driver who was killed when the truck he was operating left the highway and crashed. The compensation carrier denied that the driver was in the course and scope of employment because he was intoxicated at the time of the fatal accident. The jury found in favor of the insurance carrier.

On appeal, the court held that the trial court did not err in admitting a business record affidavit from a toxicologist that established the truck driver's blood alcohol content was 0.16%.[122] The appellate court noted that the presumption that a worker was injured in the course and scope of employment is rebutted by evidence that the accident occurred while the em-

113. *Id.* at 649-50.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 650.
119. TEX. REV. CIV. STAT. ANN. art. 8306, § 3(b) (Vernon 1967).
120. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967); Texas Indemnity Ins. Co. v. Dill, 42 S.W.2d 1059 (Tex. Civ. App.—Eastland 1931), *aff'd*, 63 S.W.2d 1016 (Tex. Comm. App. 1933, opinion adopted).
121. 773 S.W.2d 785 (Tex. App.—Fort Worth 1989, no writ).
122. *Id.* at 787.

ployee was intoxicated.[123] In the face of such evidence, the claimant bears the burden of proof that he was not intoxicated at the time of injury.[124] When evidence of intoxication is presented at trial, the court should submit an instruction and definition of intoxication with the course of employment issue, and the court need not submit a separate jury question on intoxication.[125] The appellate court thus affirmed the take-nothing judgment of the trial court.[126]

Director of State Employees Workers' Compensation Division v. Camarata[127] involved a workers' compensation suit in which the plaintiff alleged that his injury was mental trauma arising from his feeling that he had been unfairly treated on his job. Plaintiff's main complaint concerned a memo from his supervisor stating that plaintiff had an unusually high rejection rate for his audit work and that the quality of his reports was not acceptable, particularly considering the time which plaintiff took to complete the tasks. Plaintiff felt that the memo was unfair and inaccurate.[128]

Plaintiff testified at trial that this unfavorable evaluation caused him stress which led to physical problems, including nocturia, weakness of the legs, low back pain, blurred vision, loss of sleep, severe anxiety, and sleep problems. Plaintiff's doctor diagnosed the condition as post traumatic stress syndrome, the same disorder that affects Vietnam war veterans. The jury found temporary total incapacity. The court of appeals affirmed, holding that mental trauma can produce an accidental injury under the Workers' Compensation Act upon proof of a definite time, place, and cause.[129] The appellate court held that the trial court was within its discretion in denying defendant's requested instruction that " 'worry and anxiety over job loss is not connected with what a workman has to do in performance of his contract.' "[130]

In *Sanders v. Texas Employers Insurance Association*[131] a worker who was injured in a fight with his brother, who was also his supervisor, filed suit for workers' compensation benefits after he was fired by his brother. The district court rendered summary judgment favoring the insurance company. On appeal, the court concluded that plaintiff's deposition testimony established that he was fired by his brother immediately prior to the fight.[132] The court held that once an employee resigns or is fired an injury occurring at

123. *Id.* at 791.
124. *Id.*
125. *Id.*
126. *Id.* at 792.
127. 768 S.W.2d 427 (Tex. App.—El Paso 1989, no writ).
128. Plaintiff, upset by the memo from his supervisor, struck his fist against some computer printout paper.
129. *Id.* at 429.
130. *Id.* Given the court's analysis, an interesting question is the significance of evidence bearing upon the truth or falsity of the unfavorable job review. If a worker can suffer a work-related injury arising from anxiety over receiving an unfair and untrue evaluation report, could not a worker equally suffer from receiving a true report of unsatisfactory performance? The *Camarata* court did not analyze the relevance of evidence relating to the accuracy of the evaluation.
131. 775 S.W.2d 762 (Tex. App.—El Paso, 1989, no writ).
132. *Id.* at 763-64.

the job site or while leaving the job site subsequent to the termination is not an injury sustained in the course of employment within the meaning of the Workers' Compensation Act as a matter of law.[133] The court also concluded that the testimony revealed that the basis for the fight was a personal dispute regarding child support payments.[134] The court further held that, pursuant to article 8309, section 1,[135] when one employee assaults another solely from hatred, revenge, or vindictiveness not growing out of or incident to the employment, the injury is attributed to the voluntary act of the assailant and is not within the scope of employment.[136]

