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Procedure before the Industrial Accident Board and on Appeal to the Courts Student Symposium - Workmen's Compensation: A Pandect of the Texas Law.

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PROCEDURE BEFORE THE INDUSTRIAL ACCIDENT BOARD AND ON APPEAL TO THE COURTS

The Industrial Accident Board is the administrative agency created to enforce and administer the Workmen's Compensation Act.[256] The Board consists of an employer of labor in some industry or business covered by the Workmen's Compensation Act, a wage earner in a business industry covered by the Act, and a practicing attorney.[257]

The purpose of the Board, as stated in *Texas Employers' Insurance Association v. Knouff*,[258] "was to afford to the injured employee a forum in which he can present his claim for compensation, have its merits determined and appropriate relief speedily awarded."[259]

JURISDICTION

The Industrial Accident Board has exclusive original jurisdiction over all claims arising under the Workmen's Compensation Act.[260] A workmen's compensation case therefore cannot be brought before a court until the Board has passed upon the claim.[261] The Board's decisions and rulings are binding upon the parties in the absence of legal action to set them aside.[262]

In most instances, a subscriber under the Workmen's Compensation Act will notify the insurer of any injuries sustained by his employees, and the insurer will begin making the required compensation payments without any proceedings before the Board.[263] In the event that payments are not made, however, the employee may seek relief by filing a claim with the Board.[264]

An employee must comply with two procedural requirements in order to

256. *See* TEX. REV. CIV. STAT. ANN. art. 8307, §§ 1, 4 (1967).

257. *Id.* § 2. The Board has been given the power to appoint all employees necessary to properly administer the Act. *Id.* § 3.

258. 271 S.W. 633 (Tex. Civ. App.—Waco 1925, writ ref'd).

259. *Id.* at 635.

260. Twin City Fire Ins. Co. v. Gibson, 488 S.W.2d 565, 569 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Knouff, 271 S.W. 633, 637 (Tex. Civ. App.—Waco 1925, writ ref'd).

261. Industrial Accident Bd. v. Glenn, 144 Tex. 378, 382, 190 S.W.2d 805, 807-808 (1945); Twin City Fire Ins. Co. v. Gibson, 488 S.W.2d 565, 569 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); Traders & Gen. Ins. Co. v. Huntsman, 125 S.W.2d 431, 436 (Tex. Civ. App.—Forth Worth 1939, writ dism'd jdgmt cor.); *see* Associated Indus. Ins. Co. v. Ellis, 16 F.2d 464, 465 (N.D. Tex. 1926).

262. Texas Employer's Ins. Ass'n v. Knouff, 1271 S.W. 633, 636 (Tex. Civ. App.—Waco 1925, writ ref'd); *see* 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).

263. Booth v. Texas Employer's Ins. Ass'n, 132 Tex. 237, 242, 123 S.W.2d 322, 325 (1938); Hotchkiss v. Texas Employers' Ins. Ass'n, 479 S.W.2d 336, 339 (Tex. Civ. App. —Amarillo 1972, no writ).

264. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967); Booth v. Texas Employers' Ins. Ass'n, 132 Tex. 237, 242, 123 S.W.2d 322, 325 (1934); Hotchkiss v. Texas Employer's Ins. Ass'n, 479 S.W.2d 336, 339 (Tex. Civ. App.—Amarillo 1972, no writ).

bring his claim within the jurisdiction of the Board. First, if the association or subscriber does not have notice of his injury, the employee must give such notice to the association or employer within 30 days after the occurrence of the injury or the first distinct manifestation of an occupational disease.[265] Since the purpose of this requirement is to enable the insurer to investigate the facts upon which the employee bases his claim,[266] the employee has no duty to give notice of his injury to the association or employer if the employer has notice through actual knowledge of the injury.[267] Notice may be established as a *matter of law* where the employer or supervisor has witnessed an accident in which the employee was known to have been injured, or where it was obvious that the employee could not have escaped injury from the accident.[268] If the injury is not so "spectacular," however, notice becomes a *question of fact*: whether the circumstances surrounding the accident were such as to lead a reasonable man observing them to conclude that a compensable injury had been sustained.[269] This test was established in *Miller v. Texas Employers' Insurance Association,*[270] where the alleged injury resulted from a "slip and fall" accident which was witnessed by the plaintiff's employer and his supervisor. The employee failed to notify his employer within 30 days that he had been injured in the accident, and the insurer contended that the employee had thereby waived his right to compensation benefits. The court of civil appeals interpreted the notice requirement of article 8307, section 4a to mean that the statute required notice of an *injury,* and not merely notice of an "accident" or "incident."[271] The court held that there was a question of fact as to whether the employer had received notice that the employee had sustained a compensable injury.[272]

In the absence of actual knowledge of the insurer, employer, or the employer's supervisor,[273] the employee must give one of such persons notice of the date, time, occasion and nature of the injury within 30 days after the

265. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).

266. Booth v. Texas Employers' Ins. Ass'n, 132 Tex. 237, 242, 123 S.W.2d 322, 325 (1938); Hotchkiss v. Texas Employers' Ins. Ass'n, 479 S.W.2d 336, 339 (Tex. Civ. App.—Amarillo 1972, no writ).

267. TEX. REV. CIV. STAT. ANN. art. 8306, § 4a (1967); *see* Hotchkiss v. Texas Employers' Ins. Ass'n, 479 S.W.2d 336, 339 (Tex. Civ. App.—Amarillo 1972, no writ).

