St. Mary's Law Journal

Volume 10 | Number 1 Article 8

3-1-1978

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THE COMPENSABILITY OF MENTALLY INDUCED OCCUPATIONAL DISEASES UNDER TEXAS WORKERS' COMPENSATION LAW

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The concept of compensation for work related accidents and diseases has undergone a major change in recent years. In many jurisdictions, workers' compensation awards are now granted for psychiatric disorders attributable to employment related pressures and emotional stresses.[1] Frequently, the causal relationship between the hazards of employment and the disability is obscure.[2] The issue is not merely one of legal line drawing, but a larger and more difficult problem of reconciling the work related injury theory of workers' compensation with the social and moral issue of a disabled member of society.[3] A 1971 amendment to the Texas Workers' Compensation Act[4] has raised a number of questions concerning recovery for mentally induced occupational diseases under Texas law. The following discussion will attempt to analyze that amendment in light of the efforts toward more liberal compensation in other jurisdictions and the Texas decisions before and after the amendment.

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1. *See, e.g.*, Baker v. Workmen's Compensation Appeals Bd., 96 Cal. Rptr. 279, 285 (Ct. App. 1971); Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeal Bd., 487 P.2d 278, 282 (Hawaii 1971); Carter v. General Motors Corp., 106 N.W.2d 105, 110 (Mich. 1960). The term "workmen's" has been changed to "workers'" in the Texas statute. TEX. REV. CIV. STAT. ANN. art. 8306b, § 1 (Vernon Supp. 1978).

2. *Compare* Deziel v. Difco Laboratories, Inc., 232 N.W.2d 146, 151-52 (Mich. 1975) (employee's subjective perception of work environment determines causation) *with* Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 345, 345-46 (1965) (only objective stress should be considered since no job is stress free and compensating for subjective stresses will lead to compensating all psychological maladies). "[T]he complex etiology of psychoneuroses . . . are such that . . . a psychiatrist will be unable to estimate with any degree of accuracy the probabilities of the injury occurring in the absence of employment. . . . In such cases, the causation requirement . . . is of little assistance in deciding whether to award compensation." Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1142-43 (1961).

3. *See* Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 345, 347 (1965).

> [E]xtension of the benefits of the compensation system to all sick or injured employees . . . . would make workmen's compensation into something never contemplated and would violate completely the basic principle that the expense of *work* injuries are to be a part of the cost of production. However, if we are to approach that result inevitably . . . perhaps the time has come when we must answer certain questions frankly—notably, the question whether we actually intend to make industry pay for all disabilities of employees regardless of fault, and if so, under what rules, and subject to what limitations.

Id. at 347.

4. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978).

BASIC THEORY OF WORKERS' COMPENSATION

Workers' compensation is a "mechanism for providing cash-wage benefits and medical care to victims of work connected injuries and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product."[5] Statutes generally reflect this theory of compensation by requiring that an injury or occupational disease arise "out of and in the course of employment."[6] This phrase frequently is discussed in terms of "risk," and a given injury is considered to have arisen "out of and in the course of employment" when the employment situation creates a risk that the injury will occur.[7] Another common statutory provision excludes from compensation "[o]rdinary diseases of life to which the general public is exposed outside of employment."[8] Clearly, diseases which are characteristic of life in general involve no risk arising from employment and are not within the in-

5. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1, at 1 (1978). *But see* Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEXAS L. REV. 117, 119 (1969) (proposal for compensating all injuries regardless of work connection).

6. *See, e.g.*, ALA. CODE tit. 25, § 25-5-1(9) (1977); ARIZ. REV. STAT. § 23-1021 (1971); TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978). The first part of the clause "arise out of employment" is said to deal with cause and origin, and the second, "in the course of employment," with the place and time of the accident. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, §§ 6 at 3-1, 14 at 4-1 (1978).

> In practice, the "course of employment" and "arising out of employment" tests are not, and should not be, applied entirely independently; they are both parts of a single test of work-connection, and therefore deficiencies in the strength of one factor are sometimes allowed to be made up by the strength in the other.

Id. § 29 at 5-295.

7. *See* Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 111, 246 S.W. 72, 74 (1922); Aetna Ins. Co. v. Hart, 315 S.W.2d 169, 173 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.). "The crucial issue is the kind or quality of risk which employment must create in order to satisfy the minimum requirement of legal causation." Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1141 (1961).

Originally the courts applied a "peculiar or increased risk" doctrine, which required that the risk created by the employment be greater than that to which the employee was subjected in everyday life. This restrictive doctrine was supplanted by the "actual risk" doctrine which inquires whether the risk is in fact related to the employment, regardless of whether it is common to the public. Professor Larson also cites a third doctrine, that of "positional risk," which is used by a few courts. This doctrine determines whether the employment placed the employee in position to sustain the disability. *See* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 6 at 3-1 to 3-5 (1978).

Evidence that Texas has adopted the "actual risk" position is found in Garcia v. Texas Indem. Ins. Co., 146 Tex. 413, 419, 209 S.W.2d 333, 337 (1948). The rationale of this doctrine is that "[t]he risk may be no different in degree than those to which he may be exposed outside of his employment. The injury is compensable, not because of the extent or particular character of the hazard, but because it exists as one of the conditions of employment." *Id.* at 417, 209 S.W.2d at 337 (quoting Savage v. St. Aeden's Church, 189 A. 599, 601 (Conn. 1937)).

8. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978); *see* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 41.33, at 7-267 (1973).

tended range of compensability.[9] Workers' compensation is intended to compensate employees for work related injuries, but compensation where the only proof is that there was a change in the employee's physical or mental makeup while on the job goes beyond such intent.[10] "The Legislature," it is observed, "has not provided health insurance."[11] Thus the issue of compensability, due to the purpose of workers' compensation and the statutory definitions of compensable injuries, is inextricably connected with the question of causation.[12]

TEXAS LAW

The Texas Workers' Compensation Act originally applied only to accidental injuries and such diseases or infections as naturally resulted therefrom.[13] In 1947 the Texas Legislature formally recognized that illness, as well as injury, could result from industrial hazards by amending the act to provide compensation for a specific and exclusive list of occupational diseases.[14]

Thus, after 1947 there existed two distinct classifications of injuries for which a disabled employee could be compensated: accidental injuries and occupational disease.[15] An accidental injury required an undesigned, untoward event which could be traced to a definite time, place, and cause.[16]

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9. In Mueller v. Charter Oak Fire Ins. Co., 533 S.W.2d 123 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.), the court relied upon the statutory exclusion as indicative of "a Legislative intent to require evidence of probative force of a causal connection between employment and occupational diseases."

10. Northern Assurance Co. of America v. Taylor, 540 S.W.2d 832, 834 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.). In connection with heart attack cases, Professor Larson has stated:

> Obviously if the heart attack is a genuinely work-connected injury, to deny compensation benefits would be a gross violation of the legislative purpose and of the workman's rights. It is equally obvious that under the coverage clause . . . (arising out of and in the course of employment), compensation cannot be paid for every heart attack which happens to make its appearance during working hours.

Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441, 441 (1967).

11. Northern Assurance Co. of America v. Taylor, 540 S.W.2d 832, 834 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); *accord*, Houston Fire & Cas. Ins. Co. v. Biber, 146 S.W.2d 442, 443 (Tex. Civ. App.—San Antonio 1940, writ dism'd judgmt cor.).

12. *See* Mueller v. Charter Oak Fire Ins. Co., 533 S.W.2d 123, 126 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); Aetna Ins. Co. v. Hart, 315 S.W.2d 169, 173 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.).

13. 1917 Tex. Gen. Laws, ch. 103, Part IV § 1, at 291.

14. *See* 1947 Tex. Gen. Laws, ch. 113, §§ 2-9, at 176-80.

15. *See* Texas Employer's Ins. Ass'n v. McKay, 146 Tex. 569, 573, 210 S.W.2d 147, 150 (1948) (accidental injury); Rudd v. Gulf Cas. Co., 257 S.W.2d 809, 811-12 (Tex. Civ. App.—El Paso 1953, no writ) (occupational disease).

16. *See, e.g.*, Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859, 859 (Tex. 1972); Northern Assurance Co. of America v. Taylor, 540 S.W.2d 832, 833 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); Consolidated Underwriters v. Wright, 408 S.W.2d

An accident per se was not required, but there must have been an event which, although not occurring in the normal course of employment, was a risk thereof.[17] An occupational disease, on the other hand, was acquired in the usual and ordinary course of employment.[18] Occupational diseases developed gradually and their inception was untraceable except as an incident to the pursuit of an occupation.[19]

Until 1971 compensation for occupational diseases was limited to diseases specifically enumerated in the statute.[20] All unlisted diseases went without compensation unless they satisfied the requirements of an accidental injury.[21] In 1971 the Texas Legislature, in an effort to "make all diseases arising out of employment compensable,"[22] amended the Workers' Compensation Act, repealing the specific list of occupational diseases and substituting in its place a broad definition of the term.[23]

140, 148 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

17. *See* Northern Assurance Co. of America v. Taylor, 540 S.W.2d 832, 833 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); Aetna Ins. Co. v. Hart, 315 S.W.2d 169, 173 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.); Texas Employer's Ins. Ass'n v. Mincey, 255 S.W.2d 262, 269 (Tex. Civ. App.—Eastland 1953, writ ref'd n.r.e.).

18. *See* Hartford Accident & Indem. Co. v. McFarland, 433 S.W.2d 534, 536 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Frazier v. Employers Mut. Cas. Co., 368 S.W.2d 955, 959 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.).

19. *See, e.g.,* Hartford Accident & Indem. Co. v. McFarland, 433 S.W.2d 534, 536 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Frazier v. Employers Mut. Cas. Co., 368 S.W.2d 955, 959 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.); Solomon v. Massachusetts Bonding & Ins. Co., 347 S.W.2d 17, 19 (Tex. Civ. App.—San Antonio 1961, writ ref'd).

20. *See* Hartford Accident & Indem. Co. v. McFarland, 433 S.W.2d 534, 536 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); 1947 Tex. Gen. Laws, ch. 113, §§ 2-9, at 176-80.

21. In Frazier v. Employers Mut. Cas. Co., 368 S.W.2d 955, 959 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.), the court found that the claimant had in fact suffered an occupational disease, but denied compensation since the disease was unscheduled and could not be fit into the accidental injury category.

