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Scope of the Act: Benefits Student Symposium - Workmen's Compensation: A Pandect of the Texas Law

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statute provides that the employee must prove: (1) that there was an injury resulting in a hernia; (2) that the hernia appeared suddenly and immediately following the injury; (3) that it did not exist in any degree prior to the injury; and (4) that the injury was accompanied by pain.[148]

Unless specifically classified by statute, any other injury falling within the Act must be compensated as a general injury; consequently, the employee will be required to prove loss of earning capacity and disability.[149] For example, when the employee claims compensation for loss of an eye and permanent disability from severe burns, compensation for the lost eye is awarded per se as a specific injury while compensation for the burns is awarded only after proof of the resulting disability.[150]

The statute also distinguishes between total and partial incapacity by listing those injuries which are legislatively presumed to be total and permanent.[151] For those injuries not listed the claimant has the burden of establishing the extent and duration of his incapacity.[152] Even when an employee is unable to perform his usual task but is capable of performing some labor of a less remunerative class, he is considered to be partially incapacitated and can receive compensation.[153] In *Guerra v. Texas Employers' Insurance Association*,[154] the employee sustained a back injury for which he claimed total and permanent incapacity. After a successful operation the employee returned to work and was placed on light duty during which time his average earnings were substantially the same as before the accident. Witnesses testified that he was able to perform his job without any difficulty. Since the employee was able to perform part of his usual tasks and to retain employment suitable to his physical condition, he was awarded compensation for partial incapacity only.[155]

SCOPE OF THE ACT: BENEFITS

Workmen's compensation encompasses a wide range of benefits including death benefits paid to the beneficiaries of a deceased employee[156] and benefits paid to the employee himself both for injuries sustained in the course of

148. TEX. REV. CIV. STAT. ANN. art. 8306, § 12b (1967); Akin, *Workmen's Compensation*, 25 SW. L.J. 122, 125 (1971).
149. *See* National Mut. Cas. Co. v. Lowery, 136 Tex. 188, 191, 148 S.W.2d 1089, 1090 (1940).
150. *See* Choate v. Hartford Accident & Indem. Co., 54 S.W.2d 901, 903 (Tex. Civ. App.—Eastland 1932, writ ref'd).
151. TEX. REV. CIV. STAT. ANN. art. 8306, § 11a (1967).
152. *See* National Mut. Cas. Co. v. Lowery, 135 S.W.2d 1044, 1053 (Tex. Civ. App. —Eastland 1939), *aff'd*, 136 Tex. 188, 148 S.W.2d 1089 (1940).
153. TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1967).
154. 343 S.W.2d 306 (Tex. Civ. App.—San Antonio 1961, no writ).
155. *Id.* at 308.
156. TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (Supp. 1974).

employment[157] and for expenses incurred for medical services.[158] These statutory benefits provided by workmen's compensation are exclusive and are a partial substitute for the employer's tort liability and the employee's common law causes of action.[159] Compensation is awarded only if the injury or the death of the employee arises out of and in the course of employment.[160]

MEDICAL BENEFITS

Section 7 of Part I of the Act enumerates the various medical benefits for which injured employees are eligible.[161] For example, physical rehabilitation will be provided to the extent that the injured employee will be restored to his normal level of capacity or will be reasonably relieved of pain.[162] However, the Industrial Accident Board is expressly relieved of the burden of providing services for vocational rehabilitation.[163] The Board's responsibility in this area is to notify the employee of the services provided by the Texas Rehabilitation Commission available to him and simultaneously inform the Rehabilitation Commission of the employee's condition.[164] The employee's difficulty in obtaining vocational rehabilitation is manifested by the fact that he must deal with two agencies.

Section 7-e also provides for an artificial appliance to be furnished to an injured employee if it is found that it would materially improve future occupational opportunities.[165] It is implicit though that a prosthetic device will not be provided simply for cosmetic purposes.[166] The cost of the appliance furnished to the employee will be commensurate with his wages or salary, but the insurer is not liable either for replacement or repair.[167]

Amendment

Section 7 has recently been amended to allow the injured workman the sole right to select his own doctor and hospital care or to request that the Board do so for him.[168] Under the present statute the insurer no longer has

157. *Id.* §§ 10, 12.
158. *Id.* § 7.
159. H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 44 (1954).
160. *Id.* at 53.
161. TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Supp. 1974).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* § 7-e.
166. *Id.* § 7-e.
167. *Id.* § 7-e.
168. Tex. Laws 1917, ch. 103, § 7, at 269, *as amended*, TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Supp. 1974) limited the employee's right to recover:

> The employee shall not be entitled to recover any amount expended or incurred by him for . . . medical aid . . . unless the association or subscriber shall have had notice of the injury and shall have refused, failed or neglected to furnish it or them within a reasonable time.

to choose the doctor who will care for the workman nor the hospital that will be used.[169] The only obligation that the workman owes the insurer in this respect is notification of the injury.[170]

Incidental Services

Notice of injury is also the only requirement the employee must fulfill in order to charge the insurance company for incidental care,[171] and it is not necessary that he give notice each time he requires specific services.[172] The following cases, dealing primarily with the rendition of nursing services to the plaintiff and his right to reimbursement for them, illustrate both the great amount of judicial discretion in the area of notice and the varying standards of proof the plaintiff must meet in order to recover for incidental medical services.

