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The Coming-and-Going Rule and Article 8309, Section 1b

Michael M. Gibson

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Since the promulgation of the Workmen’s Compensation Act in 1913, controversies emanating from the “coming-and-going” rule have presented a recurring problem. The problem is whether an employee who is injured while going to his employment from his home or returning to his home from his employment is within the “course of his employment” at the time of the injury. This issue has been resolved by applying the definition of “injury sustained in the course of employment” found in section 1 of article 8309. However, in 1957, the legislature enacted an amendment to article 8309 which directly affects the coming-and-going rule. The purpose of this Comment is to analyze the cases establishing the coming-and-going rule in Texas and the exceptions thereto and also to determine the effect of the amendment as interpreted by subsequent court decisions.

I. Course of Employment and the Coming-and-Going Rule

One issue determining recovery under the Workmen’s Compensation Act is whether the injury was sustained in the course of employment. Such an injury is defined by article 8309 as one “having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer’s premises or elsewhere.” The courts have interpreted this language as placing a two-fold burden of proof on the claimant-employee; that is, the employee must prove that he was engaged in the furtherance of the affairs of his employer, and that the injury was of the kind and character having to do with and originating in the work or business of the employer. The employee is furthering the affairs of the employer if he is concerned with promoting the progress of the employer’s business, and not merely pursuing some personal affair. The claimant will satisfy the latter facet of the test if the in-

2 Id. art. 8309, § 1. “[I]njury sustained in the course of employment . . . shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer’s premises or elsewhere.”
4 Id. § 1.
jury results from a risk or danger which is "necessarily or reasonably inherent in or incident to the conduct of the employer's business."

Generally, an injury suffered while using the streets and highways in going to or returning from the place of employment is not compensable. The rationale behind this coming-and-going rule is that such an injury is not sustained in the employee's course of employment, because the injury is a consequence of risks and hazards to which all members of the traveling public are subject, rather than risks and hazards having to do with and originating in the work or business of the employer. The breadth of the coming-and-going rule may be illustrated by the varying circumstances in which it has been applied: injuries sustained during the lunch hour, injuries sustained while riding in a car pool, and injuries sustained where the employee has leased his personal vehicle to his employer have been held noncompensable.

II. EXCEPTIONS TO THE COMING-AND-GOING RULE

Four exceptions to the coming-and-going rule have developed through case law in Texas. These exceptions may be explained in part by the fact that the Workmen's Compensation Act is construed liberally in favor of the employee with a view toward accomplishing and promoting justice. Thus, even though the employee was injured while going to or from work, compensation has been allowed when the employer furnished the means of transportation, the employer paid another employee to transport the injured employee, the employee undertook a special mission at the direction of the employer, and the employee was injured while on a private means of transportation.

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2 Janak v. Texas Employers' Ins. Ass'n, 381 S.W.2d 176 (Tex. 1964); Jecker v. Western Alliance Ins. Co., 369 S.W.2d 776 (Tex. 1963); Texas Employers' Ins. Ass'n v. Inge, 146 Tex. 347, 208 S.W.2d 867 (1948); Smith v. Texas Employers' Ins. Ass'n, 129 Tex. 573, 105 S.W.2d 192 (1937).
10 Texas Employers' Ins. Ass'n v. Inge, 146 Tex. 347, 208 S.W.2d 867 (1948).
of access to the employment premises. These four exceptions to the coming-and-going rule and the article 8309 test of "injury sustained in the course of employment" are interrelated. For example, when an employee's injury falls within one of the exceptions to the coming-and-going rule, it satisfies the definitional test of course of employment found in section 1 of article 8309 and is thus compensable.

Transportation Furnished by Employer. When the employer and employee agree in the contract of employment that the employer will furnish the employee with transportation to and from the place of work, the courts have held that an injury sustained during the journey is within the employee's course of employment and hence compensable. For instance, in *Western Indemnity Co. v. Leonard*, the employer was working on a federal government cost-plus contract which permitted him to include the transportation expenses of his employees in the cost of construction. The employer by contract furnished his employees' transportation to and from work at no expense to them, and an employee was injured while boarding a train furnished for such purposes. The court held that the injury was sustained within the employee's course of employment and was therefore compensable.