22. Terry, *Occupational Disease & Cumulative Injury,* 8 TRIAL L.F. 3, 3 (April-June 1974) (quoting Tex. H.R. Comm. on Judiciary, Report on S.B. 265, 62nd LEG. 4 (1971)).

23. The amended statute, TEX. REV. CIV. STAT. ANN. art 8306, § 20 (Vernon Supp. 1978), provides:

> Wherever the terms "Injury" or "Personal Injury" are used in the Workmen's Compensation Laws of this State, such terms shall . . . mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom . . . [and] . . . include "Occupational Diseases . . . ." "Occupational Disease" . . . shall be construed to mean any disease arising out of and in the course of employment which causes damage or harm to the physical structure of the body and such other diseases or infections as naturally result therefrom. An "Occupational Disease" shall also include damage or harm to the physical structure of the body occurring as the result of repetitious physical traumatic activities extending over a period of time and arising in the course of employment; provided, that the date of the cumulative injury shall be the date disability was caused thereby. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident to an "Occupational Disease" or "Injury" as defined in this section.

The amendment defines occupational disease as "any disease arising out of and in the course of employment which causes damage or harm to the physical structure of the body."[24] Additionally, damage or harm to the physical structure of the body resulting from "repetitious physical traumatic activities extending over a period of time and arising in the course of employment," is included in the definition.[25] Ordinary diseases of life, however, remain uncompensable.[26]

The amended definition in section 20 of article 8306 raises a number of questions regarding occupational disease coverage as well as the continued viability of the distinction between accidental injury and occupational disease. The definition of "injury" which courts previously interpreted to mean accidental injury, as distinguished from occupational disease, now includes occupational diseases arising out of employment.[27] It has been suggested that this synthesis of cumulative injury or occupational disease[28] and a sudden injury which is accidental in nature into the single term "injury" has rendered the distinction between the two terms obsolete.[29] The observation is not unfounded. Its basis lies in the contention that it is not the cause of the claimant's injury that is important, so long as it is work related, but it is the disabling effect of the injury that gives rise to compensation.[30] Under this analysis, however, compensation for injuries will go far beyond what has heretofore been allowed in Texas, and in the majority of state jurisdictions.[31] Therefore, the changes deserve close scrutiny to determine legislative intent.[32] The amendment clearly was enacted to expand recovery for occupational diseases,[33] but precisely what the legislature meant by the terms "arising out of and in the course of employment,"[34] and "occurring as the result of repetitious physical traumatic activity"[35]

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. As occupational diseases are of a gradually developing nature the terms occupational disease and cumulative injury are used interchangeably herein.

29. *See* Terry, *Occupational Disease & Cumulative Injury*, 8 TRIAL L.F. 3, 3 (April-June 1974).

30. *See id.* at 4.

31. *See, e.g.*, Lawson v. Employers Ins., 330 F. Supp. 321 (E.D. Tenn. 1971); Verdugo v. Industrial Comm'n, 561 P.2d 1249, 1250 (Ariz. Ct. App. 1977); Erhart v. Great W. Sugar Co., 546 P.2d 1055, 1058 (Mont. 1976). *See also* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23, at 7-373 (1973).

32. A number of writers have already discussed the statute. *See* Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 29 SW. L.J. 183, 184 (1975); Terry, *Occupational Disease & Cumulative Injury*, 8 TRIAL L.F. 3, 3 (April-June 1974); 9 HOUS. L. REV. 597, 599 (1972).

33. See note 22 *supra* and accompanying text.

34. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978).

35. *Id.*

is subject to controversy.[36] This is particularly true in the area of mental disabilities.

MENTAL CAUSE AND INJURY IN TEXAS

In the area of mental trauma and injury, there are three categories of compensable injury in Texas:[37] physical trauma causing mental injuries,[38] mental trauma causing physical injuries,[39] and mental trauma causing mental injuries.[40] Although a number of jurisdictions have been reluctant to allow compensation in the latter category,[41] Texas was one of the forerunners in the field.[42] In *Bailey v. American General Insurance Co.*,[43] the Texas Supreme Court held that traumatic neurosis resulting from an emotional stimulus which was produced by an incident involving a risk or hazard of employment constituted damage to the physical structure of the body.[44]

Texas was thus a leader in allowing compensation for injuries involving both a mental cause and a mental effect. Nevertheless, *Bailey* and its progeny have retained some limitations on recovery in such cases. Since *Bailey,* disabilities associated with mental or psychological causes have been compensable, but only as accidental injuries.[45] As such they must be traceable to a definite time, place, and cause.[46] Occupational diseases for which recovery has been allowed, on the other hand, have all been physi-

36. *See* Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 29 SW. L.J. 183, 184 (1975); Terry, *Occupational Disease & Cumulative Injury*, 8 TRIAL L.F. 3, 3 (April-June 1974).

37. The categories are suggested by Professor Larson. *See* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.20, at 7-348 (1973).

