Partial Incapacity under the Texas Workmen's Compensation Act

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The much amended Texas Workmen's Compensation Act was again subjected to reparative amendment by the Fifty-fifth Legislature. House Bill 433 was passed raising the maximum weekly benefits from $25.00 to $35.00[1] with a resultant increase in maximum possible compensation from $10,025 to $14,035. In addition, those sections of the act providing compensation for injuries resulting in partial incapacity were amended to alter the methods used by Texas courts to compute compensation for this type of injury.[2] The amendments are effective as to injuries occurring after September 1, 1957. In view of their departure from well established court-made law, the amendments appear likely to disinter problems which for the most part have lain dormant under the former methods of computation. One of the primary problems will be the determination of "average weekly wage earning capacity" for those injuries to be compensated under article 8306, section 11. Further, the amendment to section 12 of article 8306 may stimulate a reappraisal of the former interpretations of that section and the computation of benefits under it.

CLASSIFICATION OF INJURIES

Injuries under the Texas Workmen's Compensation Act are classified according to duration as either "temporary" or "permanent" and are further categorized as either "general" or "specific."[3] A "general" injury is usually defined as any injury not enumerated within the schedule of "specific" injuries as set out in the act and is compensated under section 10 (total incapacity) and 11 (partial incapacity).[4] Under these sections "incapacity for work" is both the contingency upon which the right to compensation depends and the measure of that compensation.[5] On the other hand, a "specific"

[1] Tex. Rev. Civ. Stat. Ann. art. 8306, §§ 8, 10, 11, 12 (Supp. 1957); Vernon's Tex. Sess. Laws 1957, c. 397, §§ 8, 10, 11, 12.

[2] Id. at §§ 11 and 12.

[3] See Clark, Commentary, 22 Tex. Rev. Civ. Stat. Ann. XVII, at XXXIX and XL (1956).

[4] Id. at XL.

[5] Tex. Rev. Civ. Stat. Ann. art. 8306 § 11 (1953) reads as follows: "While the incapacity for work resulting from the injury is partial, the association shall pay the injured employee a weekly compensation equal to sixty per cent (60%) of the difference between his average weekly wages before the injury and his average weekly wage earning capacity during the existence of such partial incapacity, but in no case more than Twenty-five Dollars ($25) per week. The period covered by such compensation shall be in no case greater than three hundred (300) weeks; provided that in no case shall the period of compensation for total and partial incapacity exceed four hundred and one (401) weeks from the date of injury." See also Texas Employers' Ins. Ass'n v. Hughey, 266 S.W.2d 456 (Tex. Civ. App. 1954) error ref. n.r.e.

injury is one enumerated under section 11a or 12, such as the loss of an eye, hand, or foot. If the injury is specifically enumerated under either section 11a or 12, the workman's right to compensation is absolute upon proof that he suffered the specified injury, irrespective of his capacity to earn wages.[6]

Although section 11 has from its enactment[7] clearly stated that compensation for partial incapacity from a general injury should be calculated by taking sixty per cent of the difference between the "average weekly wages before the injury" and the "average weekly wage earning capacity during the existence of such incapacity," the majority of Texas courts have computed the award on the basis of percentage of physical incapacity. Under this method of computation, weekly compensation was determined by multiplying the average weekly wage before injury by the percentage of disability, the compensation being sixty per cent of the result. While recognizing that it might be preferable to determine compensation on the basis of lost "earning capacity," the courts have said that there was no reason to believe that a different amount of compensation would result,[8] and that computing the weekly compensation as a percentage of incapacity was not reversible error.[9] Such decisions were founded in the belief that an impairment of the functional ability to work would inevitably result in a proportionate impairment of wage earning capacity.[10]

Some of the earlier cases did hold that allowing the jury to compute the compensation on a percentage of disability basis was reversible error,[11] or at least when the jury made a finding on both the issue of percentage disability and wage earning capacity the former was irrelevant.[12] Only two recent decisions have followed this line of reasoning. In *Texas Employers' Ins. Ass'n v. Swaim*[13] the court stated:

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[6] Texas Employers' Ins. Ass'n v. Moreno, 277 S.W. 84 (Tex. Comm. App. 1925).

[7] Acts of 1913, 33rd Leg., ch. 179, p. 429.

[8] Federal Underwriters Exchange v. Price, 145 S.W.2d 951 (Tex. Civ. App. 1940) error dism., judg. cor.

[9] Associated Indemnity Corp. v. McGrew, 138 Tex. 583, 160 S.W.2d 912 (1942); Texas Employers' Ins. Ass'n v. Spivey, 231 S.W.2d 760 (Tex. Civ. App. 1950) error ref. n.r.e.; Traders & Gen. Ins. Co. v. Robinson, 222 S.W.2d 266 (Tex. Civ. App. 1949) error ref.; Siller v. United States Fidelity & Guaranty Co., 93 S.W.2d 529 (Tex. Civ. App. 1936) error dism.

