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Workmen's Compensation

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WORKMEN'S COMPENSATION

by

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IT WOULD not be unreasonable to assume that after more than a half-century of exposure to the limelight of courts, attorneys, subscribers, labor unions, employees, and the Industrial Accident Board, nearly all legal ambiguities concerning the workmen's compensation statutes of Texas would have been solved. However, in spite of the fact that the legislature has worked diligently in amending the act, and the judiciary in construing, applying, and plugging loopholes in its provisions, numerous problems still remain unsolved. The year 1966 has presented its quota of problems—some old and some new.

I. Scope of the Act

In *Travelers Ins. Co. v. Brown*[1] the supreme court considered the rights of an injured agricultural worker, expressly excluded from coverage by the act.[2] His employer's insurance policy allowed an injured employee to elect to receive the equivalent of compensation benefits. The policy provided that if any person shall commence any proceeding at law seeking damages from the insured or the company on account of the injury, the company's liability under the voluntary compensation endorsement is terminated. The employee filed a common law action for damages against his employer; however, the suit was dismissed with prejudice three days before the court was to hear the motion for summary judgment of the employer's insurance company. The court held that the filing of the suit did not amount to "commencement" of suit since it was not shown that citation was ever issued and served or that the employer voluntarily entered its appearance in the suit. Consequently, the workman was able to maintain, successfully, an action for compensation under the voluntary compensation endorsement.

In another case of first impression, a court of civil appeals held that a street railway company which had permanently abandoned its operations of street cars on rails and had begun using buses, no longer came within section 2 of article 8306[3] which excepts from coverage employees of any person, firm or corporation operating any electric street or interurban railway

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[1] 402 S.W.2d 500 (Tex. 1966).

[2] Tex. Rev. Civ. Stat. Ann. art. 8306, § 2 (1967).

[3] *Ibid.*

as a common carrier.[4] The court reasoned that any doubts concerning the eligibility of an employer to become a subscriber under the act should be resolved in favor of bringing the employer within the act. Thus, since the transit company was eligible to be, but had not become, a subscriber, it could not avail itself of the common law defenses of contributory negligence, negligence of a fellow servant, and assumed risk.[5]

Under section 8a of article 8306[6] and section 38 of the Probate Code,[7] a dependent adult child is entitled to receive the benefits provided by the act to the exclusion of the mother of the deceased employee. The court of civil appeals placed the burden of proof on the mother to show that the adult child was not dependent upon the deceased and approved the following test of dependency: "[W]as the alleged beneficiary relying in whole or in part upon the labors of the deceased for support?"[8] This language appears to conflict with the general rule that the dependent beneficiary must depend upon the labors of the deceased employee for a substantial part of his support.

Section 19 of article 8306[9] provides that an employee hired in Texas, but injured in the course of his employment outside the state, is entitled to the same rights and remedies as an employee injured within the state. This extraterritorial provision was construed in *Texas Employers Ins. Ass'n v. Dossey*[10] which held that one's status as a Texas employee is fixed in the fact of his employment to work in Texas. The court overruled the contention that he must work in Texas before working in other states to qualify for this status. Thus, a jury question was present as to the employee's status where the employee worked first in New Mexico, then in Texas, and again in New Mexico where the injury occurred. Similarly, the Fifth Circuit decided that a travelling salesman hired in Texas but injured in New Orleans while travelling from a required Texas appearance was a Texas employee.[11]

II. PROCEDURE

Section 4a of article 8307[12] requires that the association or subscriber be notified of the injury within thirty days after its occurrence or manifestation and that a claim for compensation be filed within six months of the occurrence or manifestation unless good cause can be shown for any delay.

[4] Houston Transit Co. v. Farrack, 403 S.W.2d 184 (Tex. Civ. App. 1966).
[5] TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (1967).
[6] TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (1967).
[7] TEX. PROB. CODE ANN. § 38 (1956).
[8] Turner v. Travelers Ins. Co., 401 S.W.2d 618 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[9] TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (1967).
[10] 402 S.W.2d 153 (Tex. 1966), 20 SW. L.J. 427.
[11] Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Nathan, 361 F.2d 18 (5th Cir. 1966).
[12] TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).

