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Workmen's Compensation

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WORKMEN'S COMPENSATION

by

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A WIDE variety of old refrains, plus an occasional matter of first impression in applying and construing the Texas Workmen's Compensation Act[1] mark the appellate court decisions of the survey year. Additional patches were also applied to the Act at the regular session of the 61st Legislature.[2]

I. SUBSTANTIVE LAW

Good Cause. The Act requires the claimant to give notice of injury to the employer or the insurer within thirty days after the accident, or to file a claim for compensation within six months. However, failure to give notice or to file a claim for compensation within these prescribed periods is not fatal if the claimant can show good cause for such failure. The established test of good cause is whether the claimant prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.[3] Good cause must continue until the date the claim is filed.[4] During the period under review, several cases arose in which the courts reached differing results in deciding the question of the continuation of good cause.

In *Moronko v. Consolidated Mutual Insurance Co.*[5] the claimant was injured on May 25, 1965, but did not file her claim until January 12, 1966. An agent of the insurer had represented to her that everything was taken care of and the insurer paid weekly benefits to her until December 14, 1965. Evidence indicated that the claimant consulted a lawyer between December 14, 1965, and January 12, 1966. The Supreme Court of Texas held that these facts constituted sufficient evidence for a jury finding of good cause for failure to file within the statutory six-month period. The court ruled that the totality of the claimant's conduct after December 14, 1965, had to be considered and that the claimant had a reasonable time after the removal of good cause to file the claim with the Industrial Accident Board.

Four other cases reached the opposite result. In *Allstate Insurance Co. v. King*[6] the Supreme Court of Texas held that neither ignorance of the

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[1] TEX. REV. CIV. STAT. ANN. arts. 8306-09(f) (1967).

[2] Tex. Laws 1969, ch. 18, §§ 1-18, at 48-54.

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

[4] Texas Employers' Ins. Ass'n v. Hancox, 162 Tex. 565, 349 S.W.2d 102 (1961); Petroleum Cas. Co. v. Dean, 132 Tex. 320, 122 S.W.2d 1053 (1939); Indemnity Ins. Co. of N. America v. Williams, 129 Tex. 51, 99 S.W.2d 905 (1937); Jones v. Texas Employers' Ins. Ass'n, 128 Tex. 437, 99 S.W.2d 903 (1937); Holloway v. Texas Indem. Ins. Co., 40 S.W.2d 75 (Tex. Comm'n App. 1931), *opinion adopted*; New Amsterdam Cas. Co. v. Scott, 54 S.W.2d 175 (Tex. Civ. App.—Eastland 1932), *error ref.*

[5] 435 S.W.2d 846 (Tex. 1969).

[6] 444 S.W.2d 602 (Tex. 1969).

limitations period, the belief that compensation is not payable while continuing to work, the assumption that hospitalization insurance constituted all the benefits to which he was entitled, nor the failure of his employer to report the injury, constituted good cause for the claimant's failure to file until thirteen months after the injury was sustained.

Similarly, in *Fritz v. Texas Compensation Insurance Co.*[7] the claimant did not file his claim until eighteen months after the injury. The claimant contended that he did not realize he would not fully recover until he returned to work after eleven months of treatment. In rejecting this argument the court of civil appeals held that even if this delay was justified, the claimant had sufficient reason to believe he would not fully recover at least four months prior to filing his notice of injury and claim for compensation. Therefore, the claimant failed to prosecute his claim with that degree of diligence that an ordinarily prudent person would have exercised under the circumstances, and good cause did not continue to exist up to the time his claim was filed.

A summary judgment in favor of the insurer was affirmed by a court of civil appeals where the claimant, who was injured on July 6, 1966, did not file his claim until April 13, 1967.[8] This result was reached despite the fact that the insurer paid compensation for twelve weeks and from time to time the claimant discussed the matter of settlement with the insurer's adjuster. The claimant testified that he believed that he would receive a fair settlement and that his rights were being protected by the adjuster, since he had been assured by the adjuster that all he had to do was be patient.

The claimant in *Stone v. Fidelity & Casualty Co.*[9] sustained an injury impairing his hearing but did not file a timely claim. He testified that his belief that his condition would improve was based on information from his doctor to the effect that he would learn what he could and could not do, which he construed to mean his position would improve. In affirming the trial court's judgment, the court of civil appeals rejected this construction of the doctor's advice and held that as a matter of law good cause was not established.

