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Workmen's Compensation

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WORKMEN'S COMPENSATION

by

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IN VIEW of the upsurge in unemployment during the period covered by this review, it is surprising that the volume of workmen's compensation cases reaching the appellate courts of Texas during the last year has decreased rather than increased. A partial explanation for this may be: (1) the efficient work of the hearing officers;[1] (2) increased unemployment payments; (3) the equalization of attorneys' fees for representing claimants before the Industrial Accident Board and before the courts;[2] (4) the fact that unsettled points of law in this field are fast becoming fewer; and (5) the wide application of the rule that the Workmen's Compensation Act[3] should be construed liberally so as to effectuate the beneficent purpose for which it was enacted. The cases propounded no startling innovations this year, but were mostly reiterations of well established rules.

I. SUBSTANTIVE LAW

Good Cause. One of the first prerequisites to a recovery of compensation benefits is that a claim for compensation be filed within six months from the date of the injury. This requirement can be waived in a meritorious case for good cause which exists up to the time the claim is filed. For some peculiar reason, there seems to be a relation between the hard times of recession and the late times of filing claims for compensation as specified in the Act.[4] This brings into play the escape hatch that in meritorious cases and for good cause strict compliance with the six-month filing requirement may be waived. The test for determining whether good cause for late filing exists up to the time the claim is made is the ordinarily prudent person test.[5]

In *Torres v. Western Casualty & Surety Co.*[6] the Texas supreme court held that such a case of good cause was presented where: (1) the adjuster had contacted the claimant less than three months after the injury and assured him that he would be taken care of, and (2) the defendant had paid the claimant's frequent medical bills.[7] Similarly, good faith reliance by a claimant upon the assurances of her physicians that her injuries

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[1] TEX. REV. CIV. STAT. ANN. art. 8307, §§ 3, 10 (Supp. 1970).

[2] *Id.* art. 8306, §§ 7c, 7d.

[3] *Id.* arts. 8306-09(f) (1967).

[4] *Id.* art. 8307, § 4a.

[5] Texas Employers' Ins. Ass'n v. Hudgins, 294 S.W.2d 446 (Tex. Civ. App.—Waco 1956), *error ref. n.r.e.*

[6] 457 S.W.2d 50 (Tex. 1970).

[7] Almost identically, the submission to the jury of a good cause issue was justified in Texas Employers' Ins. Ass'n v. Stateler, 449 S.W.2d 533 (Tex. Civ. App.—Dallas 1969), where the claimant testified that the insured's adjuster told him not to worry, that all reports to the insurance company and the board would be taken care of.

were not serious constituted good cause for a period up to the time her physicians advised her to the contrary.[8]

However, in *Travelers Insurance Co. v. Warren*[9] the claimant's duty of continuing diligence was reaffirmed, and it was held that, while the claimant's reliance upon her employer's assurances that her claim had been filed may have been justified for some period of time, as a matter of law reliance thereon for twenty-two months was imprudent. Since good cause did not exist "until the day the claim was actually filed,"[10] the judgment below was reversed and rendered.[11]

Course of Employment—Transportation and Travel. Both state and federal courts made an attempt to clarify the statutory provision that an injury sustained by an employee while engaged in the dual purpose of traveling in furtherance of the affairs or business of his employer and also in furtherance[12] of his own personal or private affairs should not be the basis for a claim that the injury was sustained in the course of employment—unless the trip would have been made even if there had been no personal or private affairs of the employee to be furthered, and unless the trip would *not* have been made if there had been no affairs or business of the employer to be furthered thereby.[13]

In *Davis v. Argonaut Southwest Insurance Co.*[14] conflicting evidence was presented as to whether the injury was incurred in the course of the employees' employment. Evidence presented by the plaintiffs tended to support the jury finding that the trip to Houston was made in the course of employment. The defendant's evidence, however, indicated that the trip was planned for personal reasons, and that the employer's foreman had, after learning of the plans, asked the employees to pick up some supplies while they were in Houston. The court of civil appeals[15] reversed the trial court's judgment for the plaintiffs, finding no evidence to satisfy the "dual purpose" rule. However, the Texas supreme court reversed[16] since the court was unable to hold that the evidence "conclusively established that the private purpose was a motivating cause"[17] of the trip. "The

[8] Texas Employers' Ins. Ass'n v. Sapien, 458 S.W.2d 203 (Tex. Civ. App.—El Paso 1970), *error ref. n.r.e.*

[9] 447 S.W.2d 698 (Tex. Civ. App.—Tyler 1969), *error ref. n.r.e.*

[10] *Id.* at 701.