[10] Traders & Gen. Ins. Co. v. Patterson, 123 S.W.2d 769 (Tex. Civ. App. 1938).

[11] Traders & Gen. Ins. Co. v. Hicks, 94 S.W.2d 824 (Tex. Civ. App. 1936).

[12] McWhorter v. Aetna Cas. & Surety Co., 52 F. Supp. 855 (S.D. Tex. 1943); Texas Employers' Ins. Ass'n v. Reed, 150 S.W.2d 858 (Tex. Civ. App. 1941) error dism., judg. cor.; Lloyds Cas. Co. v. Meredith, 63 S.W.2d 1051 (Tex. Civ. App. 1933).

[13] 278 S.W.2d 600 (Tex. Civ. App. 1954) error ref. n.r.e.

error ref. n.r.e.

> If the legislature had intended that partial disability determine the amount of recovery, it would have stated so instead of stating that it was the difference between his average weekly wages before the injury and his average weekly wage-earning capacity during the existence of such partial incapacity.[14]

Later decisions have expressly rejected the *Swaim* decision and have continued to allow section 11 injuries to be compensated on the basis of functional disability.[15]

Disability, as recognized by the Compensation act, consists of two disparate ingredients: the first is a disability in the physical or medical sense as evidenced by inability to perform certain muscular actions or by the loss of a member of the body; the second is the lack of ability to earn wages as evidenced by not being able to work or by having a lower earning capacity.[16] It should also be recognized that the loss of wage earning capacity is not necessarily proportional to functional disability. For example, a twenty percent functional disability to a laborer's back may make it impossible for him to work and thus result in a total loss of wages. However, the same loss of functional ability by an office worker might not affect his ability to earn wages at all.[17] The distinction made here must be kept in mind when dealing with the sections on partial incapacity since it is physical incapacity which section 12 is designed to compensate[18] and the loss of wage earning capacity which section 11 compensates.[19]

In recognition of these distinctions section 11 has been re-enacted with a prohibition against equating percentage of functional disability with loss of wage earning capacity by the addition of this sentence:

> Compensation for all partial incapacity resulting from a general injury shall be computed in the manner provided in this section, and *shall not be computed on a basis of percentage of disability.* [20] (Emphasis added.)

It should be noted that this does not change the previously existing statutory law, since the section is otherwise unchanged, but

[14] Id. at 605. See also Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Gloff, 238 F.2d 839 (5th Cir. 1956).

[15] Consolidated Cas. Ins. Co. v. Newman, 300 S.W.2d 160 (Tex. Civ. App. 1957) error ref. n.r.e.; American Gen. Ins. Co. v. Bailey, 287 S.W.2d 290 (Tex. Civ. App. 1956) error ref. n.r.e.

[16] 2 Larson, Workmen's Compensation 10 (1952).

[17] 12 NACCA L.J. 58 (1953).

[18] Clark, supra note 3 at XL.

[19] Consolidated Cas. Ins. Co. v. Baker, 297 S.W.2d 706 (Tex. Civ. App. 1957) error ref. n.r.e.; United States Fidelity & Guaranty Co. v. Lewis, 266 S.W.2d 194 (Tex. Civ. App. 1954) error ref. n.r.e.

[20] Tex. Rev. Civ. Stat. Ann. art. 8306 § 11 (Supp. 1957).

merely serves to override those cases holding computation of benefits on the basis of percentage of functional incapacity not to be reversible error. The mandate to compute the compensation in the manner provided in the section would seem to require that, before a correct judgment can be entered for the claimant, the jury must find the difference between (1) his average weekly wages before the injury and (2) his average weekly wage earning capacity after injury, the compensation allowed being sixty per cent of this difference.[21]

Post-Injury Earnings

Since it is the claimant's earning *capacity* and not his earnings which constitutes the basis for compensation in general injury cases,[22] the Industrial Accident Board and the courts should take care not to confuse actual post-injury earnings with earning capacity. This differentiation is requisite in cases where the claimant returns to work after injury at the same or greater wages, for it seems well settled that economic loss is not necessary to sustain recovery for this type of injury.[23] Most Texas courts consider the return to work and the earning of wages as merely evidentiary on the question of either total or partial loss of earning capacity where there is other evidence of an actual loss of *ability* to earn wages.[24]

On the other hand, some Texas courts have held findings of temporary or permanent incapacity to be against the weight of evidence when the claimant returned to work at wages equal to or greater than those received before injury. In the case of *Lumbermen's Reciprocal Ass'n v. Coody*[25] the court acknowledged that it was "incapacity to work" upon which the right to benefits depended but held that:

> If the employee receives an injury that does not incapacitate him to work, but after receiving the injury he still has the capacity to per-

[21] Texas Employers' Ins. Ass'n v. Frankum, 145 Tex. 658, 201 S.W.2d 800 (1947); Traders & Gen. Ins. Co. v. Hicks, 94 S.W.2d 824 (Tex. Civ. App. 1936).