38. Hood v. Texas Indem. Ins. Co., 146 Tex. 522, 527, 209 S.W.2d 345, 348 (Tex. 1948) (neurosis resulting from injuries to foot and elbow); Miller Mut. Fire Ins. Co. v. Ochoa, 432 S.W.2d 118, 122 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.) (conversion reaction from eight foot fall from airplane wing).

39. Aetna Ins. Co. v. Hart, 315 S.W.2d 169, 177 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.) (stroke suffered by storekeeper after being severely berated by customer).

40. Bailey v. American Gen. Ins. Co., 154 Tex. 430, 436-38, 279 S.W.2d 315, 321-22 (1955) (traumatic neurosis after seeing fellow worker plunge to death from scaffolding).

41. *See* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23, at 7-373 (1973) (survey of case law in the area).

42. Professor Larson called the *Bailey* case the "most significant case yet to appear on the subject of 'nervous' injury." 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23, at 7-377 (1973); *see* Bailey v. American Gen. Ins. Co., 154 Tex. 430, 436-38, 279 S.W.2d 315, 321-22 (1955).

43. 154 Tex. 430, 279 S.W.2d 315 (1955).

44. *Id.* at 434-38, 279 S.W.2d at 318-22.

45. Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859, 860 (Tex. 1972). "[C]ases allowing recovery for . . . traumatic neurosis have involved particular events." *Id.* at 860.

46. *See, e.g.*, Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859, 859 (Tex. 1972); Northern Assurance Co. of America v. Taylor, 540 S.W.2d 832, 833 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.); Aetna Ins. Co. v. Hart, 315 S.W.2d 169, 173 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.).

cally induced.[47] The result has been that mental diseases which are associated with gradually developing mental or psychological causes are not compensable.[48] The question then arises whether the distinctions which developed under the pre-1971 statute remain valid after the amendment, or whether the Texas Legislature intended to broaden the category of occupational diseases to include those which are mentally induced.

Since 1971, Texas appellate courts have not faced the question of the compensability of mentally induced occupational diseases. Commentators are in disagreement,[49] but the available legislative history of the amendment,[50] the wording of the section itself,[51] and the few cases decided since its enactment,[52] reveal an apparent legislative intent to exclude mentally induced occupational diseases from the act.[53]

The contention that the distinction between "accidental injury" and "occupational disease" has been eliminated,[54] is apparently without merit. Cases decided since section 20 was amended have continued to recognize the distinction.[55] Furthermore, there is still a basic statutory distinction between the two. Article 8306, section 22 provides that when an occupational disease is aggravated by a pre-existing injury or disease, the claimant's recovery shall be reduced by the percentage of the injury attributable

47. There was no provision for mentally induced occupational diseases in the pre-1971 schedule of compensable diseases. *See* 1947 Tex. Gen. Laws, ch. 113, §§ 2-9, at 176-80. Furthermore, occupational disease cases decided by appellate courts under the 1971 amendment to article 8306, section 20 have all concerned physical causes. *See* Employers Commercial Union Ins. Co. v. Schmidt, 516 S.W.2d 117, 118 (Tex. 1974) (chronic myositis from working in stooped position); Standard Fire Ins. Co. v. Ratcliff, 537 S.W.2d 355, 357 (Tex. Civ. App.—Waco 1976, no writ) (repeatedly pressing knee against sewing machine lever); Charter Oak Fire Ins. Co. v. Hollis,511 S.W.2d 583, 584 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (inhaling toxic substance over 20 years' employment).

48. *See* Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law,* 29 Sw. L.J. 183, 187 (1975).

49. *Compare* Terry, *Occupational Disease & Cumulative Injury,* 8 TRIAL L.F. 3, 3-4 (April-June 1974) (compensable); 9 HOUS. L. REV. 597, 602 (1972) (arguably compensable) *and* 3 TEXAS TECH. L. REV. 367, 371 (1972) (possibly compensable) *with* Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law,* 29 Sw. L.J. 183, 187 (1975) (not compensable) *and Symposium—Workmen's Compensation: A Pandect of the Texas Law,* 6 ST. MARY'S L.J. 608, 670-71 (1974) (not compensable).

50. TEX. S.J. 666 (1971); TEX. H.R.J. 5494-96 (1971).

51. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978).

52. *See* Aetna Cas. & Sur. Co. v. Shreve, 551 S.W.2d 79, 81 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); Mueller v. Charter Oak Fire Ins. Co., 533 S.W.2d 123, 126 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); City of Austin v. Johnson, 525 S.W.2d 220, 221 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

53. *See* Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law,* 29 Sw. L.J. 183, 187 (1975).

54. See note 29 *supra* and accompanying text.

55. Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859, 860 (Tex. 1972); Aetna Cas. & Sur. Co. v. Shreve, 551 S.W.2d 79, 81-82 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

to the pre-existing injury.[56] In the case of accidental injuries, however, the injury need only be a producing cause, and recovery is not reduced on account of a pre-existing injury.[57]

There also is evidence of a legislative intent to exclude cumulative mental stress from the definition of occupational disease. The repetitive trauma section of the amendment was apparently taken from the California Labor Code,[58] which defines "cumulative injury" as "repetitive mentally or physically traumatic activities extending over a period of time" which cause a disability.[59] The original Texas version of the bill, as introduced and passed in the Senate, contained exactly the same wording.[60] The House of Representatives, however, struck the word "mental" from the bill and left it as it now reads: damages resulting from "repetitious physical traumatic activities extending over a period of time and arising in the course of employment."[61] The apparent intent of the legislature in deleting the word "mental" from the act was to avoid the extent to which the California courts were allowing compensation under their statute.[62] Therefore, cumulative stress, while considered a repetitive traumatic activity, is regarded as a mental rather than physical traumatic activity, and is not compensable.