[11] The court said that sometime within the twenty-two month period a diligent claimant would have:

> (1) [made] inquiry of [her] employer as to why [she] was not to receive further payments; (2) [made] inquiry of someone as to what was necessary to receive further workmen's compensation benefits; (3) [filed] a claim for workmen's compensation benefits, or at the very least, [checked] to see if a claim for workmen's compensation benefits had in fact been filed in her behalf.

Id. at 702.

[12] "[T]he word 'furtherance' here 'connotes the conferring of a benefit on the employees by helping to forward or advance his personal or private affairs.' " Davis v. Argonaut Southwest Ins. Co., 14 Tex. Sup. Ct. J. 158, 159 (1970), quoting Johnson v. Pacific Employers Indem. Co., 439 S.W.2d 824, 827 (Tex. 1969).

[13] TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (1967).

[14] 14 Tex. Sup. Ct. J. 158 (1970).

[15] 455 S.W.2d 416 (Tex. Civ. App.—Austin 1970).

[16] 14 Tex. Sup. Ct. J. 158 (1970).

[17] *Id.* at 159.

testimony of plaintiffs, which the jury was entitled to believe, was to the contrary."[18]

The federal case[19] involved a close question of private versus business motivation for a trip by the employee, his employer and a third person. Both the employer and the employee were active in church affairs and, in addition, the employer's business involved the construction of churches. Thus, although the itinerary included several cities, the Detroit leg of the trip, which proved to be fatal, was arguably in furtherance of exclusively church affairs (attendance of a missionary conference). The court upheld the jury finding for the claimant, saying that since the claimant's deceased was the employer's "man Friday," constantly required to be at his "beck and call," no practical distinction could be drawn between the employer's church activities and his church construction business.

Course of Employment—Causal Connection. The quantum of proof sufficient to establish causation in a workmen's compensation case is not the same as that required in ordinary negligence cases.[20] Proof of a mere "causal connection" will suffice in a workmen's compensation case, while a "proximate cause" must be found in negligence cases. It is generally stated that there must be a showing that the injury was a producing cause of the incapacity, or that the incapacity must have naturally resulted from the injury.

The rule attributed to *Insurance Co. of North America v. Kneten*,[21] that the evidence must show a "reasonable probability" of causation, was apparently followed in two cases involving oilfield workers who had died of heart attacks. In *Standard Fire Insurance Co. v. Sullivan*[22] there was evidence of some strenuous work both on the day of death and the day before, coupled with strong medical testimony.[23] The trial court judgment for the claimant was affirmed. On the other hand, in *O'dell v. Home Indemnity Co.*[24] no unusually strenuous work was shown and the claimant's medical testimony was that the doctor "could find no cause of death attributable to the deceased's work."[25]

In a third case,[26] one involving a fractured elbow which developed into cancer, the jury found that the on-the-job injury was the producing

[18] *Id.* On a cross-point the insurance company argued that the trial court erred in admitting testimony of the deceased's wife and son which tended to show that the deceased had planned to stay home the weekend of the trip. The court held that such testimony was proper to show the deceased's state of mind on the "dual purpose" issue.

[19] North River Ins. Co. v. Corbell, 421 F.2d 273 (5th Cir. 1970).

[20] *See* Musslewhite, *Medical Causation Testimony in Texas: Possibility Versus Probability*, 23 Sw. L.J. 622 (1969).

[21] 440 S.W.2d 52 (Tex. 1969).

[22] 448 S.W.2d 256 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

[23] The claimant's doctor testified that, based upon "reasonable medical certainty and probability [the deceased] suffered a cardiac infarction on the day of his death . . . as a result of the work he did that day." *Id.* at 258.

[24] 449 S.W.2d 485 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*

[25] *Id.* at 487.

[26] Commercial Ins. Co. v. Wright, 457 S.W.2d 141 (Tex. Civ. App.—Texarkana 1970), *error ref. n.r.e.*

cause of the resultant loss of the arm. On appeal it was urged by the appellant that the evidence was insufficient to prove causation. The court, in discussing the quantum of proof necessary,[27] interpreted the *Kneten* case as one decided upon a theory of "strong possibility" as opposed to "reasonable probability." *Insurance Co. of North America v. Myers*[28] was also cited as a "possibility" case. The court, however, termed its discussion a response to a hypothetical question in this instance, since whatever proof was necessary was supplied, and the judgment for the claimant was affirmed.

Hernia. In order to recover for a hernia resulting from an injury in the course of employment the claimant must show, *inter alia*,[29] "[t]hat the hernia did not exist in any degree prior to the injury for which compensation is claimed."[30] In *Security Mutual Casualty Co. v. Turner*[31] a physician gave undisputed testimony to the effect that the claimant had a protruding hernia fourteen months prior to the injury in question. The claimant testified that some symptoms could have existed prior to the injury, but that he had never suffered any real discomfort. Although the court acknowledged that laymen are allowed much latitude in describing their physical condition, judgment was rendered for the defendant since the claimant was not competent to give opinion evidence as to a diagnosis which required the expertise of a qualified physician or surgeon.