268. Miller v. Texas Employers' Ins. Ass'n, 488 S.W.2d 489, 492 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.); Bray v. Texas Employers' Ins. Ass'n, 483 S.W.2d 907, 911 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

269. *See* Miller v. Texas Employers' Ins. Ass'n, 488 S.W.2d 489, 492 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

270. *Id.*

271. *Id.* at 491.

272. *Id.* at 492.

273. Notice to the employer's supervisor or designated agent is imputed to the employer. *See* Twin City Fire Ins. Co. v. Gibson, 488 S.W.2d 565, 573 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); Hotchkiss v. Texas Employers' Ins. Ass'n, 479 S.W.2d 336, 339 (Tex. Civ. App.—Amarillo 1972, no writ); Texas Gen. Indem. Co. v. Thomas, 428 S.W.2d 463, 468 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

injury was sustained.[274] The notice may be given either orally or in writing, although written notice is preferred.[275] When the employee has given timely notice of his injury, he has satisfied the first of the two procedural requirements necessary to obtain a hearing from the Industrial Accident Board.

The second procedural requirement for jurisdiction is that a claim for compensation must be submitted to the Board within 6 months after the occurrence of the injury or of the first manifestation of an occupational disease.[276] Additionally, in case of death to the employee or in the event of his mental or physical incapacity, a claim must be filed by his beneficiaries within 6 months after his death or by the employee within 6 months after the termination of the incapacity.[277]

Since the Industrial Accident Board is an administrative agency, a claim for compensation is submitted to it in the form of a brief or a letter, rather than as a formal petition.[278] The Board has ruled that any written communication by an employee "giving his name, the date and the general nature of injury, and the name of his employer shall constitute a claim."[279] If the employee is represented by an attorney, however, the Industrial Accident Board has ruled that a written brief *must* be filed with the Board not less than 2 days prior to the hearing date.[280] This brief must establish the following:

(1) Employment by the named insured on the date of injury.
(2) Date of injury or last exposure in case of an occupational disease.
(3) Wage rate of claimant on date of injury.
(4) Establishment of accidental injury.
(5) Location of accident.
(6) Facts to support the extent of claimed disability.
(7) Wage earning capacity loss, if any.
(8) Hardship, if applicable.[281]

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274. Hotchkiss v. Texas Employers' Ins. Ass'n, 479 S.W.2d 336, 338 (Tex. Civ. App.—Amarillo 1972, no writ). In *Hotchkiss*, the employee was denied compensation because, although he informed his supervisor he had injured himself, he did not state the date or occasion of the injury, nor that he had sustained the injury in the scope of his employment. *Id.* at 339.

275. *See* Twin City Fire Ins. Co. v. Gibson, 488 S.W.2d 565, 573 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); Hotchkiss v. Texas Employers' Ins. Ass'n, 479 S.W.2d 336, 339 (Tex. Civ. App.—Amarillo 1972, no writ); Royal Indem. Co. v. Jones, 201 S.W.2d 129, 133 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.).

276. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).

277. *Id.*; *see* Baker v. Travelers Ins. Co., 483 S.W.2d 10, 11 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ).

278. INDUSTRIAL ACCIDENT BD. R. 4.040; *see* Booth v. Texas Employers' Ins. Ass'n. 132 Tex. 237, 242, 123 S.W.2d 322, 325 (1938).

279. INDUSTRIAL ACCIDENT BD. R. 4.040.

280. INDUSTRIAL ACCIDENT BD. R. 5.080.

281. *Id.*

If the attorney fails to comply with this rule, the Board may postpone the hearing date.[282]

Failure to satisfy the requirements either of notice or of filing may prevent the claim from being reviewed by the Board.[283] The Board has the statutory power, however, to waive strict compliance with these requirements for *good cause.*[284] To establish good cause the claimant must allege and prove that he prosecuted his claim with that degree of diligence that a person of ordinary prudence would have exercised under the same or similar circumstances.[285] The claimant must prove not only that good cause existed for not meeting the 30-day or the 6-month requirements, but also that such good cause was continuous and existed up to the date of the notice or the filing of the claim.[286] For example, if a claim were filed 8 months after injury, the employee would have to show that good cause existed for the entire 8 months, rather than only for the initial 6-month period.[287] If good cause is not established, the Board will be without authority to review the claim, and the employee will not obtain compensation benefits even though his disability is otherwise compensable.[288]

Since the test for good cause is "reasonableness,"[289] the validity of each allegation of good cause will be determined by the Board, or by the court on appeal after considering the particular facts and circumstances involved.[290]

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282. Although the writer has found no instances in which the Board has done so, the rule does state that the attorney *must* file the brief.

283. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967); *see* Travelers Ins. Co. v. Warren, 447 S.W.2d 698, 701 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.).

284. TEX. REV. CIV. STAT. ANN. art. 8306, § 4a (1967); *see* Akin, *Workmen's Compensation,* 26 SW. L.J. 177 (1972); Collins, *Workmen's Compensation,* 28 SW. L.J. 131, 138 (1974).

285. Aetna Cas. & Sur. Co. v. Hughes, 497 S.W.2d 282, 283 (Tex. Sup. 1973); Torres v. Western Cas. & Sur. Co., 457 S.W.2d 50, 51 (Tex. Sup. 1970); Moronko v. Consolidated Mut. Ins. Co., 435 S.W.2d 846, 847 (Tex. Sup. 1968); Bray v. Texas Employers' Ins. Ass'n, 483 S.W.2d 907, 911 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.); Travelers Ins. Co. v. Warren, 447 S.W.2d 698, 701 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.); Dishongh v. Texas Employers' Ins. Ass'n, 438 S.W.2d 678, 680 (Tex. Civ. App.—Eastland 1968, no writ). *See also* Akin, *Workmen's Compensation,* 26 SW. L.J. 177 (1972).

