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Reformers' Regress: The 1991 Texas Workers' Compensation Act.

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No man's life, liberty or property are safe while the Legislature is in session.[1]

I. INTRODUCTION

The "most significant piece of legislation to come out of the Texas legislature in twenty years"[2] went into effect January 1, 1991.[3] The controversy out of which it emerged continues to rage among lawmakers, lawyers, employers, and insurance carriers. In December 1989, after two special sessions fraught with obstinacy and emotion, the Texas legislature passed a bill which radically restructured the state's seventy-six-year-old workers' compensation system.[4] The enactment and execution of this new program will—directly or indirectly—affect most Texas workers and taxpayers. Therefore, an understanding of the history of Texas' workers' compensation law, the current controversy, and the statute's implications for the future is essential. After a brief history of workers' compensation law, this comment will present a discussion on the background of the new Texas act,[5] an analysis of some significant changes the Act made, a focus on current challenges to it, and potential responses to the statute's inadequacies.

II. TEXAS WORKERS' COMPENSATION LAW: ITS STURDY ROOTS

A. *Early Developments*

Long before the nationwide promulgation of modern workers' compensation acts,[6] employees injured on the job were left with the uncomfortable

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1. Collins, *Workers' Compensation*, 35 SW. L.J. 273, 273 n.1 (1981) (quoting *Estate of A.B.*, 1 Tuck. 247, 249 (N.Y. Sur. Ct. 1866)).

2. *Texas Takes the Bull by the Horns: Work Comp Reforms Expected to Control Litigation, Costs Surge*, Bus. Ins., Dec. 18, 1989, at 1 (statement of Governor Bill Clements).

3. TEX. REV. CIV. STAT. ANN. arts. 8308-09 (Vernon 1991). The new law went into effect January 1, 1991, and applies only to injuries which occur on or after that date. P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 16 (1990). The Texas Workers' Compensation Commission was established on April 1, 1990, and replaced the Industrial Accident Board. The Commission applies the old law to claims which arose prior to January 1, 1991. *Id.*

4. Tex. S.B. 1, 71st Leg., 2d C.S. (1989).

5. For a detailed treatment of all major changes from the old law, see generally P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT (1990); Ashcraft & Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH L. REV. 609 *passim* (1990); Caperton & Elliott, *Legislative Update*, in 1 ADVANCED WORKERS' COMPENSATION COURSE A *passim* (1990).

6. *See* 1 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 321 (2d ed. 1981) (workers' compensation laws have been enacted in every state); Keaney, *What Have the States Done to Improve Their Workmen's Compensation*

task of seeking common-law remedies from their employers.[7] If they chose to pursue damages, injured workers had to prove that their employers were negligent,[8] which was virtually unworkable because of employers' superiority over their employees.[9] As the Industrial Revolution brought more work-related injuries, courts began to impose safety-based duties on employers.[10] Nevertheless, injured employees faced extreme difficulty[11] in overcoming the common-law defenses of contributory negligence,[12] the fellow servant rule,[13]

Systems?, 1 WORK. COMPENSATION L. REV. 283, 283 (1974) (last state to get workers' compensation was Mississippi in 1949).

7. *See* 1 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 321 (2d ed. 1981) (due to expense, lack of information, and fear of losing their jobs, workers were reluctant to file suit against employers). Another problem with the common-law remedy was the fact that injured workers often would need fellow employees to help prove the employer's negligence. Ragland, *The Texas Workers' Compensation Law: A Historical Perspective*, 23 TEX. TRIAL LAW. F. No. 3, at 7 (1989). However, the threat of dismissal prevented co-employees from testifying. *Id.*

8. *See, e.g.*, Gulf, C. & S.F. Ry. Co. v. Larkin, 98 Tex. 225, 226, 82 S.W. 1026, 1027-28 (1904) (employee injured at work could not recover because he could not prove employer's negligence); Merchants' & Planters' Oil Co. v. Burns, 96 Tex. 573, 575, 74 S.W. 758, 762 (1903) (representatives of worker killed at work were deprived of benefits because of failure to prove negligence on part of employer); Pilkenton v. Gulf, C. & S.F. Ry. Co., 70 Tex. 226, 227, 7 S.W. 805, 807 (1888) (for employee to recover, he must prove employer's or fellow servant's negligence); *see also* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 9 (1938); Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 775-86 (1982); Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35, 35-42 (1917).

9. *See* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 10 (1938) (exceptions and distinctions in law favored employers); Berkowitz, *Occupational Safety and Health*, 443 ANNALS 41, 46 (1979) (employers' positions gave them advantages over employees).

10. *See, e.g.*, Missouri, K. & T. Ry. Co. v. Beasley, 106 Tex. 160, 162, 155 S.W. 183, 187 (1913) (noting that railroad companies' duties to protect employees must be performed reasonably); Beck v. Texas Co., 105 Tex. 303, 305, 148 S.W. 295, 299 (1912) (stating it is employer's duty to provide safe place for employee to work); Hugo, Schmeltzer & Co. v. Paiz, 104 Tex. 563, 565, 141 S.W. 518, 523-24 (1911) (law imposes safety duties on employers); *see also* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 2-4 (1938) (detailing the duties as they evolved in Texas); 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 202 (2d ed. 1981) (duties included providing: safe places to work, safe machinery and tools, competent and sober fellow employees, safety rules, and warnings of dangers).

11. *See* 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 203 (2d ed. 1981) (as country industrialized, application of common law yielded many unfair results); Ragland, *The Texas Workers' Compensation Law: A Historical Perspective*, 23 TEX. TRIAL LAW. F. No. 3, at 7 (1989) (common-law defenses frequently defeated workers' claims); Vinson, *Constitutional Stumbling Blocks to Legislative Tort Reform*, 15 FLA. ST. U.L. REV. 31, 39 (1987) (workers rarely prevailed in negligence suits, and industrial system's injustices which left injured and poverty-stricken victims led to first tort crisis).

12. *See, e.g.*, Anderson v. St. Louis S.W. Ry. Co., 104 Tex. 340, 341-42, 134 S.W. 1175, 1177-78 (1911) (contributory negligence of employee injured at work precluded his recovery);

and assumption of risk.[14] This troublesome application of common-law rules led to unfair results and pressure for changes in the system.[15] Courts unsuccessfully attempted to respond with narrower applications of the defenses and more liberal interpretations of negligence law.[16]

Houston & T.C. Ry. Co. v. Ravanelli, 133 S.W. 424, 426 (Tex. 1911) (even though employer was also negligent, employee could not recover damages); *see also* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 8-9 (1938) (noting history of contributory negligence and stating that concept had long been discarded with regard to admiralty cases); 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 202 (2d ed. 1981) (defining "contributory negligence": if injured employee's negligence contributed to injury, recovery totally barred); Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 242-43 (1914) (describing contributory negligence and stating that it would eventually disappear from the law). Contributory negligence has been replaced with comparative negligence in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1986 & Supp. 1991).

13. *See, e.g.*, Missouri, K. & T. Ry. Co. v. Poole, 104 Tex. 36, 36-37, 133 S.W. 239, 239-41 (1911) (fellow servant defense caused reversal of verdict for plaintiff); Gulf, C. & S.F. Ry. Co. v. Howard, 97 Tex. 513, 513-14, 80 S.W. 229, 229-30 (1904) (fellow servant rule precluded recovery); *see also* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 5-7 (1938) (exemplifying fellow servant doctrine); 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 203 (2d ed. 1981) ("fellow servant rule" means employer not liable to employee for injury caused by negligence of fellow employee); Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 242 (1914) (employers liable to strangers for injuries their employees caused, but not liable to one employee for injury caused by another).

14. *See, e.g.*, Galveston, H. & H. Ry. Co. v. Hodnett, 106 Tex. 190, 190-91, 163 S.W. 13, 14-16 (1914) (explaining assumption of risk and denying plaintiff's recovery as result of it); Houston & T.C. Ry. Co. v. Alexander, 103 Tex. 594, 594, 132 S.W. 119, 120 (1910) (noting that contributory negligence and assumed risk often prevented employees from filing suit); St. Louis S.W. Ry. Co. v. Brisco, 100 Tex. 354, 354-55, 99 S.W. 1020, 1022-23 (1907) (injured worker denied damages because he assumed risk); *see also* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 8 (1938) (explaining history and application of assumption of risk doctrine); 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 202 (2d ed. 1981) ("assumption of risk" means employer not liable to employee who understood risk of unsafe condition and nevertheless voluntarily continued employment). The assumption of risk doctrine has been abolished in Texas. Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975).

15. *See* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 10 (1938) (common law offered injured employee weak remedy which legislation must address); 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 203 (2d ed. 1981) (inequity led to calls for change).

16. *See, e.g.*, Orange Lumber Co. v. Ellis, 105 Tex. 363, 364-65, 150 S.W. 582, 586 (1912) (general rule of assumption of risk does not mean that employee assumes every possible risk of employment); Quinn v. Glenn Lumber Co., 103 Tex. 253, 253-54, 126 S.W. 2, 3-4 (Tex. 1910) (court declined to apply fellow servant rule to representative of employer); Houston & T.C. Ry. Co. v. Alexander, 102 Tex. 497, 498-99, 119 S.W. 1135, 1138-39 (1909) (interpretations of assumption of risk in light favorable to plaintiff); *see also* 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 203 (2d ed. 1981) (courts attempted to interpret rules in favor of plaintiffs).

By the turn of the century, the application of common-law principles in the area of work-related injuries was headed for extinction.[17] Many states had codified the employers' common-law duties and abolished some of the common-law defenses with various types of employers' liability laws.[18] Still, however, injured workers seeking compensation were often forced to take their employers to court.[19] The problems inherent in relying on traditional remedies led to the no-fault workers' compensation systems of today.[20] A look at the original principles behind the promulgation of workers' compensation statutes not only provides a reference point, but also helps bring into focus the inadequacies of the new Texas act.

B. *Establishment of Constitutional Statutory Remedies*

1. Nineteenth-Century Europe

Modern workers' compensation law evolved from nineteenth-century developments in Prussia and England.[21] From 1837 to 1887, the Prussian government applied a compensation system which was supported by a fund of contributions from employers and employees.[22] In 1897, the English Parlia-

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17. *Cf.* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 1 (1938) (common law still applies to situations in which employment not covered by workers' compensation).

18. *See, e.g.*, Hisel v. County of Los Angeles, 238 Cal. Rptr. 678, 682-83 (Cal. Ct. App. 1987) (discussing history of workers' compensation law and noting that a main purpose of it was to abolish common-law defenses); Klapproth v. Turner, 240 A.2d 886, 887 (Conn. 1968) (noting that state law had abolished common-law defenses in actions for damages due to on-the-job injuries); Gannon v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., 175 N.E.2d 785, 791-93 (Ill. 1961) (detailing history of laws which were precursors to Illinois' workers' compensation law). *See generally* Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 787-97 (1982) (detailing employers' liability acts' origins); Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843 *passim* (1987) (discussing employers' liability laws).

19. *See* 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 203 (2d ed. 1981) (trial was often still required for injured employee to obtain damages).

20. *See* LIABILITY: PERSPECTIVES AND POLICY 164 (R. Litan & C. Winston eds. 1988) (difficulties employees faced under common law led to workers' compensation system); Fowler, *Work of the Texas Industrial Accident Board*, 2 TEX. L. REV. 301, 301 (1924) (noting that injured workers' dependence on public for support brought changes from common-law system).

21. J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 11-12 (1938). *See generally* Horovitz, *Worldwide Workmen's Compensation Benefits*, 1 WORK. COMPENSATION L. REV. 515, 517-20 (1974) (historical background); Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35 *passim* (1917) (detailing history of workers' compensation origins).

