



3-1-1969

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Recommended Citation

Leslie H. Williams Jr., *Continuing Problems of Travel and Transportation.*, 1 ST. MARY'S L.J. (1969).
Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol1/iss1/6>

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CONTINUING PROBLEMS OF TRAVEL AND TRANSPORTATION

LESLIE H. WILLIAMS, JR.

I. INTRODUCTION

The Texas Workmen's Compensation Act seeks to protect the employee by assuring him of a speedy and inexpensive means of applying for relief and by providing adequate compensation for injuries sustained in the course of his employment.¹ The act is based on the theory that the burden of industrial accidents should properly be borne by industry as a part of the cost of production.² One of the most perplexing questions in workmen's compensation litigation is: was the workman injured while acting within the scope of his employment?³ Travel and transportation cases present a recurring problem in determining whether an injury was sustained while in the course of employment.

The increasing number of travel-oriented injuries involving scope of employment resulted in an amendment⁴ to the Workmen's Compensation Act which restricts the interpretation in this area. The enactment provided the courts with guidelines to follow in deciding course and scope of employment injuries under the facts of each particular case.⁵

This comment will examine this feature of the Texas Workmen's Compensation Act, particularly with relation to the scope of employment problem. Special emphasis will be given to recent Texas cases interpreting the transportation and travel amendment.

II. DEVELOPMENT OF WORKMEN'S COMPENSATION ACTS

"Workmen's compensation is not an outgrowth of the common law or of employers' liability legislation; it is the expression of an entirely new social principle having its origins in nineteenth century Germany."⁶ In the United States at the end of the nineteenth century, the

¹ TEX. REV. CIV. STAT. ANN., arts. 8306-8309; *Woolsey v. Panhandle Refining Company*, 131 Tex. 449, 116 S.W.2d 675 (1938); *Fidelity & Casualty Company of New York v. McLaughlin*, 134 Tex. 613, 135 S.W.2d 955 (1940).

² *Miller's Mutual Casualty Company v. Hoover*, 235 S.W. 863 (Tex. Comm'n App. 1921, jdgmt adopted); *Moore v. Lumberman's Reciprocal Association*, 258 S.W. 1051 (Tex. Comm'n App. 1924, jdgmt adopted); *General Accident Fire and Life Assurance Corporation v. Evans*, 201 S.W. 705 (Tex. Civ. App.—Dallas 1918, no writ); *Southern Surety Company v. Inabnit*, 1 S.W.2d 412 (Tex. Civ. App.—Eastland 1927, no writ); *Federal Surety Company v. Ragle*, 40 S.W.2d 63 (Tex. Comm'n App. 1931, jdgmt adopted).

³ 21 Sw. L.J. 81 (1967).

⁴ TEX. REV. CIV. STAT. ANN., art. 8309, § 1b (1957).

⁵ *Wynn v. Southern Surety Company*, 26 S.W.2d 691 (Tex. Civ. App.—Waco 1930, writ ref'd); *Cercy v. Trader's & General*, 142 S.W.2d 512 (Tex. Civ. App.—El Paso 1940, writ ref'd).

⁶ 1 Larson, *Workmen's Compensation Law* 33, § 5.00 (1968).

coincidence of increasing industrial injuries and decreasing remedies produced a situation ripe for radical change.⁷ Legislation throughout the United States used the German system as a guide to the direction which efforts at reform might take.⁸ Various investigations ensued which ultimately resulted in the drafting of a Uniform Workmen's Compensation Law.⁹ Although numerous state acts which followed were not uniform, the progress of the investigations did much to set a fundamental pattern of legislation.¹⁰ In 1913, the Texas Legislature passed the Workmen's Compensation Act¹¹ modeled after a Massachusetts statute.¹² The law was amended in 1917,¹³ borrowing freely from various statutes and embracing features not found in any other act; in effect it constituted a substitute statute.¹⁴

III. PURPOSE AND SCOPE OF WORKMEN'S COMPENSATION LAW

It is the intent of the workmen's compensation law to protect the employee against the risk or hazard taken in order to perform his master's tasks.¹⁵ Any injury sustained as a result of such risk or hazard must be sustained in the course of employment¹⁶ and originate in the work of the employer to be compensable.¹⁷ By statutory provision¹⁸ course of employment includes all injuries, of every kind and character, that deal with and originate in the work, business, trade, or profession of the employer which are sustained by an employee while engaged in or about the furtherance of the affairs or business of his employer, whether the injuries occurred on the employer's premises or elsewhere. Basically, the judicial tests under section 1 of article 8309 have remained constant for more than forty years.¹⁹ To recover for an

⁷ *Id.* See § 5.20, p. 37.

⁸ *Id.*

⁹ 1 Larson, *Workmen's Compensation Law* 37, § 5.20. (1968); Boyd, *Compensation for Injuries to Workmen*, pp. 17-22 (1913).

¹⁰ 1 Larson, *Workmen's Compensation Law* 37, § 5.20 (1968).

¹¹ Gen. Laws 1913, 33d Leg. ch. 179, p. 429.