Course of Employment—Transportation and Travel. Notwithstanding twelve years of interpretation of section 1b of article 8309,[10] problems continue to arise in determining whether employees injured in transportation or travel are within the scope of their employment. The Texas supreme court held in *Johnson v. Pacific Employers Indemnity Co.*[11] that evidence that his superior directed the employee to join an automobile pool to supply ice and water to the drilling rig (the place of employment) supported the inference that the deviated route to the place of employ-

[7] 434 S.W.2d 702 (Tex. Civ. App.—Austin 1968).

[8] Dishongh v. Texas Employers' Ins. Ass'n, 438 S.W.2d 678 (Tex. Civ. App.—Eastland 1968).

[9] 443 S.W.2d 783 (Tex. Civ. App.—Texarkana 1969). *See also* Weigle v. Great Am. Ins. Co., 434 S.W.2d 373 (Tex. Civ. App.—Amarillo 1968).

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

[11] 439 S.W.2d 824 (Tex. 1969). The court, however, reversed for a determination as to whether this finding was supported by a preponderance of the evidence.

ment was for the purpose of furthering the employer's business. Thus, the "dual purpose" rule was inapplicable and the employee was injured in the course of his employment.

Vaughn v. Highlanders Underwriters Insurance Co.[12] decided the question of whether a truck driver was in the course and scope of his employment while traveling at the direction of the dispatcher from his place of employment to a restaurant where he intended to eat. Relying on *Johnson*, the court of civil appeals held the "dual purpose" rule inapplicable and reversed and remanded the trial court's summary judgment in favor of the insurer.

In *Travelers Insurance Co. v. Mesta*[13] the court of civil appeals held the "dual purpose" rule to be applicable. The question was whether the employee was pouring gasoline into his automobile in order to use the automobile to run an errand for the employer, or whether he was doing so for personal reasons. The court held the evidence sufficient to support a jury finding that the claimant was acting within the scope of his employment but reversed for improper instructions.[14]

Texas Employers' Insurance Ass'n v. Clauder[15] involved a claim for death benefits where the employee sustained fatal injuries in a collision on an oil field road while driving from his employer's plant to his home. The employer did not furnish or pay for the transportation or exercise any control over the means of transportation or the route followed, and he did not pay for the time in going to and from work. The "access doctrine" was held inapplicable because the road was not so closely related to the employer's premises as to be fairly treated as a means of ingress and egress to and from the place of employment. In another case, *Bales v. Liberty Mutual Insurance Co.*,[16] the access doctrine was also held to be inapplicable. The claimant was injured when his vehicle was struck by a tank car while crossing a set of railroad tracks located on a public road a mile or more from his employer's place of business. A similar result was reached in *Dishman v. Texas Employers' Insurance Ass'n*[17] where a summary judgment was affirmed against the claimant, who was injured while crossing the street from the company plant to the public parking lot where her car was parked.

Summary judgment in favor of the insurer was also affirmed where a truck driver, staying overnight in a motel, went to the room of a stranger to have a shot of liquor but instead received a shot in the back. *Walker v. Texas Employers' Insurance Ass'n*[18] held that since the employee was

[12] 445 S.W.2d 234 (Tex. Civ. App.—Houston 1969).

[13] 435 S.W.2d 228 (Tex. Civ. App.—San Antonio 1968), *error ref. n.r.e.*, 438 S.W.2d 905 (Tex. 1969).

[14] The court of civil appeals held as reversible error the trial court's refusal to give instructions on employee injuries sustained in the course of transportation and in the course of travel. Travelers Ins. Co. v. Mesta, 435 S.W.2d 228, 232 (Tex. Civ. App.—San Antonio 1968), *error ref. n.r.e.* The supreme court, in refusing the applications for writ of error, held there was no evidence requiring the instruction dealing with transportation since transportation was not involved. 438 S.W.2d 905 (Tex. 1969).

[15] 431 S.W.2d 579 (Tex. Civ. App.—Tyler 1968), *error ref. n.r.e.*

[16] 437 S.W.2d 575 (Tex. Civ. App.—Amarillo 1969).

[17] 440 S.W.2d 727 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

[18] 443 S.W.2d 429 (Tex. Civ. App.—Fort Worth 1969), *error ref.*

engaged in a purely personal mission of pleasure which was in no way incident to his employment, his injury did not have its origin in a risk created by the necessity of sleeping or eating away from home.

Recovery was denied a night watchman who was shot by a robber at a filling station a block or more away from the premises he was employed to guard. The court of civil appeals, in *West v. Home Indemnity Co.*,[19] affirmed on the ground that the claimant was not injured in the course of his employment when he went to the filling station to procure cigarettes and a soft drink. The court held that he was not covered under the "street risk" theory or under the "personal mission" rule.

