WORKMEN'S COMPENSATION CLAIMS

ADMINISTRATION IN

TEXAS

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WORKMEN'S COMPENSATION CLAIMS ADMINISTRATION IN TEXAS

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INTRODUCTION: OBJECTIVES OF THE STUDY

Workmen's Compensation embodies an ideal of social justice wholly foreign to the eighteenth century philosophy which inspired the founders of our government. Blackstone is quoted as saying:

> The public good is in nothing more essentially interested, than in the protection of every individual's private rights. So great, moreover, is the regard of the law for private violation of it, no, not even for the general good of the whole community.[1]

Every man was presumed to know his own rights and to be equally capable of maintaining them. Differences of wealth, rank and education were looked upon as God-given inequalities which the state had no right to curtail or neutralize. Equality before the law was deemed all-sufficient to secure the ultimate ends of justice. Government had only to preserve the peace and prevent force and fraud.

It was in keeping with this leave-them-as-you-find-them theory of social relationships that forced the individual workman to take upon himself the risks of his employment. It is open to every man to choose his own occupation, to quit any service which he distastes, and to exact a wage which will enable him to provide against the contingencies of sickness, accident, premature death, unemployment

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[1] G. W. Childs, Commentaries on the Laws of England, Vol. 1, p. 138.

and old age. This common-law doctrine of assumption of risk held its ground so long as that philosophy appealed to current common sense. This doctrine has been constantly changing because as time has passed the rights of private property have come to hold a lower position, and human life and happiness a higher place in men's esteem. Democratic governments more and more concern themselves with measures designed to promote the general good at the expense of restraint upon the pursuance of self-interest. It is by the extension of the police power and by the principles of collective responsibility that the modern state seeks to secure the health, safety, comfort, and education of all its citizens. In no field of economic relationship have the new ideals of social justice made a more drastic reversal of traditional views than in that of employers' responsibility for the risks of industrial employment.

The economic theory which underlies workmen's compensation is frequently spoken of as the doctrine of occupational risk. This doctrine is based on the assumption that the risk of economic loss through personal injury in the course of production should be borne by the industry itself.[2] This principle is evidently applicable to all personal disablements, whether by accident or disease, which are incident to the production of economic goods or services.

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[2] Middleton v. Texas Power and Light Company, 249 U. S. 152 (1919).

Workmen's Compensation is a comparatively new concept. In legislative form it has been in operation in the United States for about forty years and in Europe for around sixty years.[3] In the United States each state having a Workmen's Compensation Act has drafted it separately, and no two Workmen's Compensation Acts are exactly alike in wordings and provisions. Nevertheless, the benefits provided by every Workmen's Compensation law include a certain amount of medical and hospital care for the injured worker, certain monetary payments to take the place of a part of his wages while he is unable to work, and specified amounts to be paid to his dependents if he is killed. In addition, nearly half the laws contain some provision for the rehabilitation of injured workers. Not only is Workmen's Compensation today a complicated and highly specialized field of legislation, it is a continuously changing one. Its laws are constantly being amended, their scope broadened, and benefits increased, in accordance with the changing economic picture.

Within the scope of this study it is not proposed to survey the broad and ever increasing growth of this field of legislation in its entirety. One of the greatest problems of a state workmen's compensation administrative organization is the settlement of claims in a prompt and efficient manner.

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[3] F. H. Ellsworth, "The Process of Insurance Through Constructive Regulation," Proceedings of the 34th Annual Meeting of the Association of Life Insurance Presidents, 1950, p. 72.

This function is the heart of the system, as it affects all the participants in the state workmen's compensation program. It is with this in mind that this study is devoted to a detailed survey of the claims administrative machinery of the State of Texas.

CHAPTER I

HISTORICAL DEVELOPMENT OF WORKMEN'S COMPENSATION

European Development

In the process of making any study of a political or social movement it is necessary for the individual to have a general understanding of the historical development of the movement. The movement toward the development of the workmen's compensation programs which operate in all of the states today in this country is no exception to this rule. In the following brief review of the historical development of workmen's compensation laws in Europe, particular attention is devoted to Germany and Great Britain as the situation in these countries had a profound influence upon legislation which followed later in this country.

Germany.--In 1871, when, upon the formation of the German Empire, suffrage was granted, there was one socialist member in the Reichstag. A few years later the number had grown to twelve members representing 493,000 constituents. This rise of the Socialist Party was viewed with alarm by the more conservative elements in Germany at that time. Bismarck, who was Prime Minister, tried several methods including outright force and active repression to stamp out this Socialist

movement. Failing in these attempts he advocated a system of social insurance to appease the wave of radicalism that was spreading across the country. His object was to appease or remove a growing source of social unrest by establishing a paternalistic scheme through which the worker would be assured of assistance in case of the occurrence of any of the misfortunes of accident, sickness, disability and old age, and to demonstrate that the state could accomplish more for the workers than the socialists themselves.

There was also a great deal of agitation for reform when in 1881 the government advocated the passage of the Accident Insurance Bill. This bill provided for the establishment of a state fund to be supported by contributions from employers and employees supplemented by a government subsidy and also for mutual insurance associations of employers under governmental regulation. Compensation was to be provided for workmen injured by accidents which occurred in the course of employment. There were amendments which were not acceptable to the government proposed in the Reichstag, and the bill was withdrawn before a final vote was taken.

In May 1882, the government made a second attempt to secure legislation of this description. This time two bills were introduced -- a revised bill providing for compulsory accident insurance and a second bill providing for compulsory insurance of workmen against sickness. Both of these bills affected the accident problem because it was intended that

compensation should be paid from the sickness funds during the first thirteen weeks of disability resulting from accidental injury and that the accident funds should not be used for compensation except in cases of serious injury which caused either death or disablement beyond the thirteen-week period. Both of these bills were referred to the same committee and the sickness insurance bill was considered first. So much time was spent by the committee in reaching a decision to recommend the bill that no time remained in which to consider the accident insurance bill at that session. The sickness insurance bill was enacted on June 15, 1883, and became operative on December 1, 1884.