¹² *Wm. Cameron & Company v. Gamble*, 216 S.W. 459 (Tex. Civ. App.—Austin 1919, no writ).

¹³ Gen. Laws 1917, 35th Leg. ch. 103, p. 269.

¹⁴ *Wm. Cameron & Company v. Gamble*, 216 S.W. 459 (Tex. Civ. App.—Austin 1919, no writ).

¹⁵ *Pace v. Appanoose County*, 184 Iowa 498, 168 N.W. 916, 918 (1918); *Texas Employers Insurance Association v. Grammer*, 157 S.W.2d 701, 704 (Tex. Civ. App.—Dallas 1941, writ ref'd w.o.m.); *Liberty Mutual v. Nelson*, 142 Tex. 370, 178 S.W.2d 514, 516 (1944).

¹⁶ TEX. REV. CIV. STAT. ANN., art. 8306, § 3b (1917) provides:

If an employe who has not given notice of his claim of common law or statutory rights of action, or who has given such notice and waived the same, sustains an injury in the course of his employment, he shall be paid compensation by the association as hereinafter provided, if his employer is a subscriber at the time of the injury.

¹⁷ TEX. REV. CIV. STAT. ANN., art. 8309, § 1 (1959).

¹⁸ *Id.*

¹⁹ *North River Insurance Company v. Hubbard*, 391 F.2d 863, 865 (5th Cir. 1968).

injury, the employee must show two factors: (1) that at the time of injury, he was engaged in or about the furtherance of his employer's affairs or business, and (2) the injury was of a kind and character that dealt with and originated in the employer's work, business, trade or profession.²⁰ The wording of the Texas statute is different from that of the English Acts of 1897 and 1906 and most American statutes, which provide for compensation in case of personal injury by accident "arising out of and in the course of the employment." The phrase "having to do with and originating in the work," is in effect the same as the expression "arising out of the employment,"²¹ though the statute does not use these specific terms.²² Liability is not based on the act or omission of the employer,²³ nor on the absence of fault on the part of the employee,²⁴ rather it is based on the existence of the employer-employee relationship.²⁵ A compensable injury, therefore, must not only be received in the course of employment but must also arise out of the employment. Neither requirement alone is sufficient.²⁶

As a general rule, an employee discharges his duties of employment during working hours and on his employer's premises.²⁷ Ordinarily if he is injured after his working hours or while he is engaged in personal pursuits, whether on the public highway or elsewhere, the injury is not compensable.²⁸ Risks that are incidental to employment however

²⁰ *Shelton v. Standard Insurance Company*, 389 S.W.2d 290, 292 (Tex. Sup. 1965); *Texas General Indemnity Company v. Bottom*, 365 S.W.2d 350, 352-3 (Tex. Sup. 1963); *Smith v. Texas Employers' Insurance Association*, 129 Tex. 573, 105 S.W.2d 192, 193 (1937); *Texas Indemnity Insurance Company v. Clark*, 125 Tex. 96, 81 S.W.2d 67, 69 (1935); *Aetna Life Insurance Company v. Burnett*, 283 S.W. 783, 784 (Tex. Comm'n App. 1926, jdgmt adopted); *Liberty Mutual Insurance Company v. Preston*, 399 S.W.2d 367, 372 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.).

²¹ *Cassell v. United States Fidelity & Guaranty Company*, 115 Tex. 371, 283 S.W. 127, 46 A.L.R. 1137 (1926); the court in *United States Casualty Company v. Hampton*, 293 S.W. 260, 262 (Tex. Civ. App.—Texarkana 1927, no writ) stated that:

The words "out of" point to origin and cause of accident or injury; words "in course of" to time, place, and circumstances under which the accident or injury takes place.

²² *Lumberman's Reciprocal Association v. Behnken*, 112 Tex. 103, 246 S.W. 72 (1922); *Consolidated Underwriters v. Saxon*, 250 S.W. 447 (Tex. Civ. App.—Beaumont 1923, rev'd on other grounds, 265 S.W. 143).

²³ *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366 (1923).

²⁴ *United Employers Casualty Company v. Barker*, 148 S.W.2d 260 (Tex. Civ. App.—San Antonio 1941, no writ).

²⁵ *Gulf Casualty Company v. Tucker*, 201 S.W.2d 81 (Tex. Civ. App.—Beaumont 1947, no writ); *Texas Employers Insurance Association v. Andrews*, 130 Tex. 502, 110 S.W.2d 49 (1937); *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366 (1923).

²⁶ *American Motorists Insurance Company v. Steel*, 229 S.W.2d 386 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

²⁷ *Royalty Indemnity Company v. Madrigal*, 14 S.W.2d 106 (Tex. Civ. App.—Beaumont 1929, no writ); *Texas Employers' Insurance Association v. Herron*, 29 S.W.2d 524 (Tex. Civ. App.—Waco 1930, writ dism'd by agr.); *Kinard v. American Employers Insurance Company*, 318 S.W.2d 713 (Tex. Civ. App.—El Paso 1958, writ ref'd), 56 A.L.R. 859 (1928), 69 A.L.R. 1121 (1930).

