SMU | Dedman School of Law

SMU Law Review

Volume 27
Issue 1 *Annual Survey of Texas Law*

Article 10

January 1973

Workmen's Compensation

John L. Cox Jr.

WORKMEN'S COMPENSATION

by

*John L. Cox, Jr.**

MOST of the cases included in this year's *Survey* relate to problems which are not unusual in workmen's compensation litigation. However, some new insights were offered by the courts in several different areas, and one case in particular presented the first judicial interpretation of a pertinent section of the Compensation Act. A consideration of some current statutory amendments is also included in this survey of workmen's compensation law.

I. SUBSTANTIVE LAW

Exempted Employment. Generally, an employee's protection by workmen's compensation coverage exists only while he is engaged in the usual course of the trade, business, profession, or occupation of his employer.[1] Such protection is extended to cover injuries sustained by an employee while engaged in services which he has been temporarily directed or instructed by his employer to perform which are outside the employer's usual course of trade, business, profession, or occupation.[2] In order to determine if a plaintiff is entitled to the continued coverage, it is critical to examine the facts and circumstances attending the performance of the unusual services. This problem was presented in *Commercial Standard Fire & Marine Insurance Co. v. Hood*,[3] in which a minor, who had been a part-time employee in an appliance store which was covered by compensation insurance, was fatally injured during his first day at work on the farm of his employer. Farm work is normally exempt from the coverage of the Compensation Act.[4] The court denied a claim for death benefits presented by the deceased employee's beneficiaries, holding that he had been employed in the exempted capacity of farm employee, rather than having been temporarily directed into such work. This decision was based on testimony which indicated that the employee had been offered and had accepted new employment on the farm, unrelated to his usual work in the appliance store.

Coverage. Reversing the trial court's grant of the defendant's motion for summary judgment, the court in *Robbins v. Maryland American General Insurance Co.*[5] held that a recovery may be secured under a workmen's compensation policy for a loss which occurred prior to the issuance of the policy, provided neither the insured nor the insurer knew of the loss when the contract was made.[6] The employer requested the issuance of a workmen's compensation policy on the day after the employee was injured, but further requested that it be made effective the preceding day. After issuance, the insurer

* B.S., LL.B., University of Houston. Professor of Law, University of Houston.

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

[2] *Id.*

[3] 474 S.W.2d 522 (Tex. Civ. App.—Tyler 1971), *error ref. n.r.e.*

[4] TEX. REV. CIV. STAT. ANN. art. 8306, § 2 (1967).

[5] 472 S.W.2d 203 (Tex. Civ. App.—Corpus Christi 1971), *error ref. n.r.e.*

[6] *Cf.* Burch v. Commonwealth County Mut. Ins. Co., 450 S.W.2d 838 (Tex. 1970).

learned of the prior injury and executed an endorsement to its policy changing the effective date to the date on which its issuance was requested. The court held that genuine issues of material fact existed regarding the effective date of the policy, which precluded resolution by summary judgment.

Wage Rate. The manner of establishing a workmen's average weekly wage is explicitly provided by statute.[7] A workman may establish his average weekly wage on the basis of either (1) the amount paid to him for work during 210 days of the preceding year, (2) the amount paid to another employee of the same class for similar work during 210 days of the preceding year. If he can demonstrate that the average weekly wage cannot be established in either of these ways, the workman is entitled to a "just and fair wage." Despite the supreme court's requirement of strict compliance with the statutory mandate,[8] cases still arise which fail to meet the statutory standards. Where the injured employee had not worked for at least 210 days during the year preceding the date of his injury, his failure to prove that no other employee of the same class had worked for the prescribed period required reversal of a judgment based on a "just and fair wage rate."[9] In another case, the testimony of a witness that she knew most or many employees engaged in work similar to that of the deceased employee, none of whom worked a sufficent period of time to satisfy the statutory requirement, was held to be insufficient to establish that there was no employee of the particular class in question who had worked at least 210 days during the year preceding the injury in question.[10] However, a claimant's pre-injury wage rate cannot be contested and is presumed to be true as pleaded unless it is denied by verified pleadings.[11]