In *Standard Fire Insurance Co. v. Simon*[173] the plaintiff's wife, a graduate nurse, and his mother-in-law, a vocational nurse, cared for him after his injury. In this instance, the plaintiff's wife was considered competent to testify as to the reasonable cost of nursing care, and although the plaintiff did not

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Charter Oak Fire & Ins. Co. v. Few, 456 S.W.2d 156 (Tex. Civ. App.—Tyler 1970, *rev'd on other grounds*, 463 S.W.2d 424 (Tex. Sup. 1971), is illustrative of the law prior to the amendment. Mrs. Few was injured in the course of her employment. The insurance company agreed to pay for the medical expenses she incurred immediately following the accident, but it was not found to be liable for payments to a doctor of her choice after she had been assigned another by the insurer.

If the workman failed to establish that either the Board or the insurer had not provided medical services, then the insurer was not liable for the employee's medical expenses. Travelers Ins. Co. v. Garcia, 417 S.W.2d 630, 633-34 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); *see* Texas Employer's Ins. Ass'n v. Steadman, 415 S.W.2d 211, 217 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.); Liberty Universal Ins. Co. v. Gill, 401 S.W.2d 339, 346 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); United States Fidelity & Guar. Co. v. Camp, 367 S.W.2d 952, 955 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.).

Failure on the part of the employee to seek approval by the Board for treatment has resulted in loss of court jurisdiction over his claim. Paradissis v. Royal Indem. Co., 496 S.W.2d 146, 150 (Tex. Civ. App.—Houston [14th Dist.] 1973), *aff'd*, 507 S.W.2d 526 (Tex. Sup. 1974).

169. TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Supp. 1974).

170. *Id.*

171. Standard Fire Ins. Co. v. Simon, 474 S.W.2d 530, 532 (Tex. Civ. App.—Dallas 1971, no writ); *see* Texas Employer's Ins. Ass'n v. Chappell, 494 S.W.2d 159, 160 (Tex. Sup. 1973); Twin City Fire Ins. Co. v. Gibson, 488 S.W.2d 565, 573-74 (Tex. Civ. App. —Amarillo 1972, writ ref'd n.r.e.).

The court in *Simon* interpreted the part of section 7 dealing with notice:

> Notice of the injury within the time specified . . . is sufficient notice to invoke section 7 of article 8306, V.A.C.S., and thus allow recovery for reasonable medical expenses incurred due to an injury covered by our Workmen's Compensation Statute.

Standard Fire Ins. Co. v. Simon, 474 S.W.2d 530, 532 (Tex. Civ. App.—Dallas 1971, no writ).

172. Standard Fire Ins. Co. v. Simon, 474 S.W.2d 530, 532 (Tex. Civ. App.—Dallas 1971, no writ).

173. *Id.* at 530.

actually expend any funds for these services, his claim was allowed.[174] Similarly, in *Home Indemnity Co. v. Draper*,[175] in which the plaintiff's wife provided him with nursing care, a physician testified as to the usual fees received by nurses and sitters. The court upheld the jury award, stating that it was immaterial to the question of compensation whether the plaintiff actually expended money or incurred a debt for the nursing services rendered.[176] In both of these cases notice of the injury was sufficient to charge the insurer for incidental nursing services and testimony as to the reasonable cost of these services was admitted.[177]

These standards were totally ignored, however, in *Barrientos v. Texas Employer's Insurance Association*[178] in which the jury awarded compensation not only for injuries but also for nursing services. The award for services rendered was set aside by the court of civil appeals for three reasons. The first two reasons—that Barrientos could recover compensation for nursing services only if the insurer refused to furnish them, and that since Barrientos had not actually paid for the services, he had nothing to recover—were directly contrary to *Simon* and *Draper*.[179] The third reason was that the value of the services was not proven.[180] A registered nurse testified concerning the usual fees paid to both registered and licensed vocational nurses. The same type of testimony was accepted in *Draper* in which the compensation award for services was upheld, thus more closely adhering to the overall intent of the Workmen's Compensation Act.[181]

Although the medical benefits provided by the Act cover a wide range of areas, they stop short of comprehensive coverage. Requiring the injured employee to seek vocational rehabilitation from the Texas Rehabilitation Commission rather than providing it under the Workmen's Compensation Act is an example of this type of shortcoming. This provision would better serve the workman by providing vocational rehabilitation incident to any hospital services rendered under workmen's compensation.