22. J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 11-12 (1938); *see also* Fowler, *Work of the Texas Industrial Accident Board*, 2 TEX. L. REV. 301, 302-03 (1924) (noting history of German (Prussian) workers' compensation law).

ment passed a bill which devised a system of compensating employees for industrial injuries without regard to fault.[23] The Workmen's Compensation Act of 1897[24] was based on the premise that employers should charge compensation expenses to the industry as part of production costs.[25] Implementation of the English and Prussian compensation concepts had spread across Europe by 1903.[26] The European programs would soon serve as models for state legislatures seeking effective compensation systems in the United States.[27]

2. Twentieth-Century America

In the early twentieth century, state legislatures were hesitant to adopt such social insurance programs for several reasons,[28] including the uncertain constitutionality of abrogating common-law rights.[29] In fact, prior to 1910, two states'[30] compensation statutes were found unconstitutional by their state courts.[31] In spite of the constitutionality issues, however, the work-

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23. J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 12 (1938); *see also* Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35, 36-38 (1917) (noting history of English workers' compensation law).

24. Stats. 60 & 61 Vict., ch. 37.

25. J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 12 (1938); Ragland, *The Texas Workers' Compensation Law: A Historical Perspective*, 23 TEX. TRIAL LAW. F. No. 3, at 7 (1989).

26. *See* Fowler, *Work of the Texas Industrial Accident Board*, 2 TEX. L. REV. 301, 303 (1924) (virtually every European country had placed workers' compensation laws into effect before first statute was passed in United States); Horovitz, *Worldwide Workmen's Compensation Trends*, 59 KY. L.J. 37, 41 (1970) (Austria in 1887; Norway in 1894; Finland a year later; Italy, France, and Denmark in 1898; Greece in 1901; Russia and Belgium in 1903).

27. Berkowitz, *Occupational Safety and Health*, 443 ANNALS 41, 46 (1979). *See generally* Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35 *passim* (1917) (presenting detailed history of origins of workers' compensation systems in various states).

28. *See* 2 H. MILLIS & R. MONTGOMERY, THE ECONOMICS OF LABOR: LABOR'S RISK AND SOCIAL INSURANCE 194 (1st ed. 1938) (reasons included political issues, traditions of individualism, and working class relative well-being).

29. *Id. See generally* Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 *passim* (1914) (discussing distinctions between common law and then-emerging workmen's compensation laws).

30. *See* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 12-13 (1938) (Maryland's and Montana's acts both provided for compensation to workers in specific fields).

31. *See* Cunningham v. Northwestern Improvement Co., 119 P. 554, 566 (Mont. 1911) (declaring Montana law invalid); *see also* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 12-13 (1938); Fowler, *Work of the Texas Industrial Accident Board*, 2 TEX. L. REV. 301, 303 (1924). Maryland's law was held unconstitutional in an unrecorded decision of a trial court. Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 33, 34 (1917).

men's[32] compensation doctrine had taken a firm hold on the interests of several state legislatures by 1910.[33] That same year, New York enacted a law which made workmen's compensation compulsory for certain dangerous occupations.[34] The state's high court soon held the law invalid as a violation of the due process clauses of the state and federal constitutions.[35] In 1913, a new law was passed which, in effect, made the compensation system elective rather than compulsory.[36] A few years later, the United States Supreme Court upheld New York's 1913 law, noting that the state's abrogation of common-law rights and the establishment of another system as a replacement was a just resolution to a difficult problem.[37] By 1917, the federal government and about twenty-five states had enacted workmen's compensa-

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32. *See* Sartwelle, *Workers' Compensation*, 32 SW. L.J. 291, 291 (1978) (in Texas, "workmen's" compensation officially became "workers' " compensation in 1978).

33. 1 MODERN INSURANCE THEORY AND EDUCATION 215 (K. Tuan ed. 1972). Commissions were appointed by several state governments to study workmen's compensation issues. J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 13 (1938). Commissions from nine states and the federal government met in 1910 to discuss the problems. *Id.* Then, in 1911, New Jersey, Wisconsin, and several other states passed workmen's compensation statutes. Berkowitz, *Occupational Safety and Health*, 443 ANNALS 41, 46 (1979).

34. *See* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 13 (1938). New York enacted two compensation laws; one was voluntary (1910 N.Y. Laws, ch. 352), the other compulsory (1910 N.Y. Laws, ch. 674). The voluntary act was soon abandoned. *Id.* Employers were held to pay compensation at rates set by law if there was a danger necessarily attendant to employment, or a risk inherent in the occupation, and the employers failed to exercise due care or to comply with laws affecting the employment. 2 H. MILLIS & R. MONTGOMERY, THE ECONOMICS OF LABOR: LABOR'S RISK AND SOCIAL INSURANCE 194 (1st ed. 1938).

35. *See* Ives v. South Buffalo Ry. Co., 94 N.E. 431, 448 (N.Y. App. Div. 1911) (court agreed that law deprived employers of 14th amendment rights by making them pay for injuries which might not have been their fault); *see also* 2 H. MILLIS & R. MONTGOMERY, THE ECONOMICS OF LABOR: LABOR'S RISK AND SOCIAL INSURANCE 194-95 (1st ed. 1938) (discussing *Ives*).

36. *See* 2 H. MILLIS & R. MONTGOMERY, THE ECONOMICS OF LABOR: LABOR'S RISK AND SOCIAL INSURANCE 195-96 (1st ed. 1938) (actually, New York approved a constitutional amendment which allowed the new law); *see also* Herkey v. Agar Mfg. Co., 153 N.Y.S. 369, 370-71 (Sup. Ct. 1915) (discussing constitutionality of New York's workmen's compensation statute); Wasilewski v. Warner Sugar Refining Co., 149 N.Y.S. 1035, 1037 (Sup. Ct. 1914) (detailing policies behind New York's workmen's compensation law). The first true "elective" form act, however, was enacted in New Jersey. *See* Pensabene v. F. & J. Auditore Co., 140 N.Y.S. 266, 267 (App. Div. 1913) (discussing elective status of New Jersey's act). The New Jersey law permitted employers and employees to choose whether or not they wanted to be covered by the workmen's compensation act. J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 13 (1938). If they decided not to, then they would follow the old common-law system. *Id.* A similar statute was declared constitutional in Massachusetts. Opinion of the Justices, 96 N.E. 308, 316 (Mass. 1911).

37. New York Cent. R.R. Co. v. White, 243 U.S. 188, 204-205 (1917) (it is not unreasonable or arbitrary for state to impose absolute compensation duties on employers). During the same term, the United States Supreme Court upheld a state's right to set up an exclusive fund

tion statutes.[38] Three years later, all but eight jurisdictions had adopted such laws.[39] Today, every state has some type of workers' compensation system.[40]

3. Workers' Compensation in Texas

Texas was one of the first states to enact workers' compensation legislation.[41] The original 1913 act provided for: (1) a system to compensate workers, without regard to fault, for injuries sustained in the course of employment; (2) an administrative board for efficient resolution procedures; and (3) a state-supervised employers' insurance company to which employers could elect to subscribe.[42] Originally, the Texas act was compulsory for employees and elective for employers.[43] If eligible employers chose not to

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and to classify industries, for payment purposes, according to their danger levels. Mountain Timber Co. v. Washington, 243 U.S. 219, 243-44 (1917).

38. *See* 2 H. MILLIS & R. MONTGOMERY, THE ECONOMICS OF LABOR: LABOR'S RISK AND SOCIAL INSURANCE 197 (1st ed. 1938) (twenty states had workmen's compensation laws by 1913: California, Illinois, Kansas, Massachusetts, New Hampshire, New Jersey, Nevada, Ohio, Washington, and Wisconsin in 1911; Arizona, Michigan, and Rhode Island in 1912; Connecticut, Iowa, Minnesota, Nebraska, New York, Oregon, and Texas in 1913). Ten more adopted workmen's compensation laws by 1915: Louisiana, Maryland, Colorado, Indiana, Maine, Montana, Oklahoma, Pennsylvania, Vermont, and Wyoming. *Id.*; *see also* 1 MODERN INSURANCE THEORY AND EDUCATION 215 (K. Tuan ed. 1972) (reprinting 1917 article which notes that 25 states and federal government had workmen's compensation laws).

39. *See* 2 ISSUES IN INSURANCE 231-32 (J. Long 2d ed. 1981) (for 30 years after the first workmen's compensation act in 1910, remaining states followed suit); 2 H. MILLIS & R. MONTGOMERY, THE ECONOMICS OF LABOR: LABOR'S RISK AND SOCIAL INSURANCE 197 (1st ed. 1938) (by 1920, workmen's compensation laws were in effect in all but seven southern states and Washington, D.C.).

40. *See, e.g.*, 2 ISSUES IN INSURANCE 231-32 (J. Long 2d ed. 1981); 2 J. LORIMER, H. PERLET, F. KEMPIN, & F. HODOSH, THE LEGAL ENVIRONMENT OF INSURANCE 203 (2d ed. 1981); 2 H. MILLIS & R. MONTGOMERY, THE ECONOMICS OF LABOR: LABOR'S RISK AND SOCIAL INSURANCE 197 (1st ed. 1938) (between 1921 and 1935, Georgia, Missouri, Washington, D.C., North Carolina, Florida, and South Carolina adopted workmen's compensation programs).

41. *See generally* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 13 (1938) (adoption and general nature of Texas statute); Fowler, *Work of the Texas Industrial Accident Board*, 2 TEX. L. REV. 301, 304-06 (1924) (noting enactment and provisions of Texas workmen's compensation law); Ragland, *The Texas Workers' Compensation Law: A Historical Perspective*, 23 TEX. TRIAL LAW. F. No. 3, at 7-10 (1989) (history of Texas workers' compensation law).

42. Act of April 16, 1913, ch. 179, 1913 Tex. Gen. Laws 429, *amended by* Act of March 28, 1917, Ch. 103, 1917 Tex. Gen. Laws 269, *repealed by* Act of December 13, 1989, Ch.1, 1989 Tex. Gen. Laws __; *see also* Fowler, *Work of the Texas Industrial Accident Board*, 2 TEX. L. REV. 301, 305-06 (1924) (summarizing major provisions); Ragland, *The Texas Workers' Compensation Law: A Historical Perspective*, 23 TEX. TRIAL LAW. F. No. 3, at 8-9 (1989) (detailing significant sections of original workers' compensation law).

43. J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 13 (1938).

follow the Act, their common-law defenses would be abrogated.[44]

Like many other states' workmen's compensation laws, the Texas act's constitutionality was soon challenged.[45] The first challenge came from an employer who had lost his common-law defenses after failing to follow the Workmen's Compensation Act.[46] The Court of Civil Appeals rejected the employer's contentions and upheld the Act's constitutionality.[47] The next, and most significant, challenge came from an employee who argued that the Act was unconstitutional because it denied employees the option of not having their employment covered by workmen's compensation.[48] In *Middleton v. Texas Power & Light Co.*,[49] the Court of Civil Appeals certified several questions to the Texas Supreme Court.[50] The Supreme Court held that the Act did not violate any fundamental rights of either employers or employees.[51] The case was then appealed to the United States Supreme Court, where the Act was upheld as valid in its original form.[52]

In 1917, while the United States Supreme Court's decision in *Middleton* was pending, the Texas legislature amended the Workmen's Compensation Act to allow employees to choose whether to be covered by the Act or to retain their common-law rights and be subject to the common-law defenses.[53] Other changes made by the 1917 amendments included the granting of more power to the Industrial Accident Board by making it quasi-judicial so that its awards could be legally enforced.[54]

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44. *Id.* at 14.

45. Memphis Cotton Oil Co. v. Tolbert, 171 S.W. 309, 311-13 (Tex. Civ. App.—Amarillo 1914, writ ref'd).

46. *Id.* at 312.

47. *Id.* at 313.

48. Middleton v. Texas Power & Light Co., 178 S.W. 956, 958 (Tex. Civ. App.—Austin 1915), *aff'd*, 108 Tex. 96, 185 S.W. 556 (1916), *aff'd* 249 U.S. 152 (1919); *see also* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 15-16 (1938) (discussing *Middleton*).