²⁸ Cases cited note 27 *supra*.

are not always so circumscribed as to time and place.²⁹ The statute does not require that the injury be sustained on the employer's premises to be compensable.³⁰ It is sufficient that the injury results from a risk necessarily, ordinarily, or reasonably inherent in or incident to the conduct of the work.³¹ The mere fact that an injury was sustained on a highway and not on employer's premises will not necessarily preclude recovery; recovery is available if the injury meets the requirements of the statute.³²

IV. TRAVEL AND TRANSPORTATION—ARTICLE 8309, SEC. 1b

The law governing transportation or travel as the basis for the employee's claim in Texas is found in Article 8309, section 1b.³³ Section 1b was added to the Texas Workmen's Compensation Act as an amendment by the 1957 Legislature in an attempt to clarify the rules set out in numerous cases involving travel and transportation. The Fifth Circuit in *North River Insurance Company v. Hubbard*³⁴ viewed section 1b as a reconciliation of the section 1 tests with the special problems of travel risks. The court said two common law rules of compensation have proven to be less than harmonious, namely: (1) injuries received while using the public highways in going and coming from work are not compensable under the workmen's compensation acts because all members of the traveling public take such risks,³⁵ and (2) Workmen's Compensation statutes should be construed liberally to carry out their intended purpose.³⁶ The Texas Legislature seemingly saw in the gen-

²⁹ *Lumberman's Reciprocal Association v. Behnken*, 112 Tex. 103, 246 S.W. 72 (1922); *Federal Surety Company v. Ragle*, 40 S.W.2d 63 (Tex. Comm'n App.—1931, judgment adopted); *Employers' Liability Assurance Corporation v. Light*, 275 S.W. 685 (Tex. Civ. App.—Austin 1925, writ ref'd); *Fidelity Union Casualty Company v. Hammock*, 5 S.W.2d 812 (Tex. Civ. App.—Galveston 1928, writ dismissed); *Petroleum Casualty Company v. Green*, 11 S.W.2d 388 (Tex. Civ. App.—Waco 1928, writ ref'd); *Texas Employers' Insurance Association v. Herron*, 29 S.W.2d 524 (Tex. Civ. App.—Waco 1930, writ dismissed by agreement); *Texas Employers' Insurance Association v. Anderson*, 125 S.W.2d 674 (Tex. Civ. App.—Dallas 1939, no writ); *Maryland Casualty Company v. Kramer*, 62 F.2d 295 (5th Cir. 1932); *Mosley v. Royal Indemnity Company*, 68 F.2d 220 (5th Cir. 1934).

³⁰ TEX. REV. CIV. STAT. ANN., art. 8309, § 1 (1959).

³¹ *Fidelity Union Casualty Company v. Hammock*, 5 S.W.2d 812 (Tex. Civ. App.—Galveston 1928, writ dismissed); *Petroleum Casualty Company v. Green*, 11 S.W.2d 388 (Tex. Civ. App.—Waco 1928, writ ref'd); *Columbia Casualty Company v. Kee*, 11 S.W.2d 529 (Tex. Civ. App.—Fort Worth 1928, no writ); *St. Paul Mercury Insurance Company v. Dorman*, 341 S.W.2d 480 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.); *Employers Mutual Liability Insurance Company of Wisconsin v. Konvicka*, 99 F. Supp. 433 (S.D. Texas 1951); *Lumberman's Reciprocal Association v. Behnken*, 112 Tex. 103, 246 S.W. 72 (1922).

³² *Shaver v. Allstate Insurance Company*, 289 S.W.2d 429 (Tex. Civ. App.—Fort Worth 1956, no writ); *Employers Mutual Liability Insurance Company of Wisconsin v. Konvicka*, 197 F.2d 691 (5th Cir. 1952).

³³ TEX. REV. CIV. STAT. ANN., art. 8309, § 1b (1957).

³⁴ 391 F.2d 863, 866 (5th Cir. 1968).

³⁵ *Texas General Indemnity Company v. Bottom*, 365 S.W.2d 350 (Tex. Sup. 1963).

³⁶ *Shelton v. Standard Insurance Company*, 389 S.W.2d 290 (Tex. Sup. 1965).

eral terms of section 1 and in the above common law rules a potential for misuse of interpretive imagination, whether in awarding recovery or denying it. Thus, they enacted section 1b to restrict judicial analysis to travel-oriented standards.³⁷ The Supreme Court in *Texas General Indemnity Company v. Bottom*,³⁸ in construing section 1b, stated that,

when the provisions of section 1b are read in connection with those of section 1 and our decisions construing and applying the same, we think the Legislature intended thereby to circumscribe the probative effect that might be given to the means of transportation or the purpose of the journey rather than to enlarge the definition found in section 1.³⁹

Section 1b of article 8309 did not change the existing rule with regard to risks and hazards of travel. An injury occurring in the use of the public streets or highways while going to and returning from the place of employment is noncompensable.⁴⁰ The rationale of the rule as stated in *Bottom* is:

in most instances such an injury is suffered as 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 recognized exceptions to the general travel rule were changed,

³⁷ North River Insurance Company v. Hubbard, 391 F.2d 863 (5th Cir. 1968).