286. Baker v. Travelers Ins. Co., 483 S.W.2d 10, 13 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ); Maleski v. Texas Employers Ins. Ass'n, 471 S.W.2d 416, 420 (Tex. Civ. App.—Corpus Christi 1971, no writ); Charter Oak Fire Ins. Co. v. Dewett, 460 S.W.2d 468, 470 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); Travelers Ins. Co. v. Warren, 447 S.W.2d 698, 701 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.).

287. *See* Travelers Ins. Co. v. Warren, 447 S.W.2d 698, 701 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.).

288. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).

289. Aetna Cas. & Sur. Co. v. Hughes, 497 S.W.2d 282, 283 (Tex. Sup. 1973); Torres v. Western Cas. & Sur. Co., 457 S.W.2d 50, 51 (Tex. Sup. 1970); Moronko v. Consolidated Mut. Ins. Co., 435 S.W.2d 846, 847 (Tex. Sup. 1968).

290. Moronko v. Consolidated Mut. Ins. Co., 435 S.W.2d 846, 847 (Tex. Sup. 1968); *see* Maleski v. Texas Employers Ins. Ass'n, 471 S.W.2d 416 (Tex. Civ. App.—Corpus Christi 1971, no writ).

For example, good cause for non-compliance has been held to have been established where the employee reasonably believed his injury was not serious,[291] but not where the employee should have known that he had sustained a compensable injury.[292] Additionally, good cause has been found to have existed where the employee relied for a reasonable period of time on statements made by his employer that everything would be taken care of,[293] but not where the claimant was ignorant of the filing requirement or where he mistakenly believed that compensation was not available for his particular injury.[294] Case law illustrates that as the period of time for non-compliance increases, the chances of proving good cause diminish.[295]

There is an additional situation in which the employee may escape the requirement of filing a claim for compensation within 6 months after the occurrence of his injury. The Workmen's Compensation Act requires every subscriber who has notice of an injury to an employee to file a report of such injury within 8 days after the occurrence of the accident, or within 8 days after the employee notifies the employer of a manifestation of an occupational disease.[296] The employee has 6 months from the day his employer files this report in which to file his claim for compensation.[297]

POWERS OF THE BOARD

In order to fulfill its responsibilities, the Board has been given not only many quasi-judicial powers,[298] but also the quasi-legislative authority to make rules necessary to carry out the provisions of the Act.[299] The rules pronounced by the Board have the effect and force of law so long as they are not inconsistent with the Act.[300]

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291. Maleski v. Texas Employers Ins. Ass'n, 471 S.W.2d 416, 420 (Tex. Civ. App. —Corpus Christi 1971, no writ); Texas Employers Ins. Ass'n v. Sapien, 458 S.W.2d 203, 205 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.); *see* Akin, *Workmen's Compensation*, 26 Sw. L.J. 177, 178 (1972).

292. Aetna Cas. & Sur. Co. v. Hughes, 497 S.W.2d 282, 283 (Tex. Sup. 1973).

293. Northwestern Nat'l Ins. Co. v. Kirchoff, 427 S.W.2d 638, 641 (Tex. Civ. App. —Houston [14th Dist.] 1968, no writ); *see* Torres v. Western Cas. & Sur. Co., 457 S.W.2d 50, 51 (Tex. Sup. 1970).

294. Allstate Ins. Co. v. King, 444 S.W.2d 602, 605 (Tex. Sup. 1969).

295. *See* Bray v. Texas Employers' Ins. Ass'n, 483 S.W.2d 907, 911 (Tex. Civ. App. —Houston [1st Dist.] 1972, writ ref'd n.r.e.); Baker v. Travelers Ins. Co., 483 S.W.2d 10 (Tex. Civ App.—Houston [14th Dist.] 1972, no writ); Travelers Ins. Co. v. Warren, 447 S.W.2d 698, 702 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.); Northwestern Nat'l Ins. Co. v. Kirchoff, 427 S.W.2d 638, 641 (Tex. Civ App—Houston [14th Dist.] 1968, no writ).

296. TEX. REV. CIV. STAT. ANN. art. 8307, § 7 (1967).

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

298. *See* General Accident Fire & Life Assurance Corp. v. Hames, 416 S.W.2d 894, 897 (Tex. Civ. App.—Dallas 1967, no writ); Texas Employers' Ins. Ass'n v. Shilling, 259 S.W. 236, 239 (Tex. Civ. App.—Fort Worth 1923, no writ).

299. TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (1967).

300. *Id.*; *see* Clawson v. Texas Employers' Ins. Ass'n, 469 S.W.2d 192, 195 (Tex.

Settlement Agreements

The Industrial Accident Board may approve compromise settlement agreements made between the employee and the insurer "where the liability of the association or the extent of the injury of the employee is uncertain, indefinite or incapable of being satisfactorily established . . . ."[301] A settlement contract which is not approved by the Board is void, and the Board may not approve a settlement agreement if it has received notice that either of the parties wishes to withdraw its consent.[302]

Although the decision to approve any compromise settlement agreement lies totally within the discretion of the Board,[303] the Board rules provide that settlements will be approved only upon certain specific conditions:

> (a) That the Board is of the opinion that the agreement provides for payment of compensation to claimant or claimants in an amount to which he or they are justly entitled under the law.
>
> . . . .
>
> (c) That the agreement is accompanied by a physician's report of the findings of a recent examination of the employee.
>
> (d) That the employee has achieved maximum recovery, or that good reason exists for settlement prior to maximum recovery.[304]
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> . . . .

