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Scope of the Act: Eligibility and Injuries Student Symposium - Workmen's Compensation: A Pandect of the Texas Law.

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an appeal from the final award of the Texas Industrial Accident Board,[32] and also defining total incapacity.[33]

Instead of applying the general rule requiring strict construction of a statute which is in derogation of the common law, the courts have firmly established a rule of liberal construction in favor of the main objective of the Workmen's Compensation Act to provide for an injured employee or his beneficiary. Examples of such liberal construction are: allowing recovery for total and permanent incapacity for more than one time where a greenback poultice has produced a miraculous cure; allowing recovery for total and permanent incapacity even though the employee is making higher wages after the injury than he made before, such as the employee who started preaching and evidently got a "tither in his tank" since he made more money preaching than he did working;[34] calling neuroses accidental personal injuries; establishing causal connection between a claimed injury and death by circumstantial evidence of extraordinary exertion or strain; accepting the diagnosis by an injured employee of the extent and duration of his injury; applying the harmless error rule to the admission of inadmissible evidence and to improper argument; and turning from increased risk to positional risk.

The veiled threat of federal preemption of the workmen's compensation field has doubtless spurred the flood of enactments in Texas in 1973 embracing the latest thinking of the outstanding experts in this field.

Such constant amendments and additions to the Texas Workmen's Compensation Act require periodical reviews in order to keep the legal profession up to date, such as the scholarly symposium which follows. This symposium is therefore most timely and constitutes a real service to the bar in helping to bring order out of the chaos created by the patchwork known as the Texas Workmen's Compensation Act, which has been amended, construed, and added to over the past six decades by the courts as well as by the legislature in attempts to make the accomplishment of the beneficent purpose of the workmen's compensation law surer, easier, and quicker.

SCOPE OF THE ACT: ELIGIBILITY AND INJURIES

The Texas Workmen's Compensation statute is designed to provide adequate and prompt relief to employees accidentally injured while in the scope of their employment.[35] As a result of public policy, the cost of such compensation has been transferred from the employee to the industry in which he is employed and ultimately to the consumer as a part of the cost of produc-

32. Booth v. Texas Employers' Ins. Ass'n, 132 Tex. 237, 123 S.W.2d 322 (1938).
33. Texas Employers' Ins. Ass'n v. Hawkins, 369 S.W.2d 305, 306 (Tex. Sup. 1963).
34. Aetna Cas. & Sur. Co. v. Curlee, 416 S.W.2d 890, 893 (Tex. Civ. App.—Fort Worth 1967, no writ).
35. *E.g.*, Texas Employers' Ins. Ass'n v. Leake, 196 S.W.2d 842, 843 (Tex. Civ. App.—Fort Worth 1946, writ ref'd n.r.e.).

tion.[36] Consequently, workmen's compensation stands somewhere between the concepts of social insurance and relief through common law tort liability.[37] It is unlike social insurance in that it is not a government regulated program; only the employer, insurance carrier and the employee or his beneficiaries are concerned parties. It is also unlike tort liability in that when an employee files a claim, questions of negligence or fault are, for the most part, immaterial.[38]

Although it establishes a voluntary system for relief,[39] the Act is designed to make workmen's compensation more beneficial and expedient to both the employer and employee than recovery through litigation. The requirements for employer-employee eligibility and the commensurate rights and obligations as well as the types of injuries compensable are enumerated in the statutes. Moreover, there have been a number of judicial interpretations since the adoption of the Act in 1913 which have aided in defining the extent as well as the limitations on recovery.

EMPLOYERS

Eligibility

Since the time of its original enactment there has been a steady trend to broaden the range of workmen's compensation coverage through liberalization of the employer eligibility requirements. In general, any employer who enlists workmen under a contract for hire may subscribe for coverage under the Workmen's Compensation Act.[40] Subscription may be made either to the Texas Employers' Insurance Association[41] or to an authorized private insurance carrier.[42] Thus, there are two bilateral agreements made among

36. *E.g.*, Employers Mut. Liab. Ins. Co. v. Konvicka, 197 F.2d 691, 693 (5th Cir. 1952).

37. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 3.10 (1972).

38. *Id.* §§ 2.00, 3.10. It is undisputed that negligence can provide an independent basis for liability; in many states contributory negligence will bar a plaintiff's claim for injuries. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 416 (4th ed. 1971). In awarding workmen's compensation, however, such considerations are excluded. There are several reasons for this move from traditional tort liability concepts toward a more socialized form of relief. One is the prevalence of work connected accidents. Another is the shifting burden for compensation from employer to the consumer which protects industry against judgments of a magnitude sufficient to destroy it.

39. Middleton v. Texas Power & Light Co., 108 Tex. 96, 105, 185 S.W. 556, 558 (1916).

40. The statute defines an employer as "any person, firm, partnership, association of persons or corporation or their legal representatives that makes contracts of hire." TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).

41. The association after reviewing the employer's application will issue a policy of liability insurance. TEX. REV. CIV. STAT. ANN. art. 8308, § 12 (1967).