Good Cause. The Texas compensation statute provides time limitations during which notice of injury and claim for compensation must be made.[12] Notice of an injury must be given by the injured employee to his employer or his employer's insurance carrier within thirty days after the date of injury. Additionally, a claim for compensation must be filed with the Industrial Accident Board within six months of such injury. Failure to meet either requirement can be excused upon a showing of good cause for such omission by the claimant. The courts have consistently required that the good cause asserted by a claimant must exist up until the time the notice or claim is filed, and is to be measured by the degree of diligence which a reasonably prudent person would have exercised under the same or similar circumstances.[13]

The application of these requirements has been considered in several recent cases. In one case compensation benefits were denied because the claimant

[7] TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).
[8] *E.g.*, Texas Employers' Ins. Ass'n v. Shannon, 462 S.W.2d 559 (Tex. 1970).
[9] Aetna Ins. Co. v. Giddens, 476 S.W.2d 664 (Tex. 1972).
[10] Texas Employers' Ins. Ass'n v. Smith, 469 S.W.2d 486 (Tex. Civ. App.—Texarkana 1971), *error ref. n.r.e.*
[11] Commercial Ins. Co. v. Lane, 480 S.W.2d 781 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*
[12] TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).
[13] *E.g.*, United States Fid. & Guar. Co. v. Herzik, 359 S.W.2d 914 (Tex. Civ. App.—Houston 1962), *error ref. n.r.e.*

failed to give adequate notice to the employer.[14] Although the claimant reported a back injury to someone whom he characterized as his yard boss, that person's connection with the employer was not shown. Furthermore, the injury was not reported by the claimant with enough particularity to satisfy the notice requirement.

The remaining cases dealt with the issue of good cause for failing to file a timely claim with the Industrial Accident Board. In *Robbins v. Maryland American Insurance Co.*[15] an insured employer denied that he was covered by workmen's compensation insurance to the claimant's attorney personally, as well as by affidavit. The question of good cause was held to be a jury question, and a summary judgment for the defendant compensation insurer was reversed.

Two cases arose in which good cause was asserted by the respective claimants who believed their injuries were not serious or disabling. Both cases involved employees who had been led to believe that their claims had been filed for them. In *Maleski v. Texas Employers' Insurance Ass'n*[16] the injured employee became disabled six months after his injury. For three-and-one-half months thereafter an agent of his employer's workmen's compensation carrier repeatedly assured him he would receive compensation benefits, but no claim was filed. The court held that a fact issue regarding "good cause" was present and reversed the trial court's summary judgment for the defendant carrier. In *Travelers Insurance Co. v. Speer*[17] a jury finding of good cause was upheld. The claimant had delayed fourteen days while attempting to contact her attorney after learning that her claim had not been filed.

Two other cases involved assertions of reliance on representations made to employees regarding their claims. Compensation was denied in *Boone v. Continental Insurance Co.* because the injured employee waited twenty-one months after her injury before she filed her claim, relying on her supervisor's assurances that "everything would be taken care of."[18] More explicit was the promise by the employer's bookkeeper in *Security Insurance Co. v. Harris*,[19] who filled out the claim form for an employee of limited education and promised to mail it for him. Compensation benefits were paid during an initial thirteen-week period of disability immediately after the injury was sustained. Subsequently, additional hospitalization and surgery became necessary. Thereafter, discussions with the insurance adjuster were sporadically continued until the claimant discovered that his claim had been denied. His claim was filed with the Industrial Accident Board about nineteen days later, after he contacted his attorney. A jury finding of good cause continuing until the date of filing was affirmed.