In *Texas Employers Ins. Ass'n v. Brantley*[13] the claimant attempted to show good cause for not filing a claim within the required six months by testifying that neither he nor his doctor thought the injury was serious. However, the injury was a hernia, which to be compensable must appear suddenly and immediately and must cause pain.[14] The supreme court recognized that it is usually a question of fact as to whether the claimant prosecuted his claim with that degree of diligence which a reasonably prudent person would have exercised under the same or similar circumstances, but the evidence presented was considered to justify ruling as a matter of law that good cause was not shown. Another attempt at showing good cause was rejected by the supreme court, even though the facts were more favorable to the claimants. In *American Motorists Ins. Co. v. Villagomez*[15] the employee filed a claim well within the six-month period but died from a stroke six days after filing. A letter was sent to the Board advising them of the death, but no cause of death was related, nor did the letter purport to be a claim by the employee's survivors. The widow and surviving minor children's claim, filed eight months after the death, was rejected. The court based its holding on the settled rule that where death results from a compensable injury, a new, separate, and distinct cause of action arises in the legal beneficiaries for which a claim must be filed within the six-month period.[16]

Section 5 of article 8307[17] provides that any interested party who is unwilling to abide by the Board's final ruling must file notice to this effect with the Board within twenty days after the final ruling. A suit to set aside the Board's ruling must then be filed within twenty days after giving notice. The claimant met both mandatory time requirements, except that he did not then pay sufficient costs. He later paid, but the citation was not issued until twenty-six days after the filing of notice. The court held that the district court acquired jurisdiction, distinguishing former cases which denied jurisdiction, because here the delay in issuing citation was not requested by the claimant.[18]

Other decisions have procedural significance. It was held that a trial court did not abuse its discretion by ordering a physical examination during trial, even though two previous motions for an examination had been

[13] 402 S.W.2d 140 (Tex. 1966).

[14] See note 48 *infra*.

[15] 398 S.W.2d 742 (Tex. 1966).

[16] Swain v. Stanford Acc. Ins. Co., 130 Tex. 277, 109 S.W.2d 750 (1937); Maryland Cas. Co. v. Stevens, 55 S.W.2d 149 (Tex. Civ. App. 1932) *error ref.*

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

[18] Buffalo Ins. Co. v. McLendon, 402 S.W.2d 559 (Tex. Civ. App. 1966). The case also holds that cashing drafts for the amount of the Board's award did not amount to a court compromise settlement because a compromise settlement agreement, to be binding, must be approved by either the Board or the court.

denied.[19] The Fifth Circuit held that accrued interest at the statutory rate of four per cent per annum on unpaid installments cannot be taken into consideration in determining whether the $10,000 jurisdictional amount is in controversy, even though it is part of the statutory cause of action.[20] The court relied on section 1332 of the United States Code[21] which expressly excludes interest in determining the jurisdictional amount and rejected a contention that the interest was in fact a penalty, and, therefore, could be considered.[22]

An "old friend" came back to haunt the Texas courts in *Commercial Standard Ins. Co. v. Allred*.[23] There the court ruled that the issue "Do you find from a preponderance of the evidence that Leroy Allred sustained an injury to his body as the result of heat exhaustion . . .?" was subject to the objection that it was duplicitous and amounted to a comment on the evidence. The court of civil appeals rejected a contention that this issue had received Texas Supreme Court approval,[24] and that court has agreed to review the decision.

Despite the Board's authority to make rules for carrying out and enforcing the provisions of the act,[25] one court held that Board rule 2.03,[26] which provides that a policy will be in effect until notice of cancellation is received by the Board, cannot invalidate cancellation by an insurance association.[27] The court reasoned that the rule-making power vests neither legislative nor judicial authority in the Board; hence, the Board, which can act only as an administrative agency, cannot impose conditions or requirements in excess of or inconsistent with the act. Rule 2.03 was considered to violate this doctrine because section 20 of article 8308[28] requires only that an employer who ceases to be a subscriber must notify the Board on or before the expiration date of the policy. The statute imposes no such duty on the association.

III. Evidentiary Matters

Many evidentiary questions were litigated, the most frequent of which being the degree of evidence necessary to determine the appropriate wage

[19] Jones v. Commercial Union Assur. Co., 405 S.W.2d 207 (Tex. Civ. App. 1965).

[20] Insurance Co. of No. America v. Keeling, 360 F.2d 88 (5th Cir. 1966); *cf.*, Booth v. Texas Employers Ins. Ass'n, 123 S.W.2d 322 (Tex. Comm'n App. 1938).

[21] 28 U.S.C. § 1332 (1964).