49. 178 S.W. 956 (Tex. Civ. App.—Austin 1915), *aff'd*, 108 Tex. 96, 185 S.W. 556 (1916).

50. *See* Middleton v. Texas Power & Light Co., 108 Tex. 96, 96, 185 S.W. 556, 557 (1916) (noting that court was asked to respond to 17 questions certified to it by court of appeals).

51. *Id.* at 562; J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 16-19 (1938) (quoting opinion). A similar case was soon decided in the Texas Court of Appeals in accordance with the Texas Supreme Court's decision in *Middleton*. *See* Consolidated Kansas City Smelting & Ref. Co. v. Dean, 189 S.W. 747, 747 (Tex. Civ. App.—El Paso 1916, no writ).

52. Middleton v. Texas Power & Light Co., 249 U.S. 152, 163 (1919).

53. Act of March 28, 1917, ch. 103, 1917 Tex. Gen. Laws 269, *repealed by* Act of December 13, 1989, ch. 1, 1989 Tex. Gen. Laws __; *see also* Akin, *Workmen's Compensation: A Pandect of the Texas Law*, 6 ST. MARY'S L.J. 608, 609 (1974).

54. Act of March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 269 (repealed 1989); *see also* J. LAWLER & G. LAWLER, TEXAS WORKMEN'S COMPENSATION LAW 19-20 (1938) (significant changes also established schedule of defined injuries, for which compensation was made payable for certain periods, and consideration of loss of earning power); Fowler,

The 1917 law was frequently, and sometimes significantly, amended over the years by legislative acts and court opinions.[55] Although once appropriately referred to as a chaotic "patchwork,"[56] the original Texas Workers' Compensation Act nevertheless remained a fundamentally steady system of law[57] until the legislative sessions of 1989.

III. THE NEW STATUTE: ITS UNSTEADY ORIGINS

A. *Early Warnings*

The current Texas Workers' Compensation Act has its roots in the tort reform movement which spread across the country in the 1980's.[58] Rapidly

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Work of the Texas Industrial Accident Board, 2 TEX. L. REV. 301, 308-11 (1924) (explaining board's quasi-judicial functions).

55. *See, e.g.*, Akin, *Workmen's Compensation: A Pandect of the Texas Law*, 6 ST. MARY'S L.J. 608, 609-11 (1974) (listing various amendments from 1917 to 1974); Ashcraft & Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH L. REV. 609 *passim* (1990) (latest developments); Brousseau, *Workers' Compensation*, 38 SW. L.J. 345 *passim* (1984) (explaining several legislative changes to the act); Collins, *Workers' Compensation*, 35 SW. L.J. 273 *passim* (1981) (focus on case law); Collins, *Workmen's Compensation*, 28 SW. L.J. 131 *passim* (1974) (noting vast changes in law from both courts and legislature); Collins & Ramon, *Workers' Compensation*, 37 SW. L.J. 239 *passim* (1983) (reviewing changes made during 1982; noting that Texas Workers' Compensation Act of 1913 had retained amazing vitality); Collins & Ramon, *Workers' Compensation*, 36 SW. L.J. 341 *passim* (1982) (surveying law over previous year); Mitchell, *Workers' Compensation*, 42 SW. L.J. 77 *passim* (1988) (describing previous year's legislation and case law); Muldrow, *Workers' Compensation*, 34 SW. L.J. 323 *passim* (1980) (reviewing several amendments); Needham, *Workers' Compensation*, 41 SW. L.J. 61 *passim* (1987) (detailing developments in the law); Needham, *Workers' Compensation*, 40 SW. L.J. 75 *passim* (1986) (annual survey of Texas workers' compensation law); Noteware & Bates, *Workers' Compensation*, 43 SW. L.J. 57 *passim* (1989) (reviewing case law changes during survey period); Noteware & Haynes, *Workers' Compensation*, 44 SW. L.J. 63 *passim* (1990) (surveying developments in Texas workers' compensation law in year prior to new act); Sartwelle, *Workers' Compensation*, 32 SW. L.J. 291 *passim* (1978) (survey of several significant changes); Sartwelle, *Workmen's Compensation*, 30 SW. L.J. 213 *passim* (1976) (annual review of developments); Wilson, *Workers' Compensation*, 39 SW. L.J. 69 *passim* (1985) (noting major decisions and amendments).

56. *See* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 1 (Dec. 1988) (Tex. H.R. Research Org.) (noting criticism that "patchwork" is poorly understood and overly complex); Akin, *Workmen's Compensation: A Pandect of the Texas Law*, 6 ST. MARY'S L.J. 608, 611 (1974) (author sought to "bring order out of the chaos created by the patchwork known as the Texas Workmen's Compensation Act").

57. *See* Ragland, *The Texas Workers' Compensation Law: A Historical Perspective*, 23 TEX. TRIAL LAW. F. No. 3, at 8 (1989) (stating that Texas workers' compensation law had remained conceptually intact up to that date).

58. *See* Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 628 (1988) (over 3/5 of states enacted some type of tort reform law in 1986); Kristof, *Insurance Woes Spur Many States to Amend Law on Liability Suits*, N.Y. Times, Mar. 31, 1986, § A, at 1, col. 2 (reporting

increasing rates[59] prevented corporations, physicians, and others from affording and acquiring sufficient liability insurance coverage.[60] The insurance industry blamed high and inconsistent jury verdicts[61] for the rising premiums. Trial lawyers countered with evidence of insurance corporations' mismanagement of funds,[62] high profits and dividend payments,[63] and their exemption from anti-trust regulation.[64] As the "insurance crisis" or "law-

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that almost every state legislature meeting that year considered bills to reform their liability systems).

59. *See* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1576-77 (1987) (citing examples and statistics on frequency and amounts of insurance premium increases).

60. *See id.* at 1521-22 (listing various products and services which, early in 1986, had become either too expensive to insure or impossible to insure). Tort reform and the availability and cost of liability insurance were controversial national topics due to the increasing expense and difficulty businesses, professionals, and state and local governments faced in obtaining insurance to protect against lawsuits. *Attorneys General Disagree on Insurance Reform*, UPI report, June 10, 1986 (LEXIS, NEXIS library, Wires file); *see also Jury Phobia—is Reform Due?*, Nat'l L.J., Dec. 30, 1985, at S3 (noting that physicians, municipalities, grain silo operators, and lawyers, among others, confronted higher insurance premiums).

61. *See* Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 336 (1987) (noting that different states' laws and juries led to divergent outcomes for similarly situated victims); Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 631 (1988) (distrust of jury system was major factor behind reform). In Texas, some critics also blamed the state's oil-based economic collapse and the increased likelihood of workers filing claims during hard economic times. T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 15 (Dec. 1988) (Tex. H.R. Research Org.).

62. *See* O'Connell, *A Correct Diagnosis of the Ills of Liability Insurance—and a False Cure: A Comment on the Reports of the Federal Tort Policy Working Group*, 63 NOTRE DAME L. REV. 161, 164-65 (1988) (section entitled "Imprudent Insurance Company Business Practices and Declining Investment Income"); Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 629 (1988). Commentators suggested that insurance companies helped cause the crisis when insurers overextended themselves with reliance on investments instead of sufficient premiums to produce profit and subsidize claim losses in the 1970's. *Id.*; *see also* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 15 (Dec. 1988) (Tex. H.R. Research Org.)(citing insurers' management errors).

63. *See Consumer Coalition Announces Eight-Point Insurance Plan*, UPI report, July 30, 1986 (LEXIS, NEXIS library, Wires file). A director of a consumer group said that insurance companies' first-quarter profits were "huge," even though insurers argued that their profits were suffering because of court judgments. The director also stated that insurance companies' stock performance revealed they had emerged from the bottom of the average profit cycle and were making enormous profits. *Id.* An analysis made by panel of six attorneys general revealed that the insurance industry continued to make profits in spite of "crisis." *Attorneys General Scoff at "Crisis,"* Nat'l L.J., June 30, 1986, at 2. Some attorneys general also argued that insurance companies had been withholding financial information. *Id.*

64. *See* Ayres & Siegelman, *The Economics of the Insurance Antitrust Suits: Toward an Exclusionary Theory*, 63 TUL. L. REV. 971, 972 (1989) (in 1988, eight state attorneys general filed anti-trust suits alleging major insurance companies colluded and thereby caused insurance

suit crisis" gained public attention,[65] legislators in scores of states saw reform of tort law as the solution.[66] Texas was no exception.[67]

B. *Impairment of a Constitutional Statutory Remedy*

1. The 70th Legislature

In the shadows of the mounting tort reform battle, the Texas workers' compensation system came under the legislature's scrutiny.[68] Along with high liability insurance rates came higher prices for workers' compensation coverage.[69] In Texas, the cost of workers' compensation insurance rose by 148% between 1985 and 1989.[70] As early as 1986, a House Interim Committee began to study the system.[71] The 70th legislature saw only two bills

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crisis); O'Connell, *A Correct Diagnosis of the Ills of Liability Insurance—and a False Cure: A Comment on the Reports of the Federal Tort Policy Working Group*, 63 NOTRE DAME L. REV. 161, 163, 166 (1988) (Working Group's report asserted collusion and irresponsible pricing as causes for crisis); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1523 (1987) (setting out theory that crisis was caused by collusion and price-fixing in insurance industry).

65. *See* Strasser, *Both Sides Brace for Tort Battle*, Nat'l L.J., Feb. 16, 1987, at 1 (discussing insurers' advertising campaigns to improve industry's image); Wasilewski, *Tort Reform: Courting Public Opinion*, Best's Rev.—Property-Casualty Ins. Ed., June 1986, vol. 87, at 14 (Insurance Information Institute spent $6.5 million for television commercials). In 1986, members and supporters of the insurance industry invested in intense advertising campaigns to inform the public about what it claimed to be the source of the crisis. *Id.*; *see also Mattox Accuses Insurance Board of Coddling Insurance Industry*, UPI report, May 21, 1986 (LEXIS, NEXIS library, Wires file) (Texas Attorney General Jim Mattox claimed insurance companies engaged in "insidious propaganda campaign").

66. *See* Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 329 (1987) (several state legislatures had enacted laws to assure media and public that torts crisis was under control).

67. *See* Kristof, *Insurance Woes Spur Many States to Amend Law on Liability Suits*, N.Y. Times, Mar. 31, 1986, § A, at 1, col. 2. Texas legislators on both sides of the issue prepared for debates to be held early in 1987, while a special House and Senate committee met to study liability insurance problems. Texas Attorney General Jim Mattox had called for an investigation of the insurance industry to determine whether insurers were denying coverage as part of a plan to achieve changes in the law. *Id.*

68. *See Warning: Legislature in Session*, 16 Houston Bus. J., Jan. 26, 1987, § 1, at 1A (legislature had been considering workers' compensation reform in addition to tort reform).

69. *See* Pazer, *Insurance Costs Fly Higher*, Engineering News-Record, Sept. 18, 1986, at 62 (quoting statistics on rate increases for liability insurance and workers' compensation insurance).

70. T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 1 (Dec. 1988) (Tex. H.R. Research Org.); Ashcraft & Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH L. REV. 609, 610 n.2 (1990).

71. Caperton & Elliott, *Legislative Update*, in 1 ADVANCED WORKERS' COMPENSATION COURSE A 2 (1990); *Legislative Report Recommends Abolishment of Work Comp System*, UPI report, Feb. 27, 1987 (LEXIS, NEXIS library, Wires file); *see also* T. VARGAS, SPECIAL LEGIS-

emerge from that study,[72] but those bills signaled the conflict to come.