Course of Employment—Causal Connection. Even though "proximate cause" is not a necessary element of a workmen's compensation case, a causal connection between the injury and the disability or death is required. This connection is established if the injury is a producing cause of the disability or death or if the disability or death naturally resulted from the injury. The Texas supreme court, in *Insurance Co. of North America v. Kneten*,[20] held that the finding of causal connection between a job-connected electric shock and the employee's heart attack was not conjecture. The claimant's doctor testified that the shock "could have" been a contributing factor and that there was a "strong possibility" the shock had precipitated the heart attack. The doctor did not testify, however, that it was at least "reasonably probable" that the shock was a contributing factor even in view of the prompt onset of symptoms progressing to a critical stage after the shock. The well-reasoned concurring opinion[21] refused to concede that "strong possibility" means "reasonable medical probability" or that failure to negate "reasonable medical probability" somehow satisfied the claimant's burden of proving reasonable medical probability of causation. Concurrence was based instead on a liberal construction of the Act and the right of juries to decide causation with or without medical testimony in areas where courts and juries have common experience and knowledge.

On the same day, the Texas supreme court decided *Parker v. Employers Mutual Liability Insurance Co.*[22] in which an opposite result was reached. There, the court agreed that no evidence was presented pointing to a causal connection between the employee's exposure to radiation and subsequent development of cancer. Such a connection was neither found within the general experience of common sense of reasonable men, nor supported by medical testimony of "reasonable probability."[23]

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[19] 444 S.W.2d 786 (Tex. Civ. App.—Beaumont 1969).

[20] 440 S.W.2d 52 (Tex. 1969).

[21] *Id.* at 54 (Greenhill, J., concurring).

[22] 440 S.W.2d 43 (Tex. 1969).

[23] The following afflictions and circumstances from which the employees died supported the conclusion that death resulted from an injury: Lindley v. Transamerica Ins. Co., 437 S.W.2d 371 (Tex. Civ. App.—Fort Worth 1969) (coronary thrombosis due to arteriosclerosis where the employee, after doing strenuous work, complained of weakness, headache, aching in the arms and pains in the chest); Insurance Co. of N. America v. Parker, 434 S.W.2d 159 (Tex. Civ. App.—Tyler 1968), *error dismissed by agreement* (acute myocardial infarction following strenuous work wrenching rods on an oil rig); Hill v. Highlands Ins. Co., 433 S.W.2d 247 (Tex. Civ. App.—

Occupational Disease. Aetna Casualty & Surety Co. v. Haik[24] held that since compensation is not provided for pain and suffering, but only for loss of wages, the compensation period for occupational disease begins on the date of disability rather than on the date of the first distinct manifestation of the disease.

Death Benefits. Pacific Employers Indemnity Co. v. Aguirre[25] held that despite the presumption in favor of the validity of marriage, a letter from decedent's first wife to the county clerk inquiring whether decedent had remarried supported the jury findings that the previous marriage had been dissolved. Thus, decedent's subsequent common law wife and three children were entitled to death benefits under the Act.

In *Patton v. Shamburger*[26] the Texas supreme court held that the deceased employee's children, adopted by his wife's new husband, were no longer entitled to death benefits. The new relation of parent and child was held to sever old legal ties except for inheritance.

Wage Rate. In the absence of direct evidence as to the precise extent of future earning capacity, *Fidelity & Casualty Co. v. Read*[27] held the same evidence which showed the extent of disability sufficient to support a finding as to wage earning capacity after the injury. In *Commercial Union Insurance Co. v. Mabry*[28] the employee's pleading that he had an average daily wage of *at least* $13 and that another employee of the same class had an average daily wage of $13 did not render excessive the finding of $37.26 as his average daily wage before the injury.

In determining the claimant's average weekly wage, *Travelers Insurance Co. v. Mesta*[29] held that testimony that the claimant did substantially the same type of work in a restaurant from April to October or November 1960, and from then to April 22, 1961, in a hotel where he was

Houston 1968), *error ref. n.r.e.* (arteriosclerosis where the employee was found dead in the guard shack and his widow related his right eye and chin were bruised and his lip cut); Pacific Employers Indem. Co. v. Aguirre, 431 S.W.2d 33 (Tex. Civ. App.—Waco 1968), *error ref. n.r.e.* (cerebral aneurysm after doing light work sitting at a machine for two hours, then helping ship some coils of fencing and operating a forklift where the employee had a history of a subarachnoid hemorrhage diagnosed as aneurysm anterior communicating arteries).