[22] For an application of this rule see Buras v. Birmingham Fire Ins. Co., 327 F.2d 238 (5th Cir. 1964).

[23] 400 S.W.2d 778 (Tex. Civ. App. 1966) *error granted*. The court relied on Johnson v. Zurich Gen. Acc. & Liab. Ins. Co., 146 Tex. 232, 205 S.W.2d 353 (1947).

[24] Eubanks v. Texas Employers Ins. Ass'n, 151 Tex. 67, 246 S.W.2d 467 (1952) was relied on for this contention.

[25] Tex. Rev. Civ. Stat. Ann. art. 8307, § 4 (1967).

[26] Tex. Rev. Civ. Stat. Ann. rules of the Industrial Acc. Bd. § 2.03 (1967).

[27] Johnson v. Fireman's Ins. Co., 398 S.W.2d 318 (Tex. Civ. App. 1965).

[28] Tex. Rev. Civ. Stat. Ann. art. 8308, § 20 (1967).

rate of the injured employee. Article 8309, section 1[29] directs that average weekly wages be determined by the following standards: (1) the injured employee's pay scale, according to the prescribed formula, if he has done the same type of work for at least 210 days of the year, and if not, (2) according to the pay scale, calculated by the same formula, of a similarly situated employee who had done the type of work claimant has for 210 days of the year, and if either method is impractical, (3) by a calculation by the Board of the average weekly wage in a manner just and fair to the parties. The year's litigation indicates that a claimant can satisfy his burden of proving the average weekly wage of another employee in the claimant's class without naming a specific employee.[30] But a claimant does not sustain the burden of negating subdivisions (1) and (2), which is necessary in order that subdivision (3) apply, merely by stating that he did not know if any employees in the same or similar employment in the neighborhood had worked in this type of employment for the year.[31] However, one case indicates that testimony based on inquiry and investigation is sufficient to negate subdivisions (1) and (2).[32] That court reasoned that the trend of recent decisions is to require only slight proof, particularly where there is no real contest of the wage issue.

In other evidentiary matters the supreme court resolved several important issues and agreed to review another. In *Hartford Acc. & Indem. Co. v. Hale*[33] the court had before it the question of whether a claimant was injured in the course of his employment. Both lower courts had found in favor of the claimant, but the supreme court ruled that it was error to admit testimony as to how the employee described the accident to his immediate superior after the accident. In an earlier decision the court had ruled that for declarations to be admissible as part of the *res gestae*, the event causing the declarations must be proved by independent admissible evidence.[34] In that case the court had pointed out not only that the event was not proven by independent evidence, but also that the admissible evidence gave a strong indication that the accident did not occur in the time, place, and manner that the employee stated that it did. In the present case

[29] TEX. REV. CIV. STAT. ANN. art. 8309, §§ 1(1), (2), (3) (1967).

[30] Texas Employers Ins. Ass'n v. Woolf, 406 S.W.2d 748 (Tex. Civ. App. 1966).

[31] Travelers Ins. Co. v. Sides, 403 S.W.2d 519 (Tex. Civ. App. 1966) *error ref. n.r.e.* See also Texas Employers Ins. Ass'n v. Ford, 153 Tex. 470, 271 S.W.2d 397 (1954). In *Travelers*, the court rejected the claimant's contention that the association was estopped to contest the wage rate because it had voluntarily paid compensation of $35.00 per week for over eighteen weeks. *Cf.*, Griffen v. Superior Ins. Co., 161 Tex. 195, 338 S.W.2d 415 (1960). The court also held that it was not reversible error to allow the claimant, over the insurer's objection, to read the part of his answer which stated the maximum compensation he could receive, *i.e.*, $35.00 per week for 401 weeks, or $14,035.00.

[32] American Motorists Ins. Co. v. McNeil, 404 S.W.2d 905 (Tex. Civ. App. 1966).

[33] 400 S.W.2d 310 (Tex. 1966). For further discussion see Ray, *Evidence*, this Survey at footnotes 28, 32.

[34] Truck Ins. Exch. v. Michling, 364 S.W.2d 172 (Tex. 1963).

there was some evidence, even though it carried little weight, which indicated that the event occurred as the employee had related. But the court ruled that even if the statements were within the *res gestae* exception to the hearsay rule, they were inadmissible in the absence of independent corroborating proof of the incident or occurrence to which the statements relate. Thus, the court clearly has taken the position that hearsay statements themselves cannot be used as part of the *res gestae* to prove the exciting event. Further, the court held that the fact that compensation was voluntarily paid does not constitute an admission that an injury was accidental nor that it was sustained in the course of employment.