OTHER JURISDICTIONS

Few jurisdictions have extended the concept of workmen's compensation to include mentally induced occupational diseases.[63] The most controversial example of such cumulative injury is that of a neurosis or anxiety reaction which is alleged to have been induced by protracted or repetitive mental stress attributed to job pressures. Among the cases which have granted such compensation, *Carter v. General Motors Corp.*[64] is the most notorious. In *Carter* the Michigan Supreme Court sustained a compensation award for a psychosis resulting from cumulative emotional pressures suffered on the job by an assembly line worker.[65] The award was sustained

56. TEX. REV. CIV. STAT. ANN. art. 8306, § 22 (Vernon 1967).

57. *See, e.g.*, Gill v. Transamerica Ins. Co., 417 S.W.2d 720, 723 (Tex. Civ. App.—Dallas 1967, no writ); United States Fidelity & Guar. Co. v. Herzik, 359 S.W.2d 914, 918 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.); Traders & Gen. Ins. Co. v. Rooth, 268 S.W.2d 539, 542 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.).

58. *See* Terry, *Occupational Disease & Cumulative Injury*, 8 TRIAL L.F. 3, 3-4 (April-June 1974).

59. CAL. LAB. CODE § 3208.1 (Deering 1976).

60. TEX. S.J. 666 (1971).

61. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978); TEX. H.R.J. 5494-96 (1971).

62. *See* Baker v. Workmen's Compensation Appeals Bd., 96 Cal. Rptr. 279, 285 (Ct. App. 1971); Beveridge v. Industrial Accident Comm'n, 346 P.2d 545, 547 (Cal. Ct. App. 1959).

63. *See* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23, at 7-377 (1973).

64. 106 N.W.2d 105 (Mich. 1960).

65. *Id.* at 113.

despite the fact that the employee had considerable emotional difficulties in his background and that his job involved no extraordinary stress, hazardous condition, or identifiable risk of employment.[66] The court rejected the contention that a traumatic event should be required in mental disease cases in order to insure that the disease is work related.[67] California courts have reached the same result as *Carter*.[68] In awarding compensation for a cumulative mental injury, a California Court of Appeals reasoned, "[t]he more enlightened view, to which we subscribe, does not impose physical accident or trauma as a precondition of recovery for psychoneurotic injury."[69] California also holds that the disabling injury may be the result of each day's stresses and strains.[70]

The jurisdictions which allow compensation for mentally induced occupational diseases commonly justify such awards on the ground that no matter what distinctions are drawn concerning the cause of the injury, the result nevertheless is a disabled worker.[71] Since the chance that workers will succumb to the pressures of their job is present, then that chance is a "risk of employment" which should, like accidental injuries, be borne by industry as a cost of production.[72] Another reason advanced for disposing

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66. *Id.* at 109, 113.

67. *Id.* at 109, 113.

68. Baker v. Workmen's Compensation Appeals Bd., 96 Cal. Rptr. 279, 285-86 (Ct. App. 1971).

69. *Id.* at 285; *see* Firemen's Fund Indem. Co. v. State Indus. Accident Comm'n, 250 P.2d 148, 150 (Cal. 1952); Lumbermen's Mut. Cas. Co. v. Industrial Accident Comm'n, 175 P.2d 823, 826 (Cal. 1946).

70. Baker v. Workmen's Compensation Appeals Bd., 96 Cal. Rptr. 279, 285 (Ct. App. 1971). In Beveridge v. Industrial Accident Comm'n, 346 P.2d 545, 547 (Cal. Ct. App. 1959), the court stated:

> The fact that a single but slight work strain may not be disabling does not destroy its causative effect, if in combination with other such strains, it produces a subsequent disability. . . . The fragmentation of injury, the splintering of symptoms into small pieces, the atomization of pain into minor twinges, the piecemeal contribution of work-effort to final collapse, does not negate injury.

71. *See, e.g.*, Baker v. Workmen's Compensation Appeals Bd., 96 Cal. Rptr. 279, 285-86 (Ct. App. 1971); Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeal Bd., 487 P.2d 278, 282 (Hawaii 1971); Carter v. General Motors Corp., 106 N.W.2d 105, 109 (Mich. 1960); Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEXAS L. REV. 117, 126-27 (1969).

> The emphasis now seems to be on the right of a working man to recover regardless of the origin of the risk, as long as the employment has some substantial effect on the conduct or life of the employee when the injury occurs. . . . The focal point is no longer the causal connection, but now becomes the disabling injury and its effect not only on the employee, but also on society.

Id. at 126-27.

72. Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeal Bd., 487 P.2d 278, 282 (Hawaii 1971).