Even where no express provision is present in the employment contract, the courts often have held that the employer impliedly furnished the employee's transportation to and from work. This is particularly true where the employee uses the employer's vehicle for transportation over a substantial period of time with the employer's permission or with his apparent consent. The courts, employing a test of control, have reasoned that the employer could avoid extra risks by maintaining control over the vehicle and by refusing to permit departure from direct or designated routes. However, the control element was eliminated in 1948 when the Texas Supreme Court held that no actual control over the details of the journey was necessary in order for an injury, otherwise compensable, to be within the course of employment.

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18 Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 246 S.W. 72 (1922).
23 Fritzmeier v. Texas Employers' Ins. Ass'n, 131 Tex. 165, 114 S.W.2d 236 (1938); Republic Underwriters v. Terrell, 126 S.W.2d 752 (Tex. Civ. App. 1939).
24 Texas Employers' Ins. Ass'n v. Inge, 146 Tex. 347, 208 S.W.2d 867 (1948). The court did say, however, that the general power of supervision, implicit in the contract of employment, was not relinquished.

Employer Pays Another To Transport the Employee. A second exception allowing recovery for injuries sustained during travel to and from work is illustrated by *Texas Employers' Insurance Association v. Inge.* In that case the employer agreed to pay one of the crewmen at a drill site seven cents a mile if he would use his own private automobile to transport to and from work fellow workmen who owned no automobiles. There were no housing facilities at the drill site, and the crewmen had to drive a round-trip of sixty-three miles from the nearest town where they resided. According to the Texas Supreme Court, all of these workmen were within the course of their employment while driving to and from work under the carpool arrangement. The court pointed out that the arrangement was an important part of the employment contract because it provided transportation for all crew members. Moreover, the court observed that the employer's affairs were being carried out as if the employer himself owned the car. The reasoning underlying this exception is that the employer's only purpose in making such an arrangement is to enhance his business affairs by assuring himself that all his employees have adequate transportation. However, no court has decided whether this reasoning would be applicable if the employer hired an independent contractor to transport his employees, none of whom owned automobiles. Seemingly, no distinction should be made, for the primary purpose of the contract between employer and independent contractor almost surely would be to secure the services of the employees.

Special Mission. The special mission exception to the coming-and-going rule includes situations in which the employee, while traveling between his home and place of employment, undertakes a special mission at the direction of the employer or performs a service in furtherance of his employer's business with the express or implied approval of the employer. If an injury results from street and highway risks encountered while carrying out a special order of the employer, the injury will be compensable even though it would otherwise be noncompensable under the coming-and-going rule. Thus, when a foreman needs the company car for a personal emergency and orders an employee to drive his fellow crewmen to the drill site in the employee's personal car, the special mission exception is applicable, and injuries suffered by the employee during the journey to the place of employment fall within the workmen's compensation law. The

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80 *146 Tex. 347, 208 S.W.2d 867 (1948). See also Maryland Cas. Co. v. Mason, 118 F.2d 244 (5th Cir. 1946).*
81 *Texas Employers' Ins. Ass'n v. Inge, 146 Tex. 347, 352, 208 S.W.2d 867, 869 (1948).*
82 The special mission exception is herein restricted to those situations where the employee is directed to undertake a special mission while traveling between his home and place of employment. This Comment does not treat those situations where the employee undertakes a special mission during the normal hours of employment.
83 *Columbia Cas. Co. v. Kee, 11 S.W.2d 529 (Tex. Civ. App. 1928). The court held this to be true irrespective of the fact that the employer had previously undertaken to convey the employees to and from the drill site as part of their compensation. The company in the past had a policy to furnish transportation, but before the accident the employer changed his policy and furnished transportation only after deducting fifty cents a week from each employee's salary. See also Hart-
fact that the injury does not occur until after the special mission has been completed and the employee is returning to his place of employment or continuing homeward does not affect recovery as long as the employee does not materially deviate from a direct route and engage in an enterprise of his own. However, the employee's route on the special mission must not be so closely related to the usual and ordinary route home or to the place of employment as to be termed only incidental to the trip.