In *Houston Fire & Cas. Ins. Co. v. Brittian*[35] the court held that a trial court has no discretion to admit testimony of a doctor given at a prior trial and that admitting this evidence was reversible error. Also, the supreme court recently has reversed a court of civil appeals' opinion[36] which held that the tender of an operation without the admission of liability renders testimony relating to the beneficial effects of an operation inadmissible in the trial of the case on appeal from an award of the Board.

Opinion testimony created its share of controversy with the courts of civil appeals: allowing a chiropractor to testify with respect to neurological and surgical matters because the chiropractor was not expressing an opinion in the field of surgery, but rather was expressing an opinion as to the mechanical restoration of a spinal injury;[37] admitting testimony of claimant's fellow employees and his wife in regard to statements he made indicating he was going on a business trip to show the claimant's state of mind;[38] recognizing that unless there is no evidence supporting a contrary finding,[39] a jury is not bound to find in accordance with expert testimony;[40] and presuming in the absence of a statement of facts that the jury's ver-

[35] 402 S.W.2d 509 (Tex. 1966). For further discussion see Ray, *Evidence*, this Survey at footnote 35.

[36] Deiter v. Houston Fire & Cas. Ins. Co., 403 S.W.2d 222 (Tex. Civ. App. 1966), *rev'd*, Houston Fire & Cas. Ins. Co. v. Deiter, 10 Tex. Sup. Ct. J. 156 (Jan. 7, 1967). The court relied on Texas Employers Ins. Ass'n v. Shelton, 161 Tex. 259, 339 S.W.2d 519 (1960), which is based on Truck Ins. Exch. v. Seelbach, 161 Tex. 250, 339 S.W.2d 521 (1960), which held that the trial court is not clothed with those powers based exclusively with the Board. For further discussion see FitzGerald, *Administrative Law*, this Survey at footnote 80.

[37] Liberty Universal Ins. Co. v. Gill, 401 S.W.2d 339 (Tex. Civ. App. 1966) *error ref. n.r.e.* In Travelers Ins. Co. v. Buffington, 400 S.W.2d 800 (Tex. Civ. App. 1966) *error ref. n.r.e.*, the court held that evidence that a chiropractor had been convicted of practicing medicine without a license seven years prior to trial was properly excluded, as the conviction did not involve moral turpitude and was too remote.

[38] Liberty Mut. Ins. Co. v. Preston, 399 S.W.2d 367 (Tex. Civ. App. 1966) *error ref. n.r.e.* The court, however, was unable to find any evidence to support a finding that the employee was injured in the course of his employment.

[39] Crothers v. Truck Ins. Exch., 400 S.W.2d 582 (Tex. Civ. App. 1966); King v. Aetna Cas. & Sur. Co., 405 S.W.2d 111 (Tex. Civ. App. 1966).

[40] Export Ins. Co. v. Johnson, 401 S.W.2d 324 (Tex. Civ. App. 1966) *error ref. n.r.e.*; King v. Aetna Cas. & Sur. Co., note 39 *supra*.

dict was supported by the evidence.[41] There were also several holdings of harmless error due to the introduction or exclusion of evidence.[42]

IV. Scope of Employment

Probably the most litigated issue in workmen's compensation suits in 1966 was whether the workman was injured while acting within the scope of his employment. In 1964 the supreme court announced that injuries received during travel are received in the course of employment, only (1) when the transportation is furnished as part of the employment contract, (2) when it is paid for by the employer, (3) when it is under the employer's control, or (4) when the employee is directed to travel from one place to another.[43] In *Agricultural Ins. Co. v. Dryden*[44] the supreme court refused recovery to a claimant who was injured when he swerved to avoid hitting a dog while transporting his employer's tools from his home to the work site. Although he was acting pursuant to the employer's instructions to have the tools unloaded and ready for use, the supreme court ruled that he was not injured while acting in the course of his employment because none of the aforementioned criteria were met. Particular emphasis was placed on the fact that the employee was not on a special mission requiring travel other than his regular transportation to and from work. The courts of civil appeals decided various scope-of-employment questions. The rule that a borrowed employee is covered by the compensation insurance of the borrowing employer if such employer has authority and control over the borrowed employee was reiterated.[45] One decision held that an injury which occurred during an activity (driving steers by horseback) diverse from the employee's usual course of employment (saddle repair work), but which was carried on with the employer's permission during work hours, was not activity within the scope of employment;[46] but another case was

[41] Brown v. American Auto. Ins. Co., 405 S.W.2d 416 (Tex. Civ. App. 1966).