42. The statute provides that any private insurance carrier may issue policies of liability insurance if it is lawfully authorized to transact "liability or accident business" in Texas. The subscriber and carrier will be subject to all of the provisions in the Act. TEX. REV. CIV. STAT. ANN. art. 8309, § 2 (1967).

three parties which, in essence, create a tripartite contractual arrangement.[43] The employer contracts with the carrier for accident insurance coverage of his employees, and the employee by his employment contract agrees to accept coverage in lieu of his common law right.[44] By this arrangement the carrier acquires a contractual obligation to pay compensation to any employee who is incapacitated from an injury sustained in the course of his employment.[45]

As the act was originally adopted, the state was excluded as an eligible employer.[46] This exception was based on the common law rule of governmental immunity and the lack of constitutional power to authorize a workmen's compensation plan for state employees.[47] In 1936 under an enabling amendment[48] the legislature was granted this power, but chose to enact individual statutes to provide coverage only for particular state agencies and political subdivisions.[49] The legislature amended the Act in 1973 to authorize a self-insurance plan whereby the state can now extend coverage to its employees.[50]

The Act also originally excluded employers who had less than three employees.[51] One of the purposes of the limitation was to avoid administrative inconvenience to small business.[52] In 1973 the legislature reduced the minimum number of employees to one, dropping the three employee requirement, and thereby bringing these small business enterprises within the scope of the Act.[53]

Common Law Liability

One of the most effective inducements for the employer to subscribe to

43. Employers Mut. Liab. Ins. Co. v. Evins, 211 S.W.2d 359, 362 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.).

44. Southern Cas. Co. v. Morgan, 12 S.W.2d 200, 201 (Tex. Comm'n App. 1929, jdgmt adopted).

45. *Id.* at 201; Garrett v. Texas Employers Ins. Ass'n, 226 S.W.2d 663, 664 (Tex. Civ. App.—San Antonio 1949, writ ref'd).

46. Matthews v. University of Texas, 295 S.W.2d 270, 272 (Tex. Civ. App.—Waco 1956, no writ); Brooks v. State, 68 S.W.2d 534, 535 (Tex. Civ. App.—Austin 1934, writ ref'd).

47. Matthews v. University of Texas, 295 S.W.2d 270, 272 (Tex. Civ. App.—Waco 1956, no writ).

48. TEX. CONST. art. III, § 50. This provision gives the legislature the discretionary power to provide workmen's compensation to those state employees it deems necessary to cover.

49. For example, Tex. Laws 1937, ch. 502, at 1352, *as amended,* TEX. REV. CIV. STAT. ANN. art. 6674s, § 7 (Supp. 1974-75) (Highway Department).

50. TEX. REV. CIV. STAT. ANN. art. 8309g (Supp. 1974). As a self-insurer the state can provide coverage through appropriations by the legislature. For the most part, the state plan has adopted the general provisions of the Texas Workmen's Compensation Act. The plan does not supercede those statutory sections authorizing coverage for specific state agencies or political subdivisions. *Id.*

51. Tex. Laws 1917, at 269, *as amended,* TEX. REV. CIV. STAT. ANN. art. 8306, § 2 (Supp. 1974).

52. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 52.00 (1973).

53. TEX. REV. CIV. STAT. ANN. art. 8306, § 2 (Supp. 1974).

workmen's compensation is his resulting immunity from liability in a common law suit for damages. The Act specifically provides that an employee of a subscriber may look only to the compensation carrier for recovery and has no right of action against his employer.[54] The employee is deemed to have waived his common law right of action for damages against the employer[55] unless he gives proper notice at the time he enters into the employment contract that he will retain such rights.[56] While the subscribing employee is precluded from bringing an action for damages, at the same time the compensation carrier may not avail himself of the traditional common law defenses in a claim for compensation.[57] Contributory negligence, negligence of a fellow employee, and assumption of the risk are specifically excluded.[58]

These limitations on the common law rights of the carrier and employee stem from the underlying principle that fault or negligence is immaterial in awarding workmen's compensation.[59] The purpose of the Act is to provide a form of accident insurance payable upon the occurrence of a compensable injury.[60] Moreover, the employee's right to receive compensation is contractual in nature and not based on tort liability.[61]

Employer's Defenses

There are four noted exceptions to the rule barring an employee from his right to receive compensation: (1) where the injury is caused by the willful intention of the employee;[62] (2) where the injury is caused by the act of

54. *Id.* § 3. This exclusive remedy applies not only to the employee but also to his representatives or beneficiaries and to the parents of a minor employee. Moreover, both the employer and his agents, servants and employees are immune. *Id.* § 3.

55. *Id.* § 3a; Paradissis v. Royal Indem. Co., 507 S.W.2d 526, 529 (Tex. Sup. 1974). The supreme court has held that it is within the constitutional power of the legislature to abolish causes of action under the Act as long as the rights have not already vested. Middleton v. Texas Power & Light Co., 108 Tex. 96, 107-109, 185 S.W. 556, 560-61 (1916).

56. Texas Employers' Ins. Ass'n v. Downing, 218 S.W. 112, 118 (Tex. Civ. App.—Amarillo 1919, writ ref'd).

57. TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (1967).

58. *Id.*; El Paso Elec. Co. v. Sawyer, 298 S.W. 267 (Tex. Comm'n App. 1927, opinion adopted).

59. Travelers Ins. Co. v. Lancaster, 71 S.W.2d 318, 321 (Tex. Civ. App.—San Antonio 1934, writ dism'd).

60. *Id.* at 321.

61. There is a basic distinction between contract and tort liability. A suit in contract is for breach of an agreement between parties, and damages are limited to what was within the reasonable expectation of the parties at the time the contract was made. A suit in tort involves questions of negligence and proimate cause, and damages are limited only to the magnitude of the injury. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 613 (4th ed. 1971).

62. TEX. REV. CIV. STAT. ANN. art. 8306, § 1, and art. 8309, § 1 (1967); *e.g.*, Jones v. Traders & Gen. Ins. Co., 140 Tex. 599, 602, 169 S.W.2d 160, 162 (1943). Also, the supreme court has held that an employee will be denied recovery where his negligence is "proximate cause" of the injury. Najera v. Great Atl. & Pac. Tea Co., 146 Tex. 367, 371, 207 S.W.2d 356, 367 (1948).

a third party for personal reasons;[63] (3) where the employee is injured while in a state of intoxication;[64] and (4) where the injury is caused by an act of God.[65] The reason for these exceptions is that each involves an intervening, independent agency which breaks the necessary causal connection between the nature of the employment and the injury; consequently, the injury falls outside the course of employment.[66] It could be argued, however, that the beneficial purpose of workmen's compensation is defeated by the recognition of these exceptions in all cases. The overall objective of the Act is to provide adequate and prompt relief to employees who sustain compensable injuries regardless of negligence.[67] Yet a strict application of these exceptions, especially in the areas of intoxication and willful conduct, is often tantamount to reinstating the defenses of contributory negligence and assumption of the risk.[68]

Liability of Non-subscribers

An employer who is eligible but chooses not to subscribe under the Act is subject to any suit for damages brought by injured employees, and the provisions of article 8306, section 1 which remove the employer's common law defenses applies.[69] In a suit for damages the necessary proof of negligence

63. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).