³⁸ 365 S.W.2d 350 (Tex. Sup. 1963).

³⁹ *Id.* at 353.

⁴⁰ Smith v. Texas Employers' Insurance Association, 129 Tex. 573, 105 S.W.2d 192 (1937); United States Fidelity & Guaranty Company v. Flanagan, 134 Tex. 374, 136 S.W.2d 210 (1940); Safety Casualty Company v. Wright, 138 Tex. 492, 160 S.W.2d 238 (1942); Texas Employers' Insurance Association v. Inge, 146 Tex. 347, 208 S.W.2d 867 (1948); American General Insurance Company v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957); Texas General Indemnity Company v. Bottom, 365 S.W.2d 350 (Tex. Sup. 1963); American Indemnity Company v. Dinkins, 322 S.W. 949 (Tex. Civ. App.—Beaumont 1919, writ ref'd); Boatright v. Georgia Casualty Company, 277 S.W. 802 (Tex. Civ. App.—San Antonio 1925, writ dismiss'd); Aetna Life Ins. Co. v. Palmer, 286 S.W. 283 (Tex. Civ. App.—Austin 1926, writ ref'd); Columbia Casualty Company v. Kee, 11 S.W.2d 529 (Tex. Civ. App.—Fort Worth 1928, no writ); Royal Indemnity Company v. Madrigal, 14 S.W.2d 106 (Tex. Civ. App.—Beaumont 1929, no writ); Sullivan v. Maryland Casualty Co., 82 S.W.2d 1088 (Tex. Civ. App.—Eastland 1935, writ ref'd); Republic Underwriters v. Terrell, 126 S.W.2d 752 (Tex. Civ. App.—Eastland 1939, no writ); Insurors Indemnity & Insurance Company v. Lankford, 150 S.W.2d 288 (Tex. Civ. App.—El Paso 1941, no writ); Texas Employers Insurance Association v. Grammar, 157 S.W.2d 701 (Tex. Civ. App.—Dallas 1941, writ ref'd w.o.m.); Bozant v. Federal Underwriters Exchange, 159 S.W.2d 973 (Tex. Civ. App.—Galveston, 1942, writ ref'd w.o.m.); Jasper v. Texas Employers Insurance Association, 206 S.W.2d 646 (Tex. Civ. App.—Waco 1947, no writ); Texas Employers' Insurance Association v. Beach, 213 S.W.2d 60 (Tex. Civ. App.—Eastland 1948, writ ref'd n.r.e.); Jones v. Texas Indemnity Insurance Company, 223 S.W.2d 286 (Tex. Civ. App.—El Paso 1949, writ ref'd); Oefinger v. Texas Employers' Insurance Association, 243 S.W.2d 469 (Tex. Civ. App.—Fort Worth 1951, writ ref'd); Henshaw v. Texas Employers' Insurance Association, 282 S.W.2d 928 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.); Maryland Casualty Company v. Thomas, 367 S.W.2d 407 (Tex. Civ. App.—San Antonio 1963, writ ref'd); Janak v. Texas Employers' Insurance Association, 381 S.W.2d 176 (Tex. Sup. 1964).

however, by the 1957 amendment and the tests of section I were reconciled and enumerated into four exceptions in the first part of section 1b.

V. GOING & COMING AND DUAL PURPOSE RULES

Article 8309, section 1b⁴¹ provides that an employee, while traveling, will be considered in the course and scope of employment if the injury occurred under one of the following circumstances: (1) if the transportation is furnished as a part of the contract of employment; (2) if the transportation is paid for by the employer; (3) if the means of transportation are under the control of the employer; (4) if the employee has been directed in his employment to proceed from one place to another. This specific section in the statute is referred to as the "going and coming" rule.

Section 1b also changed the general rule that allowed compensation in instances where the employee was traveling public streets or highways and there was a joint purpose for the trip. This second part of section 1b is called the "dual purpose" rule and provides:

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, unless the trip to the place of occurrence of said injury would have been made even had there been no 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.

The generally adopted "going and coming" rule has received criticism from a number of authors as being a court made rule that has been swallowed by the great number of exceptions to it. Mr. Horowitz⁴² states that the great majority of workmen's compensation acts

⁴¹ TEX. REV. CIV. STAT. ANN. art. 8309 § 1b (1957) provides:

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, unless the trip to the place of occurrence of said injury would have been made even had there been no 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 or business of the employer to be furthered by said trip.

⁴² 14 NACCA L.J. 36 (1954).

have no provisions or stipulations concerning "going to work" or "coming from work," but that the courts by judicial fiat through the years have read into the acts the general rule that injuries sustained in "going to or from work" are not compensable. Mr. Horowitz says the rule was adopted through repetition in order to avoid the necessity of deciding each case on its own merits.