[42] Jones v. Commercial Union Assur. Co., 405 S.W.2d 207 (Tex. Civ. App. 1965) (physician's testimony as to whether claimant would have passed a pre-employment physical excluded); Mountain States Mut. Cas. Co. v. Hamilton, 401 S.W.2d 303 (Tex. Civ. App. 1966) (physician's testimony that in his opinion claimant's positive serology contributed to his disability excluded); Hanover Ins. Co. v. Johnson, 397 S.W.2d 904 (Tex. Civ. App. 1965) *error ref. n.r.e.* (evidence that woman with whom claimant was living was not his wife excluded).

[43] Janak v. Texas Employers Ins. Ass'n, 381 S.W.2d 176 (Tex. 1964), construing Tex. Rev. Civ. Stat. Ann. art. 8309, §§ 1, 1b (1967).

[44] 398 S.W.2d 745 (Tex. 1965).

[45] Employers Cas. Co. v. American Employers Ins. Co., 397 S.W.2d 292 (Tex. Civ. App. 1965) *error ref. n.r.e.*; *cf.*, Wise v. Texas Employers Ins. Ass'n, 402 S.W.2d 228 (Tex. Civ. App. 1966) *error ref. n.r.e.* (claimant, employed by truck driver to assist in unloading shrimp at cold storage company, was not an employee of the cold storage company even though one of its employees instructed claimant where the shrimp was to be placed); Smith v. Fireman's Ins. Co., 398 S.W.2d 435 (Tex. Civ. App. 1966) (claimant, employed by a siding contractor who was an independent contractor in relation to a general contractor, was not covered by the general contractor's insurance).

[46] Hogan v. Hanover Ins. Co., 406 S.W.2d 217 (Tex. Civ. App. 1966) *error ref. n.r.e.*

remanded to enable the jury to determine if an automobile salesman's knee injury, suffered while playing baseball at a company picnic, was compensable.[47]

V. Injuries—Specific, General, and Hybrid

Besides the cases holding that the claimant failed to prove the factual elements necessary, according to section 12b of article 8306,[48] to recover compensation for sustaining a hernia,[49] the courts of civil appeals promulgated two significant decisions. A case recently reversed by the supreme court, *Royal Indem. Co. v. Dennis*,[50] held that a claimant is entitled to twenty-six weeks compensation for an unsuccessful hernia operation in spite of a jury finding of total disability for only six weeks. The court of civil appeals reasoned that it would be absurd to allow twenty-six weeks compensation for a successful operation (the hernia partakes of the nature of a specific injury when the operation is successful)[51] and allow a lesser recovery for an unsuccessful operation. While it is difficult to quarrel with the lower court's reasoning, the holding flies in the face of the following express language in section 12b of the act: "If such operation is not successful . . . he shall be paid compensation under the general provision of this law."[52] Also, for the first time, a court of civil appeals[53] allowed a claimant to recover for a double hernia, *i.e.*, twenty-six weeks for a left inguinal hernia and twenty-six weeks for a right inguinal hernia, together with the medical expenses of the successful operations.

Section 12c of article 8306[54] provides that the insurer shall not be liable for incapacity resulting from a pre-existing injury when its effect combines with a subsequent injury to produce incapacity. The supreme court has agreed to hear the question of whether a claimant's head and neck

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[47] Clevenger v. Liberty Mut. Ins. Co., 396 S.W.2d 174 (Tex. Civ. App. 1965) *error ref. n.r.e.*

[48] Tex. Rev. Civ. Stat. Ann. art. 8306, § 12b (1967) requires that the claimant satisfactorily prove that:

1. There was an injury resulting in a hernia.
2. That the hernia appeared suddenly and immediately following the injury.
3. That the hernia did not exist in any degree prior to the injury for which compensation is claimed.
4. That the injury was accompanied by pain.

[49] Travelers Ins. Co. v. Quibedeaux, 403 S.W.2d 826 (Tex. Civ. App. 1966) *error ref. n.r.e.* (It appeared that the claimant first noticed a bulge on his right side two to three months after the accident.) McAdams v. Fidelity & Cas. Co., 406 S.W.2d 518 (Tex. Civ. App. 1966).