64. TEX. REV. CIV. STAT. ANN. art. 8306, § 1, and art. 8309, § 1 (1967).

The specific wording of section 1 of article 8306, "while the employe was in a state of intoxication," has created a problem of interpretation. See for example, Hartford Accident & Indem. Co. v. Durham, 222 S.W. 275, 277 (Tex. Civ. App.—Amarillo 1920, writ dism'd) (intoxication must have contributed to the accident). *But see* Smith v. Trader & Gen. Ins. Co., 258 S.W.2d 436, 438 (Tex. Civ. App.—Eastland, 1953, writ ref'd) (necessary only that the employee be in a state of intoxication at the time of injury). A few courts have required the employer to prove that the intoxication was the sole cause or proximate cause of the injury. See for example, Bullington v. Aetna Cas. & Sur. Co., 178 S.E.2d 901, 903 (Ga. Ct. App.), *rev'd on other grounds*, 181 S.E. 2d 495 (1971). Under a number of state statutes, proof of intoxication merely reduces the compensation. Electric Mut. Liab. Ins. Co. v. Industrial Comm'n, 391 P.2d 677, 679 (Colo. 1964).

Other states have held that where the employer acquiesces to the employee's intoxication, the employer should not be permitted to assert the defense. For example, United States Steel Corp. v. Mason, 227 N.E.2d 694, 696 (Ind. Ct. App. 1967).

65. The statute specifically excludes compenstaion for injuries caused by an act of God unless the nature of the employee's duties subjected him to a greater hazard than ordinarily applies to the general public. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).

66. *See* Jones v. Traders & Gen. Ins. Co., 140 Tex. 599, 602, 169 S.W.2d 160, 162 (1943).

67. Texas Employers' Ins. Ass'n v. Leake, 196 S.W.2d 842, 843 (Tex. Civ. App.—Fort Worth 1946, writ ref'd n.r.e.).

68. Although the willful conduct exception seems to allow employers to shift responsibility for employment connected hazards by making safety rules, few courts have denied recovery simply for a violation of these rules. *Compare* Davis, *Workmen's Compensation*, 34 J. AM. TRIAL LAWS. ASS'N 299, 302 (1972) *with* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 33.10 (1973).

69. TEX. REV. CIV. STAT. ANN. art. 8306, § 4 (1967); Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, —, 280 S.W.2d 238, 239 (1955); J. Weingarten, Inc. v. Sandefer,

and proximate cause are required; consequently the employer's only possible defenses are either that there was a lack of negligence or that the employee's own negligence was the sole cause of his injury.[70] As with the provision granting common law immunity to subscribers, the legislative intent of this limitation was to induce the employer to provide workmen's compensation to his employees.

Borrowed Servant Doctrine

Establishing employer liability becomes more difficult when an employee of a subscriber is borrowed by another subscribing employer for a short period of time. The risk of accident in these cases is often much greater since the work involves new surroundings and unknown hazards.[71] The critical question in this situation is whether the general employer retains liability for the employee's compensable injuries or whether the special employer assumes the liability during the time the employee is under his control. The common law test of liability under the borrowed servant doctrine consists of four determinations: (1) was there an agreement to work between the employee and special employer; (2) whose work was being done; (3) who had the right of control; and (4) for whose benefit was the work performed.[72] The courts of civil appeals have followed the common law test by holding that the employer who has exercised the right of control assumes the liability for compensation.[73] Moreover, this right of control is determined either by the nature of the particular act which caused the injury[74] or by the provisions of the employment contract itself.[75]

Although the borrowed servant doctrine is a necessary tool in establishing the liability of a general or special employer, it can work a hardship on the employee who is seeking compensation.[76] The ultimate question in any workmen's compensation case is whether the employee has sustained an injury for which compensation should be paid. After this fact is established,

490 S.W.2d 941, 944 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.); Akin, *Workmen's Comensation*, 25 Sw. L.J. 122, 128 (1971).

70. Potter v. Garner, 407 S.W.2d 537, 541 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.).

71. Davis, *Workmen's Compensation*, 33 J. AM. TRIAL LAWS. ASS'N 140, 177 (1970).

72. Ryan, Inc. v. Industrial Comm'n, 159 N.W.2d 594, 595 (Wis. 1968).

73. J.A. Robinson Sons, Inc. v. Wigart, 431 S.W.2d 327, 330-31 (Tex. Sup. 1968); United States Fire Ins. Co. v. Warden, 471 S.W.2d 427, 428 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.).