Death Benefits. Notwithstanding the clear provisions that compensation for an injury resulting in the death of an employee "shall be distributed among the beneficiaries as may be entitled to the same as hereinbefore provided, according to the laws of descent and distribution of this State,"[32] controversies still arise over such distribution.

For example, in *Servantez v. Aguirre*[33] the grandfather of the deceased employee sued his daughter, the natural mother of the deceased, to ascertain the proper beneficiary. The defendant had left the child in the plaintiff's home seven days after his birth, and the plaintiff and his wife raised the child as a son. The plaintiff-grandfather claimed to be the adoptive father, but the court held that the deceased was never legally adopted by his grandfather and that the requisites of an adoption by estoppel were missing.[34] The court held that there was neither a requirement for dependency nor a penalty for abandonment, and affirmed the summary judgment in favor of the mother.

[27] The ambiguity in this area is exemplified by the fact that *both* parties cited *Kneten* and *Myers* as supportive of their different positions on the quantum of proof.

[28] 411 S.W.2d 710 (Tex. 1966).

[29] According to TEX. REV. CIV. STAT. ANN. art. 8306, § 12b (1967) a claimant must also show that there was an injury resulting in a hernia; that the hernia appeared suddenly and immediately following the injury; and that the injury was accompanied by pain.

[30] *Id.*

[31] 457 S.W.2d 305 (Tex. Civ. App.—Austin 1970).

[32] TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (1967).

[33] 456 S.W.2d 467 (Tex. Civ. App.—San Antonio 1970).

[34] For the elements of adoption by estoppel, see Cavanaugh v. Davis, 149 Tex. 573, 235 S.W.2d 972 (1951).

The parents of the deceased fared better in a case[35] wherein death benefits had been awarded to the guardian of the deceased's minor children who had been adopted by their mother's new husband after her divorce from the deceased. It will be recalled that the Supreme Court of Texas, in *Patton v. Shamburger*,[36] disregarded the statutory directive that benefits be distributed to the beneficiaries according to the statute of descent and distribution under which adopted children were entitled to take from their natural father.[37] Instead, the court held, at least as far as death benefits are concerned, that the adoption relationship superseded the natural relationship and that the adopted children were no longer entitled to death benefits. However, in *Gentry v. Travelers Insurance Co.*[38] the Industrial Accident Board had entered its award in favor of the adopted children eleven days prior to the *Patton* decision. The insurance company made a valiant, but delinquent, attempt to appeal the award.[39] The court imposed a double liability on the insurance company, finding that the award to the adopted children, though legally incorrect, was not reviewable collaterally (and, thus, not at all),[40] and that the deceased's parents could not be denied the benefits to which they were legally entitled under *Patton*.

In an important and eminently just decision[41] the court of civil appeals at Dallas escaped the rank injustice which a literal reading of *Patton* would have required. The court held that denying recovery of death benefits to an adopted minor child and awarding benefits to that child's brothers and sisters who had not been fortunate enough to be adopted violated the equal protection clause of the United States Constitution. In reaching its decision the court pointed out that the children were "all 'minors' in that they had not yet reached their majority, and [that] they were all 'children' of the decedent in the biological sense."[42] Therefore, the court reasoned:

> [T]he discrimination between the two classes [adopted and unadopted children] in the case at bar [was] 'invidious' because the effect of it is to take from a defenseless, innocent child a substantial right to certain protection under the workmen's compensation law, not because of anything the child has done, but wholly because of the act of one or more adults in adopting the child. We do not think this line of discrimination can be said to have been 'a rational one' as having any bearing on public health, morals or general welfare, or on the ground of supposed monetary advantages or disadvantages incident to adoption of children. We do not think the discrimination can be

[35] Gentry v. Travelers Ins. Co., 459 S.W.2d 709 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

[36] 431 S.W.2d 506 (Tex. 1968).

[37] *See* Akin, *Workmen's Compensation, Annual Survey of Texas Law*, 24 Sw. L.J. 141, 145 (1970).

[38] 459 S.W.2d 709 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

[39] TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967) provides that appeals must be made within twenty days.

[40] *Id.* art. 8306, § 12d provides that the Industrial Accident Board may review and change any award at any time within the compensation period if there is a change of condition, mistake or fraud. The change of condition provisions refers to the condition of the injured employee, not the "condition" of the case law.

[41] Dickerson v. Texas Employers' Ins. Ass'n, 451 S.W.2d 794 (Tex. Civ. App.—Dallas 1970).