[22] Zurich Gen. Acc. & Liab. Ins. Co. v. Johnson, 202 S.W.2d 258 (Tex. Civ. App. 1947); Texas Employers' Ins. Ass'n v. Hughey, 266 S.W.2d 456 (Tex. Civ. App. 1954) error ref. n.r.e.

[23] Consolidated Cas. Ins. Co. v. Newman, 300 S.W.2d 160 (Tex. Civ. App. 1957); Texas Gen. Indemnity Co. v. Mannhalter, 290 S.W.2d 360 (Tex. Civ. App. 1956).

[24] Great Am. Indemnity Co. v. Segal, 229 F.2d 845 (5th Cir. 1956); Gulf Cas. Co. v. Jones, 290 S.W.2d 334 (Tex. Civ. App. 1956) error ref. n.r.e.; United States Fidelity & Guaranty Co. v. Lewis, 266 S.W.2d 194 (Tex. Civ. App. 1954) error ref. n.r.e.; Texas Employers Ins. Ass'n v. Wells, 207 S.W.2d 693 (Tex. Civ. App. 1948) error ref. n.r.e.; Traders and Gen. Ins. Co. v. Wilder, 186 S.W.2d 1011 (Tex. Civ. App. 1943) error ref.

[25] 278 S.W. 856 (Tex. Civ. App. 1926).

> form his *usual* duties and does so, for which he receives in full his *usual* wages, then he has lost nothing and his injury does not bring him within the law.[26] (Emphasis added.)

This was construed in *Employers Reinsurance Corp. v. Wagner*[27] as requiring proof of an economic loss. In the *Wagner* case the workman returned to a job requiring greater physical effort and received higher wages than before his injury. A finding of permanent partial incapacity was reversed in view of the "undisputed evidence" of his ability to perform more difficult tasks at higher wages. Likewise in the *Swaim* case a finding of fifty per cent permanent incapacity was reversed where the workman had returned to his same job at the same pay.[28]

In some jurisdictions it is held that post-injury earnings equal to those received before injury create a presumption against loss of earning capacity.[29] It was reasoned in *Commercial Cas. Ins. Co. v. Strawn*[30] that:

> The fact that he [an employee] may have returned to his same job at the same price does not as a matter of law establish the fact that he is not partially disabled. Said fact may be taken into consideration by the jury in determining whether the employee is partially disabled, and, if so, to what extent; and, if there is no other evidence of partial disability then . . . it might be held as a matter of law that the employee had not been partially disabled.[31]

Thus, though never formalized in terms of presumptions, it would seem that failure to explain post-injury earnings will defeat the recovery of benefits.

Rebutting Presumption Raised by Earnings

Although post-injury earnings may be strong evidence of the extent of earning capacity, this may be rebutted by evidence that they do not reflect the employee's actual capacity.[32] For example, where it was shown that the intervention of war between the time of injury and the return of the employee to work caused a rise in the general wage levels, a finding of total permanent incapacity was

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[26] Id. at 857.

[27] 250 S.W.2d 420 (Tex. Civ. App. 1952).

[28] 278 S.W.2d 600 (Tex. Civ. App. 1954) error ref. n.r.e.

[29] "[P]ost-injury earnings and earning capacity are not synonymous. Earnings equal to pre-injury earnings are the strongest evidence of non-impairment of capacity, but they are not conclusive. In most jurisdictions their effect seems to be to create a presumption which may be overcome by other evidence showing that the actual earnings do not fairly reflect claimant's capacity." 2 Larson, Workmen's Compensation 10 (1952).

[30] 44 S.W.2d 805 (Tex. Civ. App. 1931) error ref.

[31] Id. at 807.

[32] See note 29 supra.

sustained despite an increase in the actual earnings.[33] If it can be proved that the post-injury earnings are a gift from his employer, the employee will not be deprived of benefits "just because his employer, out of the goodness of his heart, has seen fit to pay his wages . . . and has kept him on the payroll allowing him to do light work."[34] Evidence that the employee has been given lighter work or that his co-employees have assisted him with the heavier work is usually sufficient to rebut any inference of non-loss of capacity raised by post-injury wages.[35]

Evidence that actual earnings are not indicative of capacity may be established by proof that the employment is only temporary and that should the job be lost an employment physical for another could not be passed.[36] A judgment for permanent partial incapacity was affirmed for an injured electrician who had returned to work in a supervisory capacity at higher wages on the basis of such proof in *Texas Employers Ins. Ass'n. v. Taylor.*[37] The court held that:

> Although one may be able to serve in a supervisory capacity at a higher rate of pay, a showing that such positions are not always available nor as common as jobs requiring journeymen and working foremen, will support a finding of partial incapacity.[38]

Finally, proof that the claimant worked not because he was physically capable of doing so but under the compulsion of necessity will rebut any inference that wages earned are a true reflection of earning capacity.[39] "Pinched by poverty, beset by adversity, driven by necessity, one may work to keep the wolf away from the door though not physically able to work," and the jury will not be prevented from finding from the evidence before them that the employee is disabled.[40]

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[33] "It is for the loss of earning capacity that the workman is entitled to recover compensation. And the fact that a workman may, by reason of unusual conditions, be able to earn more with an impaired earning capacity than he could have earned under preceding conditions with an unimpaired earning capacity . . . is no obstacle to recovery for the impairment of his earning capacity sustained by reason of the injury . . . the accidental rise or fall of wages actually earned after injury was not made the criterion, but an impairment of capacity resulting in ability to do only work of a less remunerative class." Texas Employers' Ins. Ass'n v. Mallard, 192 S.W.2d 302, 303 (Tex. Civ. App. 1946) error ref. n.r.e.