74. United States Fire Ins. Co. v. Warden, 471 S.W.2d 425, 428 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.).

75. Sanchez v. Leggett, 489 S.W.2d 383, 387 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.).

76. Davis, *Workmen's Compensation*, 33 J. AM. TRIAL LAWS. ASS'N 140, 183 (1970).

questions of liability between carriers are secondary; yet these questions can unnecessarily delay awarding prompt and adequate relief to the employee since their determination must precede awarding compensation.[77]

Other Liabilities

Although it is accepted that the employer shift the burden of premium payments to the consumer, he is barred by statute from passing on the cost to his employees.[78] The penalty for such action is not only full compensation benefits for the employee from the carrier when he incurs a compensable injury, but also a right of action against the employer for damages without regard to the compensation paid.[79] In effect, the employee has the right to a double recovery.[80]

Another directive to the employer is that he not extend coverage only to a select few, but rather to all employees engaged in the same general "class of business."[81] The most important exception to this rule is that where an employer conducts two separate and distinct businesses, the workmen's compensation coverage for each of the businesses operates independently of the other.[82] The Texas Supreme Court has stated, however, that for two businesses to be separate and distinct, they must have separate risks, payrolls, and premium payments.[83]

The effect of these limitations is to create obvious restrictions on the operation of an employer's business. Although the Act is defined as a *voluntary* system almost every employer is affected since eligible non-subscribers, as well as subscribers, lose their common law defenses. Consequently, there is a positive inducement for all eligible employers to provide workmen's compensation and comply with its restrictive provisions. The sole purpose of these provisions is to protect the employee and insure his right to compensation.[84] He is relieved of the burden of defending against charges of contributory negligence and assumption of the risk. It is apparent, however, that the employer also receives protection under the Act through immunity from eco-

77. *Id.* at 183. If the general employer is held liable regardless of who exercised control over the employee, the employee would receive compensation immediately upon proving his case and the general employer could then proceed against the special employer for remuneration. *Id.* at 183.

78. TEX. REV. CIV. STAT. ANN. art. 8306, § 12g (1967).

79. *Id.* In a suit by the employee the employer is precluded from asserting the defenses in section 1, article 8306. *See* Big Mack Trucking Co. v. Dickerson, 497 S.W.2d 283, 286 (Tex. Sup. 1973).

80. Big Mack Trucking Co. v. Dickerson, 497 S.W.2d 283, 286 (Tex. Sup. 1973).

81. Maryland Cas. Co. v. Sullivan, 160 Tex. 592, 594, 334 S.W.2d 783, 786 (1960).

82. *Id.* at 594, 334 S.W.2d at 786.

83. *Id.* at 594, 334 S.W.2d at 786.

84. TEX. REV. CIV. STAT. ANN. art. 8307c (Supp. 1974) precludes an employer from discriminating against an employee who has filed a claim. *See* Akin, *Workmen's Compensation*, 26 SW. L.J. 177 (1972).

nomically damaging law suits.[85] The overall effect, then, is that both the employee and employer receive substantial benefits from workmen's compensation.

EMPLOYEES

Eligibility

Like employers, employees are subject to eligibility requirements. Generally, for a person to be considered an employee under the Act, there must be an express or implied contract of employment.[86] It is not sufficient that performance of the work is gratuitous in nature.[87]

There are several exceptions to the eligibility provisions of the statute. Domestic servants and casual employees engaged in employment incidental to a personal residence[88] and farm and ranch laborers[89] are specifically excluded. Employees of any person, firm or corporation operating any steam,

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85. The employer is not immune, however, if (1) the employee reserves his common law rights; (2) the employer charges premiums against the employee; (3) the employer intentionally injures the employee; (4) the employer's negligence is the proximate cause of the employee's death.

86. The statute defines an employee as

> any person in the service of another under any contract of hire, expressed or implied, oral or written, except masters of, or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of an employer . . . .

TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1967).

87. Nobles v. Texas Indem. Ins. Co., 24 S.W.2d 367, 368 (Tex. Comm'n App. 1930, opinion adopted); Associated Employers Lloyds v. Gibson, 245 S.W.2d 738, 739 (Tex. Civ. App.—Eastland 1951, writ dism'd).

88. TEX. REV. CIV. STAT. ANN. art. 8306, § 2 (Supp. 1974); Akin, *Workmen's Compensation*, 22 SW. L.J. 15, 17 (1968).

89. TEX. REV. CIV. STAT. ANN. art. 8306, § 2 (Supp. 1974). The nature of the work the employee is hired to perform is controlling. Holmes v. Travelers Ins. Co., 148 S.W.2d 270, 271 (Tex. Civ. App.—Galveston 1941, writ ref'd). *Compare* Guerro v. United States Fidelity & Guar. Co., 128 Tex. 407, 410, 98 S.W.2d 796, 798 (1936) (nursery stock) *with* Hill v. Georgia Cas. Co., 45 S.W.2d 566, 567 (Tex. Comm'n App. 1932, opinion adopted) (fruits and vegetables).

There are several reasons given for the agricultural exemption. The most valid is the administrative burden that would be placed on a substantial number of small farmers in handling the necessary records, insurance and accounting. Larson has suggested that although this may be a valid consideration, it should be limited to small farmers and not apply to the large farming operations which are as capable of handling the burden as any industry. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 53.20 (1972).

A less convincing argument is that farm employment is not hazardous enough to warrant coverage. With the rapid increase in mechanized farming, however, statistics have proven that it is one of the most dangerous of all occupations. 1 A. LARSON, THE LAW of WORKMEN'S COMPENSATION § 53.20 (1972); Lambert, *Workmen's Compensation*, 35 J. AM. TRIAL LAWS. ASS'N 132, 137 (1974).