In addition, "[n]o Compromise Settlement Agreement will be approved by the Board for an amount less than the maximum weekly compensation provided by law at the time of the injury."[305] The Board also will not approve a settlement agreement if the injury to the employee resulted in his death or total permanent disability.[306]

Civ. App.—Houston [14th Dist.] 1971), *aff'd*, 475 S.W.2d 735 (Tex. Sup. 1972); Galacia v. Texas Employers' Ins. Ass'n, 348 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.).

301. TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (1967).

302. Brannam v. Texas Employers' Ins. Ass'n, 151 Tex. 210, 213, 248 S.W.2d 118, 119 (1952).

303. *See* Industrial Accident Bd. v. Glenn, 144 Tex. 378, 382, 190 S.W.2d 805, 807 (1945) (parties could not obtain a writ of mandamus to compel the Board to approve their settlement agreement).

304. INDUSTRIAL ACCIDENT BD. R. 8.030.

305. INDUSTRIAL ACCIDENT BD. R. 8.140.

306. INDUSTRIAL ACCIDENT BD. R. 8.010. Once the Board has approved a compromise settlement agreement, the only circumstance under which the employee may have the agreement set aside is to file a lawsuit alleging that the defendant or his agent committed a fraud upon the employee causing a detriment to the employee. Texas Employers' Ins. Ass'n v. Sprabery, 507 S.W.2d 340, 344 (Tex. Civ. App.—Fort Worth 1974, no writ); Mackintosh v. Texas Employers' Ins. Ass'n, 486 S.W.2d 148, 152 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); Esco v. Argonaut Ins. Co., 405 S.W.2d 860, 863 (Tex. Civ. App. Beaumont 1966, writ ref'd n.r.e.). The binding effect of the settlement agreement after approval by the Board can produce harsh results where the employee or his attorney has underestimated the seriousness of the injury, since inadequacy of consideration does not constitute grounds for vitiating the settlement agreement. *See* Pearce v. Texas Employers Ins. Ass'n, 412 S.W.2d 647 (Tex. Sup. 1967); Gwinn v. Associated

Upon the Board's approval of a settlement agreement, the insurance association has 20 days from the date of such approval to pay the agreed amount.[307] If the insurer fails to pay the settlement amount within 20 days, the employee is entitled to an additional 12 percent of the settlement amount as damages plus reasonable attorney's fees.[308]

Hearings

Although there is no statutory provision for a specific term or session of the Board, the Workmen's Compensation Act contemplates that the Board will always be available to receive and adjudicate claims.[309] In the absence of a compromise agreement, the Board will investigate the employee's claim and make a final decision at a scheduled hearing.[310] If the Board fails to set a date for a hearing within a reasonable time, either party may obtain a writ of mandamus to compel the Board to proceed toward a final disposition of the claim.[311] The hearing may be postponed, however, so long as the claimant is being paid compensation in the interim.[312]

The hearing before the Board is equivalent to a trial in the sense that it involves the presentation of evidence and arguments. Proceedings before the Board, however, are informal,[313] and the Board is not bound by the rules of evidence and procedure which govern the courts.[314]

Thus, the Board is vested with specific pre-hearing powers in order that it may investigate claims and render decisions as quickly as possible. It has the broad power to "hold hearings, or to take testimony or make investigations" anywhere in Texas,[315] and in so doing may subpoena witnesses, administer oaths, investigate all matters of fact, and examine the books and rec-

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Employers Lloyds, 280 S.W.2d 624, 627 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.).

307. INDUSTRIAL ACCIDENT BD. R. 8.220. Although this 20-day requirement arises from a Board rule, rather than from the language of the Workmen's Compensation Act, the supreme court has held that the rule does not constitute an abuse of authority by the Board. Pacific Employers' Ins. Co. v. Brannon, 150 Tex. 441, 448, 242 S.W.2d 185, 189 (1951).

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

309. *E.g.*, Texas Employers' Ins. Ass'n v. Knouff, 271 S.W. 633, 635-36 (Tex. Civ. App.—Waco 1925, writ ref'd).

310. TEX. REV. CIV. STAT. ANN. art. 8309a (Supp. 1974).

311. *Id.*; Kelly v. Industrial Accident Bd., 358 S.W.2d 874, 878 (Tex. Civ. App.—Austin 1962, writ ref'd); Industrial Accident Bd. v. Hudson, 246 S.W.2d 715, 718 (Tex. Civ. App.—Austin 1952, no writ).

312. TEX. REV. CIV. STAT. ANN. art. 8309a (Supp. 1974).

313. *E.g.*, Texas Employers' Ins. Ass'n v. Knouff, 271 S.W. 633, 636 (Tex. Civ. App. —Waco 1925, writ ref'd).

314. Traders & Gen. Ins. Co. v. Huntsman, 125 S.W.2d 431, 436 (Tex. Civ. App.—Fort Worth 1939, writ dism'd jdgmt cor.); Travelers Ins. Co. v. Mote, 116 S.W.2d 427, 430 (Tex. Civ. App.—Amarillo 1938, writ dism'd by agr.).