Incapacity

To receive compensation for total incapacity the employee must be unable

174. *Id.* at 533-34.
175. 504 S.W.2d 570 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e..).
176. *Id.* at 576.
177. Home Indem. Co. v. Draper, 504 S.W.2d 570, 575 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.); Standard Fire Ins. Co. v. Simon, 474 S.W.2d 530, 532-34 (Tex. Civ. App.—Dallas 1971, no writ).
178. 507 S.W.2d 900 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).
179. *Id.* at 902.
180. *Id.* at 902.
181. Paradissis v. Royal Indem. Co., 496 S.W.2d 146, 149 (Tex. Civ. App.—Houston [14th Dist.] 1973), *aff'd*, 507 S.W.2d 526 (Tex. Sup. 1974).

to retain employment requiring him to do the usual tasks of a workman.[182] Inability to work in a particular occupation is not enough to grant an award for total incapacity.[183]

Partial incapacity occurs when an injury prevents as employee from performing a part of his usual job, but does not preclude the employee from obtaining employment that is suitable to his physical condition.[184] Both total and partial incapacities are considered general injuries to the body.[185] If the employee suffers a specific injury, the amount of his compensation is governed exclusively by section 12.[186]

If an injury affects a particular member of the body for which compensation is specifically provided by section 12, the insurer's liability is limited to that amount, notwithstanding the fact that the injury to the specific member may result in total incapacity.[187] An employee will not, however, be precluded from recovery for total incapacity if he proves that the injury to the specific member extended to and affected other parts of his body so as to totally incapacitate him.[188] An employee who seeks to recover total disabil-

182. Texas Employer's Ins. Ass'n v. Mallard, 143 Tex. 77, 79, 182 S.W.2d 1000, 1001 (1944).

183. Standard Fire Ins. Co. v. Simon, 474 S.W.2d 530, 534 (Tex. Civ. App.—Texarkana 1968, writ dism'd).

184. Travelers Ins. Co. v. Smith, 435 S.W.2d 248, 249-50 (Tex. Civ. App.—Texarkana 1968, writ dism'd); *see* TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (Supp. 1974).

Compensation for partial incapacity is paid to the injured employee weekly. The benefits are equal to 66 2/3 percent of the difference between his average weekly wages before the injury and his average weekly wage earning potential while he is incapacitated. Compensation for partial incapacity shall not exceed 300 weeks. *Id.* § 11.

185. Ruddell v. Charter Oak Fire Ins. Co., 482 S.W.2d 382, 383 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.).

The Texas Workmen's Compensation Act divides compensable injuries into two classes: general injuries, which affect the entire body, and specific injuries, which cause the loss or loss of the use of a particular member. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 10-12 (Supp. 1974). When the injury results in total incapacity for work, the injured employee is provided with weekly compensation equaling 66 2/3 percent of his average weekly wage, but this compensation will only be paid for a maximum of 401 weeks. *Id.* § 10.

186. TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (Supp. 1974). For example, the loss of an index finger results in the payment of compensation to the employee of 66 2/3 percent of his average weekly wages for 45 weeks, while the loss of a hand results in the same percentage of payments for 150 weeks.

187. Hartford Accident & Indem. Co. v. Helms, 467 S.W.2d 656, 661 (Tex. Civ. App. —Tyler 1971, no writ); Texas Employers Ins. Ass'n v. Polasek, 451 S.W.2d 260, 265 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.); Coleman v. Hartford Accident & Indem. Co., 297 S.W.2d 236 (Tex. Civ. App.—Fort Worth 1957, writ ref'd).

188. Hartford Accident & Indem. Co. v. Helms, 467 S.W.2d 656, 661 (Tex. Civ. App. —Tyler 1971, no writ); *see* Texas Employer's Ins. Ass'n v. Espinosa, 367 S.W.2d 667 (Tex. Sup. 1963); Texas Employer's Ins. Ass'n v. Brownlee, 152 Tex. 247, 256 S.W.2d 76 (1953); Texas Employer's Ins. Ass'n v. Polasek, 451 S.W.2d 260 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.); Brown v. Transamerica Ins. Co., 416 S.W.2d 902 (Tex. Civ. App.—Tyler 1967, no writ); General Accident Fire & Life Assurance Corp. v. Murphy, 339 S.W.2d 392 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

ity payments must proceed in one of two ways. He may rely on proof that he suffered a general injury to his body resulting in total incapacity to work, or he may prove that, while the injury was to a specific member of the body compensable under section 12, it also extended to and affected other parts of the body causing or contributing to total incapacity thereby bringing it within the realm of section 10.[189]

Hartford Accident & Indemnity Co. v. Helms[190] is illustrative of the successful use of the second method. Helms was employed in a lumber yard and injured his shoulder while performing manual labor. He claimed that he had sustained a general injury resulting in total disability, but the insurer contended that the shoulder injury entitled the claimant to compensation for a specific injury only. After extensive medical testimony, the court agreed that Helms had proved that his general incapacity was caused by an extension of the specific injury and affirmed the jury award for total incapacity.[191]

A different result was reached in *Travelers' Insurance Co. v. Marmolejo.*[192] Following an award for general disability in the trial court, the supreme court reversed and remanded, saying that an injured workman does not establish a right to compensation for general disability merely by showing that the specific injury affected his body generally.[193] The burden is on the plaintiff to show that his incapacity was a result of the extension of the injury to another part of his body.[194]

These two cases, although they arrive at opposite conclusions, are easily reconciled due to the distinctive natures of specific injuries involved. The major problem in this area arises in those cases where there is a difficult distinction between the specific injury itself and the extension of that injury.