In 1972 the Michigan Supreme Court held that the provisions under their Workmen's Compensation Act which excluded full coverage to those agricultural employees who were hired on a piecework basis, that is transient workers, was unconstitutional. Gutierrez v. Glaser Crandell Co., 202 N.W.2d 786, 791 (Mich. 1972).

electric, street or interurban railway as a common carrier are also excepted.[90]

Independent contractors have also been excluded as employees under the act.[91] The test for distinguishing an employee from an independent contractor is similar to the test under the borrowed servant doctrine: specifically, the amount of control exercised by the employer over the work performed. The reason for this exception is that independent contractors are not generally as subject to an employer's control as are employees.[92]

Most states have held that partners do not fall within the definition of an employee for two reasons: a partnership is not a legal entity, and an individual cannot be considered as both an employer and an employee for workmen's compensation purposes.[93] Using this reasoning as a basis the Texas civil appeals courts have followed this view in a limited number of cases.[94] By a 1973 amendment, however, sole proprietors, partners and corporate executive officers are now statutorily considered to be employees.[95]

Common Law Rights

Although under an employment contract where the employer is a subscriber, the employee is deemed to have waived his common law rights, he may elect to retain them by giving the employer proper notice at the time he enters into the contract.[96] By exercising his right in a suit for damages he is

90. TEX. REV. CIV. STAT. ANN. art. 8306, § 2 (Supp. 1974).

91. Anchor Cas. Co. v. Hartsfield, 390 S.W.2d 469, 471 (Tex. Sup. 1965); Akin, *Workmen's Compensation*, 22 SW. L.J. 15, 17 (1968).

92. Anchor Cas. Co. v. Hartsfield, 390 S.W.2d 469, 471 (Tex. Sup. 1965). The court should also consider whether (1) the work requires special skill; (2) the worker supplied his own tools; (3) he performed a particular job according to predetermined plans; (4) he could work at his own discretion; (5) he was paid by the job or by the hour; and (6) he was on the payroll, social security or income tax withholding rolls of the employer. *Id.* at 471.

An employee may be engaged in two or more occupations under the same employment contract, one of which is excluded from compensation. The fact that one occupation is excluded will not preclude recovery for compensable injuries sustained while engaged in performing the other. Hardware Dealers' Mut. Fire Ins. Co. v. King, 426 S.W.2d 215, 217-18 (Tex. Sup. 1968).

93. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 54.30 (1972); *e.g.*, Crawford v. DeLong, 324 S.W.2d 25, 27-28 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.) (wife denied recovery as employee of community owned business).

94. Berger v. Fidelity Union Cas. Co., 293 S.W. 235, 237-38 (Tex. Civ. App.—Galveston 1927, no writ); *see* Superior Ins. Co. v. Kling, 160 Tex. 155, 158, 327 S.W.2d 422, 424 (1959).

95. TEX. REV. CIV. STAT. ANN. art. 8309, § 1a (Supp. 1974) requires that sole proprietors, partners and corporate executive officers be specifically named in the insurance contract.

96. TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (1967). If the employee becomes a subscriber subsequent to hiring the employee, notice must be given of the employee's election within 5 days of notice of subscription. The employer's notice to the Industrial Accident Board that he is a subscriber is considered constructive notice to his employees. If the employer ceases to be a subscriber he must give notice to the Board and to his employees by posting three public notices. *Id.* § 3c.

required to prove negligence and proximate cause;[97] however, as a subscriber the employer may assert any of his common law defenses.[98]

By accepting workmen's compensation the employee does not forfeit all of his common law rights. In the case of his death, for example, his heirs retain the right to sue the employer for exemplary damages if the employer is guilty of gross negligence or if the death resulted from his willful act or omission.[99] The employee or his heirs may also sue negligent third parties.[100] Prior to 1973 Texas was the only state which required an election of remedies between workmen's compensation and damages in a suit against a third party.[101] If the employee elected to pursue his right of action for damages, he was precluded from also seeking compensation benefits even if he was unsuccessful in his suit.[102] Pursuant to a 1973 amendment, the employee now may sue the third party without waiving his right to compensation.[103] In the event that compensation is claimed first, the employee can still maintain a suit for damages against the third party subject to the carrier's right of subrogation to recoup compensation paid.[104]

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97. Texas & N.O.R. Co. v. Pool, 263 S.W.2d 582, 588 (Tex. Civ. App.—Waco 1954, no writ).

98. TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (1967).

99. *Id.* § 5; Paradissis v. Royal Indem. Co., 507 S.W.2d 526, 528 (Tex. Sup. 1974); Jones v. Jefferys, 244 S.W.2d 924, 926 (Tex. Civ. App.—Dallas 1952, writ ref'd). The supreme court has defined gross negligence as "that *entire want of care* which would raise the belief that the act or omission complained of was the result of a *conscious indifference* to the right or welfare of the person or persons to be affected by it." Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825, 828 (Tex. Sup. 1964) (court's emphasis).

100. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Supp. 1974). An employee does not have a right of action for damages against his employer or against "any agent, servant or employee" of the employer. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1967). This limitation applies to the employee's right to sue negligent third parties, under article 8307 section 6a, only when the employer could also be charged with the third parties' negligence under the doctrine of respondeat superior. Ward v. Wright, 490 S.W.2d 223, 226 (Tex. Civ. App.—Fort Worth 1973, no writ).

101. Tex. Laws 1917, at 269, *as amended*, TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Supp. 1974); Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818, 820 n.6 (1974).

102. Texas Employers Ins. Ass'n v. Brandon, 126 Tex. 636, 640, 89 S.W.2d 982, 983-84 (1936).

103. TEX. REV. CIV. STAT. ANN. art. 8307a, § 6a (Supp. 1974); Wagstaff v. City of Groves, 419 S.W.2d 441, 444 (Tex. Civ. App.—Beaumont, writ ref'd n.r.e.); Akin, *Workmen's Compensation*, 23 SW. L.J. 137, 141 (1969).

104. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Supp. 1974). In exercising his subrogation right the carrier may recover for compensation paid to the claimant, plus costs, but any excess over that amount must be paid to the claimant or his beneficiaries.