Baker v. Travelers Insurance Co.[20] involved a claim for death benefits filed by the employee's wife over seven years after the employee's death. It was

[14] Hotchkiss v. Texas Employers' Ins. Ass'n, 479 S.W.2d 336 (Tex. Civ. App.—Amarillo 1972).
[15] 472 S.W.2d 203 (Tex. Civ. App.—Corpus Christi 1971), *error ref. n.r.e.*
[16] 471 S.W.2d 416 (Tex. Civ. App.—Corpus Christi 1971).
[17] 477 S.W.2d 699 (Tex. Civ. App.—Beaumont 1972).
[18] 472 S.W.2d 166 (Tex. Civ. App.—Waco 1971), *error ref. n.r.e.*
[19] 478 S.W.2d 118 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.*
[20] 483 S.W.2d 10 (Tex. Civ. App.—Houston [14th Dist.] 1972).

found that good cause existed for the failure to file the claim for a period of nearly seven years, since during that time the plaintiff was mentally incapacitated. However, a delay in filing her claim for almost five months after her mental disability was removed was held to bar her recovery.

The Beaumont court of civil appeals held that if no claim was asserted against either a negligent third party or the employer's insurer within two years after the accident, the injured employee was barred by the statute of limitations which governs actions in tort from pursuing his cause of action against the third party, after he had successfully obtained a recovery from his employer's insurer upon a showing of good cause for failing to file a claim.[21] The supreme court reversed this decision.[22] Since the Workmen's Compensation Act itself makes provision for suits against third parties, the court held that when an employee elected to proceed under the Act, the cause of action against the third party did not accrue until the employee had obtained an award from the Industrial Accident Commission or a court had awarded him a judgment against the insurer. The court pointed out, however, that if the employee was unable to obtain a recovery from the insurer, his only remedy would be in tort, and, therefore, the statute of limitations governing torts would apply.

Medical Expenses. In *Aetna Casualty & Surety Co. v. Jennusa*[23] the court reiterated the rule placing the burden of proof on the claimant to establish that the medical treatment and hospitalization charges for which recovery is sought are reasonable and proper. In the absence of such proof, the appellate court reversed an award of substantial medical expenses, and ordered either a remittitur or a new trial.

An award of medical expenses for nursing services furnished by the claimant's wife and mother-in-law was upheld in *Standard Fire Insurance Co. v. Simon*[24] over objections that the claim for those expenses had not been made before the Industrial Accident Board and that there had been no notice to the insurer that such services were needed. In considering the first point, the court noted that the claim was not presented by the persons rendering the nursing services, but by the claimant himself, who can make a claim for medical or nursing expenses in the district court, incidental to the compensation claim, even though no such claim was presented to the Industrial Accident Board.[25] In regard to the latter point, it was held that the only statutory notice required was notice of the injury, that there is no requirement of notice of a claim for medical or nursing services, and that a request for such services is not a prerequisite to the carrier's liability. The court also noted that the statements of both the treating doctor and the insurance company's claim

[21] Campbell v. Sanford Chem. Co., 480 S.W.2d 237 (Tex. Civ. App.—Beaumont), *rev'd*, 486 S.W.2d 932 (Tex. 1972).

[22] Campbell v. Sanford Chem. Co., 486 S.W.2d 932 (Tex. 1972).

[23] 469 S.W.2d 423 (Tex. Civ. App.—Beaumont 1971).

[24] 474 S.W.2d 530 (Tex. Civ. App.—Dallas 1971).

[25] *See also* Utica Mut. Ins. Co. v. Jacobs, 483 S.W.2d 500 (Tex. Civ. App.—Houston [14th Dist.] 1972).

agent who visited the claimant in his home provided ample evidence that nursing services were necessary.

The claim for medical expenses can be asserted by either the injured workman or the party who rendered such services.[26] In *Palo Pinto Hospital v. Houston Fire & Casualty Insurance Co.*[27] the employee asserted and was awarded wage and medical benefits before the Industrial Accident Board. The award was overturned at the suit of the insurance carrier, and no appeal was taken. A subsequent claim for the same medical benefits by the hospital, whose representative had participated as a witness in the employee's litigation, was denied; the hospital was held to be bound by the finding in the employee's suit.