Access Doctrine. The access doctrine exception to the coming-and-going rule allows recovery where the employee is injured in an area or zone used as a means of ingress or egress near the employer's premises. In the first access case to come before the Texas Supreme Court, the injury occurred while the employee was returning to work after having lunch at home. A single road leading from a public street and crossing a railroad track was the only practical way for employees to cross the track and reach their place of employment, and the employee was killed by a train at this crossing. The supreme court held the injury compensable on the basis that the railroad crossing bore so intimate a relationship to the employer's premises that it could be treated only as a part of those premises. The court reasoned that if an injury occurs at a place furnished by the employer in the interest of his business as the necessary and immediate means of access to the employee's place of employment, and at a time when the employee is expected or required to enter the employer's premises, the injury is the result of a risk incident to his employment just as if he had been injured within the actual premises and during his regular employment hours.

These requirements of the access doctrine have been broadened by subsequent decisions. The fact that the means of access upon which the injury occurred is the only access available to the employees has been persuasive to the courts. However, the employee need not be performing some specific employment duty at the time of his injury; it is sufficient

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1968] COMMENT 845

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that he is engaged in activity incidental to his employment. In effect, under the access doctrine the course of employment begins prior to the time the actual work is entered into and before the actual business premises are reached.

III. THE BROADER RULE AND ITS EXCEPTION

The Broader Rule. The coming-and-going rule denies recovery for injuries sustained while coming from or going to the place of employment. However, there is a broader rule of workmen’s compensation law which denies recovery for injuries sustained while traveling anywhere on the public streets and highways for any purpose. The same rationale applies to both rules: that is, the injury is not sustained in the course of employment because it is a consequence of risks and hazards to which all members of the traveling public are subject. The coming-and-going rule is thus a part of and involves only a restricted portion of the broader rule. Consequently, the direct exceptions to the coming-and-going rule are also indirect exceptions to the broader rule.

The Contract Exception to the Broader Rule. The contract exception to the broader rule provides that injuries are compensable when suffered by employees who, by the nature of their work, are subjected to the perils and hazards of the public streets and highways while traveling pursuant to the requirements of their employment contract. Delivermen, salesmen, truck drivers, cab drivers, messengers, collectors, and hosts of others fall within this exception. The contract exception, however, is a direct exception to the broader rule; it does not fall within the restricted limits of the coming-and-going rule because the injury does not necessarily occur while the employee is traveling to or from work. Technically, for the contract exception to apply, the employee must be injured while he is performing the specific contractual duties of his employment.

In Federal Underwriters’ Exchange v. Lebers the employer directed an employee to pick up receipts at one of two stores owned by the employer, and the employee was injured before he arrived at the designated store. Even though his regular place of employment was the other store, the Texas Supreme Court held that the employee was injured while performing a specific duty, and thus was injured because of the nature of his work. The court of civil appeals had also held the injury compensable, but had done so on the theory that the employee was within the course of his employment.

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55 See note 10 supra.
54 This exception will hereinafter be referred to as the contract exception.
52 Thereafter, supra. 13 Tex. 140, 120 S.W.2d 791 (1938).
ployment because he was on a special mission,\textsuperscript{48} an exception to the coming-and-going rule. \textit{Lehers} demonstrates that some facts may fit either the "special mission" or the "contract" exception; nevertheless, the two exceptions are distinct and independent.

IV. The 1957 Amendment: Article 8309, Section 1b

A. The Statutory Provisions

In 1957 the Texas Legislature, by amending article 8309, specifically dealt with claims for compensation arising from injuries sustained as a result of travel on the public streets and highways. The amendment may be divided into two distinct portions. The first portion deals with exceptions to the coming-and-going rule and to the broader rule; the latter portion sets out the dual purpose doctrine.\textsuperscript{44} The "exception" portion of the amendment is written in negative language, stating that transportation will not be a basis for a claim that an injury was sustained in the course of employment unless (1) the transportation was furnished by the employer as a part of the employment contract, (2) the transportation was paid for by the employer, (3) the means of such transportation was under the control of the employer, or (4) the employee was directed in his employment to proceed from one place to another. Three exceptions to the coming-and-going rule from the pre-1957 era are specifically included within section 1b,\textsuperscript{44} but unlike pre-1957 law, the amendment includes the additional exception of transportation under the control of the employer. Conversely, the access doctrine exception to the coming-and-going rule and the "contract" exception to the broader rule are not specifically covered by the amendment.