> In today's highly competitive world it cannot be doubted that people often succumb to mental pressures resulting from their employment. These disabilities are as much a cost of the production process as physical injuries. The humanitarian purposes of the

of the requirement of an "event" causing the injury is that cumulative stress can produce injuries as serious as those produced by sudden trauma.[73] The argument that the workman is being compensated for pre-existing mental defects which he brought with him to the job is refuted by reference to the traditional rule in accidental injury cases that the employer must take his employees as he finds them.[74] In Michigan, a subjective standard is used to determine whether the injury in question arose out of employment, and no consideration is given to the claimant's pre-existing mental maladies.[75] Thus it is the effect of the work environment as the employee perceives it that is considered, and not as it is viewed objectively. The claimant's perception of the workplace, as altered by pre-existing disease, may not conform to reality, but if he perceives it to be injurious, and suffers a mental disability as a result of such perception, his injury is compensable under the Michigan standard.[76]

Other jurisdictions refuse to allow recovery in cases of nervous injury brought on by gradual strain and worry. In *Lawson v. Employers Insurance of Wausau,*[77] a Federal district court faced the problem directly. The plaintiff suffered a chronic anxiety reaction, and there was testimony that the disability was caused by the long hours and irregular shifts he was required to work. The court, applying Tennessee law, denied compensation reasoning that such conditions were not "present in any peculiar or increased degree by comparison with employment generally" and thus were not a "risk connected with employment."[78] Similarly, Arizona courts have held

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Workmen's Compensation Law require that indemnification be predicated not upon the label assigned to the injury received, but upon the employee's inability to work because of impairments flowing from the conditions of his employment.

Id. at 282.

73. *See* Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions,* 70 YALE L.J. 1129, 1137-38 (1961).

[T]he reluctance to consider trivial events suggests a mistaken view as to the nature of precipitating events. The courts apparently believe that the intensity of a stimulus is related to the likelihood that the stimulus was a cause of the psychoneurotic reaction. Psychiatrists believe that there is either no correlation between the intensity of the trauma and the resultant neurosis, or that the seriousness of the neurosis varies inversely with the severity of the triggering event.

Id. at 1138.

74. *See* Muznik v. Worker's Compensation Appeals Bd., 124 Cal. Rptr. 407, 413 (Ct. App. 1975); Liberty Mut. Ins. Co. v. Industrial Accident Comm'n, 166 P.2d 908, 911 (Cal. Dist. Ct. App. 1946); Deziel v. Difco Laboratories, Inc., 232 N.W.2d 146, 152 (Mich. 1975); 34 LA. L. REV. 846, 848 (1974).

75. Deziel v. Difco Laboratories, Inc., 232 N.W.2d 146, 152 (Mich. 1975); Carter v. General Motors Corp., 106 N.W.2d 105, 113 (Mich. 1960).

76. Deziel v. Difco Laboratories, Inc., 232 N.W.2d 146, 152 (Mich. 1975); Carter v. General Motors Corp., 106 N.W.2d 105, 113 (Mich. 1960).

77. 330 F. Supp. 321 (E.D. Tenn. 1971).

78. *Id.* at 323. The court noted that "the implications to business concerns engaging in shift work by allowing recovery for a psychological malady caused by shift work is great." *Id.* at 323. *See also* Deziel v. Difco Laboratories, Inc., 232 N.W.2d 146, 153 (Mich. 1975) (dissenting opinion).

that the "gradual buildup of emotional stress over a period of time" is part of the "usual, ordinary and expected incidents" of employment, and thus not within their workmen's compensation act.[79]

Although a majority of jurisdictions have found neuroses to be compensable injuries,[80] most retain the requirement that it be linked to an unexpected accident or event.[81] This insistence upon an ascertainable event is no doubt due to the problems of causation involved with untraceable stimuli such as pressure, anxiety, tension, and stress.[82] The event serves a dual purpose. It raises a distinction between the ordinary stress of life and the ascertainable stress of employment, thereby allowing categorization of the ascertainable stress as a risk of employment.[83] The event also provides a contributing cause upon which the chain of causation from employment to injury can be constructed.[84]

POLICY

In the case of mentally induced occupational disease, or more particularly, neuroses resulting from the cumulative stress of employment, the

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> We also would find that, although the multitudinous forces within a personality may require a person to seek a way of life gratifying to his or her psyche—the consumer of a product never was and should not be expected to bear the cost of this gratification (real though the need must be).

Id. at 153 (dissenting opinion).

79. Muse v. Industrial Comm'n, 554 P.2d 908, 911 (Ariz. Ct. App. 1975); *see* Ayer v. Industrial Comm'n, 531 P.2d 208, 211 (Ariz. Ct. App. 1975). In Shope v. Industrial Comm'n, 495 P.2d 148, 149-50 (Ariz. Ct. App. 1972), the court noted that "to grant petitioner his requested relief would literally open Pandora's Box permitting compensation to any disgruntled employee who leaves his job in a huff because of an emotional disturbance."

80. 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23, at 7-373 (1973) (survey of case law allowing and refusing compensation); *see* Hood v. Texas Indem. Ins. Co., 146 Tex. 522, 527, 209 S.W.2d 345, 348 (1948), wherein it was noted that "[t]raumatic neuroses following physical injuries are almost universally compensated . . . ."