Total Permanent Disability. Total incapacity or total disability means that an injured person is disqualified from performing the usual tasks of a workman, and is, therefore, unable to procure and retain employment as a workman. The term does not imply absolute disability to perform any kind of remunerative work.[28] Whether such incapacity exists is generally a jury question, and such a finding will not necessarily be disturbed because the claimant was making the same or greater wages after his injury.[29] Jury findings of total disability were also upheld in cases where the claimant's evidence of such incapacity related to an inability to perform the usual tasks of employment, but work was continued under the pressure of economic compulsion.[30] One such claim was upheld despite the fact that the claimant worked over six years without returning for medical attention after being discharged from further treatment following back surgery.[31] The court held that a jury finding of total permanent disability based on the testimony of the claimant or other lay witnesses can be sustained, even though that testimony may have been contradicted by testimony of medical experts.[32] Another case held that although the injury sustained was a specific injury to the employee's eye, evidence of total permanent disability based on incapacity produced by a traumatic neurosis entitled the claimant to a submission of his case to the jury.[33]

Second Injury Fund. Provisions of the Act relating to subsequent injuries and the second injury fund were amended by the legislature in 1971.[34] These

[26] TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (1967); *see* Texas Employers' Ins. Ass'n v. Hierholzer, 207 S.W.2d 178 (Tex. Civ. App.—Austin 1947), *error ref. n.r.e.*

[27] 471 S.W.2d 437 (Tex. Civ. App.—Eastland 1971), *error ref. n.r.e.*

[28] Home Ins. Co. v. Smith, 482 S.W.2d 395 (Tex. Civ. App.—Waco 1972).

[29] *Id. See also* Maryland Am. Gen. Ins. Co. v. Leffingwell, 478 S.W.2d 616 (Tex. Civ. App.—Corpus Christi 1972).

[30] Home Ins. Co. v. Smith, 482 S.W.2d 395 (Tex. Civ. App.—Waco 1972); Maryland Am. Gen. Ins. Co. v. Leffingwell, 478 S.W.2d 616 (Tex. Civ. App.—Corpus Christi 1972); Industrial Underwriters Ins. Co. v. Gamble, 471 S.W.2d 626 (Tex. Civ. App.—Waco 1971); Aetna Cas. & Sur. Co. v. Bonnie, 470 S.W.2d 779 (Tex. Civ. App.—Beaumont 1971), *error ref. n.r.e.*

[31] Liberty Mut. Ins. Co. v. Parrish, 469 S.W.2d 620 (Tex. Civ. App.—Waco 1971).

[32] *Id.* at 622, 623.

[33] Clayton v. Employers Mut. Liab. Ins. Co., 480 S.W.2d 487 (Tex. Civ. App.—Waco 1972).

[34] Ch. 316, §§ 1-3, [1971] Tex. Laws 1257-58, *amending* TEX. REV. CIV. STAT. ANN. art. 8306, §§ 12c to 12c-2 (1967) (codified at TEX. REV. CIV. STAT. ANN. art. 8306, §§ 12c to 12c-2 (Supp. 1972)).

provisions were substantially altered and, as amended, apparently create an additional liability for workmen's compensation insurers because they create, in certain instances, a possible requirement of duplicate payment. The problem will arise in situations where an injury to an employee resulted in incapacity, but the employee had incurred a prior injury which contributed to the incapacity. In such situations the burden of recoupment from the second injury fund has been shifted from the employee to the compensation insurer.

Prior to the recent amendments, the insurer was liable only for the compensation to which the subsequent injury would have entitled the injured employee, had there been no previous injury. But, it was further provided that the employee could proceed against the second injury fund for additional recovery so that he would be fully compensated for the combined incapacities resulting from both injuries. In *Second Injury Fund v. Keaton*[35] the supreme court held that access to the second injury fund was limited to cases involving total permanent disability arising from enumerated specific injuries. The 1971 amendments to the Act provide that the insurer shall compensate the employee for the total present incapacity to which both the current and any previous injury contributed, with the provision that such insurer shall be reimbursed from the second injury fund to the extent that the previous injury contributes to the combined incapacity. Assuming the limitations enunciated in *Keaton* are still controlling, the amended Act creates the possibility of liability in the insurance carrier for disability in excess of that caused by the current injury in all cases except those involving total permanent disability caused by specific enumerated injuries.