In 1987, the 70th legislature quickly and efficiently[73] made drastic changes in Texas' tort law,[74] but did not reach the issue of workers' compensation.[75] Reform of the workers' compensation system would soon prove much more difficult to achieve than tort reform.[76] The parties affected by the Texas workers' compensation system held drastically conflicting goals.[77] Employers wanted lower rates,[78] while employees wanted more benefits.[79] Trial lawyers strove to retain trial de novo,[80] while insurance companies sought to cut their costs.[81] Various business and labor groups met to discuss strategies and make compromises.[82] Lobbyists on all sides prepared for a long battle

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LATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 1 (Dec. 1988) (Tex. H.R. Research Org.) (70th legislature rejected committee's proposal that law be set for elimination by 1991).

72. Caperton & Elliott, *Legislative Update*, in 1 ADVANCED WORKERS' COMPENSATION COURSE A 2 (1990). The bill, which did not pass, proposed to sunset the workers' compensation system in 1989. Tex. H.B. 1565, 70th Leg., R.S. (1987). The other bill, which did pass, addressed medical cost containment. Act of June 19, 1987, Ch. 1118, 1987 Tex. Gen. Laws 3834 (repealed 1989).

73. *See* UPI report, May 6, 1987 (LEXIS, NEXIS library, Wires file) (Lieutenant Governor Bill Hobby commended Senate for handling the complex legislation quickly and efficiently). Hobby also said that he had never seen an issue so well debated and negotiated. *Id.*

74. *See* Caperton & Elliott, *Legislative Update*, in 1 ADVANCED PERSONAL INJURY LAW COURSE B 1-2 (1989) (survey of Texas tort reform).

75. *Id.* at 1.

76. *See* Bradford, *Texas Work Comp Reform: Bill's Backers Fear Changes by Trial Lawyers*, Bus. Ins., Mar. 19, 1990, at 2; *Texas Workers' Comp Insurance Crisis Gets Even Hotter*, 43 Ins. Reg., Oct. 30, 1989, at § 3; *Texas Squabble Continues Over Reforming Workers' Compensation Insurance*, 43 Ins. Reg., May 29, 1989, at § 5.

77. *See* Bradford, *Texas Considers Workers' Comp Reforms*, Bus. Ins., June 20, 1988, at 137 (existence of numerous special interest groups interfered with meaningful reform).

78. *Id.*

79. *Id.*

80. *See* BLACK'S LAW DICTIONARY 1349 (5th ed. 1979). "Trial de novo" is defined as a retrial or new trial in which an entire case is heard as if no other trial had occurred previously. *Id.*; *see also* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 20-22 (Dec. 1988) (Tex. H.R. Research Org.) (discussing trial de novo); Simpson, *Workers' Compensation Column*, 22 TEX. TRIAL LAW. F. No. 2, at 39 (1988) (explaining status and purpose of trial de novo with regard to Texas workers' compensation claims); Bradford, *Texas Considers Workers' Comp Reforms*, Bus. Ins., June 20, 1988, at 137 (noting attorneys insisted on keeping trial de novo).

81. *See* Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 352-53 (1987) (describing insurance companies' plan to limit amounts of damages they would be required to pay).

82. *See* Bradford, *Texas Considers Workers' Comp Reforms*, Bus. Ins., June 20, 1988, at 137 (noting that AFL-CIO had been meeting with Texas Association of Business, and that other labor unions and employer groups were planning compromises).

in Austin.[83]

During a Second Called Special Session of the 70th legislature, House Concurrent Resolution 27 was passed to establish the Joint Select Committee on Workers' Compensation Insurance.[84] For over a year, the Committee held hearings, recorded testimony, and collected and reviewed data on Texas' workers' compensation system.[85] The Committee's consultants and staff submitted a 900-page report[86] containing analyses, statistics, charts, options, and suggestions.[87] The report served as the basis for a proposal to make extensive changes in the state's workers' compensation system.[88]

2. The 71st Legislature

The proposal, House Bill 1,[89] was introduced in the 71st legislative session which began in January of 1989. Before the bill reached the House floor, the House Business and Commerce Committee had added almost half of over 300 suggested amendments.[90] Prior to the bill's presentation in the Senate,

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83. *Id.*; *see also* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 2 (Dec. 1988) (Tex. H.R. Research Org.).

84. Tex. H. R. Con. Res. 27, 70th Leg., 2d C.S. (1987); *see also* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 1 (Dec. 1988) (Tex. H.R. Research Org.).

85. *See* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 2 (Dec. 1988) (Tex. H.R. Research Org.); Caperton & Elliott, *Legislative Update*, in 1 ADVANCED PERSONAL INJURY LAW COURSE B 3 (1989); Noteware & Bates, *Workers' Compensation*, 43 SW. L.J. 57, 57 (1989).

86. *See* Caperton & Elliott, *Legislative Update*, in 1 ADVANCED PERSONAL INJURY LAW COURSE B 3 (1989). The 900-page report consisted of nine chapters on the following: (1) a history of Texas workers' compensation legislation, (2) an overview of the compensation system, (3) benefits, (4) costs, (5) comparative litigation issues, (6) medical care quality assurance and cost containment, (7) occupational safety and health, (8) vocational rehabilitation, and (9) an evaluation of the system with issues and options. *Id.* at 3-4.

87. *See* Caperton & Elliott, *Legislative Update*, in 1 ADVANCED PERSONAL INJURY LAW COURSE B, 4 (1989) (arguing that, in contrast to most reports filed by interim committees, this one offered only a series of options and alternatives with no specific recommendations). In fact, the report did recommend certain alternatives, but the final bill did not adopt them. Telephone interview with Bill Whitehurst, Attorney for plaintiffs, Garcia v. Eagle Pass Auto Elec., Inc. (Mar. 6, 1991).

88. Caperton & Elliott, *Legislative Update*, in 1 ADVANCED WORKERS' COMPENSATION COURSE A 2 (1990).

89. Tex. H.B. 1, 71st Leg., R.S. (1989). *See* Caperton & Elliott, *Legislative Update*, in 1 ADVANCED PERSONAL INJURY LAW COURSE B 5 (1989) (stating that business community saw House Bill 1 as opportunity to effect vast reforms, including elimination of trial de novo); Noteware & Bates, *Workers' Compensation*, 43 SW. L.J. 57, 57 (1989) (noting that Legislature was then considering drastic changes in the law).

90. Caperton & Elliott, *Legislative Update*, in 1 ADVANCED PERSONAL INJURY LAW COURSE B 5 (1989).

the House approved twelve more amendments to it.[91]

The Senate soon considered alternatives to House Bill 1.[92] The first alternative was a compromise version of the bill.[93] In April, the Committee of the Whole Senate[94] met to hear testimony on Texas workers' compensation.[95] A month later, by a narrow margin, a special subcommittee approved the compromise alternative version.[96] The approved bill was tied up in debate before the House and was not acted upon before the close of the regular session.[97]

Governor Clements called for a special session on the issue to convene in June.[98] After that legislative session reached no compromise, a second special session was called[99] where, in the final hours, the legislature passed Senate Bill 1.[100] The trial lawyers' and labor groups' battles against the insurance lobby throughout the 71st legislature had failed.[101] Governor Clements signed Senate Bill 1 into law on December 13, 1989.[102]

IV. CONSTITUTIONAL CHALLENGES TO CRITICAL CHANGES

Throughout 1990, opponents of the new Texas Workers' Compensation

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91. *See id.* (House Bill 1 was 200-page "overhaul" of Texas' workers' compensation).

92. *See id.* at 13-14. Several bills already in the Senate were overshadowed by House Bill 1. One bill, for example, proposed allowing self-insurance; another provided for statewide safety programs and immediate rate rollbacks. *Id.*

93. *Id.* at 13.

94. *See id.* (authors note that "Committee of the Whole Senate" is a rarely used parliamentary procedure).

95. *Id.*

96. *Id.* at 13-14.

97. Bradford, *Texas Reform Legislation to Hike Capital, Surplus Requirements for Insurers*, Bus. Ins., June 5, 1989, at 35.

98. *Id.*

99. *See Texas Work Comp Rate Request*, Bus. Ins., Aug. 21, 1989, at 2 (second attempt at reform failed in special session ending in July; Governor Clements intended to recall legislators for third try in November).

100. Tex. S.B. 1, 71st Leg., 2d C.S. (1989). *See* Caperton & Elliott, *Legislative Update*, in 1 ADVANCED WORKERS' COMPENSATION COURSE A 3 (1990) (noting that second special session resulted in agreement on bill). Another significant issue regarding the Act's constitutionality is whether it was passed properly. Opponents of the Act argue that it was a revenue-raising bill and, therefore, its origination in the Senate was a violation of article III, section 33 of the Texas Constitution which requires that all revenue-raising measures originate in the House. *See* Plaintiffs' Original Petition for Declaratory Judgment and Injunctive Relief at 26, Garcia v. Eagle Pass Auto Elec., Inc. No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Nov. 30, 1990).

101. *See* Bradford, *Texas Takes the Bull by the Horns: Work Comp Reforms Expected to Control Litigation, Costs Surge*, Bus. Ins., Dec. 18, 1989, at 1 (discussing heated debates and attorneys' and labor groups' criticisms of new law).

102. Caperton & Elliott, *Legislative Update*, in 1 ADVANCED WORKERS' COMPENSATION COURSE A 1 (1990).

Act predicted that it would not survive.[103] In fact, before the end of the year, the Texas AFL-CIO had filed suit against the Texas Workers' Compensation Commission,[104] charging that the Act violated several guarantees of the Texas Constitution.[105] The trial judge upheld the plaintiffs' contentions and placed a temporary injunction on implementation of portions of the law.[106] However, the state attorney general soon filed a direct appeal to the Texas Supreme Court, thereby effecting a stay on the injunction.[107] With the court's decision pending, the new act went into full effect on January 1, 1991.[108] Regardless of which side prevails in the current conflict, Texas' workers' compensation reform is certain to remain an issue in the courts and in the capitol. Thus, the following challenges to the Act, even if they prove unsuccessful in their primary purpose, will nevertheless serve as warnings and guides to Texas workers and their counsel.

A. *The Act Deprives Injured Workers of Equal Protection Under the Laws*

Several sections of the new act violate the equal protection provisions of

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103. *See* Bradford, *Texas Work Comp Reform: Bill's Backers Fear Changes by Trial Lawyers*, Bus. Ins., Mar. 19, 1990, at 2. The article quotes Tommy Jacks, president-elect of the Texas Trial Lawyers Association as saying, "That piece of legislation is so screwed up it will probably be the subject of review during every session for the next decade or so. As it stands now, it's an unworkable system." *Id.*

104. *See* Plaintiffs' First Amended Original Petition for Declaratory and Injunctive Relief, Garcia v. Eagle Pass Auto Elec. Co., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Nov. 30, 1990).

105. *See AFL-CIO Files Suit Against Workers' Comp Reform Law*, UPI report, Dec. 4, 1990 (LEXIS, NEXIS library, Wires file) (law challenged partially on due process, equal protection, and right to jury trial grounds); Plaintiffs' First Amended Original Petition for Declaratory Judgment and Injunctive Relief at 21-32, Garcia v. Eagle Pass Auto Elec. Co., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Nov. 30, 1990) (law was also challenged as violation of open courts, separation of powers, freedom of contract, and equal and uniform taxation).

106. *See* Order for Issuance of Temporary Injuction, Garcia v. Eagle Pass Auto Elec. Co., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 31, 1990) (judge ordered injuction on Commission's issuance of decisions on amount of impairment income benefits and supplemental income benefits); *see also Work Comp Law Challenged*, Bus. Ins., Dec. 31, 1990 at 2. The judge was said to have had misgivings about the part of the law which mandates the use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* to arrive at permanent disability benefits. *Id.* The judge also found questionable the lack of a provision which would allow covered employees the option to decline coverage by the new law. *Judge Halts Implementation of New Workers' Comp Law*, UPI report, Dec. 21, 1990 (LEXIS, NEXIS library, Wires file).

107. *Work Comp Law Challenged*, Bus. Ins., Dec. 31, 1990, at 2.