In March, 1884, the government introduced in the Reichstag a third bill for compulsory accident insurance. This bill, with a few amendments, was adopted by the Reichstag and became effective on October 1, 1885. The Accident Insurance Law of 1884 did not cover all industries; its application was limited particularly to manufacturing, mining and transportation. The Accident Insurance Law, while not embracing all industries, extended to a great many employments. Mines, quarries, shipyards, practically every kind of manufacturing establishment, dredging, public utilities, and storage warehouses were included. Insurance of all workmen and laborers, as well as technical and administrative officials whose annual salary was less than 3000 marks, was compulsory. Only injuries resulting from accidents occurring

in the course of employment were compensable and occupational diseases were, therefore, not covered. There was a three-day waiting period during which no indemnity was paid. On the fourth day and for the remainder of the first four weeks, compensation was paid from a sick fund, financed by the employee contributing two thirds and the employer one third. This compensation was payable in the amount of 50 per cent of the employee's wage. From the beginning of the fifth week to the end of the thirteenth week, compensation was increased to 66-2/3 per cent of the employee's wages; 50 per cent of which came from the sick fund and the employer was required to pay the additional 16-2/3 per cent. If disability continued beyond thirteen weeks, compensation was paid from the accident fund. In cases of permanent total disability requiring constant attendance and care by another person, 100 per cent of the employee's wage might be allowed while such conditions lasted. In fatal cases the law recognized as dependents: (1) the widow; (2) children; (3) other dependents including parents, grandparents and grandchildren. These dependents received twenty per cent of the deceased's wages for life. If a widow re-married she received three years benefits in a lump sum as a settlement.

After Germany's initial step the principle of workmen's compensation was rapidly recognized by other European countries.

Austria enacted a workmen's compensation law in 1887; Hungary in 1891; Norway in 1894; Finland in 1895; Great Britain in 1897. By 1910 practically every European country, including even Russia, had a workmen's compensation law patterned after the earlier German model.[1]

Great Britain.--In 1880 an Employers' Liability Act was passed in Great Britain but it was fairly weak and not effective. It modified but did not completely eliminate the fellow servant defense principle, and there was much agitation for greater reforms. Many amendments were proposed to correct the weaknesses of the act but none were ever adopted. Finally, it was generally conceded that instead of amending the Employers' Liability Act, an entirely new system, based upon the principles of workmen's compensation was needed. As a result of this sentiment, the Workmen's Compensation Act of 1897 was enacted. This law was of an experimental character. It covered only a limited number of dangerous employments, including work on railroads, in factories, in mines and quarries, on engineering works, and on buildings more than thirty feet in height. The employer was made responsible for the entire cost of compensation. The employer was allowed to insure his liability in any recognized carrier and to join with other employers in the organization of mutual insurance

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[1]The data concerning the development of Workmen's Compensation in Germany was taken largely from the Twenty-Fourth Annual Report of the Commissioner of Labor, Workmen's Insurance and Compensation Systems in Europe, 1909, Vol. 1, pp. 977-1015.

associations to jointly carry their risk. The act was adopted in spite of opposition from both employers and employees, the latter in some cases, believing that the cost would eventually be shifted to them and deducted from their wages. The principle of workmen's compensation had received general recognition, however, and the law was enacted and put into operation.

Workmen's Compensation having been established as a thoroughly satisfactory system, the government proposed in 1906 to consolidate all the existing statutes, to extend workmen's compensation to practically all employments, and to adopt a general revision of benefits. A law containing these changes was adopted and became effective July 1, 1907. It was this law which served, to a great extent, as a model for the earlier legislation in this country.

The British Act of 1906 applied to many employers, including those engaged in maritime pursuits. The following types of employees, however, were excluded:

(1) Employees whose annual wage exceeded 250 pounds,

(2) Employees who were employed on a part time casual basis for odd jobs,

(3) Employees who performed work on their own premises, and

(4) Members of employer's family, living in his home.

Compensation was payable for personal injury by accident arising out of and in the course of employment. There was, however, special provision for compensation in cases of certain occupational diseases. In schedule three of the law, six occupational diseases were named: anthrax, lead poisoning, mercury poisoning, phosphorous poisoning, arsenic poisoning, and ankylostomiasis. The Secretary of State for the Home Department was authorized, however, to add to this list. Under this particular arrangement eighteen diseases were added in 1907 and others have since been added.

No compensation was payable for injuries causing disability of less than one week nor was compensation payable if the injury could be attributed to the "serious and willful misconduct of the employee" unless the injury resulted in permanent disability or death. In cases where the injury was caused by "the personal negligence or willful act" of the employer or his representative, the injured employee was allowed either to pursue his right to sue for damages or to accept compensation under the compensation statute. The injured employee or his dependents were required to give the employer notice of the accident as soon as practicable, and to present a claim for compensation within six months after the occurrence of the accident or, in case of death, within six months from the date of death.

There was a provision making the principal responsible for compensation to an employee of a contractor or

sub-contractor in case of injury resulting from accidents occurring "on or in or about the premises on which the principal had undertaken to execute certain work or which were under his control or management." This provision was intended to safeguard the employee but it did not relieve the immediate employer from liability, since the principal, if he paid compensation, had a legal right to sue the immediate employer for reimbursement. In cases where the accident causing injury was the result of the act of a third person and the employee had a right of action to recover damages, he could elect either to accept compensation payments or to sue the third person for damages.

The schedule of benefits under this act contained the following provisions:

(1) In case of death where the dependents were wholly dependent upon deceased a maximum lump sum settlement of 300 pounds or less was authorized.

(2) In the case of death partially dependent persons were allowed a proportionate amount of the compensation for total dependency.

(3) In case of death where no dependents survived, the reasonable expense of medical attendance and burial were allowed.

(4) In non-fatal cases, a waiting period of one week was required but, if the disability continued for more than two weeks, compensation was paid from the date of injury.

(5) The amount of compensation in non-fatal cases causing total disability was fifty per cent of the employee's average weekly wage which had been paid during the twelve months preceding injury with a maximum of ten pounds per week.

(6) No medical or surgical benefits were provided.

(7) Payments for both total and partial disability continued for the period of disability, thus assuring life pensions in cases of permanent injury.[2]

The discussion of the Act of 1906 in Great Britain was done in a somewhat detailed manner in order that the legislation which is now in operation in the United States could be discussed more clearly. Much of the legislation in this country in the field of workmen's compensation has been patterned after the British Act of 1906. This act has probably been, in many respects, the foundation or model of the present compensation systems which we find in the United States today.