Texas Employers' Insurance Association v. Polasek[195] evidences the extreme difficulty of applying the law to the various fact situations that arise and the inequity that may result from a rigid application of the rules. Polasek was injured when a pressurized glass tank exploded. As a result of the accident he hit his head and was knocked unconscious, and because of the flying glass his eye had to be surgically removed. Polasek alleged that he had sustained a general injury which caused headaches, numbness in his hand and fingers, and exhaustion. The insurer contended that only a specific injury (the loss of an eye) had been incurred. Although the trial court awarded

189. Travelers' Ins. Co. v. Marmolejo, 383 S.W.2d 380, 381 (Tex. Sup. 1964); Texas Employers' Ins. Ass'n v. Stateler, 449 S.W.2d 533, 537 (Tex. Civ. App.—Dallas 1969, no writ).

190. 467 S.W.2d 656 (Tex. Civ. App.—Tyler 1971, no writ).

191. *Id.* at 661.

192. 383 S.W.2d 380 (Tex. Sup. 1964).

193. *Id.* at 381-82.

194. *Id.* at 382; *see* Texas Employer's Ins. Ass'n v. Espinosa, 367 S.W.2d 667 (Tex. Sup. 1963).

195. 451 S.W.2d 260 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.).

compensation for total and permanent incapacity, the court of civil appeals reversed, holding that Polasek had not proven the extension of the specific injury to other parts of his body.[196]

If Polasek had not suffered the injury to his eye, the evidence would have been sufficient to find that the head injury caused the resulting incapacity.[197] The jury could have correctly awarded him compensation for total and permanent incapacity because such findings may be based on circumstantial evidence.[198] In this particular situation, however, the court felt that medical testimony was required to prove the causal connection between the injury and the incapacity. The expert testimony on this point was adverse to Polasek and overcame the weight of circumstantial evidence in his favor.[199]

An unfair burden is placed on the plaintiff in such situations. It should make no difference whether the general incapacity is a result of an extension of the specific injury to other parts of the body or whether the specific injury itself caused the general incapacity. In either case the disability is permanent and the injured workman should be compensated.

The law in this area, at least when the distinctions are as difficult as those in *Polasek*, should be applied to allow the injury which entitles the workman the greatest amount of recovery to govern, notwithstanding the fact that the plaintiff might not meet his burden of proof regarding the showing of an extension to other parts of the body. The plaintiff's award for total incapacity would compensate somewhat for the loss of the particular member involved.

DEATH BENEFITS

If the injury that the employee sustains results in death, his legal beneficiarises are entitled to weekly compensation equaling 66 2/3 percent of the deceased workman's average weekly wage.[200] This figure is limited as to both minimum and maximum amounts.[201] If the beneficiary is the surviving spouse, these benefits are paid until his death. If he remarries, he will be paid a lump sum equaling the compensation due for a 2-year period.[202] This payment apparently discharges any further liability on the part of the carrier.

196. *Id.* at 265.
197. *Id.* at 264.
198. *Id.* at 264; Traveler's Ins. Co. v. Arnold, 378 S.W.2d 78, 83 (Tex. Civ. App.—Dallas 1964, no writ); American Gen. Ins. Co. v. Florez, 327 S.W.2d 643, 650 (Tex. Civ. App.—Houston 1959, no writ).
199. Texas Employer's Ins. Ass'n v. Polasek, 451 S.W.2d 260, 266 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.).
200. TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (Supp. 1974).
201. *Id.* § 29. This section provides that effective August 1, 1974, the maximum weekly benefits shall be 70 dollars and the minimum weekly benefit shall be 16 dollars. Initially, the amendment provided for maximum weekly benefits of 63 dollars and minimum benefits of 15 dollars. These amounts became effective August 31, 1973 and remained as such until September 1, 1974.
202. TEX. REV. CIV. STAT. ANN. art. 8306, § 8(b) (Supp. 1974).