[42] *Id.* at 796.

> justified on the basis of supposed pecuniary advantage to an adopted child as compared to its siblings who are not adopted. We think it would be unsafe and unwise to assume that an adopted child would occupy a superior position, financially or otherwise, merely because of the adoption. The converse might easily be true.[43]

The same reasoning applies with equal force to the discrimination wrought by *Patton*.

Wage Rate. Where the only testimony pertaining to the claimant's wage rate was that the witness knew of another employee of the same class as the claimant, but did not know that particular employee's rate of pay, it was held in *Travelers Insurance Co. v. Gilliland*[44] to be error to determine the wage rate of the claimant under subsection (2) of section 1 of article 8309.[45]

Although the claimant testified that he had not worked for 210 days during the year preceding his surgery in the "same or similar work,"[46] the court, in *Texas Employers' Insurance Ass'n v. Hacker*,[47] held that the evidence was, nevertheless, sufficient to support the finding of the jury that the claimant worked in the same employment for the same or another employer for at least 210 days during the year, since the record showed that he had worked more than 210 days for two different employers and there was testimony detailing the nature of the businesses.

The holding in *Texas Employers' Insurance Ass'n v. Shannon*,[48] that the error in submitting the wage rate issue was immaterial since there was no reason to require proof or submit an issue on a matter upon which both parties had agreed, was reversed by the Texas supreme court.[49]

Medical Expenses. Since the compensation carrier was obligated to furnish medical services to the employee until released by the settlement agreement, it was held in *Harleysville Mutual Insurance Co. v. Frierson*[50] that the employee could not compromise the accrued rights of a doctor and a hospital which had rendered services before the settlement agreement.

The necessity of timely objection was reaffirmed in *Charter Oak Fire Insurance Co. v. Perez*,[51] where the trial court was held to have been entitled to make findings for the employee of medical, hospital, and medicinal expense where no issue thereon was either present or requested—and no exception was made to the omission.

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[43] *Id.* at 797. The court relied on the reasoning of Levy v. Louisiana, 391 U.S. 68 (1967).

[44] 459 S.W.2d 500 (Tex. Civ. App.—El Paso 1970).

[45] TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).

[46] The court stated that such testimony was mere opinion and not conclusively binding upon the party. Texas Employers' Ins. Ass'n v. Hacker, 448 S.W.2d 234, 237 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

[47] *Id.*

[48] 453 S.W.2d 217 (Tex. Civ. App.—Amarillo 1970), *error granted.*

[49] 462 S.W.2d 559 (Tex. 1971). The insurance company had been paying the claimant 35 dollars per week as compensation, and the claimant continued to accept that amount.

[50] 455 S.W.2d 370 (Tex. Civ. App.—Houston 1970).

[51] 446 S.W.2d 580 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

In *Charter Oak Fire Insurance Co. v. Few*[52] the liberal construction rule was held not to allow a claimant to recover for the medical expenses of doctors that he himself employs unless he complies with the provisions of section 7 of article 8306 and gives notice to the insurer.[53] If such notice is given, it is the obligation of the insurer to provide the medical care within a reasonable time, and, upon default of this duty, the claimant may obtain the needed care himself.[54]

Subrogation. In *McCann Construction Co. v. Joe Adams & Son*[55] the well-established rule that a subscriber is protected against claims for contribution and indemnity, unless he has contracted for such liability, was reiterated. In *McCann* the subscriber did so contract, and the contract was held to be enforceable even though the injury might have been caused by the indemnitee's own negligence.

In another suit involving McCann Construction Company a signed release was the subject of controversy. The instrument purported to release from liability the workmen's compensation insurer and all others that might have been responsible for the accident. The court held that the release was ambiguous, and resorted to extrinsic evidence. On general principles for the construction of contracts the release was held not to release the tort claim against a third party for negligence.[56]

Liability of Non-Subscriber. In *Huffman v. Saenz*,[57] a common-law action for negligence, a judgment for the employee was affirmed. In the affirmance the court gave effect to the well-known first provisions of the workmen's compensation law,[58] which render a non-subscriber liable for negligence in proximately causing injury to his employee and deprive such non-subscriber of the common law defenses of contributory negligence, assumed risk, and negligence of a fellow employee.

Previous Injury. In *Alvarez v. Texas Employers' Insurance Ass'n*[59] the court-made law[60] that the proportion of disability which results from a prior injury is not deductible unless such prior injury was *compensable* (*i.e.*, unless it was covered by workmen's compensation), and that a prior disease is not any defense unless it was the sole cause of the disability, was reaffirmed.