Development in the United States

The workmen's compensation problem in this country differs from that of any other country in the world, because our political system acts for some purposes as a single unit while for other purposes as forty-eight autonomous bodies. Except for employees engaged in the service of the United States Government, in interstate or foreign commerce or in

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[2] The data concerning the development of workmen's compensation in Great Britain were taken largely from the Twenty-Fourth Annual Report of the Commissioner of Labor, Workmen's Insurance and Compensation Systems in Europe, 1909, Vol. 2, pp. 1495-1540.

navigation, the Federal Government has no authority to legislate on the subject of workmen's compensation. Since this subject has been, in the largest extent, reserved by the states for independent action by their own legislatures we find a great diversity of legislation in operation over the country. To review the historical development of Workmen's Compensation in this country by states would be an endless study, for each state has passed through a separate and distinct period of its own. All that can be attempted in this study is a consideration of the outstanding national events in the history of the subject.

The first American Compensation Act, modeled after the English Act, was introduced in the New York legislature in 1898, but failed to pass. The first one actually adopted was the Maryland Law of 1902, but this legislation felt the strong arm of the court and was declared unconstitutional.[3] On January 31, 1908, President Theodore Roosevelt, in a message to Congress, summed up the whole argument for the responsibility of employers for industrial injuries. He said, among other things:

> It is a matter of humiliation to the nation that there should not be on our statutes books provision to meet and partially atone for cruel misfortune when it comes upon a man through no

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[3]Frank Lang, Workmen's Compensation Insurance; Monopoly or Free Competition, p. 7.

> fault of his own while faithfully serving the public. In no other country in the world could such gross injustice occur; for almost all civilized nations have enacted legislation embodying the complete recognition of the principle which places the entire trade risk for industrial accidents (excluding of course, accidents due to willful misconduct of the employee) on the industry as represented by the employer, which in this case is the government. . . Exactly as the workingman is entitled to his wages, so should he be entitled to indemnity for the injuries sustained in the natural course of his labor. The rates of compensation and the regulations for its payment should be specified in the law, and the machinery for determining the amount to be paid should in each case be provided in such manner that the employee is represented without expense to him. In other words, the compensation should be paid automatically.[4]

This address set up a general pattern for a Federal workmen's compensation law. Congress in 1908, enacted the United States Employers' Compensation Act which has since been replaced by the Federal Employee's Compensation Act of 1916. In 1908 also, the Federal Employers' Liability Act was passed to cover employees of "common carriers", such as railroads, engaged in interstate or foreign commerce. This act was regarded as a very important step at the time of its passage. If the employee was injured because of his own negligence, damages were not forfeited but were reduced in proportion to the amount of his negligence. If the employer violated a safety statute, he could not use, as a defense,

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[4]Theodore Roosevelt, Message of the President of the U. S. communicated to the two houses of Congress at the beginning of the first session of the Fifty-Ninth Congress, Legislative Document No: 48, p. 56.

any negligence on the part of the injured worker. Railroads were held responsible to injured employees in cases in which their officers, agents, or other employees were negligent. They were also responsible in cases of defects in cars, engines, machinery, tracks, and so forth, which were due to negligence. Contracts between employers and employees of exemption from the law's operation were prohibited.[5] The Federal law was unsatisfactory in that, with all its changes in favor of the worker, it was still necessary for him to prove fault on the part of his employer. Nevertheless, its enactment had an anormous influence on the workmen's compensation movement throughout the country, and it led to the appointing of several state commissions to study the situation.

The New York Workmen's Compensation Act of 1910 was the first important attempt by a state to substitute compensation for employer's liability. It permitted the injured worker the choice of either taking compensation or suing his employer for damages under the old law. When this compensation act was invalidated the following year on the basis of constitutionality, the people of New York voted to amend the New York constitution ih order to again attempt to have a workmen's compensation law for the state.[6] The Ives v. South Buffalo

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[5]Ralph H. Blanchard, Liability and Compensation Insurance, p. 212.

[6]International Association of Industrial Accident Boards and Commissions, National Compensation Journal, May, 1914, Vol. 1, p. 17.

Railroad Company case which was decided by the New York Court of Appeals on March 24, 1911 was the final milestone in the rapid growth of the workmen's compensation movement in the United States.[7] The Ives decision was important because it indicated two possible courses of procedure in legislating upon the question of workmen's compensation. The declaration that the New York law was in violation of the state constitution suggested the possibility of amending the constitution in order to allow such a program. The fact that the unconstitutional law was compulsory also suggested the possibility of finding some way to enact a law which would be elective in form but would be compulsory in application. This course of action was followed by New Jersey in 1911, when they enacted a law in two sections. The law although elective, was to all intents and purposes compulsory in its application. The law was held to be constitutional on the ground that "no coercion was exercised by the legislature upon either party to the contract of hiring."[8]

After the New Jersey action in 1911 the way was paved for further legislation. Ten states enacted workmen's compensation laws in 1911, three in 1912, eleven in 1913, two in 1914, ten in 1915, and so it has gone until today every state in the union has workmen's compensation

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[7] Ibid., p. 19.

[8] Ibid., p. 20.

legislation upon its statute books.[9] Not all the states have followed the pattern of New Jersey. Many of them, profiting by the decision in the Ives case, first amended their constitutions and enacted compulsory workmen's compensation laws. New York adopted this policy and passed a new law in 1914.[10] This law has stood the test of constitutionality under both the State and Federal constitutions and is still effective with such amendments as have since been enacted.

Constitutionality of Workmen's Compensation Laws

This study in the process of pointing out a brief historical sketch of the workmen's compensation movement has mentioned the position of the courts several times. The court played a very important role in the administration of workmen's compensation both now and in the past. It is with this in mind that we should look briefly at some of the earlier conflicts in which workmen's compensation legislation has been involved.

Since 1911 no state workmen's compensation law, either compulsory or voluntary, has been declared unconstitutional. Although the legislation has been attacked from every point of view, the lessons of the earlier periods have enabled legislatures to frame their measures so as to avoid difficulty.

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[9] U. S. Department of Labor, State Workmen's Compensation Laws as of September, 1950, p. 3.

[10] International Association of Industrial Accident Boards and Commissions, op. cit., p. 20.

It is also true that an aroused public opinion often helps to create a liberal attitude on the part of the courts, which have been extremely broad-minded in the interpretation of the law. The question of constitutionality hinges upon whether workmen's compensation deprives employer or employees of rights guaranteed to them by the constitutions of the State and Federal governments. A mere change in remedies or programs such as between employer's liability and workmen's compensation is no ground for complaint. This is pointed out clearly by decisions of the United States Supreme Court from one of which the following is quoted:

> But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to changes of time and circumstances.[11]

This principle enables the legislature to modify or even to destroy the old assumption of risk and fellow servant defense as these are nothing more than rules of common law.