Under the following circumstances, the courts found no causal connection between the alleged injury and the disability: Weicher v. Insurance Co. of N. America, 434 S.W.2d 104 (Tex. 1968) (heat exhaustion where the employee was doing nonstrenuous work and the condition of the premises was not such as to create a greater hazard to her than that to which the general public was subjected); Griffin v. Texas Employers' Ins. Ass'n, 441 S.W.2d 664 (Tex. Civ. App.—Amarillo 1969), *error granted* (removal of a previously defective eye which became irritated on the job, there being no testimony by the doctor as to why it was necessary to remove the eye); Weigle v. Great Am. Ins. Co., 434 S.W.2d 373 (Tex. Civ. App.—Amarillo 1969) (coronary occlusion of an employee who was exposed to a great amount of emotional stress and strain and who was "bugged" when his supervisor told him he could be replaced); Hartford Accident & Indem. Co. v. McFarland, 433 S.W.2d 534 (Tex. Civ. App.—Tyler 1968), *error ref. n.r.e.* (diseased liver and heart brought on by contact with poisonous insecticides over an extended period).

[24] 442 S.W.2d 836 (Tex. Civ. App.—Waco 1969), *error granted.*

[25] 431 S.W.2d 33 (Tex. Civ. App.—Waco 1968), *error ref. n.r.e.*

[26] 431 S.W.2d 506 (Tex. 1968). *See also* Zanella v. Superior Ins. Co., 443 S.W.2d 95 (Tex. Civ. App.—Eastland 1969), *error ref.*

[27] 433 S.W.2d 797 (Tex. Civ. App.—Waco 1968), *error ref. n.r.e.*

[28] 442 S.W.2d 413 (Tex. Civ. App.—Houston 1969).

[29] 435 S.W.2d 228 (Tex. Civ. App.—San Antonio 1968), *error ref. n.r.e.*, 438 S.W.2d 905 (Tex. 1969).

injured, supported a finding that he worked in the same employment for 210 days during the year immediately preceding his injury.

Previous Injury. When an employee who has suffered a previous injury suffers a subsequent injury resulting in incapacity to which both injuries or their effect have contributed, the insurer is liable only for the compensation to which the subsequent injury would have entitled the employee had there been no previous injury.[30] Nevertheless, one court of civil appeals held that the insurer was not entitled to an issue as to whether one or more admitted previous injuries contributed to the claimant's disability and, if so, in what percentage. The holding in *Lumbermen's Mutual Casualty Co. v. Butler*[31] was based on the jury's finding that the subsequent injury was the producing cause of total and permanent disability and that prior injuries were not the sole cause of the claimant's disability. The court declined to base its holding on the claimant's suggestion that the request for further issues must fail because there was no evidence that any previous injury was compensable.

Setting Aside Compromise Settlements. Traders & General Insurance Co. v. Wright[32] involved a claimant who had broken his ankle and was told by the insurer's adjuster that the doctor said he was all right and could go back to work. A compromise settlement was made, but neither the claimant nor the insurer knew that the claimant had suffered an injury to his head. Thereafter, the claimant began to have headaches. The compromise settlement was held to have been properly set aside for fraud inasmuch as Texas does not require a culpable state of mind to constitute fraud.

Review of Award. The Industrial Accident Board may review and change any award at any time within the compensation period if there is a change of condition, mistake or fraud.[33] The phrase "change of condition" means that a claimant's condition must have become substantially worse after the date of the award.[34] A continued incapacity of the same character for the same injury upon which an award is based is not such a change as warrants a modification.[35] "Compensation period" means the maximum time prescribed by law for the nature of the injury described in the claim.[36] Accordingly, the court of civil appeals, in *Espinoza v. Miller's Mutual Fire Insurance Co.*[37] held that disability from a surgical operation authorized by the Board after the original award raised the issue of change of condition so as to preclude a summary judgment for the insurer.