In *North River Insurance Co. v. Gray*[137] the plaintiffs sought workers' compensation benefits on behalf of an employee who suffered a fatal heart attack while serving as a field maintenance supervisor for an airline. Plaintiffs produced evidence that the worker was under significant mental stress at the time that he had a heart attack. The evening before his death he had worked until nearly midnight and returned to work a little before six the next morning. After lunch the worker collapsed and died while operating a microfiche machine. The employee's supervisor testified that, while operating the microfiche machine is not physically taxing, at times the operation of the machine is capable of driving one cross-eyed. The district court awarded recovery, but the court of appeals reversed and rendered a take nothing judgment.[138] The appellate court held the plaintiff did not prove that the heart attack was caused by any physical strain and that the evidence failed to trace the worker's heart attack to any particular event.[139] Plaintiff thus did not establish an accidental injury in the course and scope of employment as required by the statute.[140]

In *Bordwine v. Texas Employers' Insurance Association*[141] the appellate court held that an injury suffered by a worker in the parking lot of the employer's place of business occurred, as a matter of law, in the course and scope of worker's employment. The appellate court reversed the take-nothing judgment of the district court and remanded it for a new trial.[142] Invoking the access doctrine, the appellate court held that scope of employment includes employer-prescribed travel routes and nonwork areas in such proximity and relation to work areas as to be, in practical effect, part of the

133. *Id.* The court noted that the rule is not applicable to situations in which the employee is required or reasonably believes he is required to remain at or return to his employer's premises for his final paycheck or to execute a duty incident to termination. *Id.* at 764. This exception did not apply on the facts of this case. *Id.*

134. *Id.* at 763-64.

135. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(4) (Vernon 1967) provides that the phrase "injury sustained in the course of employment" does not include "[a]n injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment."

136. 775 S.W.2d at 763-64.

137. 765 S.W.2d 862 (Tex. App.—Austin 1989, writ denied).

138. *Id.* at 865.

139. *Id.*

140. *Id.*

141. 761 S.W.2d 117 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

142. *Id.* at 120.

employer's premises.[143]

XII. Loss of Vision

In *Home Indemnity Co. v. Garcini*[144] the court held that in evaluating loss of vision from an eye injury sustained on the job, one must compare the claimant's pre-injury corrected vision with post-injury uncorrected vision.[145] The *National Union Fire Insurance Company v. Lucio*[146] court had previously held that a worker who had post-accident corrected vision of 20/20 could still recover for loss of vision because his uncorrected vision was 20/400.[147] The worker in *Garcini* had 20/200 uncorrected vision prior to injury (legally blind), but 20/20 corrected vision. The insurer in *Garcini* argued that the worker could not recover because he was legally blind prior to the accident, relying upon the *Lucio* court's application of uncorrected vision to the worker in that case. In rejecting the insurer's argument, the *Garcini* court held that the 20/20 pre-injury corrected vision should be compared to the total blindness caused post-injury.[148] The court affirmed the jury verdict in favor of the claimant.[149]

XIII. Conclusion

The most significant decisions rendered during the survey period were *Northbrook* and *Flores*. In *Northbrook*, the United States Supreme Court recognized original diversity jurisdiction of workers' compensation suits filed by out-of-state insurers. In *Flores*, the Texas Supreme Court drastically eroded the ability of insurers to protect their confidential claims investigation files developed during IAB proceedings from discovery in a subsequent lawsuit. Several other significant decisions were decided during the survey period. The *Gayton* court made clear that the requirement under the Texas Rules of Civil Procedure that expert witnesses be disclosed in answers to interrogatories in order to testify did not apply to the admission of medical record affidavits. The courts reached inconsistent results regarding the amount of testimony necessary to support a jury finding on the prior compensable injury defense. The *Greenhalgh* court held that the duty of good faith and fair dealing imposed by *Aranda* applied retroactively to cases not final when *Aranda* was decided. The *Garcini* court adopted a new test for measuring loss of vision which is very generous to the claimant.

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143. *Id.* at 119.
144. 757 S.W.2d 77 (Tex. App.—Houston [1st Dist.] 1988, writ denied).
145. *Id.* at 80.
146. 674 S.W.2d 487 (Tex. App.—El Paso 1984, writ ref'd).
147. *Id.* at 489.
148. 757 S.W.2d at 80.
149. *Id.* at 80. This unusual result created the distinct possibility that a worker would be entitled to recover damages for loss of vision even in cases where his vision is no worse after the accident than before. Indeed, any worker not born with 20/20 vision would be able to demonstrate lost vision under the test adopted in *Garcini*.