It has been stated several times that workmen's compensation legislation is justified as being a legitimate exercise of the police power of the state. This point, of course,

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[11] Munn v. Illinois, 94 U. S. 113 (1876).

should have some further clarification. The scope of the police power of the State has been defined in many opinions of the courts. It is the power the State uses to keep laws abreast of the times and in unison with current economic, political and social conditions. It is this power which enables the State to impose quarantine restrictions even though such action may deprive citizens of their liberty, as in the case of communicable diseases affecting persons; or of their property, as in cases where it becomes necessary to kill diseased cattle. It is easily seen that the United States Supreme Court recognizes this fact when it said:

> The fact that the law is, to a certain extent, a progressive science; that in some of the states method of procedure, which at the time the constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, on the other hand, certain other classes of persons, particularly those engaged in dangerous or in unhealthy employments, have been found to be in need of additional protection. . .[12]

In conclusion,a final quotation taken from an opinion upholding the validity of the present New York Workmen's Compensation Act, will serve definitely to sum up the reasoning which the courts have adopted in justifying Workmen's Compensation legislation:

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[12] Holden v. Hardy, 169 U. S. 366 (1898).

> This subject should be viewed in the light of modern conditions, not those under which the common law doctrines were developed. With the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both. Surely it is competent for the state in promotion of the general welfare to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage. Any plan devised by the wit of man may in exceptional cases work unjustly, but the plan is to be judged by its general plan and scope and the general good to be promoted by it. Fortunately the courts have not attempted to define the limits of the police power. Its elasticity makes progress possible under a written constitution guaranteeing individual rights. The question is often one of degree. The act now before us seems to be fundamentally fair to both employer and employee. Of course I do not speak of details, which may or may not be open to criticism, but which granting the validity of the underlying principle, are plainly within the province of the legislature. . .[13]

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[13] Southern Pacific Company v. Jensen, 244 U. S. 205 (1917).

CHAPTER II

TEXAS COMPENSATION LAW

In the previous chapter we have viewed briefly the foundation of the Workmen's Compensation system itself. In this historical background we saw how the idea of workmen's compensation had grown and spread in Europe and the United States until it has, in some form, been accepted by all the states in the union. The parent of The Texas Workmen's Compensation Law was the British Act of 1906. The idea was first transplanted into this country by the federal government; all of the states, beginning with Massachusetts and New York have gradually enacted compensation laws. The original act in Texas passed in 1913, was amended in 1917, 1931, 1937, 1941, 1947, 1951 and 1953.[1] The Act of 1913 would appear to have been modeled after the Massachusetts law, but the form of the law was so greatly changed and revised in 1917 that the amended version virtually amounted to a substitute statute. In enacting this amendment in 1917 the Legislature used patterns adopted by other states and incorporated features not found in any other act.

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[1] Vernon's Revised Civil Annotated Statutes of the State of Texas, Title 130, Workmen's Compensation Law, Revision of 1925 with amendments through 1953, Vol. XXII, p. 66.

Summary of the Law

The Texas Workmen's Compensation Law is an elective act, which simply allows the employer and the employee either to accept or reject the provisions of the act. The employers who do not become subscribers, however, are deprived of the common-law defenses of contributory negligence, the negligence of a fellow servant, and assumed risk.

There was created an employer's insurance association to which any employer of labor in the state, with certain exceptions, might become a subscriber. Out of the funds of this association, which were derived from premiums on policies of liability insurance issued by it to subscribing members, the compensation payments provided for in the act are paid. This compensation, fixed by the act on the basis of the employee's average weekly wage, assures him upon suffering any personal injury in the course of employment, which incapacitates him from earning full wages for a period of one week, a certain specified weekly compensation payment. In the event of the death of an employee the act provides that designated beneficiaries or representatives of the workman are entitled to compensation. All compensation which is allowed by the act is exempt from garnishment, attachment, judgment and all other suits and claims.

There is also a provision in the act which allows coverage to be acquired from other carriers other than the Texas Employers' Insurance Association. Reports are required on the part of the employer and insurance carrier and the Attorney General is authorized to maintain suits to collect penalties which are assessed for failure to make these reports. Any employer of labor within the scope of the act may become a subscriber and by complying with the stipulations of the act, except as to certain specified claims for exemplary damages, be released from all common law or statutory liability he might incur from injuries suffered by his employees while in this service. The act does not cover, under any circumstances, domestic servants, farm laborers, ranch laborers, employees of employers who are employing less than three people, and the employees of those operating any steam, electric, street or interurban railway as a common carrier.

There was also created by the act and charged with its administration an "Industrial Accident Board" of three members whose duties are specifically defined. If a decision of the Board is not acceptable there is machinery or provisions in the act which provide for judicial review.[2] The preceding summary of the Texas Workmen's Compensation Act was provided in order to give the reader a general viewpoint of

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[2] W. M. McKinney, editor, Texas Jurisprudence, Vol. XLV, Workmen's Compensation, pp. 2-6.

the legislation. It is the purpose of the remainder of this chapter to discuss sections and parts of the act in detail. The information and material for this analysis will be taken largely from the act itself as this is undoubtedly the most authoritative source.

The Texas Employers' Liability and Workmen's Compensation Law is divided into four main articles or divisions. Article 8306 is concerned mainly with whom is entitled to compensation and compensable injuries. Article 8307 is concerned, almost in its entirety, with the composition and operation of the Industrial Accident Board. Article 8308 is concerned in its entirety with the formation and position of the Employers' Insurance Association. Article 8309 is concerned mainly with the defining of terms used in the act and some general provisions of the act.[3]

The last three articles of this act will not be discussed in the remainder of this chapter as the Industrial Accident Board and the Employers' Insurance Association will only be considered in this study from the standpoint of the claims administrative organization in Texas. Article 8306 will only be considered in detail form, from the standpoint of who is entitled to compensation, who is not entitled to compensation, what constitutes a compensable injury, and the amount of compensation benefits which are recoverable under

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[3]Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 66.

the act. With these facts in mind, we should then be prepared to consider the main object of this study -- the claims administrative organization of workmen's compensation in Texas.