315. TEX. REV. CIV. STAT. ANN. art. 8307, § 10 (Supp. 1974).

ords of either party.[316] In addition, the Board may demand that the parties appear at scheduled pre-hearing conferences,[317] with the limitation that no party may be required to travel more than "one hundred (100) miles from the courthouse of the county of the claimant's residence or within a greater distance than one hundred (100) miles of the courthouse of the county where the injury occurred."[318]

One of the most important pre-hearing powers given to the Board is the authority to demand that any employee making a claim submit himself for a medical examination, and, if necessary, for surgery.[319] The purpose of this power is twofold: to enable the Board to obtain a professional opinion concerning the alleged injury, and to prevent the insurer from making payments which would have been unnecessary if surgery had been performed. The Board may require the employee to submit to repeated physical examinations,[320] and if he refuses prescribed medical or surgical treatment, he waives his right to compensation payments during the continuance of his refusal.[321]

In those cases where an occupational disease is the basis of the claim, the Board may, on its own motion or at the request of either party, appoint a medical committee to investigate the source of the injury.[322] The statute does not state, however, that the Board is bound by the committee's findings.[323] In addition, where a claim for compensation alleges that death occurred due to an occupational disease, the Board will, on the request of either party or on its own motion, order an autopsy.[324]

The legislature's reasoning in not allowing an autopsy when the death is alleged to have been caused from an accidental injury is perplexing, as many deaths occur in which only an autopsy can accurately determine the cause. Hypothetically, it might appear that an employee died from a slight blow on the head, when, in fact, death resulted from a brain tumor. If such a case were to come before the Board, the actual cause of death might not be discovered without an autopsy. Since the cause of death is the determining factor in awarding compensation, the Board should have discretion to order an autopsy regardless of whether the claim is based on an occupational disease or on an accidental injury.[325]

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316. TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (1967).
317. TEX. REV. CIV. STAT. ANN. art. 8307, § 10 (Supp. 1974).
318. *Id.*
319. TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (1967).
320. *See* Texas Employers' Ins. Ass'n v. Knouff, 271 S.W. 633, 638 (Tex. Civ. App. —Waco 1925, writ ref'd).
321. TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (1967).
322. *Id.* § 13.
323. *Id.* § 13.
324. *Id.* § 14.
325. *But see* 10 W. SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 2066, at 335-36 (3d ed. 1953).

After the parties have presented their cases, the Board will render its decision, awarding compensation only as provided in the Act.[326] It has no duty to base its decision either on a preponderance of the evidence or on a reasonable doubt.

In its discretion the Board may authorize compensation to be paid monthly or quarterly rather than weekly as provided by statute.[327] In addition, the association may be ordered to pay in one lump sum where "manifest hardship and injury would otherwise result."[328] Although it appears that the term "manifest hardship" constitutes a strict limitation, the Board rules provide:

> [i]n most cases a recovery of even the maximum weekly compensation rate would result in a hardship to the injured employee if the compensation payments were ordered to be paid on a weekly basis. Therefore, an application in writing by an injured employee or by his attorney . . . requesting that the award of the Board provide for payment in a lump sum will be granted.[329]

Attorney's fees for representing claimants are subject to the approval of the Board.[330] With the exception of reasonable expenses incurred in preparing and presenting a claim, attorney's fees in excess of 25 percent of the total compensation awarded may not be approved by the Board.[331]

The Industrial Accident Board has the power to review and modify any decision it renders.[332] If the compensation has been denied, the employee must file an application for review within 1 year after the date of the decision.[333] Conversely, if compensation has been awarded, the employee or association must file an application for review within the time period during which compensation is to be paid.[334] The petition for review must allege "a change of condition, mistake or fraud."[335] A change of condition has been judicially defined as a worsening of the claimant's condition, rather than as a continued incapacity from the same injury.[336] In order to obtain modifi-

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326. *See* Texas Employers' Ins. Ass'n v. Elder, 155 Tex. 27, 31, 282 S.W.2d 371, 376 (1955); Traders & Gen. Ins. Co. v. Chancellor, 105 S.W.2d 720, 723 (Tex. Civ. App.—El Paso 1937, writ dism'd w.o.j.).

327. TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (1967).

328. TEX. REV. CIV. STAT. ANN. art. 8306, § 15 (1967).

329. INDUSTRIAL ACCIDENT BD. R. 5.200.

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

331. *Id.* In addition, the Board may "bar persons guilty of unethical or fraudulent conduct from practicing before the Board." TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (1967). Unethical conduct arises when the attorney violates the Canon of Ethics of the State Bar of Texas or the Board Rules. INDUSTRIAL ACCIDENT BD. R. 1.081. The supreme court in Industrial Accident Bd. v. O'Dowd, 157 Tex. 432, 438, 303 S.W.2d 763, 767 (1957), held that this power is constitutional.

332. TEX. REV. CIV. STAT. ANN. art. 8306, § 12d (1967).

333. *Id.*

334. *Id.*

335. Gentry v. Travelers Ins. Co., 459 S.W.2d 709, 712 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

336. Espinoza v. Miller's Mut. Fire Ins. Co., 443 S.W.2d 891, 894 (Tex. Civ. App.—

cation of a previous award because of "mistake," the claimant must prove that at the hearing before the Board there was a mistake of fact as to the actual injuries sustained.[337] Finally, for modification based on "fraud," the claimant must prove that he relied to his detriment on false representations made by the defendant or his agent.[338]

APPEAL

If either party is not satisfied with the Board's decision, his only remedy is to give notice of unwillingness to abide by the decision and to file suit in a court of competent jurisdiction within the prescribed time limits.[339] The Supreme Court of Texas has held that the decision of the Board on a review application, whether it modifies a prior award or refuses to do so, is also subject to revision by the courts, even though there is no statutory authorization for an appeal of a review decision.[340]

In addition to adjudicating claims, court jurisdiction in workmen's compensation matters also extends to the enforcement of Board decisions. The Workmen's Compensation Act provides that if the association fails to pay compensation as ordered by the Board, and does not bring suit to set aside the Board's decision, the *claimant* may bring suit to enforce it.[341] If the court sustains the award, the claimant is entitled to an additional 12 percent of the compensation award as damages and to reasonable attorney's fees.[342] If the association does not bring suit to set aside an adverse Board judgment and fails to abide by the decision, the Board will certify such fact to the Commissioner of Insurance. Such certification constitutes sufficient cause for the Commissioner to revoke the license of the association.[343]

There are two conditions which must be met in order to invoke court jurisdiction. The party contesting the Board's decision must, within 20 days after the rendition of the decision, give notice to the Board that he will not abide by the decision and must, within 20 days after giving such notice, file suit

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Corpus Christi 1969, writ ref'd n.r.e.); Commercial Standard Ins. Co. v. Shank, 140 S.W.2d 273, 274 (Tex. Civ. App.—Austin 1940, writ dism'd jdgmt cor.).