[34] Trinity Universal Co. v. Rose, 217 S.W.2d 425 (Tex. Civ. App. 1949) error ref. n.r.e.

[35] Great Am. Indemnity Co. v. Segal, 229 F.2d 845 (5th Cir. 1956); Consolidated Cas. Ins. Co. v. Newman, 300 S.W.2d 160 (Tex. Civ. App. 1957) error ref. n.r.e.

[36] Consolidated Cas. Ins. Co. v. Newman, supra note 35; Consolidated Cas. Ins. Co. v. Baker, 297 S.W.2d 706 (Tex. Civ. App. 1957) error ref. n.r.e.; Hartford Acc. & Indemnity Ins. Co. v. Miller, 5 S.W.2d 181 (Tex. Civ. App. 1928) error dism.

[37] 276 S.W.2d 901 (Tex. Civ. App. 1955) error ref. n.r.e.

[38] Ibid.

[39] Ass'n Indemnity Corp. v. Potts, 164 F.2d 1002 (5th Cir. 1947); Texas Employers Ins. Ass'n v. Pillow, 268 S.W.2d 716 (Tex. Civ. App. 1954) error ref. n.r.e.; Texas Employers Ins. Ass'n v. Mallard, 192 S.W.2d 302 (Tex. Civ. App. 1946) error ref. n.r.e.

[40] Mabry v. Travelers Ins. Co., 193 F.2d 497 (5th Cir. 1952).

It can easily be seen that where the employee has returned to work at greater wages than before injury a difficult fact situation will present itself as to whether there has been any actual reduction in wage earning *capacity*. The courts may no longer solve the problem by resorting to a finding of percentage of physical incapacity. Although post-injury earnings may be strong evidence of commensurate earning capacity, their reliability as a yardstick may be rebutted by showing that they were due to unusual circumstances.[41] Having heard medical testimony of functional disability and testimony as to wage loss the jury must translate these totally different elements into a finding of average weekly wage earning capacity expressed in dollars and cents. Perhaps this is best done through a special issue such as that approved in the *Swaim* case[42] and accompanied by an instruction that they are to determine what would be paid to the claimant in his injured condition in competition with physically sound men in an open labor market.

Specific Injuries

Compensation for the loss of different members of the body is provided in the Compensation act in section 12, which contains a schedule of definite compensation to be paid for a specified number of weeks for the loss of each member listed in the schedule and provides that loss of the use of a member shall be equivalent to loss of the member.[43] Under this section the claimant is entitled to sixty per cent of his average weekly wages for the specified number of weeks. The right to receive benefits for the loss of an enumerated

[41] 2 Larson, Workmen's Compensation 6 (1952).

[42] "What sum of money do you find from a preponderance of the evidence constitutes the average weekly wage earning capacity of plaintiff, T. G. Swaim, subsequent to May 4, 1952 [date of the alleged injury]? Answer in dollars, if any, and cents, if any." 278 S.W.2d 600 at 604.

[43] The text of § 12 states: "For the injuries enumerated in the following schedule the employee shall receive in lieu of all other compensation except medical aid, hospital services and medicines as elsewhere herein provided, a weekly compensation equal to sixty per cent (60%) of the average weekly wages of such employee, but not less than Nine Dollars ($9) per week nor exceeding Twenty-five Dollars ($25) per week, for the respective periods stated herein, to wit:

[Herein follows a schedule of nineteen specific injuries such as the loss of a finger, hand, foot, leg, or arm and the number of weeks compensation to be paid for each.]

"In the foregoing enumerated cases of permanent, partial incapacity, it shall be considered that the permanent loss of the use of a member shall be equivalent to and draw the same compensation as the loss of that member.

[Herein is contained a list of five sets of concurrent injuries.]