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[52] 456 S.W.2d 156 (Tex. Civ. App.—Tyler 1970), *error granted.*

[53] The Supreme Court of Texas granted the application for writ of error, which included this point of error: "The Court of Civil Appeals erred in holding respondent [insurer] did not owe all the doctor bills for services furnished [claimant] for treatment of her injuries received in the accident." 14 Tex. Sup. Ct. J. 11 (1970). *See* text accompanying note 64 *infra.*

[54] TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (1967).

[55] 458 S.W.2d 477 (Tex. Civ. App.—Fort Worth 1970).

[56] McCann Constr. Co. v. Roberts, 449 S.W.2d 557 (Tex. Civ. App.—Fort Worth 1969).

[57] 447 S.W.2d 508 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*

[58] TEX. REV. CIV. STAT. ANN. art. 8306, §§ 1, 4 (1967).

[59] 450 S.W.2d 114 (Tex. Civ. App.—San Antonio 1970), *error ref. n.r.e.*

[60] *See* St. Paul Fire & Marine Ins. Co. v. Murphree, 163 Tex. 534, 542, 357 S.W.2d 744, 749 (1962).

Partial Loss of Use. The recurrent contention that permanent *partial* loss of the use of a specific member should draw the same compensation as the complete loss of that member was rejected in *Campbell v. Aetna Casualty & Surety Co.*[61] The trial court was held to have correctly followed the statutory provisions[62] where the jury had found that the employee suffered temporary total loss of use of her leg for eighty weeks and thirty per cent permanent partial loss of the use of the same leg, and the court awarded the employee sixty per cent of her average weekly wage for eighty weeks and thirty per cent of that figure for 120 weeks.

II. Procedural Law

Parties. The Texas supreme court has refused the writ of error applied for in *Casper v. General Insurance Co. of America*,[63] finding no reversible error in the decision of the court of civil appeals. The lower appellate court had found that the absence of the husband, in a compensation suit for injuries to the wife, did not present a case of fundamental error. The decision was in direct conflict with a later holding of the court of civil appeals[64] that the joinder of the husband was a prerequisite to the wife's recovery of workmen's compensation benefits. Most recently, *Charter Oak Fire Insurance Co. v. Few*[65] held that where the wife was joined only pro forma by her husband in a compensation suit for injuries to the wife, it was fundamental error to award affirmative relief to the husband since the workmen's compensation benefits are community property in which he owned a one-half interest, and affirmative relief cannot be granted to one who stands in a pro forma capacity. However, that decision was reversed by the Texas supreme court.[66] By virtue of this decision the conflict has been resolved in favor of non-joinder. The court said that articles 4621[67] and 4626[68] provided a sufficient basis for the holding that the husband was not an indispensable party. Both statutes were incorporated into the Texas Family Code.[69]

Non-Suit. The general rule is that perfection of an appeal from an award of the Industrial Accident Board nullifies the award. However, in *Lowery v. Transport Insurance Co.*[70] the insurer perfected his appeal, and then tried to get by with taking a non-suit without serving the claimant. The insurer had paid the amount of the award, and the claimant had not

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[61] 450 S.W.2d 888 (Tex. Civ. App.—Eastland 1970), *error ref. n.r.e.*

[62] Tex. Rev. Civ. Stat. Ann. art. 8306, § 12 (1967).

[63] 431 S.W.2d 311 (Tex. 1968).

[64] Travelers Ins. Co. v. Jacks, 441 S.W.2d 312 (Tex. Civ. App.—El Paso 1969).

[65] 456 S.W.2d 156 (Tex. Civ. App.—Tyler 1970), *rev'd*, 14 Tex. Sup. Ct. J. 200 (1971); *see* text accompanying note 52 *supra.*

[66] Few v. Charter Oak Fire Ins. Co., 14 Tex. Sup. Ct. J. 200 (1971), *rev'g* 456 S.W.2d 156 (Tex. Civ. App.—Tyler 1970).

[67] Ch. 309, § 1, [1968] Tex. Laws 708.

[68] *Id.* at 709.

[69] Ch. 888, § 6, [1970] Tex. Laws 2707, *repealing* Tex. Rev. Civ. Stat. Ann. arts. 4621, 4626 (1968); *see* Tex. Fam. Code Ann. tit. 1, §§ 4.04, 5.22 (1970).

[70] 451 S.W.2d 595 (Tex. Civ. App.—Austin 1970).

even filed his answer and cross action. The appeal was not thereby deemed to be a nullity.