Compensatory death benefits payable to children are divided into three categories. First, compensation is provided for the child until he reaches the age of 18. If it is found that the child is actually dependent beyond the age of 18, compensation will continue.[203] The statute does not specify a time limit on these payments; the question is apparently left to judicial discretion. Finally, in cases where the child is enrolled as a full-time student in an accredited educational institution, his compensation will continue until he is 25 years old.[204] This particular section of the statute presents a potential area of litigation as the criteria that constitute a full-time student vary greatly.[205]

If death occurs as a result of an injury for which compensation has been paid, that amount is deducted from the death benefits.[206] A lingering compensable injury could thus greatly diminish the total amount of recovery payable as death benefits. This section seems to provide the injured workman with the morbid incentive to die quickly in order to better provide for his family. An amendment in the area would be appropriate to change the law to make death benefits payable in addition to any prior compensation the employee had been entitled to or received.

Two Theories of Interpretation

According to section 8a the beneficiaries will receive death benefits only if the death was a direct result of the injury.[207] Consequently, there has been a great deal of litigation in this area, and the courts seem to have followed two opposing views in construing this particular statute. In one theory, involving the liberal interpretation of the words "accidental" and "injury,"[208] circumstantial evidence, along with expert medical testimony, is considered sufficient evidence to justify awarding death benefits.[209] The second theory utilizes a stricter view. Rather than construing circumstantial evidence in favor of the deceased's beneficiaries, the courts following this approach demand probative evidence to show the causal connection between injury and

203. *Id.* This situation usually arises in the case of a retarded or similarly handicapped child.

204. *Id.*

205. Collins, *Workmen's Compensation*, 28 Sw. L.J. 134 (1974). The Act also provides for compensation in the amount of 500 dollars for burial expenses to be awarded in addition to the amount due the beneficiary as death benefits. TEX. REV. CIV. STAT. ANN. art. 8306, § 9 (1967).

206. TEX. REV. CIV. STAT. ANN. art. 8306, § 8b (1967).

207. *Id.* § 8a.

208. *See* Carter v. Travelers Ins. Co., 132 Tex. 288, 295, 120 S.W.2d 581, 584 (1938); Standard Fire Ins. Co. v. Sullivan, 448 S.W.2d 256, 257 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.).

209. Standard Fire Ins. Co. v. Sullivan, 448 S.W.2d 256, 257 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); *see* Aetna Cas. & Sur. Co. v. Calhoun, 426 S.W.2d 655, 656, 658 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.); Midwestern Ins. Co. v. Wagner, 370 S.W.2d 779, 783 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.).

death.[210] This theory is harsh, and the burden on the plaintiff to prove any one particular activity as the cause of death is often too great, particularly since medical opinion often varies tremendously. The liberal view is the better approach because it allows the courts to use their discretion and award compensation depending on the facts of the individual situations.[211]

The major problem in this area revolves around the conflict of what constitutes sufficient evidence to prove the causal connection between the injury and death. While it is well established that a strain or exertion may be an accidental injury within the meaning of the Workmen's Compensation Act,[212] the type of activity that constitutes a strain or exertion is in controversy. Some Texas courts, liberal in their interpretation, find that almost any activity done at work falls within the definition of these words,[213] while others equate strain with over-exertion.[214] For example, a workman who climbs a ladder while at work and suffers a heart attack that results in death may be considered to have suffered an injury within the scope of workmen's compensation. According to the liberal theory the injury, having occurred at work, is sufficient circumstantial evidence on which to allow the plaintiff to recover. The stricter theorists, though, would not find this to be adequate and would require direct evidence to prove the causal connection between the injury and death.

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210. Whitaker v. General Ins. Co. of America, 461 S.W.2d 148, 152 (Tex. Civ. App. —Dallas 1970, writ ref'd n.r.e.).

211. *Compare* Whitaker v. General Ins. Co. of America, 461 S.W.2d 148, 152 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) (work performed must require over exertion) *with* Standard Fire Ins. Co. v. Sullivan, 448 S.W.2d 256, 257 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.) (injury during course of employment sufficient proof of causal connection between injury and death). *See also* Baird v. Texas Employer's Ins. Ass'n, 495 S.W.2d 207, 210 (Tex. Sup. 1973); Texas Indem. Ins. Co. v. Staggs, 134 Tex. 318, 324, 134 S.W.2d 1026, 1029 (1940); Gill v. Transamerica Ins. Co., 417 S.W.2d 720, 723 (Tex. Civ. App.—Dallas 1967, no writ); Hartford Accident & Indem. Co. v. Grant, 346 S.W.2d 359, 363 (Tex. Civ. App.—Dallas 1961, no writ).

212. Whitaker v. General Ins. Co. of America, 461 S.W.2d 148, 152 (Tex. Civ. App. —Dallas 1970, writ ref'd n.r.e.); *see* Carter v. Travelers Ins. Co., 132 Tex. 288, 295, 120 S.W.2d 581, 585 (1938); Pan American Fire & Cas. Co. v. Reed, 436 S.W.2d 561, 563 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); Hartford Accident & Indem. Co. v. Gant, 346 S.W.2d 359, 363 (Tex. Civ. App.—Dallas 1961, no writ).