The pre-amendment liability of the insurance carrier for incapacity arising from the current injury only was judicially construed as being applicable solely to cases involving prior *compensable* injuries.[36] As such, this evolved into a defensive issue on behalf of the insurer. Again, the amended Act does not restrict its applicability to *compensable* injuries. This factor would appear to be irrelevant, however, since the liability of the insurer for all incapacity resulting from both injuries is subject to reduction by recovery from the second injury fund.

Occupational Diseases. The decision rendered in *Legate v. Bituminous Fire & Marine Insurance Co.*[37] denied compensation for asbestosis because the disease did not manifest itself by incapacity or death within three years from the date of the employee's last injurious exposure in his employment, as was required by the statute.[38] This statute prescribed time limitations during which different classes of occupational diseases must have manifested themselves.[39] Unfortunately for the plaintiff in *Legate*, his claim arose before the occupational disease sections of the Workmen's Compensation Act were amended in

[35] 345 S.W.2d 711 (Tex. 1961).

[36] St. Paul Fire & Marine Ins. Co. v. Murphree, 357 S.W.2d 744 (Tex. 1962); Mabra v. Transport Ins. Co., 474 S.W.2d 627 (Tex. Civ. App.—Dallas 1971), *error granted.*

[37] 483 S.W.2d 488 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.*

[38] Ch. 30, § 1, [1959] Tex. Laws 55 (repealed 1971).

[39] *Cf.* Aetna Cas. & Sur. Co. v. Jennusa, 469 S.W.2d 423 (Tex. Civ. App.—Beaumont 1971).

1971. The amendments repealed the section which barred a recovery in his case.[40]

The 1971 amendments made several other changes. The statute formerly limited compensation coverage to forty-six specific occupational diseases; now, coverage has been expanded to include all occupational diseases.[41] The amendments also repealed the provisions which gave special treatment to silicosis and asbestosis, and those provisions which limited compensation to periods during which the occupational disease persisted in an acute stage.

Third Party Claims. Once an insurer pays compensation benefits to an injured employee, it becomes subrogated to his rights against any third party whose negligence caused the employee's injuries.[42] The insurance company is entitled to recoupment before the employee receives anything from the third party whether by judgment or compromise. Technical arrangements, such as an agreement by the third party to guarantee that the employee will recover a certain total amount, will not be allowed.[43] Such arrangements are considered to be attempts to circumvent the statute. In the event the carrier does not protect its subrogation rights by intervention in the claimant's suit against a third party, any recovery by the injured party must be reduced by the amount of compensation benefits he has received.[44]

When employees of different employers are working together, an injury to one caused by negligence of the other creates tort liability in both the negligent employee and his employer. This liability can be avoided if it can be established that the two employees are "fellow employees"—*i.e.*, by establishing that the injured employee has been temporarily loaned by his general employer so as to become a special employee of the negligent party's employer. However, no new relationship of employment is created if the borrowed employee is following the direction of the temporary master merely at the direction of his general employer, or in a spirit of cooperation with employees of other employers.[45] Of course, this issue of employment is important in the determination of which employer is responsible for compensation benefits, and that determination is tested by the right of control of the manner in which the employee performs the services being rendered.[46]

[40] Ch. 834, § 2, [1971] Tex. Laws 2540, *repealing* TEX. REV. CIV. STAT. ANN. art. 8306, § 25 (1967).

[41] Whenever the term Occupational Disease is used in the Workmen's Compensation Laws of this State, such term shall be construed to mean any disease arising out of and in the course of employment which causes damage or harm to the physical structure of the body and such other diseases or infections as naturally result therefrom. An Occupational Disease shall also include damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities extending over a period of time and arising in the course of employment . . . .

TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Supp. 1972).

[42] *Id.* art. 8307, § 6a (1967).

[43] Travelers Ins. Co. v. West Columbia, 482 S.W.2d 53 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.*

[44] Gundolf v. Massman-Johnson, 473 S.W.2d 70 (Tex. Civ. App.—Beaumont 1971), *rev'd on other grounds*, 484 S.W.2d 555 (Tex. 1972).