A phrase begins life as a literary expression; its felicity leads to a lazy repetition, and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.⁴³

No sooner was this artificial court created rule laid down than judges recognized the need for exceptions. Numerous exceptions have been adopted to this rule and other exceptions undoubtedly are equally justified, depending on their own peculiar circumstances. The exceptions have thus encompassed the general rule to such a point that it is no longer useful and should be abolished.⁴⁴

The rule has been a source of injustice to injured workers for many years. It has put upon them the burden of proving an exception to this narrow court-made rule. It should be abandoned in favor of deciding liberally in each case whether the journey and injury in question arose 'in the course of' the employment. The rule has been abandoned in many foreign countries, and workers are protected while going to and from work as if they were on paid time. Today, because of speeding automobiles, the journey to and from work may be the most dangerous part of the employment. The protection of workmen's compensation should be afforded during such journeys.⁴⁵

Whatever the argument concerning the "going and coming" rule, Texas coincides with the majority of states in following the general rule with the various exceptions thereto as enumerated in section 1b.

The second part of section 1b referred to as the "dual purpose" rule has presented itself as rather a prolific and troublesome doctrine. The universally accepted test in applying the "dual purpose" rule is found in *Marks' Dependents v. Gray*.⁴⁶ Chief Justice Cardozo writing for the court said:

The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though

⁴³ *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 68, 63 S. Ct. 444, 452, 87 L. Ed. 495, 618 (1942).

⁴⁴ 14 NACCA L.J. 36, 41 (1954).

⁴⁵ Horowitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L. REV. 1, 52.

⁴⁶ 251 N.Y. 90, 167 N.E. 181 (1929).

he is serving at the same time some purpose of his own. If however, the work has no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.⁴⁷

Mr. Larson makes the interesting point in his treatise that the test announced by Cardozo, with one amplification, will apply to "coming and going" trips as well as out-of-town trips under *Marks' v. Gray*. Larson believes that it is not necessary that,

on failure of the personal motive, the business trip would have been taken by this particular employee at this particular time. It is enough that someone sometime would have had to take the trip to carry out the business mission. Perhaps another employee would have done it; perhaps another time would have been chosen; but if a special trip would have had to be made for this purpose, and if the employer got this necessary item of travel accomplished by combining it with this employee's personal trip, it is accurate to say that it was a concurrent cause of the trip, rather than an incidental appendage or after thought.⁴⁸

Although the above amplification is approved in other jurisdictions,⁴⁹ it has not been authoritatively adopted in Texas in regard to "coming and going" travel.⁵⁰ In a recent Texas case, the Supreme Court stated that the Legislature expressly rejected this idea in the "dual purpose" section of 1b.⁵¹ The language in section 1b requires an evaluation of the personal and business purposes of a dual purpose trip in determining whether an injury to the particular employee making the particular trip occurs in the course of employment.⁵² Texas, following the majority of states, applies the test set out in *Marks' v. Gray* through the wording of section 1b of its Workmen's Compensation Act.

VI. APPLICATION OF ART. 8309, SEC. 1b

The leading Texas case construing article 8309, section 1b is *Janak v. Texas Employers' Insurance Association*.⁵³ In *Janak*, the claimant was a member of a drilling crew and participated in a carpool arrange-

⁴⁷ *Id.* at 183.

⁴⁸ 1 Larson, *Workman's Compensation Law*, 294.10-11, § 18.13 (1968).

⁴⁹ *Brown v. Arapahoe Drilling Company*, 70 N.M. 99, 370 P.2d 816 (1962).

⁵⁰ *Janak v. Texas Employers Insurance Association*, 381 S.W.2d 176 (Tex. Sup. 1964); *Texas Employers Insurance Association v. Knipe*, 150 Tex. 313, 239 S.W.2d 1006 (1951); *Jones v. Texas Indemnity Insurance Company*, 223 S.W.2d 286 (Tex. Civ. App.—El Paso 1949, writ ref'd); *Insurors Indemnity & Insurance Company v. Lankford*, 150 S.W.2d 288 (Tex. Civ. App.—El Paso 1941, no writ).

⁵¹ *Janak v. Texas Employers Insurance Association*, 381 S.W.2d 176 (Tex. Sup. 1964).

⁵² *Id.*

⁵³ *Id.*

ment. At the time of the accident, Janak was a passenger in a car owned and operated by a fellow crew member. Two routes were available from Yorktown, Texas, one to the north through Gillett, Texas, and the other to the south through Runge, Texas. The Gillet route was more convenient, but the crew took the Runge route in order to purchase ice for drinking water. The court of civil appeals held that there was no evidence to support the jury's finding that Janak was in the course and scope of employment when injured; but rather he was a passenger, traveling only in furtherance of his personal business. The Supreme Court reversed and remanded, holding that a drilling crew member was not precluded from recovering workmen's compensation by the mere fact he was a passenger member of an employee's carpool if the owner-operator of the automobile, by procuring ice for the drinking water, was performing services in furtherance of the employer's business.