Persons Entitled to Compensation

The main and primary objective of the compensation law is to provide certain compensation or benefits to employees or their dependents, in cases where the employees have received injuries in the course of their employment which resulted in disability or death. It is the "employee" who is primarily to receive relief under the provisions of the statute. In section one of Article 8309 the word "employee" is defined as follows:

> 'Employee' shall mean every person in the service of another under any contract of hire, express or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the visual course of the business, profession or occupation of his employer.[4]

The term "employee" also includes the legal beneficiaries of the employee when he dies. The term "employee" as used in this act also has a broader and more liberal meaning than the word "servant," as it is usually thought of in legal circles. The term "employee" may be applied to individuals whether they are doing manual labor, or in positions of management.

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[4] Ibid., p. 172.

The mere fact that an employee may have the duty of hiring and firing does not remove him from the provisions of the act, so long as he is in the service of another. In order for an employee to come under the terms of the act there must be a "contract of hire" which is made between the employee and the employer or their representatives. If a contract of employment is illegal and not enforceable the workman is not under a "contract of hire" and not covered by the act.

The act provides that minor employees may come under the jurisdiction of the act but it is the responsibility of the parents or guardian to look after their rights of compensation. When the act was first written minors were not permitted to receive compensation if they were injured on a job considered hazardous. It was against the law for them to be employed in an employment considered as hazardous. This has been changed, however, and they are allowed to receive compensation from injuries sustained in such employment. The amendment of 1931 reads as follows:

> A minor who has been employed in any hazardous or other employment which is prohibited by any statute of this State, shall nevertheless be entitled to receive compensation under the terms and provisions of this Act. Provided, that this section shall not be construed to excuse or justify any person, firm or corporation employing or permitting to be employed a minor in any hazardous or other employment prohibited by any statute of this State.[5]

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[5] Ibid., p. 98.

The law provides for compensation to the employee for injury resulting in disability only; for injury resulting in death the compensation is payable to his legal beneficiaries. The two remedies are separate and distinct even though they may flow from the same accident or injury. The right of an employee to receive compensation is personal, and he alone may settle his claim. The right of the beneficiaries to compensation, upon the death of an employee, is strictly to aid repair for the loss caused by the death. This compensation is not a part of the estate of the deceased and is not liable for any of his personal debts. The compensation is the exclusive property of the beneficiaries and is payable to them. This is not an inheritance right but is a designated statutory right.

The term "legal beneficiaries" as used in this law is defined in Article 8306, section 8A as follows:

> The compensation provided for in the foregoing section of this law shall be for the sole and exclusive benefit of the surviving husband who has not for good cause and for a period of three years prior thereto, abandoned his wife at the time of the injury, and of the wife who has not at the time of the injury without good cause and for a period of three years prior thereto, abandoned her husband, and of the minor children, parents and stepmother, without regard to the question of dependency, dependent grandparents, dependent children and dependent brothers and sisters of the deceased employee. . . .[6]

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[6] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 72.

It should be noted at this point that although "dependent grandparents" are mentioned there is no mention of grandchildren. The courts have consistently held that the words "children" and "independent children" refer only to legitimate children and so illegitimates may not receive benefits under the act. In this connection it has been observed that although the law should be liberally construed, this does not mean the courts are to encourage illicit relationships by granting compensation to illegitimate offspring. In this respect the Texas law differs from statutes elsewhere which generally provide for compensation to members of the deceased's family or household.[7] In one other portion of the act, Article 8306, section 17, it is pointed out that non-resident alien beneficiaries and resident alien beneficiaries are entitled to compensation. The law provides for the representation of such aliens by consular officers, and it authorizes the carrier to forward future installments of compensation payable to them, subject to the approval of the Industrial Accident Board.[8]

In conclusion we have seen that the law provides for compensation to the surviving husband, surviving wife, minor children, parents and stepmother without regard to the

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[7] Texas Jurisprudence, Vol. XLV, op. cit., p. 431.

[8] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 81.

question of dependency. As to grandparents, adult children and brothers and sisters, however, it must be shown that they were dependent before compensation can be recovered.[9]

Excluded Employments and Services

In viewing the discussion in the previous section of this study regarding persons covered by the act, it will be noted that the act provides:

> The provisions of this law shall not apply to actions to recover damages for personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, ranch laborers, nor to employees of any firm, person or corporation having in his or their employ less than three employees, nor to the employees of any person, firm or corporation operating any steam, electric, street, or interurban railway as a common carrier.[10]

As we have seen before, the term "employee" as defined by the act also expressly excludes, "masters of or seamen on vessels engaged in interstate or foreign commerce, and. . . one whose employment is not in the usual course of trade, business, profession or occupation of his employer."[11] The nature of these several excluded employments and the existence of other laws governing liability for injuries to railroad employees were doubtless taken into consideration by the legislature in exempting them from the act. This classification has been held

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[9] Texas Jurisprudence, Vol. XLV, op. cit., p. 435.

[10] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 66.

[11] Ibid.

to be not so arbitrary as to conflict with the equal protection clause of the Federal Constitution.[12] Employees which are excluded from the act, when they suffer injuries in the course of employment, must seek redress in accordance with common-law rules except where these rules have been changed by statute. It should also be pointed out at this time that employees who do not fall within the operation of the law cannot be brought under its operation by agreement but by statute only.

In general, where a claim is filed which indicates that the employee was injured in maritime work the admiralty courts have jurisdiction and it never comes before the Industrial Accident Board.[13] In this connection it is to be noted that the Federal Longshoremen's and Harbor Workers' Act provides for compensation for employees injured and dependents of employees killed in maritime employments. But the remedies given by that act are withheld where recovery may be had under the local compensation law, and not all persons engaged in unloading a vessel are entitled to recover under it, even though they are not covered by the local law.[14]

The original compensation law excluded "farm laborers". An amendment added in 1921 included the term "farm laborers".

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[12] Middleton v. Texas Power and Light Co., 249 U. S. 152 (1919).

[13] Texas Jurisprudence, Vol. XLV, op. cit., p. 442.

[14] Ibid., p. 443.

The Supreme Court later held, however, that the two terms were inseparable, and that the term "farm labor" included all agricultural pursuits.[15]

If an employer is engaged in two or more business pursuits, one of which comes under the act and one of which is not covered, he will still be subject to the act under the business pursuit which is covered. If the same employees are used they will be covered under one employment while a few hours later in another employment they may not be covered. As has been pointed out before that employers having less than three employees are not covered; it must be pointed out that the employees must be hired in and about the same job. It is not sufficient to show that the employer has one man working for him in one kind of business and another in a totally different business. The law was intended to protect employees engaged in the same business enterprise.[16]

What Constitutes a Compensable Injury

The Texas Workmen's Compensation Law terms "injury" and "personal injury" as:

> Wherever the terms 'injury' or 'personal injury' are used in the Workmen's Compensation Law of this state, such terms shall be construed to mean damage or harm to the physical structure

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[15] Ibid., p. 445.