The second portion of section 1b deals with the dual purpose doctrine. Developed by the courts prior to 1957, this doctrine applied when an employee was injured on the streets and highways while furthering both the employer's business objectives and the employee's personal objectives.

\textsuperscript{48} \textit{Lehers} v. Federal Underwriters Exch., 79 S.W.2d 925 (Tex. Civ. App. 1935), aff'd, 132 Tex. 140, 120 S.W.2d 791 (1938). The employee had been picking up these receipts on his way to work for fourteen days. This fact enabled the supreme court to conclude that the employee was performing a specific duty of his employment contract.

\textsuperscript{44} See note 19 infra, and accompanying text, for a discussion of the dual purpose doctrine.

Section 1b of article 8309, describing in greater detail the requirements necessary to satisfy the test of "injury sustained in the course of employment" found in § 1, reads as follows:

Unless transportation is furnished as a part of the contract of employment or is paid for by the employer, or unless the means of such transportation are under the control of the employer, or unless the employee is directed in his employment to proceed from one place to another place, such transportation shall not be the basis for a claim that an injury occurring during the course of such transportation is sustained in the course of employment. Travel by an employee in the furtherance of the affairs or business of his employer shall not be the basis for a claim that an injury occurring during the course of such travel is sustained in the course of employment, if said travel is also in furtherance of personal or private affairs of the employee to be furthered by said trip, and unless said trip would not have been made had there been no affairs of business of the employer to be furthered by said trip.

These three exceptions are transportation furnished by the employer, transportation paid for by the employer, and special mission.
The mere mixing of the employee's personal matters with those of his employer did not, as a matter of law, prevent the employee from being within the course of employment, for as long as the employee was engaged in the employer's business, it was immaterial that he joined with this activity some personal matter of his own. The test of recovery was whether the work of the employer had created the necessity for the travel.

The "dual purpose" portion of section 1b codified this doctrine, stating in negative language that travel for a dual purpose shall not be made the basis for a claim that the injury was sustained in the course of employment, even though the employee was also furthering the employer's affairs, unless the trip would have been made for the employer's business reasons had there been no personal affairs of the employee involved, and would not have been made had there been no business affairs of the employer involved. This dual purpose doctrine is interrelated with the definitional test of "injury sustained in the course of employment" found in section 1 of article 8309, because if the dual purpose doctrine is satisfied, the employee is deemed in the furtherance of his employer's affairs, and he thus satisfies one segment of the definitional test.

B. Court Interpretation of Article 8309, Section 1b

Transportation Paid for by Employer. Since the enactment of section 1b of article 8309, no case similar to Inge, where one employee was paid to transport other employees to and from work, has been litigated. Even so, the "paid for" exception of section 1b undoubtedly includes this type of situation. Thus, even under the statute, both the paid driver and his non-paid passengers are within the course of employment while going to and from work.

A similar result is not so clearly foreseeable when the employer does not pay for all of the employee's transportation expenses. It should be noted that in Inge the employer paid the employee seven cents a mile, which the court said presumably reimbursed the employee for all his transportation expenses and not just for gasoline alone. When the employer pays the employee for all his transportation expenses, the courts have concluded that the employee is within the course of his employment. Thus, in Texas Employers' Insurance Association v. Adams, where the employee was reimbursed for all his transportation expenses including gasoline, a battery, and

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49 Maryland Cas. Co. v. Stewart, 164 S.W.2d 800 (Tex. Civ. App. 1942), error ref. w.o.m.
51 Texas Employers' Ins. Ass'n v. Inge, 146 Tex. 347, 208 S.W.2d 867 (1948). See note 25 supra, and accompanying text.
53 381 S.W.2d 340 (Tex. Civ. App. 1964), error ref. n.r.e.
a fuel pump, the court of civil appeals held that the case fell under the "paid for" exception of section 1b.