[50] 404 S.W.2d 951 (Tex. Civ. App. 1966), *rev'd*, 10 Tex. Sup. Ct. J. 158 (Jan. 7, 1967).

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

[52] *Ibid.*

[53] De Hoyos v. Texas Cas. Ins. Co., 401 S.W.2d 380 (Tex. Civ. App. 1966) *error ref. n.r.e.* This case also reiterated the holding of National Mut. Cas. Co. v. Lowrey, 136 Tex. 188, 148 S.W.2d 1089 (1940), to the effect that unless the insurer admitted liability and tendered an operation while the claim was pending before the Board, the claimant must be compensated as for a general injury since the district court could not act as an administrative board and was not empowered to order or supervise a hernia operation.

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

injury aggravated his brain tumor, as held by the court of civil appeals.[55] The nature and degree of proof admissible and necessary to have an issue submitted on the question of pre-existing condition was considered in other court of appeals decisions.[56] In one case which held that proof of a prior illness without proof that it caused present pain and suffering was reversible error, the court stated that the insurer must prove that the injury was due solely to the former disease or injury. This statement is of questionable validity because the act unqualifiedly places the burden of proof on the party claiming compensation.[57]

Another matter of controversy was whether a specific injury had extended to a general injury. Reiterated was the rule that a specific injury must extend to and affect the body generally before the claimant can recover compensation for it as a general injury.[58] Thus the extension of a hand injury to a shoulder injury was not sufficient.[59] However, another opinion agreed with the fact finding that the claimant's general health was affected when an injury to his shoulder, arm and hand extended to his neck, and it consequently affirmed an award for general incapacity.[60]

VI. Extent of Disability

During the year courts adhered to the general rule that statutes concerning the extent of liability an insurer is required to assume should be harmonized and liberally construed in order to effectuate the beneficient purpose of the act.[61] Recovery for total and permanent incapacity was up-

[55] Insurance Co. of No. America v. Myers, 399 S.W.2d 932 (Tex. Civ. App. 1966) *error granted*. See also Mountain States Mut. Cas. Co. v. Redd, 397 S.W.2d 324 (Tex. Civ. App. 1965) *error ref. n.r.e.* (strain of work resulted in hemorrhage secondary to berry aneurysm). See generally Travelers Ins. Co. v. Vargas, 399 S.W.2d 173 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[56] Love v. Travelers Ins. Co., 395 S.W.2d 682 (Tex. Civ. App. 1965) *error ref. n.r.e.*; Employers Reinsurance Corp. v. Vann, 402 S.W.2d 247 (Tex. Civ. App. 1966) (relation of prior broken fingers to existing back injury); Travelers Ins. Co. v. Adams, 407 S.W.2d 282 (Tex. Civ. App. 1966) (original injury producing cause of condition necessitating emergency operation).

[57] Love v. Travelers Ins. Co., note 56 *supra*. As to the burden of proof, see Tex. Rev. Civ. Stat. Ann. art. 8306, § 5 (1967). Compare the situation where the insurer pleads a pre-existing disease as a defense. To be successful the insurer must prove it was the sole cause of incapacity, but Tex. Rev. Civ. Stat. Ann. art. 8306, § 12c (1967) provides a different rule in reference to a previous injury.

[58] Petty v. Texas Employers Ins. Ass'n, 401 S.W.2d 678 (Tex. Civ. App. 1966) *error ref. n.r.e.* See also McAdams v. Fidelity & Cas. Co., 406 S.W.2d 518 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[59] Petty v. Texas Employers Ins. Ass'n, note 58 *supra*.

[60] Bituminous Fire & Marine Ins. Co. v. Jones, 398 S.W.2d 577 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[61] Travelers Ins. Co. v. Adams, 407 S.W.2d 282 (Tex. Civ. App. 1966). Commercial Standard Ins. Co. v. Washington, 399 S.W.2d 155 (Tex. Civ. App. 1966) *error ref. n.r.e.*; *cf.*, Jones v. Commercial Union Assur. Co., 405 S.W.2d 207 (Tex Civ. App. 1965) (the court overruled claimant's contentions of no evidence and insufficient evidence to limit her incapacity to temporary total incapacity of sixteen weeks); and Hill v. Travelers Ins. Co., 401 S.W.2d 120 (Tex. Civ. App. 1966) (The jury found total and permanent incapacity, and also that any incapacity was caused solely by the loss of use of the employee's left arm which loss was stipulated as 20%. The trial court resolved the conflict in favor of 20% permanent partial disability and the court of appeals held there was no error as this verdict was supported by the evidence.).