[16] Lloyds Guarantee Assurance v. Anderson, 170 S. W. (2d) 312 (1942).

> of the body and such diseases or infection as naturally resulted therefrom.[17]

The basis of liability under the compensation law rests upon the above definition but this injury must have been sustained in the course of employment arising out of work being carried out for the employer. Generally speaking, no compensation is payable if the injury comes from a hazard which the employee would have faced, although apart from his employment. In short there must be present an element of causative danger which is associated with the particular type of work being done. All injuries which are compensable must have occurred during the scope and course of employment. If the employee at any time deviates from this pattern, any injuries sustained during this period are not compensable. The English Acts of 1897 and 1906 and most American statutes provide compensation for personal injury by accident, "arising out of and in the course of employment." As was seen by the definition, the Texas law does not use this terminology. It provides in Article 8309, section one, however, in defining injuries sustained in the course of employment, the following:

> All injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the premises or elsewhere.[18]

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[17] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 47.

[18] Ibid., p. 43.

The phrase "having to do with and originating in the work," is, according to the Supreme Court, in effect the same as the expression "arising out of the employment."[19] In another opinion commenting on whether a claim was compensable or not the court stated:

> An injury is not compensable unless it is shown that it originated in work of employer and that it was received while engaged in or about the furtherance of the affairs of the employer.[20]

To be compensable, therefore, it must be shown that the injury was received by the employee while engaged in the work or business of the employer and resulted from a risk or hazard which was necessarily or reasonably connected with the conduct of the business. It is not necessarily essential that the employee should at the time the injury was sustained have been doing some specific duty so long as whatever he was doing is incident to his employment. The statute makes the place of occurrence of the injury immaterial except as it throws light on what the employee was doing. He must, when injured, have been engaged in or about the furtherance of his employer's affairs and the injury must have originated in the business and had to do with it.

An injury may be compensable even though the employee acted by mistake or poor judgment, provided he was injured while in the course of his employment. In other words, an

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[19] Lehman v. Texas Employers' Insurance Association 259 S. W. (2d) 19 (1953).

[20] Insurers' Indemnity and Insurance Co. v. Lankford, 150 S. W. (2d) 288 (1941).

employee is not to be deprived of the benefit of the law because he used bad judgment in his effort to discharge his duty. This point is illustrated by the following decision:

> An employee who, in an honest attempt to discharge a duty assigned him, does an act incidental thereto not specifically directed, or departs from the usual methods of performing his work does not thereby necessarily deprive himself or his dependents of a right to compensation, if injured while so engaged.[21]

It is easily seen that the court will allow compensation to be paid in most cases if the injury is sustained in the course of employment which is incident to the duties of the employee. There are some specific exceptions to the term injury sustained in the course of employment, however, written directly into the law which are not compensable. These exceptions are as follows:

1. An injury caused by the act of God, unless the employee is at the time engaged in the performance of duties that subject him to a greater hazard from the act of God responsible for the injury than ordinarily applies to the general public.

2. An injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment.

3. An injury received while in a state of intoxication.

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[21] Texas Employers' Insurance Association v. Frazier, 259 S. W. (2d) 242 (1953).

4. An injury caused by the employee's willful intention and attempt to injure himself, or to unlawfully injure some other person, but shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere.[22]

Compensation and Benefits Recoverable

The compensation law specifically provides that compensation shall not be paid for an injury that does not incapacitate the employee for a period of at least one week. If incapacity lasts beyond one week compensation will begin on the eighth day after the injury. In the case that incapacity does not result at once "compensation shall begin to accrue with the eighth day after the date incapacity commenced."[23] The plain intent of this section is to fix the time of the accrual of compensation in every instance of compensable incapacity and the period for which compensation may be given is to be computed from the date of the incapacity rather than from the date of the accident. It follows that where an employee sustained an injury from which he was temporarily

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[22] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 406.

[23] Texas Jurisprudence, Vol. XLV, op. cit., p. 574.

incapacitated; the period of compensation would be computed from the eighth day after the total incapacity occurred, and compensation would be allowed for the full period permitted by the statute less the payments previously made for temporary incapacity.

The compensation to be paid to employees is for three classes of injuries, which may be classed as general, specific, and hernia. If the injury is general within the meaning of sections 10 or 11 of Article 8306, "incapacity for work is the stipulation upon which the right to compensation depends. If the injury is a specific one, provided for in section 12 of Article 8306, the right to compensation is absolute proof of the accidental occurrence of the specific injury. As to injuries of the first class the act provides that the compensation may be increased or diminished according to the conditions existing from time to time, while in the second class the rights of the parties are fixed immediately upon the occurrence of the accident responsible for the injury. The injury, hernia, has been called a specific injury. In order to recover the claimant must plead and prove the facts stipulated under section 12 b, Article 8306, which follow:

(1) That there was an injury resulting in hernia,
(2) That the hernia appeared suddenly and immediately following the injury,
(3) That the hernia did not exist in any degree prior to the injury for which compensation is claimed,
(4) That the injury was accompanied by pain.[24]

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[24] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 177.

General injuries.--General injuries are divided into two distinct categories. These two divisions are injuries which cause "partial incapacity", and injuries which may be classed as resulting in "total incapacity". Partial incapacity according to the act is defined as an injury which "in fact destroys or impairs ability to be as efficient or competent for work after the injury as before constitutes partial incapacity."[25] The compensation allowable for an injury classed as "partial incapacity" is as follows:

> While the incapacity for work resulting from the injury is partial, the association shall pay the injured employee a weekly compensation equal to sixty per cent of the difference between his average weekly earning capacity during the existence of such partial incapacity, but in no case greater than three hundred weeks; provided that in no case shall the period of compensation for total and partial incapacity exceed four hundred and one weeks from the date of injury.[26]

The court decisions in this state have given to the term "total disability" the practical and common sense meaning "that one is totally disabled when he is not, without injury to his health, able to earn his living by work and when his condition is such that common prudence and the exercise of ordinary care require him to desist from the performance of his duties."[27]

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[25] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 580.

[26] Ibid., p. 44.