However, when the employer agrees to pay for only the gasoline used in the employee's personal car, a distinction apparently has been made by the courts. In *Whisenant v. Fidelity & Casualty Co.* the court of civil appeals concluded that there was no evidence that the employer paid for the transportation at the time of the injury in spite of the fact that the employer paid for the employee's gas and oil. The employee lived in Dallas and each morning drove to his employer's Dallas plant. Because the employment necessitated that the employee travel between Fort Worth and Dallas, the employer paid for the gas. The injury occurred, however, while the employee was traveling from his home to the employer's Dallas plant. The employer actually did pay for the gas at the time the injury was sustained, but he did so merely because it was inconvenient to require the employee to reimburse the employer for the cost of the gas used while traveling from the employee's home to the plant.

In *Western Alliance Insurance Co. v. Jecker* the court of civil appeals observed through dictum that even if the employer actually paid or agreed to pay the employee for gas consumed on trips outside the employer's place of business pursuant to requirements of his employment, this still would not take such travel out of the general rule of no recovery. However, the supreme court in *Jecker* found it unnecessary to answer the "paid for" exception issue because it found that the injury fell within the bounds of the "direction" exception.

In a case decided before section 1b was enacted, the court of civil appeals proceeded under the "transportation furnished by employer" exception and held that the mere furnishing by the employer of gasoline for the employee's automobile did not constitute the "furnishing of transportation." The court reasoned that the gasoline was only incidental to the "furnishing of transportation" and not the "means of transportation" itself. However, this reasoning is not pertinent to section 1b in light of the express "paid for" exception contained therein and in light of the holding in *Adams* granting recovery even though the employee was using his own car. A literal interpretation of section 1b renders an injury compensable when the employer pays for all the employee's transportation expenses. The distinction apparently made by the courts when only gasoline is furnished by the employer seems unjustified because of the liberal interpretation given the Workmen's Compensation Act in favor of the employee.

The Direction Exception and the Dual Purpose Doctrine. In *Janak v. Texas Employers' Insurance Association* the Texas Supreme Court consid-
ered both the "direction" exception and the dual purpose doctrine. The case dealt with the employee carpool arrangement, a situation commonly arising under the coming-and-going rule. The carpool consisted of crewmen employed at an oilwell drillsite who lived in a town some miles away. On the day of the accident, Janak was a passenger in the car driven by another carpool member. In order to purchase ice for drinking water, the driver had proceeded on the southerly route to the well site although the northerly route was more direct. This deviated route was taken because no ice was available on the more direct route and because the men left too early in the morning to obtain it in their hometown. No water or ice was furnished or expressly requested by the employer at the well site.

The claimant's injury occurred while the men were proceeding to work on the deviated route; thus the court was faced with the question of whether the passengers were within the course of their employment at the time of the injury. The insurer contended that only the driver, if anyone, was within the course of employment, and that Janak was merely a passenger involved in the personal business of going to work. However, the court held that both the driver and the passengers stood in the same position because the obligation to procure ice was the obligation of all the carpool members.

The court in Janak stated that the portion of section 1b dealing with the dual purpose doctrine required an evaluation of personal and business purposes to determine whether the employees were within the course of their employment. The jury had answered this question in the affirmative. In discussing this point, the court distinguished Travelers Insurance Co. v. Forson, a case with similar facts except that the normal and direct route to the work site was not deviated from in order to obtain ice and water. The court of civil appeals in Forson accepted the argument that only the driver was in the course of employment and held the injury to the passenger noncompensable. In Janak the supreme court noted that the Forson decision was correct because none of the employees was within the course of employment "within sound limitations of the dual purpose" doctrine. Thus, the court held all the employees within the course of employment and distinguished the two cases because in Janak the carpool took a deviated route and in Forson the normal route was never deviated from.

69 268 S.W.2d 219 (Tex. Civ. App. 1954), error ref. n.r.e. Even though the supreme court refused the writ of error n.r.e., the court noted that it was not satisfied that the opinion of the court of civil appeals had in all respects "correctly declared the law" of the case.
62 This distinction was again considered in Hackfield v. Pacific Employer's Ins. Co., 393 S.W.2d 720 (Tex. Civ. App. 1965), error ref. In this case the employee was killed on his way home from the drill site twenty-five miles away. The employee was a member of a carpool and at the time of the accident there was a water can in the car which would have been filled and returned the next morning. The ice was obtained in the mornings without any deviation from the shortest and most direct route. The court held the death noncompensable, awkwardly reasoning that since the employee was killed on the return trip it would seem unimportant to consider what had happened on the trip that morning, or what would have happened the next morning except for the accident concerning the water delivery.
When the dual purpose portion of section 1b is applied to both the deviated and nondeviated route situations, the *Janak* result seems logical. Recovery is allowed where a deviated route is taken because that route would not have been taken except for business reasons and would have been taken had there been no personal reasons. Recovery is denied where a nondeviated route is taken because that route would have been taken had there been no business reasons and would not have been taken if no personal reasons had been present. Hence, the controlling issue is whether a deviated route is taken to the work site for some business reason, as opposed to a personal reason.\(^65\)