held despite the fact that the claimant renewed her working as a waitress two months after sustaining her injury.[62] Apparently the court was not concerned with whether or not claimant was economically compelled to return to work. On the other hand, economic compulsion weighed heavily when claimants received compensation despite the following factors: one employee worked a considerable amount shortly after his accident;[63] one returned to work two to three weeks after the accident;[64] and one never ceased to work.[65] Only in an extreme case[66] did a court of civil appeals refuse to agree with the trial court's determination of the extent of liability. There the court, despite a vigorous dissent, refused to allow an award of total and permanent disability to a claimant who in fact obtained and retained employment, with almost no loss of time, performing the same work as he had performed before the injury.

VII. MEDICAL EXPENSES

The 1957 amendment to section 7 of article 8306[67] allows an injured workman unlimited medical expenses, including necessary nursing fees. In *Transport Ins. Co. v. Polk*[68] the Texas Supreme Court allowed recovery for necessary nursing services rendered to a quadriplegic husband by his wife, despite the contention that section 7 directs that for fees to be recoverable they must be expended or incurred. The court noticed that the section also allows one who supplied the services to recover. The extraordinary nature of the nursing services necessarily rendered to a quadriplegic was relied on to distinguish sister state holdings which denied recovery because of a wife's marital obligation to care for her ill husband. Reported simultaneously was a like holding by a court of civil appeals.[69]

Another matter of uncertainty in light of the amendment's authorization of *unlimited* recovery for medical expenses was whether the right to future medical benefits could be waived, released, or settled. One court of civil appeals[70] expressly recognized the Board's authority to approve that part of the settlement agreement involving future medical services[71] and

[62] Travelers Ins. Co. v. Buffington, 400 S.W.2d 800 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[63] Coal Operators' Cas. Co. v. Holloway, 398 S.W.2d 421 (Tex. Civ. App. 1965) *error ref. n.r.e.*

[64] American Motorists Ins. Co. v. McNeil, 404 S.W.2d 905 (Tex. Civ. App. 1966).

[65] Universal Underwriters Ins. Co. v. Bounds, 401 S.W.2d 865 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[66] Fidelity & Cas. Co. v. Burrows, 404 S.W.2d 353 (Tex. Civ. App. 1966) *error ref. n.r.e.*

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

[68] 400 S.W.2d 881 (Tex. 1966), 20 Sw. L.J. 428.

[69] Western Alliance Co. v. Tubbs, 400 S.W.2d 850 (Tex. Civ. App. 1965) *error ref. n.r.e.*

[70] Pearce v. Texas Employers Ins. Ass'n, 403 S.W.2d 493 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[71] TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (1967) allows the Board to approve any settlement where the "liability of the association or the extent of injury of the employee is uncertain, indefinite or incapable of being satisfactorily established."

held that the settlement, once approved by the Board, was valid and binding on the parties unless and until lawfully set aside.[72]

And at least one court of civil appeals[73] has resolved whatever doubt might have existed as to whether surgery, mentioned only in a negative sense in section 7,[74] is included within the term "medical aid" as used in that section. The court expressed a preference for a broad interpretation of the section thus allowing the injured workman to recover surgical expenses incurred in the face of an emergency or, as in this case, refusal by the insurer to perform a necessary operation.

VIII. SUBROGATION AND SETTLEMENT

Section 6a of article 8307[75] provides that if an injured workman has an action at law against one other than the subscriber, but chooses to claim compensation under the act, the insurance association is subrogated to the rights of the injured employee. When the employee brings an action against the third party tort-feasor the association may intervene and assert its subrogated rights. Occasionally the third party will attempt to settle with the employee, either without the association's participation or despite its failure to agree to the settlement. In 1961 the supreme court held that an association, upon refusing the settlement and proceeding with the suit to judgment, might recover from the third party tort-feasor either the amount of the verdict returned by the jury or an amount equal to the settlement paid to the employee whichever is greater—but not both.[76] In *Capitol Aggregates, Inc. v. Great Am. Ins. Co.*, a decision recently affirmed by the Texas Supreme Court,[77] a court of appeals allowed the association to recover from the third party tort-feasor the amount of the verdict returned by the jury and to recover from the employee the amount paid to him in settlement by the third party tort-feasor. The supreme court's prior holding was distinguished because in the former case the association was attempting to recover both the amount of the verdict and the amount of the settlement from the *third party tort-feasor*. In the present case, the association was attempting to recover the amount of the settlement from the *employee* who had received it "wrongfully." Interestingly, in neither

[72] TEX. REV. CIV. STAT. ANN. art. 8306, § 12d (1967) provides that an award can be set aside any time during the compensation period if a change of condition, mistake or fraud is shown by any interested party.