81. *See* Verdugo v. Industrial Comm'n, 561 P.2d 1249, 1250 (Ariz. Ct. App. 1977); Erhart v. Great W. Sugar Co., 546 P.2d 1055, 1058 (Mont. 1976); 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23, at 7-373 (1973); Manson, *Workmen's Compensation and the Disabling Neurosis,* 11 BUFFALO L. REV. 376, 383-84 (1961-1962).

82. *See* Sartwelle, *Workmen's Compensation, Annual Survey to Texas Law,* 30 SW. L.J. 213, 234 (1976); Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions,* 70 YALE L.J. 1129, 1137 (1961); 44 FORDHAM L. REV. 204, 208-10 (1975).

83. *See Symposium—Workmen's Compensation: A Pandect of the Texas Law,* 6 ST. MARY'S L.J. 608, 670-71 (1974). The Wisconsin courts have reached an interesting solution. In School Dist. # 1 v. Department of Indus., Labor & Human Relations, 215 N.W.2d 373 (Wis. 1974), the Wisconsin Supreme Court held that non-traumatically caused mental injury was compensable only if it resulted from a situation of greater dimensions than day to day emotional strain. *Accord,* Swiss Colony, Inc. v. Department of Indus., Labor & Human Relations, 240 N.W.2d 128, 131 (Wis. 1976).

84. *See* Manson, *Workmen's Compensation and the Disabling Neurosis,* 11 BUFFALO L. REV. 376, 381 (1961-1962); Comment, *Recovery for Mental Injuries Resulting from Mental Stress Under Workmen's Compensation Laws,* 53 CHI-KENT L. REV. 731, 744 (1977); 34 LA. L. REV. 846, 846-47 (1974).

issue of causation is a complex one.[85] Since anxiety, tension, and pressure are characteristic of modern life, difficulty is encountered in attributing a given neurosis solely to employment related stress.[86] The existence of past maladjustment and emotional imbalance further complicates the assorted stimuli until it becomes an arbitrary, if not impossible task to pinpoint the precise cause of the condition.[87] This may be true even though the claimant's employment is shown to be characterized by stress and overwork since, "[i]t is more likely that a particular occurrence at work merely serves as an excuse for an inner conflict to attach to that occurrence. . . ."[88] The issue of causation is even more complex when ordinary stresses common to all types of employment, and which cause no disabilities in the ordinary employee, are alleged to have caused a particular compensable neurosis.[89] As one commentator has perceptively noted: "In

85. Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1142-43 (1961).

> [T]he complex etiology of psychoneurosis and the demands of time for examination are such that in a substantial number of cases a psychiatrist will be unable to estimate with any degree of accuracy the probabilities of the injury occurring in the absence of employment. All major schools of psychoanalytic thought agree that although immediate factors of reality may serve as precipitating or exciting causes, the adult's predisposition towards a psychoneurotic reaction lies in the childhood. . . . Whether a given experience or combination of experiences will trigger the psychoneurotic potential into a psychoneurosis will depend on the vulnerability of the individual . . . . In such cases, the causation requirement . . . is of little assistance in deciding whether to award compensation.

Id. at 1142-43.

86. Houts, *Work Stresses and Compensation*, 7 TRAUMA No. 4, at 2 (1965).

87. *See* Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 345, 346-48 (1965).

88. Manson, *Workmen's Compensation and the Disabling Neurosis*, 11 BUFFALO L. REV. 376, 386 (1961-1962). It has also been noted that "[l]ife is characterized by stress, both interpersonal and intrapsychic. No job is free from stress. It is one thing to provide sickness insurance that will cover the varied manifestations of disordered emotional states, and it is another to attribute these states incorrectly to isolated or specific job stresses." Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 345, 348 (1965).

89. Jurisdictions allowing compensation in such cases are discussed at notes 70-75 *supra* and accompanying text. This viewpoint does indeed result in employee health insurance. *See* Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 345, 345 (1965).

> Emotional adjustment is always a function of predisposition. . . .
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> What is stressful for one person may not be stressful for another. If one is to avoid reductio ad absurdum in formulating any workable concept of causal relationships as it relates to compensability it is necessary to consider only that stress which is objective . . . and unusual. Exposure to an affectionate display may result in an emotional illness in individuals who have by virtue of unresolved conflicts within themselves, an inability to deal with it. Life itself is characterized by a combination of both objective and subjective stresses. If illness caused by subjective stress were considered compensable, then all illness of emotional origin could be compensable, since no job is free of stress and the illness could be attributed to job stress.