[45] F.B. McIntire Equip. Co. v. Henderson, 472 S.W.2d 566 (Tex. Civ. App.—Fort Worth 1971), *error ref. n.r.e.*

[46] United States Fire Ins. Co. v. Warden, 471 S.W.2d 425 (Tex. Civ. App.—Eastland 1971), *error ref. n.r.e.*

Compensation Insurance Premium Payment by Employee. In a case of first impression,[47] the beneficiaries of an employee, fatally injured in the course of his employment, were granted a substantial recovery because of the employer's violation of a statutory prohibition against the collection of workmen's compensation insurance premiums from the employee.[48] Rejecting arguments that the Act limits the extent of recovery by an employee, and that any liability of the employer at common law was negated because the decedent's death was caused by a fellow servant, the court of appeals affirmed the trial court award, and construed the Act in question by stating that "[i]t was a purpose of the legislature in enacting Section 12g to penalize employers who pass on the cost of Workmen's Compensation insurance to their employees."[49]

Causation. Compensability for incapacity or death depends upon a causal relationship between such incapacity or death and the employee's employment.[50] Though such causal connection is conclusive in many instances, there are some questionable cases, particularly those involving heart attacks. In such cases the usual basis for establishing the necessary causal connection is proof of extra exertion or strain.[51] In any case, medical testimony can be persuasive one way or the other, but even where such testimony suggests only a possible causal connection, the factual circumstances of a case may provide a sufficient basis to support jury findings in favor of the plaintiff. Such a case was *Transport Insurance Co. v. McCully.*[52] Though the doctor in *McCully* testified that the claimant's heart attack was possibly precipitated by emotional stress, the case was distinguished from *Olson v. Hartford Accident & Indemnity Co.*,[53] in which compensation was denied, because the employee in *Olson* only experienced three or four irritating or frustrating experiences over a nineteen-day period with no showing of physical strain or overexertion.

A somewhat different situation is presented when injury is conceded, but the disability is denied. Such a case was *Texas Employers' Insurance Ass'n v. Goodeaux*,[54] in which an injury to a workman's eye was followed by blindness caused by hemorrhage. Although the treating doctor could only testify that the hemorrhage was possibly caused by the eye injury, a jury verdict in favor of the plaintiff was upheld when no other possible causes of the hemorrhage were suggested by the evidence.

Jury findings in favor of a deceased workman were also upheld where death was caused by inhalation of gas fumes which, though ordinarily incapable of fatal consequences, irritated a pre-existing stomach weakness, causing death.[55]

---

[47] Big Mack Trucking Co. v. Dickerson, 482 S.W.2d 1 (Tex. Civ. App.—Houston [1st Dist.] 1972).

[48] TEX. REV. CIV. STAT. ANN. art. 8306, § 12g (1967).

[49] 482 S.W.2d at 8.

[50] Safety Cas. Co. v. Wright, 160 S.W.2d 238 (Tex. 1942).

[51] Home Ins. Co. v. Burkhalter, 473 S.W.2d 318 (Tex. Civ. App.—Texarkana 1971).

[52] 481 S.W.2d 948 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.* The claimant was an airline's customer service agent who suffered a heart attack two hours after commencing work, during which time he was subject to considerable physical exertion and mental stress.

[53] 477 S.W.2d 859 (Tex. 1972).

[54] 478 S.W.2d 865 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.*

[55] Texas Employers' Ins. Ass'n v. Butler, 483 S.W.2d 530 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error ref. n.r.e.*

However, a different result was reached in *Rivas v. United States Fire Insurance Co.*,[56] in which a jury found no connecting cause between a claimant's substantial injuries sustained in a fall and his death some two months later from a failure of his cirrhotic liver, despite medical testimony that the injury was a cause of death.