[73] Travelers Ins. Co. v. Adams, 407 S.W.2d 282 (Tex. Civ. App. 1966).

[74] TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (1967) states that the injured employee is entitled to necessary expenses expended or incurred for medical aid, nursing and hospital services, chiropractic services and medicines. The section goes on to provide that the association's obligation shall not include an obligation to pay for surgical services which are not ordinarily provided by a hospital.

[75] TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (1967).

[76] Pan Am. Ins. Co. v. Hi-Plains Haulers, Inc., 163 Tex. 1, 350 S.W.2d 644 (1961).

[77] 396 S.W.2d 419 (Tex. Civ. App. 1965), *aff'd*, 408 S.W.2d 922 (1966).

case was the sum of the two amounts equal to or greater than the amount of compensation the association had paid to the employee. Of further interest is the fact that the court stated the employee was entitled to recover the amount of settlement from the tort-feasor due to its agreement to indemnify the employee in the event of loss of the settlement to the carrier. It appears that *Capitol Aggregates* will control so long as the association asserts its right to the settlement proceeds against the employee rather than the third party tort-feasor.

One court of civil appeals opinion made it clear that the subrogated association, in this case the City of Port Arthur, can lose its substantive rights of subrogation by failing to assert a counterclaim[78] in a suit brought by the employee's legal beneficiaries against itself and a negligent third party.[79] An opportunity to resolve an important question in relation to settlement of subrogation suits was by-passed. The association and the widow and children of the deceased employee had agreed to division of the proceeds in the event of a judgment, but they could not agree as to the division of a proposed settlement. The court refused to allow the requested severance or to render a declaratory judgment as to how the settlement proceeds should be divided on the ground that the parties were merely asking for an advisory opinion on an abstract question.[80]

In other matters concerning settlements, courts of civil appeals handed down the following rulings: that a settlement, made while the litigation was pending and orally approved by the court approximately nine months before the settlement was formalized by signature, was valid and binding, and also that the attorney securing the settlement was entitled to the thirty per cent fee agreed upon, even though he was not involved in the litigation when the settlement was approved;[81] that an honest expression of opinion by an adjuster which proved to be untrue was sufficient misrepresentation to allow the trial court to set aside the settlement;[82] that an employee who waived an action against his employer and the employer's insurer in favor of compensation benefits, without knowledge that his employer's compensation policy had lapsed, entered into a legal contract with the insurer and was entitled to specific performance;[83] and that where both parties to an appeal reach an agreement for settlement, the court should remand to the trial court in order that the agreed judgment be granted.[84]

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[78] TEX. R. CIV. P. 97 (1955).

[79] Gautreaux v. City of Port Arthur, 406 S.W.2d 531 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[80] Dillingham v. West Tex. Util., 403 S.W.2d 491 (Tex. Civ. App. 1966).

[81] Esco v. Argonaut Ins. Co., 405 S.W.2d 860 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[82] Liberty Ins. Co. v. Land, 397 S.W.2d 900 (Tex. Civ. App. 1965) *error ref. n.r.e.*

[83] Liberty Mut. Ins. Co. v. Martinez, 407 S.W.2d 272 (Tex. Civ. App. 1966).

[84] Manhattan Fire & Marine Ins. Co. v. Zuniga, 406 S.W.2d 796 (Tex. Civ. App. 1966); Ruiz v. Travelers Ins. Co., 405 S.W.2d 425 (Tex. Civ. App. 1966).

IX. Conclusion

The volume of workmen's compensation cases reaching the appellate courts is on the decline due to settlements in the trial court, the solution of many of the attendant problems, and standardization of many special issues, special instructions and definitions approved by the courts. Nevertheless, as shown by the volume of cases in 1966, workmen's compensation law still presents a fruitful field of litigation. Its beneficient purpose of providing a simple means whereby an injured employee will be enabled to support his family and himself until he is able to return to work, without red tape or delay, has fallen by the wayside somewhere down the line.