"In all cases of permanent partial incapacity it shall be considered that the permanent loss of the use of the member is equivalent to, and shall draw the same compensation as, the loss of that member; but the compensation in and by said schedule provided shall be in lieu of all other compensaton in such cases."

member is absolute and the claim is not defeated by a showing that the injured person has suffered no incapacity to labor.[44] On the other hand, where injury results to a particular member of the body, compensation for the loss of which is specifically provided by the statute, liability is limited to that amount, even though the injury actually results in total permanent incapacity of the employee to labor.[45]

However, if the injury to a specific member extends to and affects other portions of the body and causes incapacity, compensation is recoverable for the greater injury and may exceed the amount provided for in section 12, for in such a case the claimant is entitled to compensation for a general injury.[46] Likewise if an injury was originally inflicted on a specific member, but it injuriously affects another specific member, compensation will be allowed for the greater.[47] Thus where it was shown that an initial injury to a foot had spread and caused incapacity to the leg, the injured person was allowed compensation for the leg, which affords a greater compensation than the injury to the foot.[48]

Before recovery will be allowed for the greater specific member (*i.e.*, loss of the leg) it must be shown that there was impairment other than that merely resulting from the loss of the use of the lesser member (the foot). The injury must "extend to and affect" the greater member.[49] When the greater member was impaired only by the extension from an injury to the lesser member, the claimant may recover only for the greater, not separately for each,[50] since the lesser is a unit of the greater. On the other hand, should two distinct injuries be coexistent (*e.g.*, a general injury to the head and specific injuries to the legs) alternative rights of recovery will arise and the

[44] Texas Employers Ins. Ass'n v. Thrash, 136 S.W.2d 905 (Tex. Civ. App. 1940) error dism., judg. cor.; Texas Employers Ins. Ass'n v. Pierson, 135 S.W.2d 550 (Tex. Civ. App. 1940).

[45] Consolidated Underwriters v. Langley, 141 Tex. 78, 170 S.W.2d 463 (1943); American Gen. Ins. Co. v. Beare, 225 S.W.2d 454 (Tex. Civ. App. 1949) error ref. n.r.e.; Traders & Gen. Ins. Co. v. Jones, 201 S.W.2d 105 (Tex. Civ. App. 1947) error ref. n.r.e.; Russell v. United Employers Cas. Co., 158 S.W.2d 575 (Tex. Civ. App. 1941) error ref. w.o.m.

[46] Great Am. Indemnity Co. v. Sams, 142 Tex. 121, 176 S.W.2d 312 (1944); Consolidated Underwriters v. Langley, supra note 45; Standard Acc. Ins. Co. v. Williams, 142 S.W.2d 1015 (Tex. Comm. App. 1929); Texas Employers Ins. Ass'n v. Polk 269 S.W.2d 582 (Tex. Civ. App. 1954) error ref. n.r.e.

[47] Meyer v. Great Am. Indemnity Co., — Tex. —, 279 S.W.2d 575 (1955).

[48] Traders & Gen. Ins. Co. v. Marrable, 126 S.W.2d 746 (Tex. Civ. App. 1939) error dism.; Maryland Cas. Co. v. Donnelly, 50 S.W.2d 388 (Tex. Civ. App. 1932) error dism.

[49] Texas Employers Ins. Ass'n v. Brownlee, 152 Tex. 247, 256 S.W.2d 76 (1953).

[50] Lumbermen's Reciprocal Ass'n v. Pollard, 10 S.W.2d 982 (Tex. Comm. App. 1928).

award will be given for the greatest benefits the nature of the injuries will sustain.[51]

The foregoing general principles are considered controlling in determining whether an injury is to be compensated as general or specific. When a specific injury consists of the amputation or the *total permanent* loss of use of one of the enumerated members, compensation is a simple matter of taking sixty per cent of the average weekly wages for the specified number of weeks under those portions of section 12 set forth in footnote 39. On the other hand, when the specific injury is in the nature of a partial loss of use of an enumerated member the question arises whether such compensation is to be made under the first portion of section 12[52] or under the last paragraph of that section.[53]

The question of whether the award for partial loss or partial loss of use of one of the members enumerated in the schedule of section 12 should be made under the schedule itself or under the last paragraph of section 12 is of obvious importance since its resolution determines both the duration and the amount of the compensation.

Under the schedule it is provided that "the permanent loss of the use of the member is *equivalent* to, and shall draw the same compensation as, the loss of that member." (Emphasis added.) The earlier decisions held that partial loss of the use of an enumerated member was not compensable under this provision but under the last paragraph.[54] It was held that:

> . . . a careful reading of section 12 discloses that these specific recoveries [injuries to an enumerated member] are limited either to the loss of a member or the permanent loss of its entire usefulness. There is nothing in section 12, prior to its last paragraph, allowing recovery

[51] Hargrove v. Trinity Universal Ins. Co., 152 Tex. 243, 256 S.W.2d 73 (1953).

[52] Those portions are set out in footnote 43.

[53] The last paragraph of § 12 read: "In all other cases of partial incapacity, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employee, compensation shall be determined according to the percentage of incapacity, taking into account among other things any previous incapacity, the nature of the physical injury or disfigurement, the occupation of the injured employee, and the age at the time of injury. The compensation paid therefor shall be sixty per cent (60%) of the average weekly wages of the employees but not to exceed Twenty-five Dollars ($25) per week, multiplied by the percentage of incapacity caused by the injury for such period not exceeding three hundred (300) weeks as the board may determine. Whenever the weekly payments under this paragraph would be less than Three Dollars ($3) per week, the period may be shortened, and the payments correspondingly increased by the board."