Texas courts have found that drinking water in a situation similar to *Janak* was a necessary facility of the employer's premises and the employer, of necessity, would have to make arrangements to furnish the ice water.⁵⁴ The drinking water was reasonably essential to the continuation of the drilling operations to such a point that a deviation to obtain it is impliedly directed by the employer.⁵⁵ This implied directive is the basis of the Court's holding that the employee by deviating to obtain ice water was performing services in furtherance of the employer's business. The Court in *Janak* said that perhaps the ice water was not absolutely essential to continuation of the drilling operation, but it is sound to say that it was reasonably essential to a satisfactory continuation thereof.⁵⁶ The Court compared the necessity for a deviation to obtain ice water to the necessity in "personal comfort" cases in which employees turn aside from their work to get a drink, get warm, get fresh air or go to a restroom.⁵⁷

The *Janak* case made a distinction in whether there was a deviation in order to obtain the ice or whether it was picked up on a direct route to work.⁵⁸ If the ice was obtained while traveling on their regular, direct route, the employees would not meet the test laid down in *Marks' Dependents v. Gray* as their motives would be deemed personal. If there is a deviation from the regular and direct route,

⁵⁴ *Travelers Insurance Company v. Forson*, 268 S.W.2d 219 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.); *Janak v. Texas Employers' Insurance Association*, 381 S.W.2d 176 (Tex. Sup. 1964).

⁵⁵ *Janak v. Texas Employers' Insurance Association*, 381 S.W.2d 176 (Tex. Sup. 1964).

⁵⁶ *Id.* at 182.

⁵⁷ *Id.*

⁵⁸ *Id.* at 180.

however, then the personal matter will be combined with a business matter and it will come under the "dual purpose" test of *Marks*.

The Supreme Court in *Janak* discussed the usefulness and importance of a carpool:

It is a matter of common knowledge that travel in carpools has become an important economic facet of our modern society. This is particularly so among business and industrial employees and workers. By traveling in car pools they reduce their individual expenses which are job-connected and increase their wages usable for personal and family needs, thus making demands on the employer for increased wages less urgent.⁵⁹

The Court refused to recognize a distinction between the automobile owner-operator and a passenger in allowing compensation in a carpool case. Earlier cases had limited compensation to only the owner-operator of the automobile and not its passengers.⁶⁰ But *Janak* expressly rejected this ruling:

If on a particular trip the automobile-operator member of a carpool must perform a service in furtherance of the employer's business, the others must go also or abandon the carpool. To expect them to abandon the carpool if the deviation is not extreme is utterly unrealistic; and it is also unrealistic, therefore, to draw an imaginary line between the crew member who operates the automobile and the crew member who is but a passenger and say that the one is entitled to compensation benefits if injured but the other is not.⁶¹

The obligation to procure and transport ice and water in a carpool is the obligation of all the crew members each day, and the private arrangement between the members by which one assumed primary responsibility for discharging the obligation on that particular day does not change the situation.⁶²

The Texas courts since *Janak* have applied the provisions of article 8309, section 1b to cases involving travel under different circumstances.⁶³ In applying the rules governing injuries sustained in travel, it must not be forgotten that each case must be decided upon its particular facts.⁶⁴

⁵⁹ *Id.* at 179.

⁶⁰ *Travelers Insurance Company v. Forson*, 268 S.W.2d 219 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

⁶¹ *Janak v. Texas Employers Insurance Association*, 381 S.W.2d 176, 179 (Tex. Sup. 1964).

⁶² *Id.*

⁶³ *Texas Employers Insurance Association v. Adams*, 381 S.W.2d 340 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.); *Shelton v. Standard Insurance Company*, 389 S.W.2d 290 (Tex. Sup. 1965).

⁶⁴ *Wynn v. Southern Surety*, 26 S.W.2d 691 (Tex. Civ. App.—Waco 1930, writ ref'd);

The case of *Hackfeld v. Pacific Employers Insurance Company*⁶⁵ presented a fact situation similar to the *Janak* case. The deceased in *Hackfeld* was a member of a drilling crew engaged in a carpool arrangement. On the day of the accident, the deceased was a passenger in an automobile belonging to one of his fellow crew members. At the time of the accident, the crew was returning from the drill site after completing their day's work. An empty water can furnished by the employer was found at the scene of the accident. The morning prior to the accident, the employees obtained ice and water for the drilling crew without deviating from the regular route.

The court in *Hackfeld* did not follow *Janak*. It determined that the deceased was simply on a personal mission of returning home from work at the time of the accident. The evidence showed the employee's wages stopped at the moment he left the rig floor, and that going to and from work was a personal matter of the crew members. Some courts have regarded carpools as being personal arrangements for the benefit of the employees which do not come within the business of the employer.⁶⁶ *Janak* allowed compensation because it was found that the claimant was not returning, but was on his way to work and the driver of the car deviated from the most direct route to pick up ice and water. This deviation under the circumstances was shown to be in furtherance of the employer's business.

The Supreme Court in *Agriculture Insurance Company v. Dryden*⁶⁷ denied compensation to a foreman of a carpenter crew who was injured while on the way to work when his car overturned after suddenly swerving to avoid hitting a dog. On the morning of the accident, the foreman was transporting tools, for his employer, to the work site. The tools were being delivered by Dryden pursuant to his employer's instructions given the previous day.