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[30] TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (1967).
[31] 433 S.W.2d 19 (Tex. Civ. App.—Fort Worth 1968).
[32] 437 S.W.2d 658 (Tex. Civ. App.—Beaumont 1969).
[33] TEX. REV. CIV. STAT. ANN. art. 8306, § 12d (1967).
[34] Commercial Standard Ins. Co. v. Brock, 167 S.W.2d 281 (Tex. Civ. App.—Amarillo 1942), *error ref. w.o.m.*
[35] *Id.* at 286.
[36] Employers' Liability Assur. Corp. v. Best, 101 S.W.2d 891 (Tex. Civ. App.—Eastland 1937), *error dismissed.*
[37] 443 S.W.2d 891 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*

Maturity Suit. In 1945, an employee received fatal injuries for which compensation benefits were awarded by the Board in the amount of $20 per week for 360 weeks, one-half of which went to the deceased's two children who were respectively then twenty months and two months of age. The insurer indicated it would start payment for the minors as soon as it was furnished with guardianship papers. The widow filed application for guardianship, which was allowed, but she did not qualify as guardian or post bond. After the children became of age, they filed suit to recover the $3,600 together with interest, penalty and attorney's fees. Their claim was allowed, including interest on each installment from the date it became due. The court of civil appeals held that the insurer did not have justifiable cause for not making the weekly payments as they accrued since the Act authorizes payment to a next friend in cases of infancy.[38]

II. Procedural Law

Parties. Casper v. General Insurance Company of America[39] raised the question of whether the claimant's husband was an indispensable party to her suit for workmen's compensation benefits which were community property. The court of civil appeals decided the question in the affirmative and found the non-joinder to be fundamental error and reversed and remanded.[40] The Texas supreme court held that the absence of the husband did not present a case of fundamental error, but refused the claimant's application for writ of error.[41] *Travelers Insurance Co. v. Jacks*[42] also held the joinder of the husband to be a prerequisite to the wife's recovery of benefits. Apparently, both of these cases were tried before the effective date of article 4626[43] which allows a spouse to sue without the joinder of the other spouse. However, how the courts will interpret article 4626 remains problematical.

Pleading. Aetna Casualty & Surety Co. v. Haik[44] emphasized the importance of comprehensive pleadings. There, the employer denied by verified pleadings that the employee gave notice of the first manifestation of her occupational disease within thirty days, but he failed to deny that he had knowledge of her condition. The court held that notice was thus established as a matter of law.

Venue and Jurisdiction. The Industrial Accident Board awarded Camilio Mosqueda $35 per week for 360 weeks as compensation for the death of his father who was killed in an accident in Willacy County. The Board

[38] Hartford Accident & Indem. Co. v. Reina, 441 S.W.2d 622 (Tex. Civ. App.—Amarillo 1969), *error ref. n.r.e.*; *see* Tex. Rev. Civ. Stat. Ann. art. 8306, § 8a (1967); *id.* art. 8307, § 5a.

[39] 431 S.W.2d 311 (Tex. 1968).

[40] General Ins. Co. of America v. Casper, 426 S.W.2d 606 (Tex. Civ. App.—Tyler), *error ref. n.r.e.*, 431 S.W.2d 311 (Tex. 1968).

[41] Casper v. General Ins. Co. of America, 431 S.W.2d 311 (Tex. 1968).

[42] 441 S.W.2d 312 (Tex. Civ. App.—El Paso 1969).

[43] Tex. Rev. Civ. Stat. Ann. art. 4626 (Supp. 1967).

[44] 442 S.W.2d 836 (Tex. Civ. App.—Waco 1969), *error granted. See also* Tex. R. Civ. P. 93(n)(6); Tex. Rev. Civ. Stat. Ann. art. 8307b (1967).

also awarded Marcelo Mosqueda, decedent's brother, $500 as reimbursement for funeral expenses. The insurer appealed to the district court of Nueces County, naming Marcelo and Louis (Camilio's brother) Mosqueda as defendants. Louis was dismissed for lack of interest and Marcelo settled. Three weeks before the Nueces County judgment was entered, Camilio instituted suit in Jackson County seeking to enforce the Board order. The insurer offered the Nueces County judgment as dispositive and the trial court dismissed for lack of jurisdiction. The court of civil appeals, in *Mosqueda v. Home Indemnity Co.*,[45] reversed. The court held that Camilio's claim for death benefits and Marcelo's claim for reimbursement were separate claims. Therefore, since the Nueces County court did not have in personam jurisdiction over Camilio, who was under no duty to intervene, the judgment could not be binding upon him. Thus, the Jackson County court had jurisdiction and venue would be proper there upon Camilio's showing of residence in that county.