Application of this provision becomes difficult in situations where the third party simultaneously holds the position of an employer. For example, if a dentist performs medical services for his technician, the employer should be liable in tort as well as workmen's compensation under the "dual capacity doctrine." 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.80 (1970); Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

Minors

It is well recognized that for the most part a minor does not hold the same legal status as an adult.[105] Due to minors' immaturity and lack of experience, the law has traditionally protected them, especially in the area of contracts.[106] The related problem in workmen's compensation cases arises when a minor sustains a compensable injury while performing services under an illegal contract, for example, in violation of the child labor laws. As a general rule, an employee who claims compensation under an illegal contract of employment is barred from recovery since the application of one statute should not depend on the violation of another.[107] The Workmen's Compensation Act, however, excepts minors from this general rule, stating that a minor is considered an employee and thus entitled to receive compensation even if he is employed in a hazardous activity which is prohibited by law.[108] One reason for this provision, aside from the general policy of protecting minors, is that an employer should not be allowed to profit from his illegal acts by making use of a legal defense against a minor's claim.[109]

Assignment

Another protection extended to employees under the Act is the exemption of compensation payments from "garnishment, attachment, judgment and all other suits or claims . . . ."[110] Moreover, the right to compensation or the payment itself is not assignable.[111] For example, in *Highlands Insurance Co. v. Daniel*,[112] an employee assigned the right to his claim to the Veterans Administration to pay for medical care. Later the employee applied to collect his compensation benefits from the insurer. The insurer argued that the employee had assigned his claim and had no authority to represent the Veterans

105. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 154-55 (1971).
106. *Id.* § 134, at 996.
107. Rogers v. Traders & Gen. Ins. Co., 135 Tex. 149, 153, 139 S.W.2d 784, 785-86 (1940).
108. TEX. REV. CIV. STAT. ANN. art. 8306, § 12i (1967); Hashins v. Cherry, 202 S.W.2d 691, 692 (Tex. Civ. App.—Dallas 1947, writ ref'd). Article 8306 section 12i also provides that this section should not be construed to excuse or justify any person, firm or corporation employing a minor in a hazardous activity prohibited by any statute in this state.
109. Although this same reasoning could apply to adult employees as well, the distinction probably rests on the general rule that the immaturity of an infant will excuse him from most illegal conduct.
Section 12i provides that where it is established that an injured minor would under normal conditions expect his wages to increase, that fact may be considered in arriving at his average weekly wages for determining compensation. TEX. REV. CIV. STAT. ANN. art. 8306, § 12i (1967). If the employee is under any disqualifying cause at the time his rights accure, his guardian or "next friend" may exercise his rights for him. *Id.* § 13.
110. *Id.* § 3.
111. *Id.*
112. 410 S.W.2d 491 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

Hospital in the suit for receovery. The court of civil appeals held that the assignment was void and that the employee could collect his compensation.[113]

These protective benefits, together with the relative ease in receiving compensation without the expense of litigation, provide the greatest inducement for the employee to accept relief under the Act. His right to compensation is almost assured once he proves that his injury is compensable.

INJURIES

The determination of which injuries are compensable has created formidable problems in workmen's compensation cases. The fine distinctions and interpretations of the statutory language have given rise to a considerable amount of litigation.[114] The Act defines an injury as "damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom."[115] This injury must "incapacitate the employee for a period of at least one week from earning full wages."[116] Moreover, the courts have continually upheld the proposition that compensation is awarded for loss of earning capacity and not loss of earnings or for the injury itself.[117] For example, loss of sexual powers from an accidental injury has not been considered compensable since it does not affect the claimant's capacity to work.[118]

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113. *Id.* at 493.

114. Henderson, *Should Workmen's Compensation Be Extended to Non-occupational Injuries?*, 48 TEXAS L. REV. 117, 121 (1969).

115. TEX. REV. CIV. STAT. ANN. art. 8309, § 20 (Supp. 1974). The "damage to the physical structure of the body" need not be externally visible. *See* Texas Employer's Ins. Ass'n v. Wade, 197 S.W.2d 203 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.).

There can be no recovery, however, for resulting pain and suffering alone. Continental Cas. Co. v. Cook, 507 S.W.2d 283, 285 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); Texas Employer's Ins. Ass'n v. Brown, 408 S.W.2d 931, 935 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.); American Mut. Liab. Ins. Co. v. Wegeworth, 140 S.W.2d 213, 217 (Tex. Civ. App.—Galveston 1940, writ dism'd jdgmt cor.).

Although ordinary diseases of life are not compensable under the Act, a disease or affliction which is a "natural result" of the injury will be compensated. "Natural result" of the injury has been defined as a direct causal connection between injury and the disease or the injury is the "producing cause" of the disease. Strong v. Aetna Cas. & Sur. Co., 170 S.W.2d 786, 788 (Tex. Civ. App.—Dallas 1943, no writ); *accord*, Texas Employer's Ins. Ass'n v. Burnett, 129 Tex. 407, 411, 105 S.W.2d 200, 202 (1937) (typhoid fever was not a natural result of a blow on the head); Texas Employers' Ins. Ass'n v. Jackson, 265 S.W. 1027, 1029 (Tex. Comm'n App. 1924, jdgmt adopted) (getting wet was not damage to physical structure of the body).

116. TEX. REV. CIV. STAT. ANN. art. 8306, § 6 (1967). Incapacity has been defined as an inability to obtain or retain work as an employee. United States Fidelity & Guar. Co. v. Archer, 87 S.W.2d 281, 283 (Tex. Civ. App.—Austin 1935, writ dism'd). Therefore, an employee may suffer an injury without being incapacitated. Texas Employers' Ins. Ass'n v. Gallegas, 415 S.W.2d 708 (Tex. Civ. App.—San Antonio 1967, no writ).

117. *E.g.*, Employers Reinsurance Corp. v. Holland, 162 Tex. 394, 396, 347 S.W.2d 605, 606 (1961).