108. *Texas Workers' Compensation Commission Implements New Law*, S.W. Newswire report, Jan. 8, 1991 (LEXIS, NEXIS library, Wires file).

the Texas Constitution.[109] The Act discriminates against similarly situated workers by focusing on surface differences, such as when they took employment,[110] whether they suffer from an injury or an illness,[111] when they work,[112] and how much they are paid.[113]

1. Election of Remedy

Under the new law, a worker's rights depend in part on when he commenced employment. Texas is one of the few states without mandatory workers' compensation.[114] In Texas, both employers and employees have the option of choosing workers' compensation coverage.[115] However, section 3.08 of the new act denies certain employees the right to choose whether or not to be covered by workers' compensation.[116] Employees working for employers who do not obtain workers' compensation insurance until after January 1, 1991, are offered the option to reject coverage.[117] Similarly, employees hired by subscribing employers after the Act's effective date are granted the opportunity to decline coverage.[118] However, workers who were hired by subscribing employers when the former law was in effect, and elected to be covered by it, are forced to accept the new system as their exclusive remedy.[119] Thus, such workers are denied the option to regain

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109. *See* TEX. CONST. art. I, § 3. "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." *Id.*; TEX. CONST. art. I, § 3a. "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self operative." *Id.*

110. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 3.08 (Vernon 1991).

111. *See id.* § 5.01.

112. *See id.* § 4.10(d).

113. *See id.* § 4.23(d).

114. *See* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 16 (Dec. 1988) (Tex. H.R. Research Org.) (summarizing mandatory coverage issues); Bradford, *Texas Takes Bull by the Horns: Work Comp Reforms Expected to Control Litigation, Costs Surge*, Bus. Ins., Dec. 18, 1989, at 1 (despite reforms, only Texas, New Jersey, and South Carolina retain non-mandatory workers' compensation schemes).

115. *See* Ashcraf & Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH. L. REV. 609, 610 (1990).

116. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 3.08 (Vernon 1991) (section on employee election).

117. *See id. See generally* Ashcraft & Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH L. REV. 609, 611-12 (1990) (comments on employee coverage).

118. *Id.*

119. *Id.*; *see also* Findings of Fact and Conclusions of Law, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 31, 1990) (conclusion of law that such employees are not authorized to retain common-law rights).

their common-law rights and remedies, despite the fact that the compensation system they chose to protect them has been replaced by a much more restrictive one.[120]

2. Occupational Disease

The Act distinguishes between employees with injuries and those who suffer from occupational illnesses.[121] To perfect any workers' compensation claim, an employee must give notice of a work-related injury to his employer and must file a claim for benefits with the Texas Workers' Compensation Commission.[122] In the case of occupational disease, an employee must notify his employer within thirty days of the date when he knew, or should have known, that he might have a work-related disease.[123] Additionally, a worker with an occupational disease must file a claim for compensation with the Commission within one year of the time that he knew, or should have known, that he might have a work-related illness.[124]

Under the old law, employees with diagnosed, but not yet disabling, occupational diseases had only to give notice to their employers within thirty days of the date the illness caused an incapacity.[125] The new act makes no provision for employees who were diagnosed with occupational diseases under the prior law and were relying on its notice requirements.[126] Those workers whose opportunity to report an occupational disease has lapsed as a result of the new law are effectively rendered ineligible to obtain any benefits.[127]

3. Seasonal and Lower-Paid Workers

The new act's section 4.10(d) distinguishes between those who work on a

120. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 31, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

121. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 5.01 (Vernon 1991); Plaintiffs' First Amended Original Petition For Declaratory and Injunctive Relief, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Nov. 30, 1990). *See generally* Southers, *Occupational Disease in Texas: The Old and the New*, in 1 ADVANCED WORKERS' COMPENSATION COURSE E *passim* (1990).

122. TEX. REV. CIV. STAT. ANN. art. 8308, § 5.01 (Vernon 1991).

123. *Id.* §§ 4.14, 5.01(a),(b).

124. *Id.*

125. *See* Act of April 19, 1947, Ch. 113, § 10, 1947 Tex. Gen. Laws 180 (repealed 1989).

126. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 5.01 (Vernon 1991); Southers, *Occupational Disease in Texas: The Old and the New*, in 1 ADVANCED WORKERS' COMPENSATION COURSE E 88-91 (1990) (discussion of significant time limits under prior and current law).

127. *See* Plaintiffs' First Amended Original Petition for Declaratory and Injunctive Relief at 2, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Nov. 30, 1990) (explaining one plaintiff's situation).

seasonal basis and those who do not,[128] while section 4.23(d) has the potential of discriminating against employees who earn less than $8.50 per hour.[129] These distinctions are apparent in the new law's drastically different method of determining and distributing income benefits. The new system provides for four types of income benefits:[130] (1) temporary,[131] (2) impairment,[132] (3) supplemental,[133] and (4) lifetime benefits.[134] The employee's average weekly wage[135] is the basis for determining all income benefits as well as death benefits.[136] The old law's average weekly wage calculation formula made no distinctions between higher- and lower-paid workers, nor did it favor year-round workers over seasonal workers.[137] In contrast, the new law's formula serves to decrease the benefits of both seasonal workers[138] and those employees who make less than $8.50 per hour.[139]

Under the new law, the calculation of the average weekly wage for "sea-

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128. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.10(d) (Vernon 1991) (provisions for calculating average weekly wage for seasoned employees).

129. *See id.* § 4.23(d) (section on calculating temporary income benefits for workers earning under $8.50 per hour).

130. *See id.* § 1.03(26) (defining "income benefits" as payments for compensable injuries; excludes medical, death, and burial benefits).

131. *See id.* § 4.23(a) (temporary income benefits are available for employees who have not reached maximum medical improvement).

132. *See id.* § 4.26(a) (impairment income benefits are based on level of impairment). "Impairment" is defined as presumably permanent abnormality or loss due to compensable injury. *Id.* § 1.03(24).

133. *See id.* § 4.28 (supplemental benefits are those in addition to impairment benefits, if worker meets criteria).

134. *See id.* § 4.31(a) (lifetime benefits are paid till death for certain employees).

135. *See id.* § 4.10 (formula for calculating average weekly wage). *See generally* Ashcraft & Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH L. REV. 609, 617-21 (1990) (explaining various benefits); Caperton & Elliott, *Legislative Update*, in 1 ADVANCED WORKERS' COMPENSATION COURSE A 7-9 (1990) (overview of benefits).

136. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.41 (Vernon 1991) (death benefits are available to certain workers' beneficiaries).

137. *See* Act of June 1, 1959, Ch. 355, 1959 Tex. Gen. Laws 778 (repealed 1989) (explaining average weekly wage formula). Under the old law, the average weekly wage for employees who worked at least 210 days in the preceding year was determined by: dividing the total amount earned that year by the number of full days actually worked, multiplying that result by 300, and dividing that amount by 52. *Id.*

138. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.10(d) (Vernon 1991).

139. *Id.* § 4.23(d). Under the new law, workers who make more than $8.50 per hour and who had been working for their employer for at least 13 consecutive weeks prior to injury, have their average weekly wage calculated simply by dividing the sum of the 13 weeks' wages by 13. *Id.* § 4.10(a). The average weekly wage of employees who had not worked the 13 weeks is determined either by the usual wage the employer pays a similar employee for similar services, or by the usual wage paid in the community for similar services. *Id.* § 4.10(b). However, another provision of the Act serves to decrease benefits further for workers who make under $8.50 per hour. *Id.* § 4.23(d).

sonal employees" differs greatly from the formula applied to other workers.[140] The temporary income benefits for such employees are calculated the same as for other workers, but then the benefits are adjusted as often as the Commission deems necessary to reflect income the employee could have earned during the payment of temporary income benefits.[141] This provision causes a reduction in seasonal workers' benefits by presuming that they do not work during the time between seasons, a presumption which unnecessarily disadvantages seasonal workers.[142] In the past, classifications such as these, which create irrebuttable presumptions, have been invalidated on equal protection grounds by Texas courts.[143]

For the other income benefits, the average weekly wage is calculated by dividing the seasonal workers' total wages earned during the year by fifty.[144] Inasmuch as the Act defines seasonal employees as those whose employment is not constant throughout the year, section 4.10(d), by including periods of unemployment, significantly lowers the average weekly wage of seasonal workers.[145] Since employees must be working when they are injured in order to be covered by the Act, the calculation's only effect is to lower the average weekly wage of such workers.[146] In addition to the inequitable treatment of seasonal workers through the special formula, such a classification may constitute discrimination on the basis of race and ethnicity because the majority of seasonal workers in Texas are Hispanic, migrant agricultural workers.[147]

Section 4.10 of the new act governs determination of an employee's average weekly wage.[148] However, section 4.23(d) provides special rules for calculating the average weekly wage of employees who make less than $8.50 per

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140. *Compare* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.10(d) (Vernon 1991) (provision for seasonal workers) *with* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.10(a) (Vernon 1991) (provision for most other workers) .

141. *Id.*

142. Plaintiff's Brief in Support of Motion for Temporary Injunction at 34-37, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

143. *See, e.g.*, Whitworth v. Bynum, 699 S.W.2d 194, 196-97 (Tex. 1985); Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981); Castillo v. Hidalgo County Water Dist., 771 S.W.2d 633, 635 (Tex. Civ. App.—Corpus Christi 1989, no writ).

144. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.10(d) (Vernon 1991).

145. *Id.*

146. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 34-37, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

147. *See February Jobs Data Seen Exaggerating Weakness of Economies in California, Texas*, Daily Labor Report, Mar. 20, 1986 (Bureau of Labor Statistics noting that Texas Hispanics are heavily concentrated in areas of agriculture and construction).

148. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.10 (Vernon 1991). *See generally* Duncan, *Calculating AWW and Comp Rate and Dealing With Prior Compensation Injuries,*

hour.[149] All temporary income benefits are paid at 70% of the difference between the employee's average weekly wage and his weekly earnings during the time of disability.[150] During the first twenty-six weeks of disability for employees who make less than $8.50 an hour, however, temporary income benefits are paid at 75% of that difference.[151] On its face, the formula seems to offer the lower-paid workers higher benefits, but because of the special way in which the average weekly wage is calculated for such employees, they actually receive less than they would under the formula for higher-paid workers.[152] Rather than simply arriving at an average using the thirteen prior weeks of employment to determine the employee's earnings during the last four quarters, the Texas Workers' Compensation Commission consults Texas Employment Commission records.[153] Thus, the lower-paid employee's average weekly wage is based on the previous year's earnings, even if he had worked thirteen weeks before his injury. Moreover, temporary income benefits cannot exceed 100% of the employee's actual earnings for

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Etc., in 1 ADVANCED WORKERS' COMPENSATION COURSE I 17-26 (1990) (utilizing hypotheticals to explain calculations).

149. TEX. REV. CIV. STAT ANN. art. 8308, § 4.23(d) (Vernon 1991).

150. *Id.* § 4.23(c).

151. *Id.* § 4.23(d).

152. *See* Plaintiffs' Brief In Support of Motion for Temporary Injunction, Exhibit "A," Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

Average Weekly Wage (AWW) and Compensation Rate (CR)
Under the Previous Law and the New Act

Assumptions: 8-hour workday, 40-hour week. Injured worker is married, with two kids.

Hourly Wage	*Take-Home Pay*	*Art. 8306-8309*		*New Act*	
		AWW	*CR*	*AWW*	*CR*
3.50	129.49	161.54	107.69	140.00	105.00
4.00	147.98	184.62	123.08	160.00	120.00
4.50	166.48	207.69	138.46	180.00	135.00
5.00	184.98	230.77	153.85	200.00	150.00
5.50	202.48	253.85	169.23	220.00	165.00
6.00	217.98	276.92	184.62	240.00	180.00
6.50	233.47	300.00	200.00	260.00	195.00
7.00	248.97	323.08	215.38	280.00	210.00
7.50	264.47	346.15	230.77	300.00	225.00
8.00	279.97	369.23	246.15	320.00	240.00
8.50	295.47	392.31	252.00 (max)	340.00	238.00
9.00	310.96	415.38	252.00	360.00	252.00
9.50	326.46	438.46	252.00	380.00	266.00
10.00	341.96	461.54	252.00	400.00	280.00

Id.

153. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.23(d) (Vernon 1991).

the year divided by fifty-two.[154] This complicated provision places difficult burdens on most Texas workers.[155] Reliance on the Employment Commission's information can actually lower a worker's average weekly wage in contrast to its calculation under section 4.10.[156] The section also has a detrimental effect on employees in industries with fluctuating work patterns because their benefits may be reduced as a result of the unusual required calculations.[157] Furthermore, the Texas Employment Commission reports do not include data on certain items which the Act includes in its definition of wages.[158] Currently, income benefits are only higher for employees who make over $9.00 per hour.[159] Thus, lower-paid and seasonal workers must bear undue burdens under the new law.

4. Medical Care and Hardship Advances

Additionally, the new act limits injured workers' access to hardship advances from their attorneys[160] and restricts employees' free choice of medical care.[161] These restrictions place additional burdens on injured persons covered by workers' compensation, as opposed to injured persons who pursue common-law remedies.

Under the old law, employees were entitled to choose their health care

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154. *Id.*

155. *See Southwest, Rockies Trail Southeast in Income*, UPI Report, Aug. 23, 1989 (LEXIS, NEXIS library, Wires file) (statistics revealing that Texas and three other states placed last with an average per capita yearly income of $14,350).

156. *See* Plaintiffs' Brief In Support of Motion for Temporary Injunction at 36, Garcia v. Eagle Pass Auto Elec, Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990). For example, a full-time worker who earned $8.00 an hour during the last quarter, but earned only $4.00 per hour in the three preceding quarters, would have a lower average weekly wage than if his wage were computed the same way as workers making over $8.50 per hour. Under § 4.23, this employee's average weekly wage would be based on $5.00 per hour for the year. If § 4.10 were to apply, the worker's average weekly wage would be based on $8.00 per hour. If the worker had been making one dollar more per hour, § 4.10 would control, and his average weekly wage would be based on $9.00 per hour. *Id.*

157. *See* Plaintiffs' Brief In Support of Motion for Temporary Injunction at 36-37, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990). For example, a construction worker who had worked 13 consecutive weeks prior to his injury and had earned $5.00 per hour, but who worked only 39 weeks out of the year, would have an average weekly wage of $200 under § 4.10(a), if that section were to apply to him. However, under the applicable section (4.23(d)(1)), his average weekly wage would be cut by $50. *Id.*

158. *See* TEX. REV. CIV. STAT. ANN, art. 8308, § 1.03(47) (Vernon 1990) (including fuel, food, laundry, and other items as "wages").

159. *See supra* note 152 and accompanying text.

160. TEX. REV. CIV. STAT. ANN. art. 8308, § 10.03 (Vernon 1991).

161. *See id.* § 4.62 (section on right to select physician).

providers.[162] Now, however, employees are only allowed to select up to two treating physicians.[163] An employee is then required to submit to the Commission written reasons for any change of doctor.[164] Thereafter, any subsequent physician a worker chooses is subject to Commission or insurance carrier approval.[165] Furthermore, after January 1, 1993, an employee's choice of doctor must be made from an approved list.[166]

The new law allows employees to apply to the Commission for up to three hardship-based benefit advances.[167] These advances are subject to several restrictions.[168] However, under no circumstances may an attorney advance money to an injured worker while the worker's claim is pending.[169] Moreover, attorneys may not guarantee loans to their workers' compensation clients during that time.[170] In contrast, injured persons who were not injured under workers' compensation have the right to receive loans from their attorneys and to have their attorneys co-sign on loans for them at any time during the pendency of their suits.[171] Thus, the statute's provision conflicts with Rule 1.08 of the Texas Disciplinary Rules of Professional Conduct which allows attorneys to provide financial assistance to their clients.[172] Additionally, the section conflicts with the constitutional mandate that the judi-

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162. *See* Act of March 28, 1917, Ch. 103, 1917 Tex. Gen. Laws 269 (repealed 1989); *see* Smith v. Stephenson, 641 S.W.2d 900, 901 (Tex. 1982) (interpreting art. 8306, § 7); Nacogdoches Memorial Hosp. v. Justice, 694 S.W.2d 204, 207 (Tex. App.—Tyler 1985, writ ref'd n.r.e.) (worker has sole right to choose medical services).

163. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.62(a) (Vernon 1991) (worker may change physicians once, after submitting written reasons to Commission).

164. *Id.*

165. *Id.* § 4.62(b).

166. *Id.* § 4.63(b). At first, every Texas physician will be on the list. *Id.* § 4.63(f). Over time, the Commission may delete doctors from the list for various reasons, such as the showing of evidence that the physician's fees and treatments are inconsistent with what the Commission deems reasonable. *Id.* § 4.63(g).

167. *Id.* § 4.32(c).

168. *Id.* § 4.32. Employees who want advances must apply to the Commission on a prescribed form and describe their hardship. The advance cannot exceed four times the maximum weekly payment of temporary income benefits, and the Commission will not grant advances to employees who are receiving at least 90% of their pre-injury wages. *Id.* If an employee is entitled to and awarded impairment income benefits, a Commission order may accelerate payment. *Id.* § 4.321(b).

169. *Id.* § 10.03(a).

170. *Id.* § 10.03(b).

171. *See* SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) Rule 1.08(d) (1991) (located in pocket part for Volume 3 of Texas Government Code in title 2, subtitle G app., following § 83.006 of Government Code) (rule governing attorneys providing financial assistance to clients).

172. *See id.* (rule allows advances and guarantees for reasonable and necessary living and medical expenses, as well as court costs for indigent clients).

ciary control attorneys' activities.[173]

5. Income Benefits and Impairment Ratings

Perhaps the most significant change made by the new law is the Act's method of "compensating" workers for the income they lose as a result of their injuries.[174] The principle behind workers' compensation is the remedying of injured workers' sudden inability to earn as much income as they had been able to earn prior to injury.[175] Thus, the old law's benefits redressed workers' reduced earning capacity.[176] This was accomplished by providing the injured worker with two-thirds of the difference between his pre-injury average weekly wage and his post-injury wages.[177] Quite unlike the prior law, however, the new act relies on medical impairment rather than occupational disability to determine benefit amounts.[178] This new system restricts benefits for similarly situated employees because it considers impairment levels and whether or not the employee returns to work instead of the effect the injury places on the worker's capacity to earn income.[179] Several commentators have criticized this lack of relationship between occupational disability and medical impairment.[180]

Under the new workers' compensation system, all benefits are conditioned upon impairment levels which are determined solely by the American Medical Association's *Guides to the Evaluation of Permanent Impairment*.[181] Reliance on the AMA *Guides* poses some serious problems.[182] First, the

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173. TEX. CONST. art. V, § 31.

174. *See* 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 57.14 (1989) (stating that most significant current issue is earnings-impairment principle).

175. *See id.* (detailing origins and policies behind workers' compensation benefits).

176. *See* Act of March 28, 1917, Ch. 103, 1917 Tex. Gen. Laws 269 (repealed 1989).

177. *Id.* This amount was neither to exceed nor fall below certain amounts. *Id.* § 10. Under the old law, an injured worker who returned to work was entitled to receive up to an additional 300 weeks of benefits for permanent partial disability, so long as the total weeks of temporary total and partial benefits did not exceed 401. *Id.*

178. TEX. REV. CIV. STAT. ANN. art. 8308, §§ 4.21-4.33 (Vernon 1991).

179. *See* 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 57.14 (1989) (describing method).

180. *See* Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 103 HARV. L. REV. 964, 964-76 (1990) (reviewing third edition of AMA *Guides*); Letter from Austin Foster, Ph.D. to Joe Gunn (Apr. 14, 1989) (letter presented to Senate detailing expert's criticisms of impairment determinations).

181. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.24 (Vernon 1991). *See generally* AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT *passim* (A. Engelberg 3d ed. 1989).

182. Findings of Fact and Conclusions of Law, Garcia v. Eagle Pass Auto Elec., Inc. No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 31, 1990) (conclusion of law that use of *Guides* is unreasonable and arbitrary).

Guides' analyses of some injuries and their effects do not address occupational consequences.[183] Second, the *Guides* simply do not consider some types of injuries.[184] Also, the Act mandates that any evidence of impairment for rating calculations must be based on objective clinical or laboratory findings.[185] Such a requirement excludes pain as an element of impairment because pain is not independently confirmable.[186] In contrast to the Act, however, the *Guides* do allow pain to be considered as a factor in impairment calculations.[187] In addition to the inadequacies of applying the *Guides* to determine injured workers' benefits, such application is also troublesome from a practical standpoint. The Act specifies a certain edition and printing of the *Guides* which has already been superseded and is no longer in print.[188] Furthermore, the *Guides*' authors emphasize that the *Guides* are not to be used in the manner which the Texas legislature has prescribed.[189]

The two most significant types of benefits are impairment income benefits and supplemental income benefits.[190] Workers are entitled to impairment income benefits when they can show objective, medically confirmable evi-

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183. *See* Peck v. Palm Beach County Bd., 442 So. 2d 1050, 1051 (Fla. Dist. Ct. App. 1983) (under *Guides*, 50% hearing loss in certain range renders no impairment, but worker totally disabled). *See generally* AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT *passim* (A. Engelberg 3d ed. 1989); Pryor, *Compensation and a Consequential Model of Loss*, 64 TUL. L. REV. 783, 824-26 (1990) (citing cases which dealt with AMA *Guides* problems).

184. *See* Trindade v. Abbey Road Beef 'N Booze, 443 So. 2d 1007, 1012-13 (Fla. Dist. Ct. App. 1983) (certain knee injury not given impairment level); *see also* Pryor, *Compensation and a Consequential Model of Loss*, 64 TUL. L. REV. 783, 824-26 (1990) (discussing *Abbey* and *Guides*' problems).

185. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.25(a) (Vernon 1991).

186. *See id.* § 1.03(35) (defining objective clinical or laboratory finding as excluding employee's subjective symptoms).

187. *See generally* AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 239-44 (A. Engelberg 3d ed. 1989) (appendix B devoted to explanation of pain's relationship to impairment).

188. Findings of Fact and Conclusions of Law, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 31, 1990) (fact finding that Act does not provide for *Guides*' distribution and that *Guides* are not readily available to injured workers and general public).

189. *See* AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 6 (A. Engelberg 3d. ed. 1989).

> Each administrative or legal system that uses permanent impairment as a basis for disability rating needs to define its own process for translating knowledge of a medical condition into an estimate of the degree to which the individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements, is limited by the impairment. We encourage each system not to make a "one-to-one" translation of impairment to disability, in essence creating a use of the *Guides* which is not intended.

Id.

190. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.26 (Vernon 1991) (impairment benefits); *id.* § 4.28 (supplemental benefits).

dence of impairment.[191] Injured workers receive three weeks of impairment income benefits for each percentage point of impairment caused by an injury.[192] Thus, as a result of the *Guides*' application, impairment income benefits are not only quite limited; they are also quite unrelated to the occupational effects of an on-the-job injury.[193] Furthermore, section 4.27 of the new law distinguishes between employees who, when impairment income benefits have been awarded, have returned to work for at least three months, earning at least 80% of their pre-injury average weekly wage, and those who have not.[194] The first group of employees may elect to receive their impairment income benefits in a lump sum, but such election is impossible for the others.[195] At the termination of impairment benefits, workers who meet specific criteria may qualify for supplemental income benefits.[196] The worker must: (1) have a 15% or higher impairment rating; (2) have not returned to work or be earning less than 80% of his pre-injury average weekly wage as a direct result of the injury; and (3) be making a good faith effort to find employment commensurate with his physical condition.[197] Additionally, if the injured worker accepted his impairment income benefits in a lump sum, he forfeits entitlement to supplemental income benefits.[198] A worker who does not forfeit his right to supplemental income benefits must continually qualify for them by filing, with the carrier and the Commission, quarterly reports detailing the causal connection between his injury and his occupational and financial status.[199]

In addition to the quarterly qualification requirements, supplemental income benefits are simply difficult to obtain.[200] If a worker returns to work for nine months or more at over 80% of his pre-injury average weekly wage,

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191. *Id.* § 4.26.