The Court refused to sustain Dryden's allegation that he had been directed to proceed from one place to another by his employer. The Court reasoned that an injury occurring during transportation will not support a claim that it was sustained in the course of employment unless one of the prerequisites of article 8309, section 1b is present. The first three exceptions to the rule were not applicable but the application of the fourth exception, dealing with a directive by the employer to proceed from one place to another, was raised. The Court held that his subjection to traffic hazards while driving to and from work was

Cercy v. Traders & General Ins. Co., 142 S.W.2d 512 (Tex. Civ. App.—El Paso 1940, writ ref'd).

⁶⁵ 393 S.W.2d 720 (Tex. Civ. App.—San Antonio 1965, no writ).

⁶⁶ *Janak v. Texas Employers' Insurance Association*, 381 S.W.2d 176 (Tex. Sup. 1964); *Jecker v. Western Alliance Insurance Company*, 369 S.W.2d 776 (Tex. Sup. 1963); *Travelers Insurance Company v. Forson*, 268 S.W.2d 219 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

⁶⁷ 398 S.W.2d 745 (Tex. Sup. 1965).

not the result of, or caused by, any direction of his employer. There was no specific mission assigned which required any travel by him apart from, or in addition to, his regular and personal transportation to and from work.

Justice Pope in concurring⁶⁸ stated that Dryden was directed to proceed from one place to another to deliver the tools but he failed to meet the requirements of the "dual purpose" test. Dryden met the first test in that the trip would have been made even had there been no personal or private affairs to be furthered by the trip. He failed, however, to meet the most difficult test: to prove that the trip would not have been made had there been no affairs or business of the employer to be furthered.⁶⁹

Justice Smith based his dissent⁷⁰ on the fact that the usual means of transporting the tools was unavailable, therefore Dryden was hired to transport them. In doing so, the employer directed Dryden to proceed from one place to another, thus the transportation was under the control of the employer. Justice Smith contrasted the *Janak* case where the employer knew he must get ice water to the drill site for his employees, therefore there was an implied directive for the employees to bring it to the well site. Likewise, in *Dryden*, the employer knew the carpenters must have the proper tools to properly and adequately perform their duties. Therefore, the transportation of the tools by Dryden was under the complete direction and control of the employer.

The implied directive concept set out in *Janak* was followed in the recent Supreme Court decision of *Meyer v. Western Fire Insurance Company*.⁷¹ Meyer was employed as a service supervisor for a home builder. He worked irregular hours, partly at home, partly at his employer's office, and partly in making service calls and inspections of the various homes built by his employer. He was given discretion, except upon emergency calls from his employer's office, to determine when and where to make service calls for his employer. His duties did not require him to report to the office daily or at any particular time. On the day of the accident, he had done some paper work at home and had left to make calls at a subdivision. Although he was not required to report to the office and had no duties to perform there, he decided to drive by the office on his way to the subdivision to determine whether there were any service calls in the subdivision area. The accident occurred before he reached the office.

The Supreme Court reversed and remanded the cause saying the court of civil appeals erred in granting summary judgment because the

⁶⁸ *Agriculture Insurance Company v. Dryden*, 398 S.W.2d 745, 747 (Tex. Sup. 1965).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 425 S.W.2d 628 (Tex. Sup. 1968).

circumstances of the case created a fact issue whether he was injured in the course of employment. The Supreme Court was of the opinion that the adoption of article 8309, section 1b did not abolish the exceptions of express and implied conditions in the employment contract on travel situations. It was stated:

But the Legislature surely did not intend to provide that an employee whose employment requires him to travel at his own expense in his own automobile on streets and highways, either constantly or intermittently, should be denied compensation if accidentally injured while thus exposed to risks growing out of his employment. Any such holding would be wholly unjust to salesmen, servicemen, repairmen, deliverymen, and a host of others who may be required to use their own automobiles in their work, and would be a strict rather than a liberal interpretation of the Workmen's Compensation Act.⁷²

The Court held there was evidence that Meyer's duties as a service supervisor required him to travel from place to place in order to discharge the duties of his employment. Thus, there was evidence that he was impliedly directed to travel to make his service calls on the morning of the accident, and injuries sustained while furthering his employer's business by making such service calls would be compensable under section 1b.

This court also followed *Janak* in holding that if Meyer merely deviated to his employer's office to determine whether there were any additional duties he could perform in the neighborhood of his planned service calls, the deviation would not be for personal reasons. The deviation would be in furtherance of the employer's business and impliedly directed by the employer as the most efficient manner of performing his duties as service supervisor.

The case of *Cannedy v. Reliance Insurance Company*⁷³ involved a claim by the parents of an injured newsboy against the publisher's insurer for workmen's compensation as a result of injuries sustained by their son while collecting two delinquent accounts. The evidence showed that the boy was billed in advance by the publisher on the basis of the previous month's average daily delivery. The collections for the deliveries were found to be strictly the responsibility of the carrier and his gross income was the difference between the amount paid for the papers and the amount collected.

The court held that the injury sustained was not of the kind and character having to do with and originating in the work, business,

⁷² *Meyer v. Western Fire Insurance Company*, 425 S.W.2d 628, 630 (Tex. Sup. 1968); *Jecker v. Western Alliance Insurance Company*, 369 S.W.2d 776, 779 (Tex. Sup. 1963).