Venue. The venue of a maturity suit, whether brought under the first or second paragraph of the applicable section,[71] may be brought in the county where the accident occurred, in any county where the claimants reside, or where one or more of such claimants may have his place of residence at the time of the institution of the suit.[72]

The venue of a suit against a non-subscriber is not governed by the Workmen's Compensation Act, but by the general venue statute,[73] as is a suit to set aside a compromise settlement agreement.[74] *Texas Employers' Insurance Ass'n v. Williams*[75] reaffirms the holding that Texas Employers' Insurance Association is not a private corporation, association, or joint stock company within the general statute governing suits against corporations and associations.[76]

Jurisdiction. In *Johnson v. American General Insurance Co.*[77] the Texas supreme court held that the claimant was entitled to recover in court for an occupational disease where the claim for compensation filed with the Industrial Accident Board alleged an accidental injury at a particular time and place. The court found no fatal variance between the claim advanced before the board and that advanced before the court, and announced the test to be whether there was a fair and substantial identity of the claims.

In a similar situation the United States Court of Appeals for the Fifth Circuit upheld the trial court's determination that the injury complained of in the suit was the same as the injury that provided the basis for claimant's claim before the Industrial Accident Board.[78] The nature of the claim was not discussed in the opinion.

Summary Judgment. In *Torres v. Western Casualty & Surety Co.*[79] the claimant's pleadings indicated that after an injury on the job, the insurance adjuster talked to him and assured him that he was being given good care. It was also revealed that the insurer paid his frequent medical bills and, in addition, paid the claimant $320 in compensation benefits. In response to a motion for summary judgment by the insurer on the basis of the claimant's failure to file his claim for compensation within six months following his injury, the claimant said that he consulted an attorney and filed his claim as soon as possible upon having doubts that the insurer

[71] TEX. REV. CIV. STAT. ANN. art. 8307, § 5a (1967).
[72] Aetna Ins. Co. v. Spradley, 446 S.W.2d 941 (Tex. Civ. App.—El Paso 1969).
[73] J. Weingarten, Inc. v. Heatherly, 450 S.W.2d 693 (Tex. Civ. App.—Houston 1970).
[74] Texas Employers' Ins. Ass'n v. Williams, 447 S.W.2d 232 (Tex. Civ. App.—Houston 1969).
[75] *Id.*
[76] *See* TEX. REV. CIV. STAT. ANN. art. 1995, § 3 (1964).
[77] 14 Tex. Sup. Ct. J. 159 (1970).
[78] Vasquez v. Glens Falls Ins. Co., 426 F.2d 297 (5th Cir. 1970).
[79] 457 S.W.2d 50 (Tex. 1970); *see* text accompanying note 6 *supra.*

intended to treat him fairly. The Texas supreme court held that unless the insurer's evidentiary material had the effect of disproving the claimant's justification for not filing his claim earlier, the motion must fail—there being no burden of proof on the claimant in a motion for summary judgment as distinguished from a motion for an instructed verdict.

Evidence—Admissibility. A variety of situations in which objections were made to the admissibility of evidence were before the courts. For example, it was not error to permit counsel to discuss previous injuries to other parts of the body of the employee on *voir dire* examination of the jury panel, nor was it reversible error to admit the employee's income tax returns for previous years on the issue of a lump sum over the general objection that only a portion of the returns was admissible.[80]

X-rays which were not properly authenticated were properly excluded, and evidence as to what they showed was not admissible. Conversely, where the proper predicate has been laid, the x-rays are admissible. The doctor's testimony based on inadmissible testimony of what was revealed by the last x-rays did not call for a reversal in that it was not reasonably calculated to, and probably did not, affect the verdict and judgment.[81]

In *Landry v. Travelers Insurance Co.*[82] the trial court had refused to admit evidence for impeachment purposes of claimant's felony conviction for theft of postal money orders and subsequent forgery—offenses involving moral turpitude—five years and one month before the trial. The Supreme Court of Texas held this to be a valid exercise of discretion by the trial court.

An objection that a hypothetical question assumed things not proved in evidence was held to be too general.[83]

It was held that the trial court did not commit reversible error in excluding testimony, which was tendered by the insurer for the limited purpose of contradiction of the employee's plea for a lump sum, that the employee was receiving $80 per month from the Veterans Administration as a totally disabled veteran of World War II. The collateral source rule generally prohibits such testimony.[84]

It was also held that any harm in testimony relating to the maximum weekly compensation rate, the number of weeks for loss of the use of a foot, and the amount of attorney's fees, was subordinated to the benefit in affording the jury an evidentiary basis on which to answer the lump sum issue.[85] This was true even though such an admission was ordinarily reversible error. In another case, in which a lump sum was not put in issue, the refusal of the trial court to instruct the employee's attorney not to refer during *voir dire* examination or otherwise to weekly com-