192. *See id.* The benefits are payable at 70% of the worker's average weekly wage, subject to a statutory cap of 70% of the statewide average weekly wage. *Id.*

193. *See, e.g.*, 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 57.14 (1989); Pryor, *Compensation and a Consequential Model of Loss*, 64 TUL. L. REV. 783, 822-26 (1990) (criticizing use of *Guides* in Florida).

194. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.27 (Vernon 1991).

195. *Id. See generally* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 22-23 (Dec. 1988) (Tex. H.R. Research Org.) (information on lump sum issues).

196. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.28 (Vernon 1991) (supplemental income benefits are payable at rate of 80% of difference between 80% of pre-injury average weekly wage and current earnings; entitlement to temporary, impairment, or supplemental income benefits terminates 401 weeks after date of injury).

197. *Id.* § 4.28(b).

198. *Id. See generally* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 22-23 (Dec. 1988) (Tex. H.R. Research Org.) (discussing lump sum issues).

199. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.28(k) (Vernon 1991).

200. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 14, Garcia v.

he is then ineligible for supplemental income benefits.[201] Moreover, section 4.28(b)(1) arbitrarily creates a distinction between employees whose impairment ratings are below 15% and those whose ratings are above 15%.[202] The former employees may not recover supplemental income benefits under any circumstances.[203] The 15% threshold prevents all workers who do not meet it from receiving the benefits, no matter how seriously the injury affects their earning capacity.[204] Furthermore, section 4.28(b)(2) treats differently those employees who can and those who cannot prove that their unemployment or underemployment is a "direct result" of their injury-related impairment.[205] This burden may be extremely difficult to meet because an employee must show that his lost earnings are a direct result of a compensable injury and not due to any other cause.[206] Additionally, because the benefits are provided incrementally, injured workers may become dependent on the system.[207]

B. *The Act Deprives Injured Workers of Access to Open Courts, Remedies by Due Course of Law, and the Right to Trial by Jury*

Several of the Act's procedural provisions dramatically restrict injured employees' rights to open courts,[208] redress for injuries by due course of law,[209] and trial by jury.[210]

Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

201. *Id.*

202. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.28(b)(1) (Vernon 1991).

203. *Id.*

204. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 14, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990); Letter from Austin Foster, Ph.D. to Joe Gunn (Apr. 14, 1989) (expert's letter to Senate criticizing impairment determination method). The Texas system is especially harsh because the impoper use of the *Guides* is compounded by the arbitrary 15% cut-off point. Telephone interview with Bill Whitehurst, Attorney for plaintiffs, Garcia v. Eagle Pass Auto Elec., Inc. (Mar. 6, 1991).

205. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.28(b)(2) (Vernon 1991).

206. *See id.*

207. *See* Plaintiffs' Brief In Support of Motion for Temporary Injunction at 23-26, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

208. *See* TEX. CONST. art. I, § 13. "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.*

209. *See id.* § 19. "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." *Id. See generally* Ponton, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 93-97 (1988) (discussing historical origins of Texas Bill of Rights); Richards & Riley, *Developing a Coherent Due-Course-of-Law Doctrine*, 68 TEX. L. REV. 1649, 1649-71 (1990) (discussing Texas' due course jurisprudence).

1. Administrative Process and Dispute Resolution

Currently, as under the previous workers' compensation law, a worker must exhaust all administrative remedies before filing suit to seek a jury determination of his injury's effects on his earning capacity.[211] Previously, the process involved a pre-hearing conference to adjust and settle claims and the entrance of a final award which the worker or insurance carrier could then appeal to a trial court de novo.[212] Today, however, exhausting all administrative remedies is much more difficult due to the complex procedure the Act has established.[213] The process begins with a benefit review conference.[214] If disputed issues remain after the conference, the parties may proceed to a contested case hearing,[215] the results of which may be appealed to an agency appeals panel.[216] The panel's final determination is subject to judicial review.[217] However, the appeals panel has the power to remand claims for additional contested case hearings.[218]

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210. *See* TEX. CONST. art. I, § 15. "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." *Id. See generally* Ashman & McConnell, *Trial by Jury: The New Irrelevant Right?*, 27 SW. L.J. 436, 436-42 (1973) (explaining history of right to jury trial in several states); Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483, 1483-1511 (1988) (discussing right to jury trial in administrative law context).

211. P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 13 (1990).

212. *See* Act of May 21, 1931, Ch. 208, 1931 Tex. Gen. Laws 351 (repealed 1989).

213. *See generally* P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 10 (1990).

214. TEX. REV. CIV. STAT. ANN. art. 8308, §§ 6.11-6.15 (Vernon 1991); *see also* Kugle, *Contested Administrative Hearings Under the New Legislation*, in 2 ADVANCED WORKERS' COMPENSATION COURSE Q 5-10 (1990).

215. TEX. REV. CIV. STAT. ANN. art. 8308, §§ 6.31-6.34 (Vernon 1991); *see also* Kugle, *Contested Administrative Hearings Under the New Legislation*, in 2 ADVANCED WORKERS' COMPENSATION COURSE Q 10 (discussing contested case hearing). After January 1, 1992, the parties may agree to engage in binding arbitration. TEX. REV. CIV. STAT. ANN. art. 8308, §§ 6.21-6.28 (Vernon 1991); *see also* Kugle, *Contested Administrative Hearings Under the New Legislation*, in 2 ADVANCED WORKERS' COMPENSATION COURSE Q 10-13 (1990) (explaining arbitration process). As a practical matter, employers and insurance carriers would not agree to arbitration because the administrative avenue is much more advantageous to them. Telephone interview with Bill Whitehurst, Attorney for plaintiffs, Garcia v. Eagle Pass Auto Elec., Inc. (Mar. 6, 1991).

216. TEX. REV. CIV. STAT. ANN. art. 8308, §§ 6.41-6.45 (Vernon 1991); *see also* Kugle, *Contested Administrative Hearings Under the New Legislation*, in 2 ADVANCED WORKERS' COMPENSATION COURSE Q 17-19 (1990) (discussing appeals panel).

217. TEX. REV. CIV. STAT. ANN. art. 8308, § 6.61 (Vernon 1991); *see also* Kugle, *Contested Administrative Hearings Under the New Legislation*, in 2 ADVANCED WORKERS' COMPENSATION COURSE Q 19-28 (1990) (explaining judicial review process).

218. TEX. REV. CIV. STAT. ANN. art. 8308, § 6.42(b)(3) (Vernon 1991).

At any point in this process, workers seeking adequate compensation risk waiving certain rights. The parties must raise all issues in dispute at the benefit review conference.[219] Any issue not raised may not be brought up at a later contested case hearing unless the parties consent, or the Commission determines that good cause existed for not raising the issue earlier.[220] Furthermore, the only issues which may be appealed to the agency appeals panel are those which were raised and decided at the contested case hearing.[221] Therefore, a party seeking judicial review of a Commission decision can only argue issues decided by, and raised before, the appeals panel.[222] Thus, absent a good cause finding by the Commission, a party's failure to address an issue at the benefit review conference may prevent him from ever raising that issue, even in a jury trial.[223] By placing these harsh limitations on injured workers who fail to present evidence or properly raise and preserve issues during the administrative process, the new act reduces workers' access to the courts in violation of the Texas Constitution's open courts, due course, and jury trial provisions.

2. Limited Jury Review

After an employee exhausts his administrative remedies, he may be able to take his case to court. In *Middleton v. Texas Power & Light Co.*,[224] the Texas Supreme Court protected the right to trial by jury in workers' compensation actions.[225] Although the new act does not expressly deny employees' rights to have their cases heard before a jury, it effectively deprives injured workers of that right by limiting judicial review to issues decided by

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219. *See id.* § 6.15(d); *see also* P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 12 (1990).

220. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 6.31(a) (Vernon 1991); *see also* P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 12 (1990).

221. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 6.42(a) (Vernon 1991); *see also* P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 13 (1990).

222. P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 13 (1990).

223. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 5, 21, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

224. 108 Tex. 96, 185 S.W. 556 (1916), *aff'd*, 294 U.S. 152 (1919).

225. *Id.* at 561-62. In *Middleton*, the Texas Supreme Court held that jury trials were required in workers' compensation cases and that administrative proceedings were no substitute for the right to trial by jury. The court upheld the original law's constitutionality because "the Act authorizes appeals from the decisions of the Board to the courts, where a jury trial of matters in dispute. . .may be had." *Id.*

the Commission's administrative appeals panel.[226] The Act does not allow juries the opportunity to determine facts at issue, and it restricts workers' rights to have juries consider the future consequences of their injuries.[227] Once an injured worker reaches the judicial review stage, the roles of the court and jury have been diminished because the previous administrative proceedings have already determined the scope of review.[228] Though legislatures may grant administrative agencies the power to determine rights and duties in certain controversies,[229] such grants must be accompanied by adequate standards and limits on administrative discretion.[230]

The Act provides that the court or jury, when determining the extent of a worker's impairment, must adopt one of the impairment ratings made under section 4.26.[231] The section also provides for dispute resolution as to the percentage of impairment with the help of a "designated doctor" who is selected either by party agreement or by Commission appointment.[232] The Act's requirement that a court or jury adopt a certain impairment rating forces the court or jury either to accept the designated doctor's rating, if the parties have agreed to that doctor; or if the Commission appointed the doctor, to give his opinion presumptive weight.[233] Thus, the Act arbitrarily limits the jury's discretion in determining the extent of a worker's impairment.[234]

In addition to the restrictions imposed by impairment ratings, the Act also provides for the exclusion of evidence in a jury trial, unless the evidence was

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226. P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 13 (1990).

227. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 23-25, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

228. P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 13 (1990).

229. Blount v. Metropolitan Life Ins. Co., 677 S.W.2d 565, 572 (Tex. App.—Austin 1984), *rev'd on other grounds*, 709 S.W.2d 646, 647 (Tex. 1986).

230. International Ass'n of Firefighters v. City of Kingsville, 568 S.W.2d 391, 394-95 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); Moody v. City of University Park, 278 S.W.2d 912, 921-22 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

231. TEX. REV. CIV. STAT. ANN. art. 8308, § 6.62(d) (Vernon 1991).

232. *See id.* § 4.26(g); *see also* P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 5-6 (1990).

233. TEX. REV. CIV. STAT. ANN. art. 8308, § 6.62(f) (Vernon 1991). The Commission-appointed designated doctor's opinion controls the Commission's award unless the great weight of the other medical evidence is to the contrary. *Id.*; P. HARDBERGER, TEXAS WORKERS' COMPENSATION ACT WITH A SUMMARY OF MAJOR PROVISIONS OF THE 1991 REFORM ACT 5-6 (1990).

234. *See* Plaintiffs' Brief In Support of Motion for Temporary Injunction at 23, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

presented timely at a contested case hearing.[235] This provision prevents the court from exercising its proper control over the admission of evidence and deprives the jury of its right to consider all relevant, material, and admissible evidence.[236] Texas courts have held that the withdrawal of material issues is equivalent to a denial of the right to jury trial.[237] Additionally, the Act's provisions regarding the acquisition of supplemental benefits restrict the right to trial by jury because they prevent the parties from getting a one-time, final adjudication of all damages arising from the injury.[238]

Another significant problem with the Act's judicial review sections is that they require two different standards of review. Section 6.62 calls for a preponderance of the evidence standard for issues concerning compensability or income or death benefits,[239] while section 6.64 mandates application of the substantial evidence rule to all other issues.[240] The Texas Supreme Court has held such a hybrid standard of review unconstitutional.[241]

3. Attorneys' Fees

The Act also offends the open courts,[242] due course,[243] and jury trial[244] provisions because it makes legal representation more necessary and less

235. TEX. REV. CIV. STAT. ANN. art. 8308, § 6.33(e) (Vernon 1991).

236. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 22, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

237. *See, e.g.*, Aetna Life Ins. Co. v. Murray, 163 S.W.2d 658, 659 (Tex. Civ. App.—Dallas 1942, writ dism'd); Masterson v. Cline, 264 S.W. 204, 207 (Tex. Civ. App.—Dallas 1924, no writ).

238. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 4.28 (Vernon 1991). Because those employees who qualify for supplemental income benefits must reassert their qualifications quarterly, at every reestablishment of benefit entitlement, one or both parties may initiate a dispute each time. Kugle, *Contested Administrative Hearings Under the New Legislation*, in 2 ADVANCED WORKERS' COMPENSATION COURSE Q 29 (1990). At that point, the parties will be forced to endure the contested case hearing and the procedures following it. Such a situation could get complicated if parties pursue multiple adjudications, each for a different 90-day period. *Id.* The complicated procedures a worker must endure to preserve his rights and exhaust his remedies, in effect, deprive him of access to the courts for asserting his rights to supplemental income benefits. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 8, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

239. TEX. REV. CIV. STAT. ANN. art. 8308, § 6.62(c)(1) (Vernon 1991).

240. *Id.* § 6.64(b).

241. *See* Southwestern Bell Tel. Co. v. Public Util. Comm'n, 571 S.W.2d 503, 506-08 (Tex. 1978); Southern Canal Co. v. State Bd. of Water Eng'rs, 159 Tex. 227, 230, 318 S.W.2d 619, 622-23 (1958); Dickerson-Seely & Assoc., Inc. v. Texas Employment Comm'n, 784 S.W.2d 573, 576 (Tex. App.—Austin 1990, no writ).

242. *See supra* note 208 and accompanying text.

243. *See supra* note 209 and accompanying text.

244. *See supra* note 210 and accompanying text.

available at the same time.[245] The new, more adversarial and complicated administrative procedures,[246] which allow the injured worker to risk waiving rights and remedies, make legal representation essential.[247] Also, because the employer is now allowed to participate in the proceedings, the injured worker's need for representation is even more significant.[248] However, the Act's regulation of attorneys' fees makes it more difficult for an injured worker to obtain competent legal representation because it infringes on the contingent fee system.[249] The new act requires that the plaintiff's attorney take either 25% of his client's recovery or an hourly fee based on expenses and time, whichever is less.[250] In contrast, defense counsels' fees must only be found "reasonable and necessary" by the court or Commission.[251] In addition to the attorneys' fees issues, some attorneys simply may no longer feel competent to take on workers' compensation clients because of the new statute's complexity.[252] Some argue that the resulting exit of attorneys from the system may eventually increase insurance costs and taxpayer expense.[253] These restrictions tend to render any injured worker's right to due process in the judicial system virtually meaningless.[254]

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245. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 8, 29 Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990); *see also* Kugle, *Contested Administrative Hearings Under the New Legislation*, in 2 ADVANCED WORKERS' COMPENSATION COURSE Q 28-29 (1990) (attorney involvement more necessary due to treacherous dispute resolution process).

246. TEX. REV. CIV. STAT. ANN. art. 8308, §§ 6.01-6.45 (Vernon 1991).

247. *See* United States Dep't of Labor v. Triplett, __ U.S. __, __, 110 S. Ct. 1428, 1439, 108 L. Ed. 2d 701, 722 (1990) (Marshall, J., concurring) (legal representation crucial for occupational injury claimants to succeed in complex processes); *see also* Kreider, *Work Comp Claims Handling: Changes Needed in How Insurers Manage Claims*, Bus. Ins., July 16, 1990, at 19 (less confusing, less threatening claims system would reduce need for legal representation).

248. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 5.10(2),(4) (enumerating employers' rights); *see also* Kugle, *Contested Administrative Hearings Under the New Legislation*, in 2 ADVANCED WORKERS' COMPENSATION COURSE Q 4 (1990).

249. *See* Plaintiffs' Brief in Support of Motion for Temporary Injuction at 28, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990); Williams, *Attorneys' Fees Under the New Workers' Compensation Act*, in 2 ADVANCED WORKERS' COMPENSATION COURSE N, 1 (1990); T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 22 (Dec. 1988) (Tex. H.R. Research Org.).

250. TEX. REV. CIV. STAT. ANN. art. 8308, § 4.05 (Vernon 1991).

251. *Id.* § 4.091.

252. *See* Simpson, *Partial Permanent Disability Under the New Workers' Compensation Act of Texas*, in 1 ADVANCED WORKERS' COMPENSATION COURSE K 18 (1990).

253. *See id.*

254. Plaintiffs' Brief In Support of Motion for Temporary Injunction at 18-19, Garcia v. Eagle Pass Auto Elec., Inc., No. 90-11-10301 CV (Dist. Ct. of Maverick County, 365th Judicial Dist. of Texas, Dec. 10, 1990).

V. CONSTITUTIONAL ALTERNATIVES

In addition to amending the hastily prepared statute to remove its violations of workers' constitutional rights, the legislature should also focus on some practical considerations which would reduce the urgency for such a complex system.

A. *Shift Expense Toward Workplace Safety*

An important reason behind Texas' workers' compensation problems is the fact that Texas is one of the most dangerous states in which to work.[255] Critics of rising insurance rates have argued that employers and the state are to blame, at least in part, for failing to respond to the urgent need for adequate safety programs.[256] In fact, the legislative committees on workers' compensation recognized the need to improve worker safety in Texas.[257] However, the legislature bypassed an opportunity to begin rectifying the situation. Rather than treat the cause of the ill, the legislature chose to enact a panacea to treat the symptoms of unsafe work environments.[258] A redirection of legislative energy toward accident prevention would not only reduce the number of claims, but also would protect the health of a vital work force.[259]

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255. *See* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 16 (Dec. 1988) (Tex. H.R. Research Org.) (citing study which found Texas holds 12th highest rate of fatalities per 100,000 United States workers); Webb, *Legislative Proposals for Workers' Compensation*, in WORKERS' COMPENSATION G, 6 (1988) (noting that Texas leads country in workplace accidents); Purcell, *Punitive Damages and the Injured Worker*, in WORKERS' COMPENSATION E, 1 (1986) (citing statistics and arguing that construction worker in Texas is more likely to die within a year than Huntsville death row inmate).

256. *See* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 1 (Dec. 1988) (Tex. H.R. Research Org.); *Legislative Report Recommends Abolishment of Work Comp System*, UPI report, Feb. 27, 1987 (LEXIS, NEXIS library, Wires file) (noting that State Board of Insurance was criticized for neglecting job safety).

257. *See* T. VARGAS, SPECIAL LEGISLATIVE REPORT NO. 146: AN INTRODUCTION TO WORKERS' COMPENSATION IN TEXAS 16-20 (Dec. 1988) (Tex. H.R. Research Org.); Texas Trial Lawyers' Association, *Summary and Analysis of the Report of the Legislative Joint Select Committee on Workers' Compensation Insurance*, at 8-10 (1989).

258. *Cf.* Fletcher, *State Comp Systems Need Reform: Experts Coalitions Working in Some States*, Bus. Ins., Sept. 24, 1990, at 26 (noting that several states focused on safety in workers' compensation reforms).

259. Texas Trial Lawyers' Association, *Summary and Analysis of the Report of the Legislative Joint Select Committee on Workers' Compensation Insurance* 10 (1989); Webb, *Legislative Proposals for Workers' Compensation*, in WORKERS' COMPENSATION G 6 (1988); *Legislative Report Recommends Abolishment of Work Comp System*, UPI report, Feb. 27, 1987 (LEXIS, NEXIS library, Wires file) (quoting representative who said safety programs would reduce claims, premiums, and the surrounding debate).

B. *Simplify Process*

The legislature neglected to look at the Texas workers' compensation scheme from a worker's point of view. A simpler, more streamlined process may not prevent as many claims as the intimidating and complex new system, but denying workers redress and keeping attorneys from advocating on behalf of injured employees should never have been the statute's aim.[260] The object of workers' compensation should be to provide injured employees with a worthwhile opportunity to apply for and receive redress for their on-the-job injuries.[261] The goal of workers' compensation should not be to place the worker in a disadvantageous, defensive position.[262] Under the new system, the expense of implementing the changes and the cost of only more paper and red tape will probably not prove to be a profitable investment.[263]

C. *Control Insurance Rates*

Perhaps no reforms would have been necessary had the state placed tighter controls on the insurance industry from the beginning.[264] Since 1981, workers' compensation premiums have fluctuated, even though the number of accidents and claims filed has remained consistent.[265] Ideally, unbiased studies should be performed on a regular basis to keep the legislature, employers, and the public informed about how much the insurers collect in premiums compared to how much they pay out in claims.[266] Realistically, the State Board of Insurance should be revitalized, so it can implement tighter controls on the still-rising workers' compensation rates.[267]

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260. *See* Fowler, *Work of the Texas Industrial Accident Board*, 2 TEX. L. REV. 301, 302 (1924) (discussing purposes of workers' compensation); Kreider, *Work Comp Claims Handling: Changes Needed in How Insurers Manage Claims*, Bus. Ins., July 16, 1990, at 19 (workers' compensation systems do not operate in purported no-fault, non-adversarial manner).

261. *See* Bethel v. Sunlight Janitor Serv., 551 S.W.2d 616, 618 (Mo. 1977) (purpose of workers' compensation to provide uncomplicated procedure for redress).

262. *See id.* at 621 (discussing fundamental purposes of workers' compensation); *see also* Kreider, *Work Comp Claims Handling: Changes Needed in How Insurers Manage Claims*, Bus. Ins., July 16, 1990, at 19 (insurers do not manage claims; rather they exhaust all efforts to deny disability and avoid payment).

263. *See* Fletcher, *Advocacy Group Eyes Work Comp Solutions*, Bus. Ins., Dec. 31, 1990, at 22 (arguing that inefficient systems lead to unnecessary expenses and that workers' compensation systems should address injured workers' needs in most efficient and cost-effective manner).

264. *See Texas Undertakes Reform of Workers' Compensation Insurance*, 43 Ins. Reg., Feb. 6, 1989, at 5 (noting that a goal of Texas workers' compensation reform was to create an agency to audit insurance carriers).

265. *See* Webb, *Legislative Proposals for Workers' Compensation*, in WORKERS' COMPENSATION G 7 (1988) (noting statistics on inconsistent premium rates).

266. *Id.* at 8.

267. *Id.* at 9.

VI. CONCLUSION

The controversy surrounding the new Texas Workers' Compensation Act has followed it from the legislature to the judiciary. Proponents of the Act, perhaps rightly, point out that trial lawyers will try to accomplish through the courts what they could not do in Austin.[268] Those close to the issue predict that the new act eventually will be subjected to scrutiny by the Texas Supreme Court or even the United States Supreme Court.[269] If the high courts agree that the statute is unconstitutional, the legislature should then focus its policymaking on what is constitutional, rather than on politics and on what may be an economic benefit to the more persuasive interest groups. Significantly, since the Act was passed, a new administration took over in the state capitol. The "New Texas" may not accept the new workers' compensation law as it exists today.

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268. *New Texas Workers' Comp Law Being Fully Enforced*, UPI report, Jan. 8, 1991 (LEXIS, NEXIS library, Wires file); *Texas Workers' Compensation Commission Implements New Law*, S.W. Newswire report, Jan. 8, 1991 (LEXIS, NEXIS library, Wires file).

269. *Texas Workers' Compensation Commission Implements New Law*, S.W. Newswire report, Jan. 8, 1991 (LEXIS, NEXIS library, Wires file).