Id. at 345.

those cases where cause-in-fact can neither be proven nor negated, the decision to grant or deny compensation should depend in large part upon the court's interpretation of the causation requirement and the policies behind the workmen's compensation statutes."[90]

RECENT DEVELOPMENT

On May 24, 1978, the San Antonio Court of Civil Appeals, in *Transportation Insurance Co. v. Maskyn*,[91] held that an anxiety depression which the appellee attributed to an accumulation of on the job pressures was not an ordinary disease of life, but rather was a compensable occupational disease.[92] The court, in holding that cumulative stress could constitute an occupational disease, relied primarily on *Bailey v. American General Insurance Co.*[93] The appellant's attempt to distinguish *Bailey* on the ground that it dealt with an accidental injury and not an occupational disease was summarily rejected.[94] The court found no reason to distinguish between a single traumatic experience and a number of such experiences for the purpose of compensability.[95] Such reasoning is no doubt correct in the context of accidental injury, since in both instances the injury, although purely mental, may be compensable. But the *Bailey* holding that a mental stimulus can result in a compensable accidental injury if traceable to a definite time, place, and cause is clearly inapplicable to occupational disease cases involving a series of untraceable mental stimuli.[96]

By its use of *Bailey* and the accidental injury criteria, and its refusal to recognize the difference between a cumulative injury and one which arises at a definite time, place, and cause, the court in *Maskyn* lends support to the theory, noted above,[97] that such distinction is no longer necessary. If the decision is allowed to stand, it will go a long way towards abolishing the distinction, which grew up by way of case law, between accidental injuries and occupational diseases.

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90. Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129, 1143 (1961).

91. Transportation Ins. Co. v. Maskyn, No. 15944 (Tex. Civ. App.—San Antonio, May 24, 1978) (not yet reported).

92. *Id.* at 10-11.

93. *Id.* at 4-5; *see* Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955).

94. Transportation Ins. Co. v. Maskyn, No. 19544, slip op. at 5 (Tex.Civ. App.—San Antonio, May 24, 1978) (not yet reported). "We see very little justification for a holding that a claimant can recover for a neurosis occasioned by one traumatic experience, but cannot recover for a similar neurosis caused by a number of such traumatic experiences." *Id.* at 5.

95. *Id.* at 5. The court had the benefit of a jury finding that the long hours the claimant was required to work constituted repetitious physically traumatic activity. *Id.* at 1. They nevertheless faced the issue of mental causation since both no evidence and insufficient evidence points on the issue were raised by the appellants. *Id.* at 3.

96. See notes 45-48 *supra* and accompanying text.

97. See note 29 *supra* and accompanying text.

CONCLUSION

The requirements that the Texas Legislature built into article 8306, section 20 of the Workers' Compensation Act seem to have been designed to insure that only work related injuries will be compensated.[98] Both stresses of employment and stresses of ordinary life create risks that neuroses will occur. As such risks are common to all employment and common to life in general, the legislature has excluded repetitive mental stress which accumulates to cause a disability from the definition of occupational disease.[99] It is submitted that such stresses are instead to be considered "ordinary diseases of life to which the general public is exposed" and thus excluded from occupational disease compensation.[100] Extraordinary stresses of employment, on the other hand, are not excluded from compensation under this analysis, even if they are purely mental. This is true because such stresses, being extraordinary, should be traceable to a definite time, place, and cause, and would thus qualify as accidental injuries.[101] It appears, then, that the Texas Legislature, conscious of the fact

98. *See* Mueller v. Charter Oak Fire Ins. Co., 533 S.W.2d 123, 126 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (evidence failed to establish that cumulative strain caused heart attack; not traceable to definite time, place, and cause); City of Austin v. Johnson, 525 S.W.2d 220, 221 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (in heart attack case, worry and anxiety over possible job loss not related to contract of employment).

In the heart attack cases, proof that the injury was in fact related to employment is on the same nebulous footing as in neurosis cases. Texas courts have required proof of an accidental, rather than cumulative injury before awarding compensation for heart attacks. The causal connection between employment and injury in such cases is proved by a showing of strain and overexertion in the course of employment. Pan Am. Fire & Cas. Co. v. Reed, 436 S.W.2d 561, 563 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.); *see* Henderson v. Travelers Ins. Co., 544 S.W.2d 649, 650-51 (Tex. 1976); O'Dell v. Home Indem. Co., 449 S.W.2d 485, 487 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.).

99. Amended article 8306, section 20 speaks directly to cumulative injury. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978). Certainly the legislature was aware of the fact that cumulative mental injuries were not compensable under prior law. *See* 1947 TEX. GEN. LAWS, ch. 113, §§ 2-9, at 176-80. They also must have been aware of the trend toward recovery in the repetitive mental trauma cases. See notes 59-71 *supra* and accompanying text. Since the word "mental" was excluded from the phrase "repetitious physically traumatic activity" in section 20, the conclusion is inescapable that the legislature intended to exclude cumulative mental stress from the occupational disease definition. *See* TEX. S.J. 666 (1971); TEX. H.R.J. 5494-96 (1971).

100. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1978). See the suggestion in Sartwelle, *Workmen's Compensation, Annual Survey of Texas Law*, 31 SW. L.J. 259, 275 (1977), that the "principal component" of the definition of occupational disease contained in the statute is the ordinary disease of life exclusion. The note goes on to point out that the phrase is not one of effortless application. *Id.* at 275-76; *see* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 41.33, at 7-267 (1973).

101. See notes 16-18 *supra* and accompanying text. A definite time, place, and cause may be found though the "accidents" occur over a period of several days. *See* Texas Employers' Ins. Ass'n v. Murphy, 506 S.W.2d 312, 316 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (accidental injury from inhaling harmful fumes over three days).

that workers' compensation is not health insurance, and that the function of the causation requirement is to limit the employer's liability to those cases where the injury has a clear relationship to employment, has designed a statutory test that all occupational diseases must meet.