[80] Alcocer v. Travelers Ins. Co., 446 S.W.2d 927 (Tex. Civ. App.—Houston 1969).
[81] Highland Underwriters Ins. Co. v. Helm, 449 S.W.2d 548 (Tex. Civ. App.—Eastland 1969).
[82] 458 S.W.2d 649 (Tex. 1970).
[83] Royal Indem. Co. v. Smith, 456 S.W.2d 218 (Tex. Civ. App.—Fort Worth 1970).
[84] Pacific Employers Indem. Co. v. Johnson, 448 S.W.2d 205 (Tex. Civ. App.—Beaumont 1969).
[85] Texas Cas. Ins. Co. v. Hooper, 448 S.W.2d 258 (Tex. Civ. App.—Waco 1969).

pensation and the number of weeks for which the employee was suing, was held to be reversible error.[86]

Evidence—Sufficiency. In a number of cases the evidence presented was held sufficient to support judgment in favor of a claimant. In *Charter Oak Fire Insurance Co. v. Perez*[87] sufficient evidence was produced by a diseased worker who claimed the producing cause of occupational lung disease to be the welding of galvanized steel. In *Swift v. Aetna Casualty & Surety Co.*[88] evidence of actual control was found sufficient to support the employer-employee relationship at a filling station, even though the contract with the petroleum company was in the form of a lease. *Keith v. Blancett*[89] held that the evidence raised an issue as to whether the decedent was an independent contractor or an employee while driving a "hook-up" for a used car dealer.

Also, in *Texas Employers' Insurance Ass'n v. Shannon*[90] the evidence supported a finding that back and leg injuries sustained while working on an oilfield rig were permanent. *Royal Indemnity Co. v. Smith*[91] sustained a compensation award even though the claimant was earning almost as much at the time of the trial as he was before his accident. In *Standard Fire Insurance Co. v. Malone*[92] a truck driver who was working and earning wages after an injury to his testicle was allowed to recover on the basis of total incapacity for 200 weeks.

On the other hand, in *Griffin v. Texas Employers' Insurance Ass'n*[93] the employee failed to carry the burden of proof in establishing with reasonable probability that an object which lodged in his eye while he was working near a cotton gin caused the loss of his eye. No statement of facts was filed in *Haley v. Texas General Indemnity Co.*,[94] and thus the appellate court could not pass on the smallness of the judgment. In other cases the lifting of a heavy bundle of steel rods was found not to be the producing cause of a back injury,[95] and evidence of the permanent partial loss of the use of a leg was found to be contrary to the overwhelming weight and preponderance of the evidence.[96]

In *Travelers Insurance Co. v. Smith*[97] the evidence was found insufficient to prove that the claimant's heart attack resulted from strenuous lifting

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[86] Travelers Ins. Co. v. DeLeon, 456 S.W.2d 544 (Tex. Civ. App.—Amarillo 1970), *error ref. n.r.e.*

[87] 446 S.W.2d 580 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*; *see* text accompanying note 51 *supra.*

[88] 449 S.W.2d 818 (Tex. Civ. App.—Houston 1970).

[89] 450 S.W.2d 124 (Tex. Civ. App.—El Paso 1969).

[90] 453 S.W.2d 217 (Tex. Civ. App.—Amarillo 1970), *error granted*; *see* text accompanying note 48 *supra.*

[91] 456 S.W.2d 218 (Tex. Civ. App.—Fort Worth 1970).

[92] 457 S.W.2d 379 (Tex. Civ. App.—Waco 1970).

[93] 450 S.W.2d 59 (Tex. 1970).

[94] 443 S.W.2d 604 (Tex. Civ. App.—Eastland 1969).

[95] Rees v. Security Nat'l Ins. Co., 445 S.W.2d 811 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*

[96] Harris v. Texas Employers' Ins. Ass'n, 447 S.W.2d 211 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

[97] 448 S.W.2d 541 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*

in the course of employment. The evidence presented in *Liberty Mutual Insurance Co. v. Pool*[98] limited compensation to a leg injury. An employee who, after electrical shock, suffered disability caused solely by the use or attempted use of his ankle was not entitled to recover compensation for general injury; nor did evidence of back injuries, work-related or otherwise, support a finding that a back injury was not the producing cause of any total disability, or that less than the total claimed medical bills was attributable to an on-the-job injury.[99]

Texas Employers' Insurance Ass'n v. Polasek[100] held that an employee failed to establish that headaches, dizziness, swelling of the head, and excessive tiredness were produced by a blow on the head and not by the loss of his right eye. In *Travelers Insurance Co. v. Rodriguez*[101] it was held that the evidence failed to establish that the injury to a claimant's hand which resulted in its loss was the producing cause of an injury to the claimant's neck and shoulder, which resulted in total incapacity. A verdict for permanent partial incapacity was clearly wrong and unjust in the absence of any evidence in the record jutifying such a finding.[102] Finally, the evidence was found to support the total loss of the use of a foot from jumping on a nail, but it did not support a finding of total and permanent incapacity resulting from the injury to the foot and extending to and affecting other parts of the body generally.[103]