[27] Maryland County Casualty Company v. Landry, 147 S. W. (2d) 290 (1941).

The Texas Workmen's Compensation law lists the injuries which are to be considered as permanent and total incapacity. These injuries as stated in the act are as follows:

(1) The total and permanent loss of the sight of both eyes.
(2) The loss of both feet at or above the ankle.
(3) The loss of both hands at or above the wrist.
(4) A similar loss of one hand and one foot.
(5) An injury to the spine resulting in permanent and complete paralysis of both arms or both legs or one arm and one leg.
(6) An injury to the skull resulting in incurable insanity or imbecility.[28]

The law fixes the maximum allowable compensation payments for the above "total incapacity" conditions in section ten, Article 8309 as follows:

> While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a weekly compensation equal to sixty per cent of his average weekly wages, but not more than twenty-five dollars nor less than nine dollars and in no case shall the period covered by such compensation be greater than four hundred and one weeks from the date of injury.[29]

Specific injuries.--Section twelve of Article 8306 of the compensation law specifically lists particular injuries which are referred to as specific injuries. Whenever the injury, sustained by an employee, is proved to be included in these specific provisions, the amount of compensation is determined by this section of the act and not the section relating to general injuries. Section twelve, of article

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[28] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 73.

[29] Ibid., p. 44.

8306, of the Texas Workmen's Compensation Act, is practically self explanatory in regard to specific injuries. This section of the act reads as follows:

> For the injuries enumerated in the following schedule the employee shall receive in lieu of all other compensation except medical aid, hospital services and medicines as elsewhere herein provided, a weekly compensation equal to sixty per cent of the average weekly wages of such employee, but not less than nine dollars per week nor exceeding twenty-five dollars per week, for the respective periods stated herein, to wit:
>
> For the loss of a thumb, sixty per cent of the average weekly wages during sixty weeks.
>
> For the loss of a first finger, commonly called the index finger, sixty per cent of the average weekly wages during forty-five weeks.
>
> For the loss of a second finger, sixty per cent of the average weekly wages during thirty weeks.
>
> For the loss of a third finger, sixty per cent of the average weekly wages during twenty-one weeks.
>
> For the loss of a fourth finger, commonly known as the little finger sixty per cent of the average weekly wages during fifteen weeks.
>
> The loss of a second or distal phalange of the thumb shall be considered to be equal to the loss of one-half of such thumb; the loss of more than one-half of such thumb shall be considered to be equal to the loss of the whole thumb.
>
> The loss of the third or distal phalange of any finger shall be considered to be equal to the loss of one-third of such finger.
>
> The loss of more than the middle and distal phalange of any finger shall be considered to be equal to the loss of the whole finger; provided that in no case shall bhe amount received for the loss of a thumb and more than one finger on the same hand exceed the amount provided in this schedule for the loss of a hand.
>
> For the loss of the metacarpal bone (bone or palm) for the corresponding thumb, finger or fingers above, add ten weeks to the number of weeks as above subject to the limitation that in no case shall the amount received for the loss or injury to any one hand be more than for the loss of the hand.
>
> For ankylosis (total stiffness of) or contracture (due to sears or injuries) which make the fingers useless, the same number of weeks shall apply to such

finger or fingers or parts of fingers (not thumb) as given above.

For the loss of a hand, sixty per cent of the average weekly wage during one hundred and fifty weeks.

For the loss of an arm at or above the elbow, sixty per cent of the average weekly wage during two hundred weeks.

For the loss of one of the toes other than the great toe, sixty per cent of the average weekly wages during ten weeks.

For the loss of the great toe, sixty per cent of the average weekly wages during thirty weeks.

The loss of more than two-thirds of any toe shall be considered to be equal to the loss of the whole toe.

The loss of less than two-thirds of any toe shall be considered to be equal to the loss of one-half of the toe.

For the loss of a foot, sixty per cent of the average weekly wages during one hundred and twenty-five weeks.

For the loss of a leg, at or above the knee, sixty per cent of the average weekly wages during two hundred weeks.

For the total and permanent loss of sight of one eye, sixty per cent of the average weekly wages during one hundred weeks.

In the foregoing enumerated cases of permanent, partial incapacity, it shall be considered that the permanent loss of the use of a member shall be equivalent to and draw the same compensation as the loss of that member.

For the complete and permanent loss of the hearing in both ears, sixty per cent of the weekly wages during one hundred and fifty weeks.

For the loss of an eye and leg above the knee, sixty per cent of the average weekly wages during a period of three hundred and fifty weeks.

For the loss of an eye and an arm above the elbow, sixty per cent of the average weekly wages during a period of three hundred and fifty weeks.

For the loss of an eye and a hand, sixty per cent of the average weekly wages during a period of three hundred and twenty-five weeks.

For the loss of an eye and a foot, sixty per cent of the average weekly wages during a period of three hundred weeks.[30]

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[30] Ibid., pp. 44-45.

This particular section of the act, after making provision for the specific injuries provides that:

> In all other cases of partial incapacity including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employee, compensation shall be determined according to the percentage of incapacity, the nature of the physical injury or disfigurement, the occupation of the injured employee, and the age at the time of the injury.[31]

The manner in which compensation shall be computed is then provided for as follows:

> The compensation paid therefor shall be 60 per cent of the average weekly wages of the employees but not to exceed twenty-five dollars per week, multiplied by the percentage of incapacity caused by the injury for such period not exceeding three hundred weeks as the board may determine. . . .[32]

This provision does not mean that the sum of twenty-five dollars is to be substituted for the amount of 60 per cent of the average weekly wages where that amount actually exceeds twenty-five dollars. Sixty per cent of the average weekly wages is to be first determined and then multiplied by the percentage of incapacity. The limitation is applicable only if the result exceeds twenty-five dollars. Some confusion has been apparent in the rulings of the court in which it has been held that the provision limited the 60 per cent of average weekly wages to twenty-five dollars per week.

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[31] Ibid., p. 46.

[32] Ibid.