Lopez v. Texas Employers' Insurance Ass'n[46] raised the issue of proper venue where the employer carried voluntary workmen's compensation insurance. The injury occurred in Zavala County but the claimant brought suit in Bexar County, his county of residence. The insurer obtained a removal to Dallas County and the claimant appealed. The court of civil appeals emphasized that claims under a voluntary workmen's compensation endorsement are a matter of contract and held that in absence of a contract provision setting venue, the general venue provisions are applicable. The injury in this case occurred before the effective date of the amendment to article 8308, section 18,[47] which provides that any employer obtaining workmen's compensation coverage automatically becomes a subscriber to the Act and thus subject to its venue provisions. Consequently, the case is significant only in those situations arising before the amendment.

Two cases,[48] involving the same parties and arising out of the same injury, dealt with the jurisdiction of the Industrial Accident Board to consider successive claims for nursing services while the original claim was being appealed. The employee was injured on April 6, 1964, and on May 16, 1966, the Board awarded total and permanent disability and certain medical expenses, which award the insurer appealed. While the appeal was still pending, the employee's wife filed a claim for nursing services rendered by her from May 17, 1966, through April 17, 1967, which the Board approved. The insurer appealed, contending that the Board had no jurisdiction because the original award was being appealed and was not final.[49] Subsequently, the wife again filed a claim for nursing services for the period from April 18, 1967, to October 18, 1967. This time, the Board

[45] 443 S.W.2d 901 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*

[46] 441 S.W.2d 318 (Tex. Civ. App.—San Antonio 1969).

[47] TEX. REV. CIV. STAT. ANN. art. 8308, § 18 (1967). The amendment became effective August 28, 1967.

[48] Texas Employers' Ins. Ass'n v. Steadman, 433 S.W.2d 756 (Tex. Civ. App.—Texarkana 1968); Texas Employers' Ins. Ass'n v. Steadman, 431 S.W.2d 556 (Tex. Civ. App.—Amarillo 1968).

[49] Texas Employers' Ins. Ass'n v. Steadman, 433 S.W.2d 756 (Tex. Civ. App.—Texarkana 1968).

decided it had no jurisdiction and denied the claim, and the claimant appealed.[50] Both courts of appeals reached the same result and held that the Board did have jurisdiction under the open medical provisions of the Act.[51] The Texarkana court construed the phrase "after the first such final award or judgment" to mean final in the sense of being appealable rather than final in the sense that all appellant's remedies have been exhausted.[52] The Amarillo court recognized that such a construction was necessary to prevent claimant's successive medical claims from being thwarted by the insurer's appeal and the six-months' limitation period.[53]

Evidence. Various questions pertaining to the admissibility of evidence were considered, with some cases holding the proposed evidence admissible[54] and others holding it inadmissible.[55] Likewise, still other cases upheld the

[50] Texas Employers' Ins. Ass'n v. Steadman, 431 S.W.2d 556 (Tex. Civ. App.—Amarillo 1968).

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

[52] Texas Employers' Ins. Ass'n v. Steadman, 433 S.W.2d 756, 760 (Tex. Civ. App.—Texarkana 1968).

[53] Texas Employers' Ins. Ass'n v. Steadman, 431 S.W.2d 556 (Tex. Civ. App.—Amarillo 1968).

[54] Transamerica Ins. Co. v. Beseda, 443 S.W.2d 915 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.* (statements made before the Board were admissible, including letter argument submitted on behalf of the insurer by an independent adjuster that conflicted with the insurer's position at trial); Olivares v. Travelers Ins. Co., 442 S.W.2d 793 (Tex. Civ. App.—San Antonio 1969) (evidence that one of two insurers had disposed of its liability was admissible where the claimant brought suit against both); Crothers v. Texas Employers' Ins. Ass'n, 442 S.W.2d 774 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.* (for impeachment purposes, evidence that the claimant had falsely denied prior arrests in her employment application was admitted); Pacific Employers Indem. Co. v. Garcia, 440 S.W.2d 335 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.* (cross examination of a doctor by reading excerpts from a medical book and asking him whether he agreed or disagreed was held not be objectionable where the doctor had not recognized the book as authoritative or based his opinion in whole or in part thereon); Moss v. Fidelity & Cas. Co., 439 S.W.2d 734 (Tex. Civ. App.—Fort Worth 1969) (the response of a doctor to hypothetical questions which the court indicated made counsel regret that he had objected to direct questions was admissible); Lindley v. Transamerica Ins. Co., 437 S.W.2d 371 (Tex. Civ. App.—Fort Worth 1969) (statements of the injured employee to his son upon coming in from work were admitted as to labor performed by the employee during the day and the condition of his health); Travelers Ins. Co. v. Walston, 436 S.W.2d 582 (Tex. Civ. App.—Tyler 1969) (rebuttal to an improper issue injected by the opposing party was held to be proper even though it was accomplished with other improper evidence); Insurance Co. of N. America v. Parker, 434 S.W.2d 159 (Tex. Civ. App.—Tyler 1968), *error dismissed by agreement* (impeachment testimony was permitted from a witness who had been present during the taking of other testimony after TEX. R. CIV. P. 267 had been invoked, such a situation being within the judge's discretion); Lumbermen's Mut. Cas. Co. v. Butler, 433 S.W.2d 19 (Tex. Civ. App.—Fort Worth 1968) (evidence of the claimant's wife's need for an operation was admissible on the issue of lump sum, since evidence had already been admitted that she needed an operation); Miller Mut. Fire Ins. Co. v. Ochoa, 432 S.W.2d 118 (Tex. Civ. App.—Corpus Christi 1968), *error ref. n.r.e.* (the opinion of a psychiatrist based upon information given to him by the claimant was admitted to describe the condition of the claimant even though the doctor did not treat him).