213. Carter v. Travelers Ins. Co., 132 Tex. 288, 120 S.W.2d 581, 583 (1938); *see* Standard Fire Ins. Co. v. Sullivan, 448 S.W.2d 256 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); Midwestern Ins. Co. v. Wagner, 370 S.W.2d 779 (Tex. Civ. App.— Eastland 1963, writ ref'd n.r.e.); Texas Employer's Ins. Ass'n v. Jenkins, 357 S.W.2d 475 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.); Hartford Accident & Indem. Co. v. Gant, 346 S.W.2d 359, 363 (Tex. Civ. App.—Dallas 1961, no writ); Texas Employployer's Ins. Ass'n v. Brogdon, 321 S.W.2d 323 (Tex. Civ. App.—Forth Worth 1959, writ ref'd n.r.e.).

214. Whitaker v. General Ins. Co. of America, 461 S.W.2d 148, 152 (Tex. Civ. App. —Dallas 1970, writ ref'd n.r.e.); *see* O'Dell v. Home Indem. Co., 449 S.W.2d 485 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.); Monks v. Universal Underwriters Ins. Co., 425 S.W.2d 431 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); General Accident Fire & Life Assurance Corp. v. Perry, 264 S.W.2d 198 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.).

There is a definite need to bring some sort of uniformity to the law in this area. The disparate decisions resulting from the use of two such opposite rules will perhaps be abated by the supreme court's decision in *Baird v. Texas Employers' Insurance Association*[215] in which an employee had suffered from mild congestive heart failure for more than 1 year prior to his death, which occurred while he was at work. The question arose concerning sufficient evidence related to strain or exertion. The trial court instructed a verdict for the insurance carrier, but the supreme court reversed, saying that "[a]n answer to the problem of whether evidence, most often circumstantial in nature, together with the inferences that may be drawn therefrom, present issuable facts, is always difficult in this type of case."[216]

While not overruling the cases which have followed the stricter rule, *Baird* does make a strong statement that circumstantial evidence is sufficient in Texas to prove the causal connection between the injury and death. If this rule is uniformly followed, the equitable purposes for which workmen's compensation was intended will be more nearly served.[217] Only in situations where it is clearly established that the injury did not cause the death should the employee be precluded from recovery. As a matter of public policy, the burden of proving this should be placed on the insurer instead requiring the plaintiff to prove that a particular activity caused the death.

Beneficiaries

When death benefits are to be awarded the statute stipulates the sole and exclusive beneficiaries.[218] There are two classes of beneficiaries: the first consists of the surviving spouse, minor children, parents and step-mother, who receive the benefits regardless of their dependency on the deceased. The second group, which is eligible for benefits only in the absence of any members of the first group, consists of grandparents, children, grandchildern and siblings who receive compensation only if they were dependent upon the deceased for support.[219] The award received by a beneficiary cannot be attached for the debts either of the deceased or of the beneficiary, and it is paid directly to the designated beneficiary without being administered by the deceased's estate.[220]

Workmen's compensation benefits are conferred solely by statute and are

215. 495 S.W.2d 207 (Tex. Sup. 1973).
216. *Id.* at 211.
217. Charter Oak Fire Ins. Co. v. Few, 456 S.W.2d 156, 162 (Tex. Civ. App.—Tyler 1970), *rev'd on other grounds*, 463 S.W.2d 424 (Tex. Sup. 1971).
218. TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (Supp. 1974).
219. *Id.*
220. *Id.*

not obtained through inheritance.[221] Basing its decision on this rule, the Texas Supreme Court in *Patton v. Shamburger*[222] held that an employee's children who had been legally adopted by his wife's second husband were no longer the employee's minor children and in case of his death, were not entitled to workmen's compensation death benefits.[223] Referring to the list of legal beneficiaries in section 8a, the court awarded the benefits to the workman's parents.[224]

This decision ignored statutory language to the effect that benefits shall be distributed according to the laws of descent and distribution, which, in Texas, provide that adopted children may inherit from their natural parents.[225] "Instead, the court held, at least as far as death benefits are concerned, that the adoption relationship superseded the natural relationship . . . ."[226]

Initially, the exclusion of adopted children from their natural father's death benefits seems inequitable, but the rule is not actually harsh. Since the children have been legally adopted, they are no longer dependent children of the deceased.[227] Rather they are provided for by their adoptive father. Likewise, if the deceased had adopted his wife's children, his adopted children would receive the benefits.[228] If he had remained single, compensation would be awarded according to statute.[229] If it were obvious that an inequity would result, the court could more leniently interpret the statute in order to perpetrate justice.[230]

The right to death benefits is derived from statute, and the statute is strictly construed.[231] The resulting inflexibility sometimes requires the payment of benefits to those who least deserve them. For example, there is no statutory provision for discretionary awards of death benefits to persons acting *in loco parentis*. The injustice in such a situation is illustrated in *Servantez v. Aguirre*[232] in which the deceased employee had been raised by his grandfather and had seen his natural mother only once or twice during his lifetime.