Because both portions of section 1b must be met by the claimant,\(^66\) the *Janak* court was faced with whether the claimant had sufficiently sustained his burden of proof concerning the exception portion of the amendment. To satisfy the direction exception, the employee must prove that he was "directed in his employment to proceed from one place to another." The court stated that the direction can be express or implied,\(^67\) but the words "in his employment" mean that the travel must be in the furtherance of the business of the employer.\(^68\) There can be no implied direction if the travel is for reasons or purposes purely personal to the employee.\(^69\) Because it was customary in the drilling business to transport both ice and water to the drill site, the court reasoned that the ice was reasonably necessary to the furtherance of the drilling business. On this basis the court found that the deviation to obtain the ice was impliedly directed by the employer. The construction given the amendment in *Janak* supports the conclusion that satisfaction of the exception portion of section 1b also satisfies the definitional test of section 1.\(^70\)

*The Access Doctrine.* Even though section 1b does not deal with the access doctrine, the result in *Jecker v. Western Alliance Insurance Co.*,\(^71\) which included the "contract" exception to the broader rule within the "direction" exception of section 1b,\(^72\) provides a strong basis for arguing that the same result should be reached when the first access doctrine case comes

\(^{65}\) In Agricultural Ins. Co. v. Dryden, 398 S.W.2d 745 (Tex. 1966), an employee was required as one of his duties as foreman of a carpenter crew to transport to and from work tools owned by his employer and used by his crew. He had to arrive some fifteen minutes before his crew in order to distribute the tools to the workers so that they could start work immediately upon their arrival. The court held the "direction" exception of section 1b was not satisfied and the injury was noncompensable because no travel was required of the employee in addition to his regular and personal transportation to and from work. This is analogous to *Janak* in that the injury was noncompensable because no deviation was required to be made.


\(^{67}\) TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (1967).


\(^{70}\) Janak v. Texas Employers' Ins. Ass'n, 381 S.W.2d 176 (Tex. 1964).

\(^{71}\) See note 87 infra, and accompanying text.

\(^{72}\) 369 S.W.2d 776 (Tex. 1963).

\(^{73}\) See note 78 infra, and accompanying text.
before the Texas Supreme Court. To satisfy section 1b, the employee in an access case could argue that he was impliedly directed from one place to another, one place being just outside the zone or area furnished by the employer for ingress and egress, and the other place being the actual premises of the employer. An alternative approach would be to contend that this area or zone is actually a part of the premises, and thus avoid section 1b and the coming-and-going rule.

In the recent court of civil appeals case of *Kelty v. Travelers Insurance Co.*, an employee was injured when she slipped on an icy sidewalk ten to twelve feet from the rear entrance of her employer's premises. The entrance was used by both employees and the general public. Vacating the trial court's order of summary judgment in favor of the insurance company, the court held that whether the employer was injured within the course of her employment was a question for the jury. The court discussed the history and development of the access doctrine in Texas and treated the doctrine as an exception to the general coming-and-going rule, but made no reference to section 1b. In effect, the court held that the pre-1957 common law doctrine requiring the place of access to the premises to be furnished by the employer in the interest of his business also required (1) that the employer intend that this particular place be used by his employees for such a purpose, or (2) that he either expressly or impliedly consent to such use. By failing to consider section 1b, the court treated this access case as an injury occurring upon the actual premises of the employer and not as one sustained on the public streets and highways.