337. Commercial Standard Ins. Co. v. Shank, 140 S.W.2d 273, 275 (Tex. Civ. App.—Austin 1940, writ dism'd jdgmt cor.); *see* Gentry v. Travelers Ins. Co., 459 S.W.2d 709, 712 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

338. Brannon v. Pacific Employers Ins. Co., 148 Tex. 289, 293, 224 S.W.2d 466, 468 (1949); Young v. Texas Employers' Ins. Ass'n, 488 S.W.2d 551, 553 (Tex. Civ. App.—Waco 1972, no writ).

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

340. Clawson v. Texas Employers' Ins. Ass'n, 475 S.W.2d 735, 738 (Tex. Sup. 1972).

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

342. *Id.*

343. *Id.* § 5. Under TEX. INS. CODE ANN. art. 1.04(e) (Supp. 1974), however, the insurance association does have the option to pay a sum not in excess of $10,000.00, such sum being determined by the State Board of Insurance, instead of havings its license revoked.

in the proper court.[344] Unless both of these requisites are met, the Board's decision becomes permanently binding upon the parties.[345] On the other hand, if notice and the suit are timely filed, the decision of the Board is set aside and becomes unenforceable.[346]

The two 20-day notice requirements have been rigidly enforced. For example, in *Yancy v. Texas General Indemnity Co.*,[347] the postal service took 16 days to deliver the plaintiff's letter of notice to the Board, but the court of civil appeals dismissed the case for want of jurisdiction because, even though the letter should have reached the Board's address within the 20-day deadline, the plaintiff had nevertheless failed to meet the statutory requirement.[348] Furthermore, in *Clawson v. Texas Employers Insurance Association*,[349] the plaintiff filed his notice of non-abidance with the Board on the day that he received notice of the Board's decision, which was the 21st day after the date of the decision. The supreme court held that the 20-day time limitation for giving notice to the Board begins to run from the date of the award and not from the date on which the Board gives notice of its decision.[350] The court granted that the result was "unfortunate" and an "injustice," but stated that the statutory period for giving notice is absolute.[351]

Although there should certainly be a point at which the Industrial Accident Board's decisions become final and not appealable, the standard for determining this time need not be so inflexible. Texas courts have often stated that the Workmen's Compensation Act should be liberally construed in order to give effect to the beneficial purposes for which it was enacted.[352] If plaintiffs were allowed to reinstate their claims upon a showing of good cause or lack of fault in failing to meet the jurisdictional requirements, these purposes would be more fully realized. Lack of fault and good cause requirements would constitute limitations for bringing suit after the statutory deadline, but they would be flexible enough to allow consideration of each case on its own facts.

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

345. Clawson v. Texas Employers' Ins. Ass'n, 475 S.W.2d 735, 737-38 (Tex. Sup. 1972); Gentry v. Travelers Ins. Co., 459 S.W.2d 709, 711 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); Yancey v. Texas Gen. Indem. Co., 425 S.W.2d 683, 685 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

346. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967); Latham v. Security Ins. Co., 491 S.W.2d 100, 104 (Tex. Sup. 1972).

347. 425 S.W.2d 683 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

348. *Id.* at 685.

349. 475 S.W.2d 735 (Tex. Sup. 1972).

350. *Id.* at 738.

351. *Id.* at 738-39.

352. Texas Employers' Ins. Ass'n v. Thomas, 415 S.W.2d 18, 19 (Tex. Civ. App.—Fort Worth 1967, no writ); *accord*, Texas Employers' Ins. Ass'n v. Steadman, 433 S.W.2d 756, 760 (Tex. Civ. App.—Texarkana 1968, no writ); Travelers Ins. Co. v. Adams, 407 S.W.2d 282, 287 (Tex. Civ. App.—Texarkana 1966, writ ref'd n.r.e.).

Jurisdictional requirements also include limitations on the nature of the claim which may be presented. The supreme court has provided that the claim asserted in the courts must have a "fair and substantial identity" with the claim presented before the Board.[353] Jurisdiction will not attach, for example, if the claimant asks the court for recovery due to an accidental injury after he has based his original claim before the Board on an occupational disease.[354]

Jurisdiction is also dependent upon the amount in controversy, which is determined, depending on the circumstances, either by the amount of the award or by the amount alleged in the petition.[355] If the insurer files the suit, jurisdiction will be determined by one of three methods. If the employee's claim before the Board did not specify the monetary amount sought to be recovered, the suit should be filed in the court having jurisdiction over the amount awarded by the Board;[356] but if the employee's claim before the Board specifies the amount sought to be recovered, and if the award of the Board equals or exceeds that amount, suit should be filed in the court having jurisdiction over that amount;[357] if, however, the award of the Board is less than the amount claimed by the employee, the amount shown in the claim is the amount which determines jurisdiction.[358] On the other hand, if the employee brings the action, jurisdiction is always determined by the amount claimed in the petition, provided that the amount is not shown to have been fraudulently alleged in order to obtain jurisdiction in a particular court.[359]