Change of Condition. Two cases involved interpretation of the provision in the Act for review of an Industrial Accident Board award upon a showing of "a change of condition, mistake or fraud."[57] No relief was granted in *Clawson v. Texas Employers' Insurance Ass'n*,[58] but the supreme court stated that the only prerequisite to consideration of a review application by the Industrial Accident Board is that the application be filed on time. It is not necessary that a renewed claim under this section be supported by medical evidence.[59]

II. PROCEDURAL LAW

Special Issues. Dissatisfied with the verdict rendered on jury findings, the claimant in *Ruddell v. Charter Oak Fire Insurance Co.* sought a reversal and new trial because of "irreconcilable conflict in the answers to special issues in the court's charge."[60] The employee had sought a recovery based on a general injury, whereas the compensation carrier asserted that her injury was confined to a specific injury to her leg. The jury found (1) the claimant sustained an injury resulting in total incapacity which was permanent, and (2) the incapacity of the claimant was caused solely by the loss of use of the left leg below the knee. Following the rule that apparent conflicts in answers should be reconciled when a resolution consistent with the pleadings can be reached,[61] the court interpreted the indicated jury answers as meaning only that the plaintiff failed to establish that her incapacity was not confined to her left leg below the knee and that there was no conflict in the absence of an affirmative finding that her incapacity was not so confined.[62]

A verdict on answers to special issues was also the subject of controversy in *Banks v. Millers Mutual Fire Insurance Co.*[63] The matter was resolved against the plaintiff on the basis of his pleadings, which sought a recovery only for a general injury, while the answers to the special issues supported a recovery only for a specific injury.

An unusual situation was presented in *Stephenson v. Boyer*,[64] in which the jury found that the claimant had not sustained an accidental injury despite the defendant's admission of accidental injury to the claimant. The trial judge apparently concluded that such a finding conflicted with the jury's

[56] 470 S.W.2d 249 (Tex. Civ. App.—Corpus Christi 1971), *error ref. n.r.e.*
[57] TEX. REV. CIV. STAT. ANN. art. 8306, § 12d (1967).
[58] 475 S.W.2d 735 (Tex. 1972).
[59] Jackson v. Texas Employers' Ins. Ass'n, 471 S.W.2d 450 (Tex. Civ. App.—Eastland 1971), *error ref. n.r.e.*
[60] 482 S.W.2d 382, 384 (Tex. Civ. App.—Texarkana 1972), *error ref. n.r.e.*
[61] *See* G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 111 (Supp. 1969).
[62] *See also* Howell v. Houston Fire & Cas. Ins. Co., 474 S.W.2d 924 (Tex. Civ. App.—Waco), *rev'd on other grounds*, 484 S.W.2d 582 (Tex. 1972).
[63] 476 S.W.2d 768 (Tex. Civ. App.—Texarkana 1972).
[64] 479 S.W.2d 355 (Tex. Civ. App.—Amarillo 1972).

finding of incapacity, thereby precluding a judgment for either party, and he granted a new trial. The appellate court held that it had no jurisdiction to issue a writ of mandamus to compel the judge to enter a verdict.

Venue. In *Guerra v. Texas Employers' Insurance Ass'n*[65] the court considered a claimant's appeal from the trial court's ruling granting the defendant insurance company's plea of privilege. The suit had been filed in order to have a compromise settlement agreement set aside for legal fraud. The claimant controverted the defendant's plea of privilege on the ground that suit could be brought in the county where the fraud was committed.[66] The trial court's ruling was upheld inasmuch as the claimant had failed to prove that the fraud or defalcation had occurred in the county of suit.[67]

Another case involving venue held that where an employee was fatally injured outside the state of Texas, venue was established by the compensation statute[68] and could not be tested by a plea of privilege.[69]

Jurisdiction. In order to appeal an unsatisfactory award of the Industrial Accident Board, a claimant must give notice that he will not abide by the Board's decision within twenty days after it is rendered.[70] This was held to be a jurisdictional requirement and not subject to excuse in *Clawson v. Texas Employers' Insurance Ass'n*,[71] even though the failure to comply was apparently caused by an error on the part of the Industrial Accident Board.[72]

A second prerequisite to jurisdiction is the filing of suit by the claimant within twenty days after he has given notice that he will not abide by the Board's decision.[73] *White v. Commercial Standard Fire & Marine Co.*[74] involved a situation where the claimant had filed his appeal from the board award in federal court. After the time limitations during which he could have filed his suit in the state court had expired, he discovered that the federal court did not have jurisdiction of the case because there was no diversity of citizenship. In order to avoid defeating the claimant's cause of action as a matter of equity, the trial court ordered the case remanded to the state court. However, the Fifth Circuit reversed the trial court action and dismissed the plaintiff's suit. A similar fact situation appeared in *Pan American Fire & Casualty Co. v.*

[65] 480 S.W.2d 769 (Tex. Civ. App.—Corpus Christi 1972).