The legislature which enacted section 1b undoubtedly had full knowledge of the access doctrine, and because this doctrine could have been included easily within the express terms of the amendment, it is possible that the legislature intended that no compensation should be granted in such a situation. It seems, however, that the *Kelty* decision will be followed in future cases, either on the rationale that the injury was sustained by the employee while being impliedly directed from one place to another or that the injury was suffered while on the actual premises of the employer.

**The Control Exception.** In *Texas General Indemnity Co. v. Bottom* an off-duty truck driver who owned a truck which he leased to his employer was killed while driving his truck from his home to his employer's premises. The lease contract required the owner-driver to maintain his truck at his own expense. In addition, the owner was at liberty to use his truck for any personal reason while off duty, and it was customary for him to drive his truck to and from work. Faced with these circumstances, the Texas Su-
preme Court held that the jury finding that the employee was within the course of employment was not supported by the evidence.

In Bottom the employee's widow argued that the facts came within the "transportation under the control of employer" exception. A literal interpretation of the amendment could have placed the fact situation within the control exception because the lease agreement gave the employer complete control over the truck even though the employee-driver was the owner and was required to maintain the truck at his own expense. The court agreed with this reasoning but still held the injury noncompensable, concluding that if the legislature had intended to authorize compensation when an employee is permitted to utilize for his own personal reasons a truck controlled by the employer, the legislature would have been more explicit. Mere gratuitous furnishing of transportation by the employer as an accommodation to the employee and not as an integral part of the employment contract does not bring the employee under workmen's compensation. The court reasoned that the company relinquished actual control of the vehicle instead of exercising its full rights under the lease contract. Thus, presently under section 1b, the employer's control of the means of transportation seemingly constitutes an exception to the coming-and-going rule. Control of the means of transportation has not yet been defined by the courts, but apparently there is no control over the means of transportation unless the employer controls the details of the journey.

The Contract Exception. In Jecker v. Western Alliance Insurance Co., the injured employee was a salesman of household appliances who also had the duty of servicing any appliance sold by him within a certain time period after its sale. The employee, who had sold an appliance in a town eighty miles away, was killed on the return trip from a service call at the home of the purchaser. The court ruled that the death was compensable and that there was no personal reason for the trip even though conflicting evidence was in the record. This decision was predicated upon the rationale that this employee's activities should be included within the "contract" exception pertaining to travel pursuant to the express or implied requirements of the employment contract. Thus, the court concluded that the employee was within the course of employment because the nature of his employment subjected him to the risks and hazards of the public streets and highways.

The Jecker court granted recovery even though section 1b contains no express provision for such a situation. Instead the court, applying the "direction" exception, reasoned that the employee was in essence impliedly directed in his employment from one place to another. The case illustrates that section 1b is applicable not only to cases involving the exceptions to the coming-and-going rule, but also to cases concerning the pre-1957 "contract" exception to the broader rule. In Jecker the coming-and-going

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18 369 S.W.2d 776 (Tex. 1963).
rule was of no moment because the course of employment did not end until the employee had at least reached the town of his employer's premises.

The Texas Supreme Court relied upon Jecker in the case of Meyer v. Western Fire Insurance Co. There the employee was a service supervisor for a home builder whose duties included the inspection of various homes built by his employer. Meyer often went by his employer's office to pick up messages, but he usually did his required paper work at his home. Meyer had received two business calls at his home and had done some paper work on the morning of the accident. He left his home to make service calls in a certain subdivision, and although he was not required to report to his employer's office, he decided to go by the office on his way to the subdivision to determine if there were any messages relating to additional service calls near the subdivision. The accident occurred before he reached the office. The supreme court held that there was an issue of fact as to whether Meyer was in the course of his employment and reversed the trial court's summary judgment in favor of the insurance company. The court stated that there was evidence that Meyer was "directed in his employment to proceed from one place to another" within the meaning of the exception portion of section 1b and the Jecker case. The court further concluded that Meyer was not precluded from recovery under the dual purpose portion of section 1b because the deviation to the office was not for personal reasons.