The plaintiff must be careful to file his suit in the court of proper jurisdiction because article 5539a, which provides that on dismissal of a case due to a want of jurisdiction 60 days is allowed to file the action in the proper court, does not apply to workmen's compensation cases.[360] Therefore, if suit is filed in the wrong court and the 20-day deadline for filing passes, the decision of the Board becomes non-appealable.[361]

A suit filed by an employee against his employer rather than the carrier will not invoke the jurisdiction of the court.[362] If the Board's decision is

353. Johnson v. American Gen. Ins. Co., 464 S.W.2d 83, 87 (Tex. Sup. 1971); *see* Consolidated Underwriters v. Wright, 408 S.W.2d 140, 145 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

354. *See* Travelers Ins. Co. v. Seale, 366 S.W.2d 685, 687 (Tex. Civ. App.—Amarillo 1963, writ dism'd by agr.).

355. Booth v. Texas Employers' Ins. Ass'n, 132 Tex. 237, 246, 252, 123 S.W.2d 322, 327, 330 (1938).

356. *Id.* at 331.

357. *Id.* at 330.

358. *Id.* at 330.

359. *Id.* at 330.

360. TEX. REV. CIV. STAT. ANN. art. 5539a (1958); *e.g.*, Pan American Fire & Cas. Co. v. Rowlett, 479 S.W.2d 782, 783 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

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

362. Brown v. McMillan Material Co., 108 S.W.2d 914, 916 (Tex. Civ. App.—Eastland 1937, writ ref'd).

against the insurer, it is he, and not the employer, who must file suit against the employee.[363]

The Workmen's Compensation Act specifically provides that a suit brought by either party to set aside the decision of the Board shall be decided on trial de novo.[364] If the party filing suit has given timely notice of unwillingness to abide by the Board's final decision and has timely filed his suit, the decision of the Board becomes a nullity as between the parties before the court.[365]

The pleadings of the parties are governed by the rules of civil procedure.[366] If the employee initiates the suit, he must allege in his petition that he is an employee of a subscriber under the Workmen's Compensation Act, that he suffered an injury while in the scope of his employment,[367] that he gave the required notice of his injury to the employer, and that he filed his claim for compensation with the Board within the required time period.[368] Furthermore, since a court has no jurisdiction to hear a workmen's compensation case until after the Board has made a final decision on the claim,[369] either party bringing suit must allege that the Board has heard and determined the claim,[370] that notice of non-abidance of the Board's decision was made within the statutory period allowed,[371] and that the suit to set aside the Board's decision was filed within the time allowed by law.[372] The Rules of Civil Procedure provide that

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

364. *Id.*

365. Latham v. Security Ins. Co., 491 S.W.2d 100, 104 (Tex. Sup. 1972); Lowery v. Transport Ins. Co., 451 S.W.2d 595, 596 (Tex. Civ. App.—Austin 1970, no writ); Hardware Mut. Cas. Co. v. Clark, 360 S.W.2d 921, 922 (Tex. Civ. App.—Waco 1962, writ dism'd).

366. Traders & Gen. Ins. Co. v. Wilson, 147 S.W.2d 866, 871 (Tex. Civ. App.—Forth Worth 1941, no writ).

367. *See* Mosqueda v. Home Indem. Co., 443 S.W.2d 901, 906 (Tex. Civ. App.—Corpus Christi 1969), *rev'd on other grounds*, 473 S.W.2d 456 (Tex. Sup. 1971); TEX. REV. CIV. STAT. ANN. art. 8306, § 3b (1967).

368. *See* Mosqueda v. Home Indemn. Co., 443 S.W.2d 901, 906 (Tex. Civ. App.—Corpus Christi 1969), *rev'd on other grounds*, 473 S.W.2d 456 (Tex. Sup. 1971); TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).

369. Industrial Accident Bd. v. Glenn, 144 Tex. 378, 381, 190 S.W.2d 805, 807 (1945); Twin City Fire Ins. Co. v. Gibson, 488 S.W.2d 565, 569 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

370. Huff v. Insurance Co. of North America, 394 S.W.2d 849, 852 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.).

371. *See* Mosqueda v. Home Indem. Co., 443 S.W.2d 901, 906 (Tex. Civ. App.—Corpus Christi 1969), *rev'd on other grounds*, 473 S.W.2d 456 (Tex. Sup. 1971); Worly v. Petroleum Cas. Co., 24 S.W.2d 756 (Tex. Civ. App.—Eastland 1930, writ ref'd); TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

372. Mosqueda v. Home Indem. Co., 443 S.W.2d 901, 906 (Tex. Civ. App.—Corpus Christi 1969), *rev'd on other grounds*, 473 S.W.2d 456 (Tex. Sup. 1971); TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

(1) Notice of injury.

(2) Claim for compensation.

(3) Award of the Board.

(4) Notice of intention not to abide by the award of the Board.

(5) Filing of suit to set aside the award.

(6) That the insurance company alleged to have been the carrier of the workmen's compensation insurance at the time of the alleged injury was in fact the carrier thereof.

(7) That there was good cause for not filing claim with the Industrial Accident Board within the six months' period provided by statute.