[55] Commercial Standard Ins. Co. v. Cotton, 443 S.W.2d 423 (Tex. Civ. App.—Eastland 1969), *error ref.* (the necessity and beneficial effect of surgery must be considered while the case is before the Board and such evidence is not admissible before the court where the operation's effect had not been determined by the Board); City of Austin v. Williams, 440 S.W.2d 115 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.* (the insurer was not allowed to tender evidence of the potentially beneficial effect of surgery which the Board had refused to order); Great Am. Ins. Co. v. Cantu, 438 S.W.2d 127 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.* (evidence of the claimant's illegal abortion was excluded as not being connected with her present claim); Texas Employers' Ins. Ass'n v. Marshall, 436 S.W.2d 617 (Tex. Civ. App.—Eastland 1969), *error ref. n.r.e.* (the results of a Social Security Administration physical examination were privileged and the trial court's refusal to compel the doctor to testify was proper); Johnston Testers v. Rangel, 435 S.W.2d 927 (Tex. Civ. App.—San Antonio 1968), *error ref. n.r.e.* (evidence that something could have possibly occurred was held inadmissible to show that it did occur); Phoenix Ins. Co. v. Stowe, 435 S.W.2d 265 (Tex. Civ. App.—Waco 1968) (testimony of a fellow worker that the claimant told him there could be no proof of whether his back was injured was excluded because it was used to show that claimant was never injured).

sufficiency of the evidence to support a variety of jury findings[56] and some held the evidence to be insufficient.[57]

Court's Charge. Lumbermen's Mutual Casualty Co. v. Butler[58] found meritless the insurer's objection to the issue of whether the claimant sustained total incapacity *following* the injury instead of *resulting from* the injury. The court of civil appeals found the phraseology not harmful to the insurer because the next issue inquired whether the injury was a producing cause of total disability.

West v. Home Indemnity Co.[59] held that objections to the charge were timely when they were dictated to the court reporter in the presence of the court and opposing counsel. That they were not typed before proceeding with the case was held immaterial.

Jury Argument. Several arguments were held not to constitute reversible error: argument by counsel for the plaintiff that if defendant had carried insurance, the insurance company would have paid the medical bills, where timely objection was made and the jury was instructed to disregard the statement;[60] argument by plaintiff's counsel referring to the insurer as a "fringe" company and suggesting that lump sum settlement should be made before the insurer went broke, as the error was harmless and was waived by failure to make a timely objection;[61] and argument by the insurer's counsel that the men on the Board were responsible and learned, had heard the same evidence as the jury and therefore the jury should reach the same result, where the error could have been cured by timely objection.[62]

Olivares v. Travelers Insurance Co.[63] held as reversible error the argument of counsel for one insurer that another insurer had settled with the claimant.

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[56] Aetna Cas. & Sur. Co. v. Coleman, 431 S.W.2d 784 (Tex. Civ. App.—Beaumont 1968) (that claimant suffered total and permanent incapacity). The following cases turned on the same point: National Ben Franklin Ins. Co. v. Allen, 440 S.W.2d 402 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.* (that claimant was injured in the course of her employment); Texas Employers' Ins. Ass'n v. Dimsdle, 440 S.W.2d 359 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*; Texas Gen. Indem. Co. v. Sheffield, 439 S.W.2d 431 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*; Firemen & Policemen's Pension Fund v. Villareal, 438 S.W.2d 387 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*; Texas Employers' Ins. Ass'n v. Washington, 437 S.W.2d 340 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*; Weigle v. Great Am. Ins. Co., 434 S.W.2d 373 (Tex. Civ. App.—Amarillo 1968) (that emotional strain or exertion on the job caused the claimant's injury); American Fire & Cas. Co. v. Baker, 431 S.W.2d 956 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.* (that claimant was a borrowed servant of the insured).