⁷³ 425 S.W.2d 420 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.).

trade or profession of the employer nor received while engaged in or about the furtherance of the affairs or business of the employer. Therefore, there could be no implied directive by the employer to the employee when the reasons for the travel are purely personal to the employee.⁷⁴ The carrier also failed the "dual purpose" test of section 1b because the trip was for his own benefit and personal reasons. The court held that the claimant did not meet the prescribed requirements so as to place himself in the course of employment.

The claimant in *Texas Employers' Insurance Association v. Clauder*⁷⁵ attempted to apply the "access" exception to the general "going and coming" rule. The deceased was working as an oil operator at the plant of his employer on the day of the accident. He had finished his duties for the day and had left the premises in his own automobile and was proceeding home over one of several exit roads over the well lease when he was killed in a collision with another automobile.

The court stated that although the claimant did not attempt to bring the claim under any of the provisions of section 1b, the "going and coming" rule was applicable. In seeking recovery, the claimant must come under the provisions of section 1b.⁷⁶ The claimant based the claim on the "access" exception to the rule governing injuries suffered while using public streets.⁷⁷ Under this exception, a workman who has been injured at a place intended by the employer for use as a means of ingress and egress to and from the actual place of the employee's work has been held to have been injured in the course of employment. The courts have said that these "access" areas are so closely related to the employer's premises as to be fairly treated as a part thereof.⁷⁸ The "access" doctrine has been recognized and applied by the courts, but it is generally held that in order to authorize a recovery, it is ordinarily essential that the way traveled should be the only way to and from the work and also that it should not be traveled by the public generally. The court thus concluded that this case was not one for the application of the "access" doctrine but rather a travel case under section 1b.

The recent Supreme Court decision of *Johnson v. Pacific Employers Indemnity Company*⁷⁹ involved a fact situation similar to *Janak*. John-

⁷⁴ *Id.*

⁷⁵ 431 S.W.2d 579 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

⁷⁶ *Id.*

⁷⁷ *Lumberman's Reciprocal Association v. Behnken*, 112 Tex. 103, 246 S.W. 72 (1922); *Kelty v. Travelers Insurance Company*, 391 S.W.2d 558 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Meyer v. Western Fire Insurance Company*, 425 S.W.2d 628 (Tex. Sup. 1968).

⁷⁸ *Texas Employers' Insurance Association v. Clauder*, 431 S.W.2d 579 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

son, an employee of a drilling company had two routes available in traveling to work. His usual and most convenient route was the *Liberty Dayton* route. The other route which Johnson would sometimes travel was the *Conroe* route. Johnson joined a carpool at the "request" of his boss. It was customary for members of the carpool to purchase ice and water for the drilling crew on the way to the drill site. As a member of the carpool Johnson drove every fourth day. He would first pick up his boss, then the ice and the two other crew members in Conroe. On the day in question Johnson was injured while traveling the *Conroe* route before he reached his boss's home or picked up the ice and water.

The Supreme Court held that the court of civil appeals erred in finding as a matter of law that Johnson deviated from his regular route of travel solely for his personal benefit.⁸⁰

The Supreme Court also held that Johnson's injuries were compensable as he was traveling an alternate route in the course of his employment at the direction of his employer. The dual-purpose provision of article 8309 section 1b was held to be inapplicable in this situation in that Johnson acted on the directions of his employer. The Court stated:

We held in *Janak v. Texas Employers' Insurance Association*, 381 S.W. 2d 176 (Tex. Sup. 1964), that the transporting of ice to a drilling rig is in furtherance of the employer's business. We now hold that it is also in furtherance of the employer's business that the transportation be under circumstances which will give assurance to the members of the drilling crew that the ice and water will be available at the beginning of the work day.⁸¹

VII. CONCLUSION

The increasing case law on employee travel and inconsistency in decisions involving transportation and travel injuries prompted the Texas Legislature in 1957 to enact section 1b to article 8309. The amendment has been viewed as a reconciliation of the section 1 tests regarding course and scope of employment with the special problems of travel risks.⁸² The Texas Legislature seemingly viewed the broad terms of section 1 and the necessity of controlling the interpretative imagination of the courts and enacted section 1b to restrict the judicial anal-

⁷⁹ 12 Tex. Sup. Ct. J. 319 (April 9, 1969).

⁸⁰ *Pacific Employers Indemnity Co. v. Johnson*, 431 S.W.2d 787 (Tex. Civ. App.—Beaumont 1968, writ granted).

⁸¹ *Johnson v. Pacific Employers Indemnity Co.*, 12 Tex. Sup. Ct. J. 319, 322 (April 9, 1969).

⁸² *North River Insurance Company v. Hubbard*, 391 F.2d 863 (5th Cir. 1968).

ysis to travel-oriented standards.⁸³ The Legislature introduced guidelines in order to give the courts a directive in cases involving the enumerable situations arising in transportation injuries. The recent cases involving transportation and travel illustrate the vastness of the area and the recurring problems with which the courts are faced today.

⁸³ *Id.*