[66] TEX. REV. CIV. STAT. ANN. art. 1995 (1964).

[67] The employee asserted that the treating physician's estimate of 50% residual disability to his injured leg, upon which basis he settled his claim, was incorrect and constituted legal fraud. The court held that a letter from the doctor, written three years subsequent to his original estimate of disability, in which he stated that the employee was 100% disabled insofar as his ability to work was concerned, was not inconsistent with and was not proof that the earlier estimate of incapacity was incorrect. Hence, there was no fraud to support the claimant's controverting affidavit. 480 S.W.2d at 774.

[68] TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1967).

[69] Commercial Standard Ins. Co. v. Lester, 481 S.W.2d 157 (Tex. Civ. App.—Beaumont 1972).

[70] TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

[71] 475 S.W.2d 735 (Tex. 1972).

[72] Clawson v. Texas Employers' Ins. Ass'n, 469 S.W.2d 192 (Tex. Civ. App.—Houston [14th Dist.] 1971). *See generally* Akin, *Workmen's Compensation, Annual Survey of Texas Law*, 26 SW. L.J. 177, 183 (1971).

[73] TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

[74] 450 F.2d 785 (5th Cir. 1971).

Rowlett.[75] Again, the claimant filed his appeal from the Board's award in federal court without the necessary diversity of citizenship. This action was dismissed on motion by the insurance carrier which then brought its own suit in state court after the twenty-day period for such action had elapsed. The insurer attempted to overcome its delay in filing by asserting that the claimant had fraudulently filed his original suit in a federal court without jurisdiction. The trial court's dismissal of the compensation carrier's suit was affirmed without reaching the question of fraud, since the insurer had allowed over twenty days to elapse after the suit was dismissed from the federal court before instituting its state court suit.

Federal law provides that in any direct action *against* the insurer, the insurer shall be deemed to be a citizen of the state of which the insured is a citizen.[76] It was held that this provision was not applicable and did not destroy the diversity otherwise existing between an insurer and a claimant in a suit filed by an insurer in federal court appealing an Industrial Accident Board award.[77]

Appeal. Security Insurance Co. v. Latham[78] involved a claim against two insurance companies. The Industrial Accident Board made an award against both companies, but only one insurer appealed. In an action against the non-appealing carrier to mature the award against it, the court held that the appeal of the first company effectively vacated the entire award. The supreme court has granted writ of error.[79]

In *Garcia v. Home Indemnity Co.*[80] the court reiterated the rule that action taken by the Industrial Accident Board on a claim for compensation cannot be introduced into evidence in a subsequent suit against the insurer. The court also rejected the claimant's objection to a realignment of the parties which prohibited him from showing that the insurer was the procedural plaintiff appealing from an unsatisfactory board award.

Interest. The supreme court has resolved some confusion concerning which statute determines the amount of interest payable on past due benefits. In *Home Indemnity Co. v. Masqueda*[81] the court held that past due compensation installments bear interest at the rate of four percent per annum.[82] After a judgment has been rendered, however, the judgment bears interest at the rate of six percent per annum so long as it remains unpaid.[83]

---

[75] 479 S.W.2d 782 (Tex. Civ. App.—Eastland 1972), *error ref. n.r.e.*
[76] 28 U.S.C. § 1332(c) (1970).
[77] Atlantic Mut. Ins. Co. v. Mitchell, 333 F. Supp. 70 (N.D. Tex. 1971).
[78] 478 S.W.2d 226 (Tex. Civ. App.—Tyler 1972), *error granted.*
[79] 15 Tex. Sup. Ct. J. 411 (1972).
[80] 474 S.W.2d 535 (Tex. Civ. App.—Amarillo 1971).
[81] 473 S.W.2d 456 (Tex. 1971).
[82] TEX. REV. CIV. STAT. ANN. art. 8306a (1967).
[83] *Id.* art. 5069-1.05 (1971).