(8) Wage rate.[373]

If any of the above are pleaded, and are not specifically denied, they will be presumed correct.[374]

In rendering its decision, the court will apply the provisions of the Workmen's Compensation Act rather than review the Board's decision.[375] It is, in fact, reversible error to introduce the decision of the Board into evidence if the opposing attorney objects.[376] Since Board decisions may not be collaterally attacked, an allegation either that there was insufficient evidence or that the Board failed to properly consider the evidence does not constitute grounds on which the decision may be judicially set aside.[377]

The case is tried as in all other civil cases, with the court deciding all issues of law and the jury resolving all questions of fact.[378] Likewise, the rules of evidence apply in workmen's compensation cases in the same manner as in any other civil case.[379] A unique procedural trait of workmen's compensation cases is that the party claiming compensation always has the burden of proof at the trial, even if the suit is brought by the insurer.[380] Although the claimant must prove his case by a preponderance of the evidence,[381] the bur-

373. TEX. R. CIV. P. 93(n).

374. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 8307b (1967).

375. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967); Texas Employers' Ins. Ass'n v. Miller, 137 Tex. 449, 453, 154 S.W.2d 450, 452 (1941).

376. Tanner v. Texas Employers' Ins. Ass'n, 438 S.W.2d 395, 398-99 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.); *see* Garcia v. Home Indem. Co., 474 S.W.2d 535, 538 (Tex. Civ. App.—Amarillo 1971, no writ).

377. General Accident Fire & Life Assurance Corp. v. Hames, 416 S.W.2d 894, 896 (Tex. Civ. App.—Dallas 1967, no writ).

378. *See* Truck Ins. Exch. v. Michling, 364 S.W.2d 172, 174 (Tex. Sup. 1963); Holmes v. American Gen. Ins. Co., 263 S.W.2d 615, 617 (Tex. Civ. App.—Beaumont 1953, no writ).

379. Truck Ins. Exch. v. Michling, 364 S.W.2d 172, 173 (Tex. Sup. 1963).

380. TEX. REV. CIV. STAT. ANN. art 8307, § 5 (1967); Garcia v. Home Indem. Co., 474 S.W.2d 535, 539 (Tex. Civ. App.—Amarillo 1971, no writ).

381. Royal Indem. Co. v. Smith, 456 S.W.2d 218, 221 (Tex. Civ. App.—Fort Worth,

den shifts to the insurer when the claimant has presented evidence sufficient to make a prima facie case.[382] The Act provides "no fixed rule of evidence by which a claimant is required to establish the fact that he has suffered an injury which caused disability."[383]

Although the majority of states follows the "substantial evidence rule," which provides essentially that the courts will review the Board's decision and sustain its judgment if there was substantial evidence in existence at the time of the decision to support it,[384] the Texas system of providing a trial de novo gives absolutely no weight to the Board's decree.[385] There are obvious advantages and disadvantages to both the minority and the majority system. The majority system, by conferring judicial powers upon the administrative agency, relieves the courts of having to hear fully workmen's compensation cases which have already been litigated before an agency created especially for that purpose. The theory is that an Industrial Accident Board, in hearing only workmen's compensation cases, develops a superior expertise in reviewing such cases.[386] Another argument in favor of providing for judicial review rather that trial de novo is that the Board does not become a "useless appendage," having its decision voided by the mere bringing of suit.[387] The principal disadvantage to the majority system is that the industrial accident board becomes, in effect, an informal trial court consisting of members who might

1970, no writ); Thompson v. Travelers Ins. Co., 449 S.W.2d 846, 847 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); Holmes v. American Gen. Ins. Co., 263 S.W.2d 615, 617 (Tex. Civ. App.—Beaumont 1953, no writ); Traders & Gen. Ins. Co. v. Stubbs, 91 S.W.2d 407, 408 (Tex. Civ. App.—Texarkana 1936, writ ref'd).

382. Garcia v. Home Indem. Co., 474 S.W.2d 535, 539 (Tex. Civ. App.—Amarillo 1971, no writ); Texas Employers' Ins. Ass'n v. Thames, 252 S.W.2d 228, 229-30 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.); Southern Sur. Co. v. Scheel, 49 S.W.2d 937, 939 (Tex. Civ. App.—San Antonio 1932), *rev'd on other grounds*, 125 Tex. 1, 78 S.W.2d 173 (1935).

383. Texas Employers' Ins. Ass'n v. Stephenson, 496 S.W.2d 184, 188 (Tex. Civ. App.—Amarillo 1973, no writ). In fact, testimony of the claimant or other lay witnesses may support a jury verdict awarding compensation even if such testimony is contradicted by expert testimony. *Id.* at 188; Royal Indem. Co. v. Smith, 456 S.W.2d 218, 221 (Tex. Civ. App.—Fort Worth 1970, no writ).

384. Jones v. Marsh, 148 Tex. 362, 369, 224 S.W.2d 198, 202 (1949); 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 80.00 (1973); Gwinn, *Judicial Review of Administrative Orders in Texas: A Comparative Analysis: The Board of Medical Examiners, Texas, California and Arkansas*, 23 BAYLOR L. REV. 34, 39 (1971).

385. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § (1967); Latham v. Security Ins. Co., 491 S.W.2d 100, 104 (Tex. Sup. 1972); Lowery v. Transport Ins. Co., 451 S.W.2d 595, 596 (Tex. Civ. App.—Austin 1970, no writ); Hardware Mut. Cas. Co. v. Clark, 360 S.W.2d 921, 922 (Tex. Civ. App.—Waco 1972, writ dism'd).

386. *See* Southern Canal Co. v. State Bd. of Water Eng'r, 159 Tex. 227, 235, 318 S.W.2d 619, 625 (1958); 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 79.00 (1973); Gwinn, *Judicial Review of Administrative Orders in Texas: A Comparative Analysis: The Board of Medical Examiners, Texas, California and Arkansas*, 23 BAYLOR L. REV. 34, 73 (1971).

387. Southern Canal Co. v. State Bd. of Water Eng'r, 159 Tex. 227, 235, 318 S.W.2d 619, 625 (1958).