[54] Maryland Cas. Co. v. Laughlin, 29 F.2d 343 (5th Cir. 1928); Millers' Indemnity Underwriters Corp. v. Cahal, 257 S.W. 957 (Tex. Civ. App. 1924); Maryland Cas. Co. v. Ferguson, 252 S.W. 854 (Tex. Civ. App. 1923) error ref.; Western Indemnity Co. v. Milam, 230 S.W. 825 (Tex. Civ. App. 1921) error ref.

for the temporary or permanent partial loss of the usefulness of an arm.[55]

Those courts which held that partial loss of the usefullness of an enumerated member was to be compensated under the last paragraph of section 12 were then faced with the necessity of determining amount of maximum weekly compensation.[58]

> The compensation paid therefore shall be sixty per cent (60%) of the average weekly wages of the employees *but not to exceed Twenty-five Dollars* ($25) *per week,* multiplied by the percentage of incapacity caused by the injury . . .[56] (Emphasis added.)

By some courts the phrase "not to exceed Twenty-Five Dollars" was interpreted to limit sixty per cent of the average weekly wages to twenty-five dollars per week and that the ultimate compensation was fixed by multplying this by the percentage of incapacity.[57] By other courts it was held that the phrase served to limit only the amount of maximum weekly compensation.[58]

In a series of four opinions over a like number of years the Texas Commission of Appeals seemingly resolved the question of whether partial loss of use of an enumerated member was to be compensated under the schedule or the last paragraph of section 12. In view of their importance it would seem that they deserve close analysis. In *Lumbermen's Reciprocal Ass'n v. Pollard*[59] the jury had found that the claimant had suffered a 75 per cent disability to his right hand and a 65 per cent disability to his right arm, and that each of these disabilities was permanent. The Court of Civil Appeals held that since the claimant had lost neither hand nor arm nor the total use of either, recovery could not be had under the specific injury provision of that statute, but should be governed by the last paragraph of section 12.[60] The Commission of Appeals quoted schedule provisions of section 12[61] and stated:

> . . . We think the injury in this case falls under the *next to the last paragraph of section* 12 of article 8306 . . . we think it was contemplated by the provision above quoted the next to the last paragraph of section 12 that, if a person lost the complete use of a member, it should

[55] Texas Employers Ins. Ass'n v. Moreno, 277 S.W. 84 (Tex. Comm. App. 1925).
[56] Tex. Rev. Civ. Stat. Ann. art. 8306, § 12 (1953).
[57] Western Indemnity Co. v. Milam, 230 S.W. 825 (Tex. Civ. App. 1925); Millers' Indemnity Underwriters Corp. v. Cahal, 257 S.W. 957 (Tex. Civ. App. 1924).
[58] Maryland Cas. Co. v. Laughlin, 29 F.2d 343 (5th Cir. 1928); Dohman v. Texas Employers' Ins. Ass'n, 285 S.W. 848 (Tex. Civ. App. 1926); Maryland Cas. Co. v. Ferguson, 252 S.W. 854 (Tex. Civ. App. 1923) error ref.
[59] 10 S.W.2d 982 (Tex. Comm. App. 1928).
[60] 295 S.W. 279 (Tex. Civ. App. 1927).
[61] The portions cited by the court were those contained in footnote 43.

> be considered the same as if the member had been amputated, and further, that, if the person has a permanent partial incapacity to a member, he should receive the compensation provided in section 12 for the loss of the specific member proportioned to the percentage of incapacity which the loss sustained would bear to the total loss of the member.[62] (Emphasis added.)

In the case of *Petroleum Cas. Co. v. Seale*[63] the claimant suffered an injury to his foot. There was no allegation that the injury extended to any other portion of the body, but there was an allegation that the claimant was totally and permanently disabled. The jury found that he had suffered 85 per cent permanent incapacity to labor and the Court of Civil Appeals affirmed a judgment for 300 weeks as being proper under the last paragraph of section 12.[64] The Commission of Appeals reversed, holding that the injury was covered by the schedule and that a permanent partial incapacity to a specific member of the body must be compensated at the same rate provided for the loss of the member, multiplied by the percentage of incapacity found to exist.

The *Seale* case was expressly approved by the Supreme Court in *Texas Employers' Ins. Ass'n v. Maledon.*[65] Again an award for 300 weeks under the last paragraph for partial loss of the use of a specific member was reversed and the claimant was restricted to that period specified for his injury in the schedule. The next to the last paragraph was referred to by the Court and was held to provide the measure of compensation.