118. Traders & Gen. Ins. Co. v. Rockey, 278 S.W.2d 490, 496 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.); Texas Employers Ins. Ass'n v. Ebers, 134 S.W.2d 797,

Another characteristic of a compensable injury is that it must be accidental in nature. An accidental injury has been defined as an undesigned, unforeseen or unexpected occurrence or mishap traceable to a definite time and place which causes harm or damage to the physical structure of the body.[119] This definition is important in distinguishing accidental injuries from occupational diseases; in the former, the injury can be traced to a definite time or place, while in the latter there is a slow and gradual development.[120] Due to a 1971 amendment, however, there is a strong indication that this distinction will not bar compensation for an occupational disease.[121]

The possible effect of this amendment coupled with the fact that an increasing number of courts have rejected the accidental injury requirement, illustrates that there is a trend toward more liberal application.[122]

Course of Employment

One of the basic elements of workmen's compensation is the limitation of coverage to employment connected injuries. Compensation will be paid only when an employee sustains an injury "in the course of his employment."[123] It has been suggested that two related major requirements have developed.[124]

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801 (Tex. Civ. App.—Amarillo 1939, writ dism'd). *But see* Colonial Penn Franklin Ins. Co. v. Mayfield, 508 S.W.2d 449 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

119. *E.g.*, Consolidated Underwriters v. Wright, 408 S.W.2d 140, 148 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e); *accord*, Highway Ins. Underwriters v. LeBeau, 184 S.W.2d 671, 677 (Tex. Civ. App.—Fort Worth 1944), *rev'd on other grounds*, 187 S.W. 2d 73 (Tex. Sup. 1945); Traders & Gen. Ins. Co. v. Weatherford, 124 S.W.2d 423, 426 (Tex. Civ. App.—Eastland 1939, writ dism'd jdgmt cor.). *But see* Hartford Indem. Co. v. Olson, 466 S.W.2d 373, 375 (Tex. Civ. App.—El Paso 1971), *aff'd*, 477 S.W.2d 859 (Tex. Sup. 1972); Aetna Ins. Co. v. Hart, 315 S.W.2d 169, 172 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.).

120. Consolidated Underwriters v. Wright, 408 S.W.2d 140, 148 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); Collins, *Workmen's Compensation*, 28 Sw. L.J. 131, 145 (1974).

121. This amendment abolished the specifically enumerated classification of occupational diseases and placed all occupational diseases under the general categories of "injuries." TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Supp. 1974); Charter Oaks Fire Ins. Co. v. Hallis, 511 S.W.2d 583 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ filed).

122. In Hartford Indem. Co. v. Olson, 466 S.W.2d 373, 375 (Tex. Civ. App.—El Paso 1971), *aff'd*, 477 S.W.2d 854 (Tex. Supp. 1972) the court of civil appeals stated that there is no language in the Workmen's Compensation Act which requires that an injury be the result of an accident. It is sufficient that the injury be sustained while in the course of employment and that such injury result in a risk or hazard of the employment. *Accord*, Aetna Ins. Co. v. Hart, 315 S.W.2d 169, 172 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.).

123. TEX. REV. CIV. STAT. ANN. art. 8036, § 3b (1967). TEX. REV. CIV. STAT. ANN. art. 8309, § 1(4) (1967) provides that injuries sustained while in the "course of employment" includes injuries "originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premise or elsewhere."

124. Akin, *Workmen's Compensation*, 26 Sw. L.J. 177, 178 (1972).

First, the employee must be injured while in the furtherance of the employer's business.[125] Evidence of the time and specific location of the accident are relevant considerations.[126] For example, the San Antonio Court of Civil Appeals has pointed out that a traveling salesman is generally considered to be acting within the scope of his employment while sleeping and eating. Even on a business trip, however, a traveling salesman may also perform a purely personal mission, not in furtherance of his employer's business.[127]

One of the products of the "course of employment" problem has been the development of the "going and coming" rule. Generally, an employee cannot recover for injuries sustained while coming to or going from work since those activities involve hazards to which all members of the traveling public are subject.[128] The exceptions to the rule occur where (1) the employee performs a service for the employer at his specific direction; (2) the travel is in the normal course of the employee's duties; and (3) the employee uses a means of ingress or egress to the employer's premises.[129] Recently the supreme court reversed a decision in which the Dallas Court of Civil Appeals had granted compensation to an employee injured while using a public cross-

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125. *Id.* at 178.

126. Henderson, *Should Workmen's Compensation be Extended to Nonoccupational Injuries?*, 48 TEXAS L. REV. 117, 122 (1969).

127. Hardware Mut. Cas. Co. v. McDonald, 502 S.W.2d 602, 604 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.). It has also been held that for an injury to be compensable it must have been sustained during a period when the employee was authorized to be working. American Motorists Ins. Co. v. Steel, 229 S.W.2d 386, 389 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

Deviations from employment have been a continual source of controversy. In many situations determining at what point the employee has left the course of his employment rests on fine distinctions of time and place. Texas Gen. Indem. Co. v. Luce, 491 S.W.2d 767 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.). There should be more than a slight impulsive act to cause a deviation; the employee must "go to a lot of trouble" to leave the scope of his employment. Davis, *Workmen's Compensation*, 33 J. AM. TRIAL LAWS ASS'N 140, 176 (1970). *Compare* Anderson v. Russell Miller Milling Co., 267 N.W. 501, 503 (Minn. 1936) *with* Moise v. Fruit Dispatch Co., 283 N.W. 495, 497 (Neb. 1939).

128. *E.g.*, Texas Compensation Ins. Co. v. Matthews, 504 S.W.2d 545, 547 (Tex. Civ. App.—Dallas 1973), *rev'd*, 17 Tex. Sup. Ct. J. 447 (Sept. 28, 1974).

TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (1967) provides that injuries are compensable if the transportation is (1) provided as a part of the contract; (2) is paid for by the employer; (3) is under the employer's control; or (4) the employee was directed to proceed from one place to another. In addition, it encompasses the dual purpose rule by stating that injuries sustained while in furtherance of the employer's affairs are not compensable if the travel is in furtherance of the employee's private affairs unless the trip would have been made had there been no private reason, and the trip would not have been made had there been no business purpose. Davis v. Argonaut Southwest Ins. Co., 464 S.W.2d 102, 103 (Tex. Supp. 1971); United States Fidelity & Guar. Co. v. Harris, 489 S.W.2d 312, 316 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.); Akin, *Workmen's Compensation*, 25 SW. L.J. 122, 123 (1971).

129. Shubert v. Fidelity & Cas. Co., 467 S.W.2d 662, 664 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

walk.[130] Writing for the majority, Chief Justice Greenhill reaffirmed the rule that the access-egress exception does not extend into areas open to the general public.[131]

Having connected the employment to the injury, the second major requirement under the "course of employment" rule is to connect the injury to the resulting incapacity.[132] A claimant is not required to prove "proximate cause;" it is necessary merely to show that the injury was a "producing" or "contributing" cause of the resulting incapacity.[133] In *Highlands Insurance Co. v. Clements*[134] the employee experienced irritation in his right eye shortly after exposure to warm vapors emitting from an air duct. The irritation was diagnosed as a neurotropic virus which could cause permanent damage to the eye. The employee testified that the vapors had a sour and foul smell which the medical witness claimed *could* have aggravated the infection. Based on the employee's testimony that foul and sour vapors were present, the court held that the jury *could* believe that it would "naturally follow" that some toxic substance was present in the vapor which in turn accelerated the already present infection.[135] A stricter rule has been applied in cases involving specific conditions or diseases such as cancer. Generally, in such cases courts have required medical testimony showing a "reasonable probability" and not simply conclusions from the factual circumstances alone.[136] The reason for this distinction is that such specific conditions and diseases are usually too technical in nature to allow an average juror to make a determination as to their cause; the determination should be made instead on the basis of opinions by medical experts.[137]

Since the injury need be only a "producing cause" of the incapacity, it follows that a pre-existing condition which contributes to the incapacity will not bar compensation.[138] The Act specifically provides that where a prior injury

130. Texas Employer's Ins. Ass'n v. Matthews, 17 Tex. Sup. Ct. J. 447 (Sept. 28, 1974), *rev'g* Texas Compensation Ins. Co. v. Matthews, 504 S.W.2d 545 (Tex. Civ. App. —Dallas 1974).

131. *Id.* at 448. The court cited an earlier decision which held that for the access exception to apply, (1) the employer must intend that the access is to be used though not a part of his premises, and (2) the area must be close enough to the employer's premises as to be fairly treated as a part of his premises. *Id.* at 548.

132. Akin, *Workmen's Compensation*, 26 Sw. L.J. 177, 178 (1972).

133. Texas Employers' Ins. Ass'n v. Horn, 333 S.W.2d 438, 441 (Tex. Civ. App.— Fort Worth 1960, writ ref'd).

134. 422 S.W.2d 218 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.).

135. *Id.* at 220. A medical expert also testified that while the injury can not cause a viral infection, in some way an injury does precipitate it according to a medical theory supported by experts. *Id.* at 219.

136. *See generally* Musslewhite, *Medical Causation Testimony in Texas: Possibility Versus Probability*, 23 Sw. L.J. 622 (1969).

137. Scott v. Liberty Mut. Ins. Co., 204 S.W.2d 16, 18 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.); *see* Colonial Penn Franklin Ins. Co. v. Mayfield, 508 S.W.2d 449, 452-53 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

138. Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207, 210 (Tex. Sup. 1973).

combines with a subsequent injury to produce incapacity, the association will be liable for all compensation.[139] For example, where an employee's heart condition is aggravated by over-exertion on the job, he can receive full compensation for the resulting incapacity.[140] It has been held, however, that a pre-existing condition is a defense to a compensation claim if it was the sole cause of the incapacity[141] or if it was a compensable injury at the time it occurred.[142]

The "course of employment" distincton would appear to be essential to distinguish occupational from non-occupational injuries. However, the large amount of litigation in this area raises questions as to the propriety of attempting to make such a distinction.[143]

There has been a definite trend in workmen's compensation cases toward broadening the scope of the "course of employment" distinction.[144] For example, in the development of the "occupational risk" doctrine, policy considerations appear to be shifting the emphasis in workmen's compensation toward a more socialized form of relief.[145] The overall effect of the injury on the employee—the resulting incapacity—is becoming more important than the origin of the risk.[146]

Classification of Injuries

Under the Texas Workmen's Compensation Act injuries are classified as either general or specific. Article 8306, section 12 contains a schedule of specific injuries and the fixed time and maximum rate at which each of those injuries is to be compensated. These classifications are based on the frequent reoccurrence of similar industrial accidents and the usual extent of resulting incapacity. Proof of loss of earning capacity is not required in a claim for scheduled injuries; the right to compensation is dependent only on proof that the employee had sustained the specific injury.[147]

The Act has also provided a specific listing for hernias. In a claim for compensation for a hernia resulting from an employment-connected injury the

139. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Supp. 1974).
140. Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207 (Tex. Sup. 1973).
141. Bituminous Cas. Corp. v. Martin, 478 S.W.2d 206, 208 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).
142. Transport Ins. Co. v. Mabra, 487 S.W.2d 704, 706 (Tex. Sup. 1972). *But see* Texas Employers' Ins. Ass'n v. Creswell, 511 S.W.2d 68 (Tex. Civ. App.—Eastland 1974, writ filed).
143. Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEXAS L. REV. 117, 121 (1969).
144. *Id.* at 121.
145. *Id.* at 126-27.
146. *Id.* at 126.
147. *See* Royal Indem. Co. v. Dennis, 404 S.W.2d 951, 953 (Tex. Civ. App.—Fort Worth 1966), *rev'd on other grounds*, 410 S.W.2d 185 (Tex. Sup. 1966).