The coming-and-going rule was not relevant in the case of Shelton v. Standard Insurance Co., but the problem was essentially the same. There a truck driver en route to Wichita, Kansas, on company business stopped for the night in Dallas, Texas. As he walked across the street from his motel to a cafe, he was struck by an automobile. The court did not consider the exception portion of section 1b; instead, it attacked the problem on the basis of the definitional test of course of employment under section 1. The court determined that the employee was furthering the affairs of the employer by stopping in Dallas for the night. Thus, the real question was whether crossing the street to eat was so related to the employee's work that the injuries sustained had to do with and originated in the business of the employer. The court concluded that the facts were sufficient to raise a jury question and reversed the trial court's summary judgment for the insurance company.

Even though the employee in Shelton was injured while walking on the public streets and highways, the court found that neither the broader rule denying recovery for injuries incurred while traveling the public streets and highways nor its "contract" exception were controlling. The court correctly omitted consideration of section 1b because the case concerned only the definitional test of section 1.

425 S.W.2d 628 (Tex. 1968).
2389 S.W.2d 290 (Tex. 1961).
V. Conclusion

Since its enactment, every aspect of section 1b of article 8309 has been considered by the Texas courts, and with few exceptions every segment has been treated in one or more Texas Supreme Court cases. The coming-and-going rule, the broader rule, and the exceptions to these rules have been included within the exception portion of section 1b. Additionally, the amendment created the control exception which did not exist via case law, and three of the four exceptions to the coming-and-going rule are specifically enumerated therein. The exception portion of section 1b has been interpreted to include the contract exception to the broader rule. When the employee is injured as a result of being subjected to the risks of the highways because of the nature of his employment, the injury is considered as one sustained while being "directed to proceed from one place to another." The fourth exception to the coming-and-going rule, the access doctrine, although not specifically included in section 1b, could be included within the "direction" exception. However, even if section 1b is interpreted to exclude the access decisions, those decisions could still be supported on the ground that such an injury was sustained upon the actual premises of the employer.

The Texas Supreme Court has interpreted section 1b as designed not to enlarge the definition of "injury sustained in the course of employment" found in section 1 but to limit the probative effect given to the means of transportation or the purpose of the journey as found in section 1b. Thus, the exceptions to the coming-and-going rule and the broader rule are limited to those contained in section 1b, and the employee cannot recover unless one of the exceptions is satisfied. Furthermore, the definitional test of "injury sustained in the course of employment" in section 1 and the exception portion of section 1b are to be construed together just as pre-1957 cases construed section 1 and the exceptions to the coming-and-going rule and the broader rule. The satisfaction of one of the exceptions found in section 1b apparently satisfies the definitional test of section 1. It is difficult to imagine a situation where the exception por-

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84 This reasoning was again stated in Jecker v. Western Alliance Ins. Co., 369 S.W.2d 776 (Tex. 1963).


86 See note 19 supra, and accompanying text.

87 In Janak v. Texas Employers' Ins. Ass'n, 381 S.W.2d 176, 181 (Tex. 1964) the court stated: "Having thus concluded that Janak is not precluded from a recovery by the mere fact that he was a passenger member of the carpool at the time of his injury . . . we must yet determine whether under Section 1b there is any basis in the evidence for saying that the travel to the place of injury was in the course of his employment." In answering this question the court narrowed the question to whether "the travel during the deviation [was] for a purpose in furtherance of the employer's business?" See also Agricultural Ins. Co. v. Dryden, 398 S.W.2d 741, 747 (Tex. 1966) (concurring
tion of section 1b would be satisfied while at the same time the injury was not of a kind and character that had to do with and originated in the business of the employer received by an employee while engaged in or about the furtherance of the employer's affairs. 88

Like the exception portion of section 1b, the dual purpose portion does not materially change the law. Pre-1957 cases allowed recovery when mixed purposes were involved, but the courts applied a test based on whether the employer's business necessitated the travel. 89 Section 1b denies recovery unless the trip would have been made had there been no personal reason, and would not have been made had there been no business reason. The amendment seems to embody the necessity test, but it goes further and establishes adequate guidelines for determining if business necessity actually existed.

In addition, the dual purpose portion of section 1b, like the exception portion, is closely related to the definitional test of "injury sustained in the course of employment" found in section 1. In fact, satisfaction of the dual purpose portion of the statute means that the injury was sustained while furthering the affairs of the employer, and thus satisfies one-half of the definitional test of injury sustained in the course of employment.


89 See note 48 supra, and accompanying text.