Court's Charge. The court's definition of an "employee" which included persons under an "agreement" rather than under a "contract of hire" was held to be too broad.[104] The definition of an "employee," which authorized the jury to find the claimant to be an employee of the insured solely on the basis of "exercise of control" rather than the "right of control" as required by law, was held to be reversible error.[105] Since the publication by the Committee on Pattern Jury Charges of the State Bar of Texas of pattern charges covering workmen's compensation,[106] there should be no excuse for any erroneous definitions or charges in a workmen's compensation case.

A rejection by the court of the insurer's request to submit appropriate issues which would have limited recovery to compensation for specific injuries constituted reversible error.[107]

To submit both "natural result" and "producing cause" to the jury was held to be a submission of the same matter twice, but such error was

[98] 449 S.W.2d 121 (Tex. Civ. App.—Texarkana 1969), *error ref. n.r.e.*

[99] Hardegree v. American & Foreign Ins. Co., 449 S.W.2d 554 (Tex. Civ. App.—Fort Worth 1969).

[100] 451 S.W.2d 260 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

[101] 453 S.W.2d 857 (Tex. Civ. App.—Eastland 1970), *error ref. n.r.e.*

[102] Travelers Ins. Co. v. DeLeon, 456 S.W.2d 544 (Tex. Civ. App.—Amarillo 1970), *error ref. n.r.e.*

[103] Texas Cas. Ins. Co. v. Hooper, 448 S.W.2d 259 (Tex. Civ. App.—Waco 1969).

[104] Travelers Ins. Co. v. Gilliland, 459 S.W.2d 500 (Tex. Civ. App.—El Paso 1970).

[105] Continental Ins. Co. v. Clark, 450 S.W.2d 684 (Tex. Civ. App.—Tyler 1970).

[106] 1 COMMITTEE ON PATTERN JURY CHARGES OF THE STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1969).

[107] Texas Employers' Ins. Ass'n v. Stateler, 449 S.W.2d 533 (Tex. Civ. App.—Dallas 1970).

deemed harmless in the absence of a showing that the duplicate submission influenced the jury to return a different verdict.[108]

The court followed rules 272 and 434 of the Texas Rules of Civil Procedure[109] in holding that where the appellant made no objections to special issues, the objections were waived.[110]

Argument of Counsel. Counsel's argument that the insurer's contentions as to the claimant's course of employment and permanent disability were the "most preposterous ever made" was held not to be of such a nature as to bring about an improper verdict.[111]

In addition, the arguments of counsel that he was only talking about 401 weeks (the definition of "permanent"), that the insurer would not pay claimant's medical bills, that the employer carried insurance to protect claimant, and that the claimant was a weak individual confronted with the massive power of the insurer, were held to be improper. However, they were of a curable nature since they were not reasonably calculated to cause and probably did not cause the rendition of an improper judgment. The error was waived for failure to request an instruction that the arguments be disregarded.[112]

An opposite conclusion was reached in considering counsel's arguments in *Texas Employers' Insurance Ass'n v. Hacker.*[113] There the attorney for the claimant referred to hardship in violation of a court order, made an argument outside the record, referred to an adjuster as "dogging" the courtroom, and commented about the sight of an all-powerful insurance company "kicking a workman down." The court held this was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. It was thus reversible error and was not cured by the trial court's sustaining objections to the acts and words of the attorney, or by instructing the jury not to consider such arguments. The trial court has the duty under rule 269(g)[114] to stop violations of the rules as to jury argument even though no objection is made to such argument. The court did reiterate the holdings that reference to the "golden rule" in argument by counsel in a jury trial in a compensation case was not error.[115]

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[108] Jackson v. International Serv. Ins. Co., 450 S.W.2d 896 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

[109] TEX. R. CIV. P. 272, 434.

[110] Alcocer v. Travelers Ins. Co., 446 S.W.2d 927 (Tex. Civ. App.—Houston 1969).

[111] Pacific Employers Indem. Co. v. Johnson, 448 S.W.2d 205 (Tex. Civ. App.—Beaumont 1969).

[112] United States Fire Ins. Co. v. Huckabee, 452 S.W.2d 565 (Tex. Civ. App.—Eastland 1970), *error ref. n.r.e.*

[113] 448 S.W.2d 234 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

[114] TEX. R. CIV. P. 269(g).

[115] Texas Employers' Ins. Ass'n v. Hacker, 448 S.W.2d 234, 241 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*