In *Fidelity Union Cas. Co. v. Munday*[66] judgment had been entered for the claimant for 15 weeks temporary total loss of the use of his hand and an additional 135 weeks for permanent partial loss of use. The judgment of the trial court was affirmed by the Commission of Appeals which stated:

> With regard to a permanent partial loss of the use of a hand, it has been repeatedly held, in effect, that such a loss comes within the purview of the above provisions the schedule and the next to the last paragraph of section 12 and that payment of compensation each week, as there provided, is required to be made in the proportion that the use of the hand is permanently lost. . . . In conference with the Supreme Court, we have been authorized to declare all holdings to the contrary, in other cases overruled.[67]

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[62] 10 S.W.2d 982 at 982-83.
[63] 13 S.W.2d 364 (Tex. Comm. App. 1929).
[64] Petroleum Cas. Co. v. Seale, 4 S.W.2d 90 (Tex. Civ. App. 1928).
[65] 27 S.W.2d 151 (Tex. Comm. App. 1930).
[66] 44 S.W.2d 926 (Tex. Comm. App. 1932).
[67] Id. at 928.

With regard to the temporary total loss of the use, the Commission held that this was contemplated by the same provisions and that the duration of the loss should control the number of weeks compensation subject to the same time limitations as in the case of permanent loss of use. Thus it seemed settled that temporary total and permanent partial loss of the use of a member was to be compensated under the schedule of injuries contained in section 12 rather than under the last paragraph.[68]

The Holmes Decision

In 1946 the case of *Texas Employers Ins. Ass'n v. Holmes*[69] came before the Supreme Court. Holmes was a welder with an average weekly wage of $95.24. The jury found that he had suffered a thirty-five per cent permanent partial loss of the use of his right leg. It should be noted that this was the same type of injury that was considered in the preceding cases. All parties agreed that under the schedule 200 weeks was the applicable period of compensation, but disagreed as to the computation of the award. The case was brought before the Court on a certified question seeking an interpretation of the last paragraph of section 12. The question was: Should the weekly compensation to be paid the employee, for thirty-five per cent permanent partial loss of use of his leg, be $20.00 (the statutory maximum at that time) instead of thirty-five per cent of the maximum or $7.00 per week? It seems that the attorneys for both sides, as well as the majority of the Court, assumed that the last paragraph of section 12 was controlling. In a five to four decision the Court held that the phrase "but not to exceed . . ." contained in the last paragraph served as a limitation on the final compensation to be paid and not as a limitation on the intermediate figure of sixty per cent of the average weekly wage. Therefore, since sixty per cent of his average weekly wage multiplied by the percentage of disablity exceded that maximum, Holmes was held to be entitled to the maximum compensation.

Justice Folley in a dissent joined by Justices Hickman and Brewster recognized that the last paragraph was not applicable to such an injury. He argued:

> That the injury here involved is not governed by the last paragraph of the section, but by previous paragraphs thereof, is no longer an open question in this state. This has been definitely settled by decisions

[68] Texas Employers Ins. Ass'n v. Patterson, 144 Tex. 573, 192 S.W.2d 255 (1946); Great Am. Ins. Co. v. Shultz, 56 S.W.2d 200 (Tex. Civ. App. 1932) error ref.
[69] 145 Tex. 158, 199 S.W.2d 390 (1946).

> which have the express or implied approval of this court, and all of which involve the same character of injury with which we are presently dealing.[70]

Compensation for this type of injury, he said, was to be computed under the first paragraph of the section and under those paragraphs providing that "in all cases of permanent partial incapacity . . . the permanent partial loss of use of the member is equivalent to . . . the loss of that member."

During the last legislature section 12 was amended to allow thirty-five dollars per week maximum compensation and the final paragraph was amended to nullify the *Holmes* interpretation of the phrase "but not to exceed. . . ."[71] It is now provided that:

> The compensation paid therefore shall be calculated . . . by first determining a basic figure amounting to sixty per cent (60%) of the average weekly wages of the employee, but which basic figure shall not exceed Thirty-five Dollars ($35); such basic figure shall then be multiplied by the percentage of incapacity caused by the injury, and the result shall be the weekly compensation which shall be paid for such period not exceeding three hundred (300) weeks. . . .[72]

Thus it seems clear that with regard to those injuries to which the last paragraph of section 12 applies, if sixty per cent of the average weekly wage exceeds the maximum of thirty-five dollars it must first be reduced to the maximum and then multiplied by the percentage of incapacity.

It is submitted, however, that in view of the *Pollard, Seale, Maledon,* and *Munday* cases, this last paragraph and the amendment thereto is not applicable to either temporary total or permanent partial loss of use of an enumerated member. Section 12 under the schedule provides that "in all cases of permanent partial incapacity, . . . the permanent loss of use of the member is equivalent to . . . the loss of the member." The Commission of Appeals and the Supreme Court held in the foregoing cases that this phrase contemplated temporary total and permanent partial loss of use as well as total permanent loss of use.[73] This writer's research reveals nothing that would indicate that these cases are not still effective.