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221. Patton v. Shamburger, 431 S.W.2d 506, 507 (Tex. Sup. 1968); *see* Zanella v. Superior Ins. Co., 443 S.W.2d 95, 96 (Tex. Civ. App.—Eastland 1969, writ ref'd).
222. 431 S.W.2d 506 (Tex. Sup. 1968).
223. *Id.* at 508.
224. *Id.* at 508.
225. Akin, *Workmen's Compensation*, 25 Sw. L.J. 126 (1971).
226. *Id.*
227. Patton v. Shamburer, 431 S.W.2d 506, 508 (Tex. Sup. 1968).
228. *Id.* at 508.
229. TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (Supp. 1974).
230. Dickerson v. Texas Employers Ins. Ass'n, 451 S.W.2d 794, 796-97 (Tex. Civ. App.—Dallas 1970, no writ) (holding lower court decision was invidious discrimination).
231. *See* Patton v. Shamburger, 431 S.W.2d 506, 507 (Tex. Sup. 1968); Servantez v. Aguirre, 456 S.W.2d 467, 470 (Tex. Civ. App.—San Antonio 1970, no writ); Zanella v. Superior Ins. Co., 443 S.W.2d 95, 96 (Tex. Civ. App.—Eastland 1969, writ ref'd).
232. 456 S.W.2d 467 (Tex. Civ. App.—San Antonio 1970, no writ).

Notwithstanding these facts, his mother rather than his grandfather received the workmen's compensation death benefits beacuse the grandfather had never legally adopted the deceased.[233]

A more equitable rule would be to allow courts to examine the facts of each case in which *in loco parentis* is alleged, and to award the benefits according to a judicial standard of fairness. Even a simple division of the benefits would be preferable in most cases to the present law.

SETTLEMENTS

Settlement agreements may be entered into whenever the employee's death or incapacity is the result of an injury sustained in the course of his employment.[234] Subject to the approval of the Industrial Accident Board, the insurer may terminate his liability by paying the employee or the employee's legal beneficiary an agreed upon lump sum.[235] The benefits payable to the deceased's spouse or children may not be paid in a lump sum, however, except in the case of remarriage or of a dispute as to the liability of the insurer.[236] It is within the power of the Board to compel the insurer to settle the claim in this way, but the Board will exercise this power only in cases where waiting for weekly compensation benefits would result in manifest hardship and injury.[237]

Although an employee cannot waive his claim to workmen's compensation benefits under the Act, this provision does not prohibit settlements which include a waiver after an injury has occurred.[238] Generally, a compromise agreement is entered into only when the employee is in immediate need of this lump sum payment because he is unable to wait for his weekly compensation benefits or for the results of lengthy litigation.[239] Thus the insurance company, obviously in the stronger financial position, would be able to outlast the workman through the negotiation process, and the workman, by accepting a settlement of his claim, is likely to relinquish some of his statutory benefits.[240] Moreover, since a compromise settlement agreement represents neither an award of compensation nor a denial of such[241] and does not consti-

233. *Id.* at 469.
234. TEX. REV. CIV. STAT. ANN. art. 8306, § 15 (1967).
235. *Id.*
236. TEX. REV. CIV. STAT. ANN. art. 8306, § 8(d) (Supp. 1974).
237. TEX. REV. CIV. STAT. ANN. art. 8306, § 15 (1967).
238. *Id.* § 14. "No agreement by any employé to waive his rights to compensation under this law shall be valid."
239. *See, e.g.*, Angelina Cas. Co. v. Bennett, 415 S.W.2d 271 (Tex. Civ. App.—Houston 1967, no writ); Pearce v. Texas Employer's Ins. Ass'n, 403 S.W.2d 493 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967).
240. Barnes v. Bituminous Cas. Corp., 495 S.W.2d 5, 8 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); *see* Esco v. Argonaut Ins. Co., 405 S.W.2d 860, 863 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.).
241. Insurance Co. of North America v. Escalante, 484 S.W.2d 608, 610 (Tex. Civ.

tute adjudication of the issues,[242] a settlement agreed to by the parties and approved by the Industrial Accident Board is not appealable.[243] It can be set aside only by a separate suit in equity.[244]

When the settlement becomes a binding agreement, it supersedes all of the workman's pending compensation benefits.[245] By judicial interpretation a workman may legally be compensated for anticipated medical expenses when such compensation is provided for in the settlement agreement.[246] An example of the inequity that may result is illustrated in *Pearce v. Texas Employers' Insurance Association*.[247] Subsequent to entering into a settlement agreement, the workman filed a second claim requesting additional money for medical services for the original injury. By entering into the agreement, however, the workman had relinquished his right to reopen his claim before the Industrial Accident Board[248] unless there had been fraud or misrepresentation.[249] Consequently, he had inadvertently relinquished his only practical opportunity to receive compensation for medical needs which arose after the compromise became final.