[57] Mackey v. Gulf Ins. Co., 443 S.W.2d 911 (Tex. Civ. App.—Amarillo 1969) (to rebut evidence that claimant had sustained an accidental injury); Commercial Ins. Co. v. Kempe, 440 S.W.2d 919 (Tex. Civ. App.—Dallas 1969) (that claimant was totally disabled); Aetna Cas. & Sur. Co. v. Thomas, 438 S.W.2d 149 (Tex. Civ. App.—Beaumont 1969) (that hernia did not exist in any degree prior to the accident); Travelers Ins. Co. v. Smith, 435 S.W.2d 248 (Tex. Civ. App. —Texarkana 1968), *error dismissed* (that claimant was totally incapacitated).

[58] 433 S.W.2d 19 (Tex. Civ. App.—Fort Worth 1968).

[59] 444 S.W.2d 786 (Tex. Civ. App.—Beaumont 1969).

[60] Bella Napoli, Inc. v. Valenzuela, 431 S.W.2d 806 (Tex. Civ. App.—El Paso 1968).

[61] Great Am. Ins. Co. v. Cantu, 438 S.W.2d 127 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*

[62] Tanner v. Texas Employers' Ins. Ass'n, 438 S.W.2d 395 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

[63] 442 S.W.2d 793 (Tex. Civ. App.—San Antonio 1969).

Jury Misconduct. *Transamerica Insurance Co. v. Beseda*[64] held that neither the denial of a recess to a juror who complained of hunger and a headache, nor statements by two jurors that they had special knowledge of workmen's compensation law, and that claimant would be totally incapacitated unless he was able to return to the same work (a misconstruction of the court's charge), constituted jury misconduct requiring reversal.

In *Highlands Underwriters Insurance Co. v. Martin*[65] a juror on *voir dire* failed to disclose, in response to a general question, that he had recently been a plaintiff on behalf of his son for the son's personal injuries. The insurer contended that it should have a new trial. The court of civil appeals affirmed the trial court's judgment in favor of the claimant, holding that the insurer failed to establish that the juror's misconduct was injurious to its case. Similarly, *Moss v. Fidelity & Casualty Co.*[66] refused to reverse the trial court solely because some jurors were the claimant's fellow employees or their wives, no injury being shown.

Jury Verdict. In *Texas General Indemnity Co. v. Dickschat*,[67] despite the conflicting findings that the injuries to the claimant's left shoulder and left elbow were producing causes of total permanent incapacity and that claimant's disability was confined to his left arm, the judgment of the trial court for total and permanent disability was affirmed. The court mistakenly held that the insurer had the burden to plead, prove, and request affirmative issues and secure findings that the incapacity was confined to the plaintiff's arm, apparently overlooking or disregarding the fact that the burden of proof is on the claimant on all issues.[68] The issues submitted correctly placed the burden of proof on the plaintiff and it was not necessary to submit both the affirmative and negative of the issues.

Statutory Amendments. Of special interest in connection with the current developments in the workmen's compensation field is the "Workmen's Compensation Administrative Reform Bill of 1969."[69] Most of the changes relate to the procedural duties and powers of the Board and the status of advance payments. Of particular interest, however, are three basic monetary changes. The maximum and minimum weekly benefits were increased to $49 and $12 respectively. The maximum attorney's fee for representing a claimant before the Board or in court is limited to twenty-five per cent of the amount recovered. The payment to the Board for the Second Injury Fund was also increased. These changes will doubtless furnish fuel for future litigation.

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[64] 443 S.W.2d 915 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*
[65] 442 S.W.2d 770 (Tex. Civ. App.—Beaumont 1969).
[66] 439 S.W.2d 734 (Tex. Civ. App.—Fort Worth 1969).
[67] 440 S.W.2d 922 (Tex. Civ. App.—Waco 1969), *error ref. n.r.e.*
[68] Barta v. Texas Reciprocal Ins. Ass'n, 67 S.W.2d 433 (Tex. Civ. App.—San Antonio 1933), *error ref.*
[69] Tex. Laws 1969, ch. 18, § 1, at 48.

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