When the final paragraph is considered in relation to the schedule of section 12, it will be seen that it contains elements entirely for-

[70] Id. at 400.
[71] Vernon's Tex. Sess. Laws 1957, c. 397, § 12.
[72] Ibid.
[73] The Supreme Court seems to have re-affirmed these principles in Texas Employers Ins. Ass'n v. Patterson, 144 Tex. 573, 192 S.W.2d 255 (1946).

eign to the concept of enumerated injuries. For the injuries included in the last paragraph it is provided that the compensation shall be determined according to the percentage of incapacity. In determining this percentage the Industrial Accident Board is permitted by the paragraph to take into consideration the impairment of occupational opportunty, the occupation of the injured employee, and his age at the time of the injury. Yet all of these factors are immaterial in determining the compensation for the injuries specified in the other paragraphs of section 12. The final paragraph allows a flexible and changing compensation period according to the facts of the case, but the compensation period for those injuries contained in the schedule is definitely fixed by that schedule. It can be seen that these factors, immaterial to the computation of award for a scheduled injury, set this paragraph apart from the preceding portions of the section.[74]

If then compensation for permanent partial loss of use of an enumerated member is to be controlled by the first paragraph and the next to the last paragraph of section 12, as held in the *Munday* case, it must be determined what the compensation will be when sixty per cent of the average weekly wage proportioned to the percentage of permanent loss of use exceeds the statutory maximum. It is submitted that when sixty per cent of the average weekly wage is multiplied by the percentage of incapacity and this amount exceeds the maximum permissable rate, the injured workman is entitled to receive the maximum rate for the period specified. Unlike its last paragraph, section 12 begins: "For the injuries enumerated in the following schedule the employee shall receive . . . a weekly compensation equal to sixty per cent (60%) of the average weekly wages of such employee, but not . . . exceeding Thirty-five Dollars per week. . . ." It would seem that the only limitation is placed upon the compensation actually paid.

The fact that a workman with only a permanent partial loss of use of a member would receive the same compensation as a workman whose member had been amputated should not prove a bar to this interpretation. In this section as well as in sections 10 and 11 the legislature has set a maximum limit above which compensation cannot go. If under section 10 a workman earning $120 per week and another earning $60 per week each suffers total permanent impairment, both would receive the $35 maximum although one has suffered twice the loss of the other. Similar illustrations might be

[74] Texas Employers Ins. Ass'n v. Holmes, 145 Tex. 158, 196 S.W.2d 390, 402 (1946) dissent.

drawn from section 11 concerning loss of earning capacity. This is true not because of any possible misinterpretations of the statute, but because the act prescribes maximum benefits.[75]

"All Other Cases of Partial Incapacity"

If the final paragraph of section 12 is not referable to partial loss of use of an enumerated member, to what then is it applicable? It has been seen that sections 10 and 11 provide compensation for general injuries from which the workman suffers a loss of earning capacity. The schedule of section 12 specifically covers the severance or total permanent loss of use of those members enumerated. The schedule has been interpreted to cover temporary total and permanent partial loss of use. It has been said that:

> In the concluding paragraph of section 12, the Legislature in the phrase "in all other cases of partial incapacity" was referring to all cases of partial physical incapacity other than those set forth in the schedule, meaning any injury to a non-enumerated part of the body, and also any that affected the body generally. . . . Thus compensation for any injury affecting the body in general is provided for by the last paragraph of section 12, if no economic disadvantage results from the injury, while compensation is provided for such a general injury under section 10 or 11, if there is impairment of wage earning.[76]

Justice Folley writing in his dissent in the *Holmes* decision was of a similar opinion:

> It is therefore obvious that the last paragraph of section 12 is an independent provision intended to apply only to such cases of partial incapacity as are not specified in other portions of the section. If I may be permitted to speculate, when we have some injury less than general, such as the amputation of an ear or a nose, or where some similar injury or disfigurement not specified in the section impairs the *future* usefulness or occupational opportunities of an employee, then, and not until then, will the last paragraph of section 12 become pertinent.[77] (Emphasis added.)

If the final paragraph is interpreted in this manner then the mandate for the Board to consider impairment of future usefulness or occupational opportunities, the nature of the physical injury, the occupation, and the age of the injured employee takes on meaning where before it had none.

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[75] Industrial Acc. Bd. v. Glenn, 144 Tex. 573, 190 S.W.2d 805, 810 (1945) dissent; Associated Indemnity Corp. v. McGrew, 138 Tex. 583, 160 S.W.2d 912 (1942).

[76] Lawler, Texas Workmen's Compensation Law 234 (1938).

[77] Texas Employers Ins. Ass'n v. Holmes, 145 Tex. 158, 196 S.W.2d 390, 402 (1946) (dissent).

Conclusion

Interpreting the act in this manner it would seem a complete and comprehensive scheme of compensation. A workman suffering a general injury and a loss of wage earning capacity will be compensated under sections 10 or 11. The workman suffering either the total or partial loss, or total or partial loss of use, of a member or members enumerated in the act would receive benefits under the schedule of section 12. An injury resulting in impairment of future occupational opportunities or capacity, but suffering no present loss if not covered by the schedule would turn to the final paragraph of section 12 for relief. It is believed that such an interpretation furthers the objective of providing speedy and equitable compensation for every injury.

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