Although section 5 of the Act does make some provision for payment of anticipated medical expenses in the absence of a settlement agreement, the employee is required to make his request to the Board, and a 6-month hiatus between requests will result in an automatic denial of the employee's claim. Section 5 explicitly prohibits the rendition of awards by the Board or the courts for services not already received by the employee.[250] There-

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App.—San Antonio 1972, writ ref'd n.r.e); *see* Barnes v. Bituminous Cas. Corp., 495 S.W.2d 5, 8 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); Angelina Ins. Co. v. Bennett, 415 S.W.2d 271, 275 (Tex. Civ. App.—Houston 1967, no writ); Pearce v. Texas Employer's Ins. Ass'n, 403 S.W.2d 493, 497 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967).

242. Lowry v. Anderson-Berney Bldg. Co., 139 Tex. 29, 34, 161 S.W.2d 459, 463 (1942); Harleysville Mut. Ins. Co. v. Frierson, 455 S.W.2d 370, 373 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ).

243. Pearce v. Texas Employer's Ins. Ass'n, 403 S.W.2d 493, 495-96, 498 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967); *see* Angelina Cas. Co. v. Bennett, 415 S.W.2d 271, 275 (Tex. Civ. App.—Houston 1967, no writ).

244. Akin, *Workmen's Compensation*, 22 Sw. L.J. 20 (1968).

245. Barnes v. Bituminous Cas. Corp., 495 S.W.2d 5, 8 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

246. Angelina Cas. Co. v. Bennett, 415 S.W.2d 271, 274 (Tex. Civ. App.—Houston 1967, no writ); Pearce v. Texas Employer's Ins. Ass'n, 403 S.W.2d 493, 498 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967).

247. 403 S.W.2d 493 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967).

248. Pearce v. Texas Employer's Ins. Ass'n, 403 S.W.2d 493, 498 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967).

249. Pacific Employers' Ins. Co. v. Brannon, 150 Tex. 441, 450, 242 S.W.2d 185, 191 (1951); Angelina Cas. Co. v. Bennett, 415 S.W.2d 271, 275 (Tex. Civ. App.—Houston 1967, no writ); Esco v. Argonaut Ins. Co., 405 S.W.2d 860, 863 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.).

250. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967). This section precludes awards for future medical expenses:

fore, the employee is able to negotiate for the inclusion of future medical needs in a settlement agreement,[251] but he is denied this right if he takes the option to plead his case before a jury.[252]

Thus, there seems to be no effective or practical way for an employee to insure that he will receive payment for future medical expenses. Although he is allowed by law to negotiate for these future payments when attempting to reach a compromise with the insurance carrier,[253] it is exactly at this point that the employee is in his weakest bargaining position and least likely to get them. If, on the other hand, the employee takes his compensation case to trial, he will be precluded by operation of law from recovering compensation for his future medical expenses.[254]

The policy reasons for allowing provision for future medical needs in compromise settlements include minimization of litigation and preservation of freedom to contract. In reality, however, this usually results in relinquishment of some of the employee's statutory rights. This inequity could be alleviated by a statutory amendment providing that settlement agreements are to be binding on the parties as to all incorporated terms, except that if the employee finds that his expenses surpass the amount of the settlement, he may petition for judicial amendment of the agreement as long as the new medical needs relate to the original injury. Amending the award only if it relates to the original claim as well as the discretion of the Board or the court would restrain employees from petitioning for unwarranted claims.

The reason for prohibiting jury awards for future medical expenses is to prevent any awards for services which might never be received. The better rule might be to allow an award for future medical expenses if the jury finds that the potential expenses reasonably might be incurred. This approach would eliminate the multiplicity of suits that can arise under the present statute which allows the insurer to contest the employee's request for additional funds after the trial has been completed.[255]

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no award of the Board, and no judgment of the court, . . . for the cost or expense of . . . medical aid . . . shall include in such award or judgment any cost or expense of any such items not actually furnished to and received by the employee prior to the date of said award or judgment.

251. Angelina Cas. Co. v. Bennett, 415 S.W.2d 271, 274 (Tex. Civ. App.—Houston 1967, no writ).

252. Bituminous Cas. Co. v. Whitaker, 356 S.W.2d 835, 837 (Tex. Civ. App.—Eastland 1962, no writ) (jury award for future medical benefits held invalid).

253. Angelina Ins. Co. v. Bennett, 415 S.W.2d 271, 275 (Tex. Civ. App.—Houston 1967, no writ); Pearce v. Texas Employers' Ins. Ass'n, 403 S.W.2d 493, 498 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967).

254. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967); *see* Angelina Cas. Co. v. Bennett, 415 S.W.2d 271 (Tex. Civ. App.—Houston 1967, no writ); Pearce v. Texas Employers' Ins. Ass'n, 403 S.W.2d 493 (Tex. Civ. App.—Dallas 1966), *reh. denied*, 412 S.W.2d 647 (Tex. Sup. 1967).

255. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).