The compensation is determined by multiplying this 60 per cent by the percentage of disability.[33]

Occupational diseases.--In 1947 the Fiftieth Legislature added a list of occupational diseases to the specific injury list. These occupational diseases, however, are not compensable as specific injuries but as general injuries. This simply means that if an employee suffers from one of the occupational diseases listed in the act he can receive benefits not exceeding twenty-five dollars per week nor less than nine dollars per week for a period of more than three-hundred weeks. If there is a period of partial disability followed by a period of total disability or vice versa the combined period of compensation cannot exceed four hundred and one weeks. The occupational diseases which are not listed in the compensation statute of this State are as follows:

> (a) Poisoning by: (1) Aluminum Trioxide; (2) Arsenic; (3) Benzol; (4) Beryllinum; (5) Cadmium; (6) Carbon Bisulphide; (7) Carbon Dioxide; (8) Carbon Monoxide; (9) Chlorine; (10) Cyanide; (11) Formaldehyde; (12) Halogenated Hydrocarbons; (13) Hydrochloric Acid; (14) Hydrofluoric Acid; (15) Hydrogen Sulphide; (16) Lead; (17) Magnanese; (18) Mercury; (19) Methanol (wood alcohol); (20) Methanol Chloride; (21) Nitrous Fumes; (22) Nitric Acid; (23) Petroleum or Petroleum Products; (24) Phospharus; (25) Selenium; (26) Sulphuric Acid; (27) Sulphur Dioxide; (28) Sulphur Trioxide; (20) Tellurium; (30) Thallium; (31) Zinc;
>
> (b) Anthrax caused by handling of wool, hair, bristles, hides and skins;
>
> (c) Blisters caused by prolonged or repeated use of tools or mechanical appliances;
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> (d) Synovitis, tenosynovitis, or Bursitis due to an occupation involving continual or repeated pressure on the parts affected;

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[33] Texas Jurisprudence, Vol. XLV, op. cit., p. 618.

(e) Chrome ulceration;
(f) Compressed air illness;
(g) Dermatitis, that is, inflamation of the skin due to oil, cutting compounds or lubricants, dust, liquids, fumes, gases or vapors;
(h) Diseased condition of the eyes due to electric arc and welding, and cataract in glass workers;
(i) Diseased condition caused by exposure to X-rays or radio-active substances;
(j) (Epitheliomatous cancer) or ulceration of the skin or of the corneal surface of the eye caused by tar, pitch, bitumen, mineral oil or paraffin or any compound, product or residue of any of these substances;
(k) Glanders and other diseased conditions caused by handling any equine animal or the carcass of any such animal;
(l) Infectious or contagious disease contracted in the course of employment in or in immediate connection with a hospital or sanatorium in which persons or animals suffering from such disease are cared for or treated;
(m) Nystagmus incurred in underground work;
(n) Asbestosis
(o) Silicosis[34]

Death.--In the preceding pages we have looked at various types of injuries and diseases which, under the Texas Workmen's Compensation Law, are covered and are compensable for the benefit of the employee. In an earlier portion of this chapter we considered the parties who could receive benefits from the law, which of course, were the employee and his beneficiaries in case of his death.

This section will be devoted to the amount of compensation the beneficiaries of a deceased employee may expect

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[34] Vernon's Revised Civil Annotated Statutes of the State of Texas, Vol. XXII, op. cit., p. 47.

to receive as a result of this statute. In section eight, Article 8306 it is stated:

> If death should result from the injury the association hereinafter created shall pay the legal beneficiaries of the deceased employee a weekly payment equal to sixty per cent of his average weekly wages, but not more than twenty-five dollars nor less than nine dollars per week, for a period of three hundred and sixty weeks from the date of the injury.[35]

The statute continues and points out regarding the death of an employee who has been receiving compensation for an injury, prior to his death the following:

> In the case death occurs as a result of the injury after a period of total or partial incapacity, for which compensation has been paid, the period of incapacity shall be deducted from the total period of compensation and the benefits paid thereunder from the maximum allowed for death.[36]

In the event that the deceased employee has no beneficiaries, the carrier or association must pay the burial expense up to a limited amount. This is illustrated by section nine of Article 8306 when it states:

> If the deceased employee leaves no legal beneficiaries, the association shall pay all expenses incident to his last sickness as a result of the injury, and in addition a funeral benefit not to exceed two-hundred and fifty dollars. Where any deceased employee leaves legal beneficiaries, but is buried at the expense of his employer or any other person, the expense of his burial, not to exceed two-hundred and fifty dollars, shall be payable out of the compensation due the beneficiary or beneficiaries of such deceased employee, subject to the approval of the board.[37]

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[35] Ibid., p. 44.

[36] Ibid., p. 72.

[37] Ibid., p. 73.

In the content of this chapter we have laid the foundation upon which the remainder of this study shall be based. It has been the purpose of this chapter to show in detail form, from the Texas Workmen's Compensation Act itself, who can receive compensation, who cannot receive compensation, what constitutes a compensable injury and the amount and types of compensation benefits recoverable under the act. If there was no conflict in the administration of the act this study would be complete but there are conflicts. In the process of administering the settlement of claims which arise under the act, we find many conflicts. It is in this area of conflict, between the varied parties involved in the settlement of claims, that the remainder of this study will be devoted.

CHAPTER III

THE CLAIMS PROCESS AND THE INDUSTRIAL ACCIDENT BOARD

In the preceding chapters of this study we have presented the historical development of workmen's compensation and portions of the Texas Workmen's Compensation Law. It was necessary to do this in order for the reader to become acquainted with the movement itself as well as to acquaint him with the act of the State of Texas which will now be considered in the remainder of this study from the standpoint of the claims administrative organization under the act.

The procedure under workmen's compensation claims administration involves provisions for the giving of notice of injury, the filing of claims for compensation and the adjustment of controversies. In this process we find three distinct groups; a governmental administrative body, the employer and employee, and the carrier or insurance company. These three groups are all affected by the court litigation in the settlement of contested or disputed claims. In this study the position of the court will not be considered as a separate unit but will be considered in the light of the part it plays in the claims process within each group. In this manner the position of the court will be more easily pointed

out and understood in the relationship that it holds to each group.

The broadest rule of liability for work injuries and the most liberal scale of benefits will not furnish the measure of relief that the legislature has in mind unless appropriate claims administrative means are provided to see that the benefits are paid in accordance with the law. In the United States today all workmen's compensation claims procedure is under the jurisdiction of an administrative system of which there are two types -- the commission or board type and the self-administrative or court type.[1] The commission or board type consists of a special administrative organization of three or five members which administers the law and exercises extensive powers with quasijudicial functions. It receives accident reports, investigates claims, settles disputes, hears cases, grants awards and issues decrees. The administrative body provided for in the Texas Compensation Law is the Industrial Accident Board. The remainder of this chapter will be devoted to a discussion of the position of the Industrial Accident Board in the claims administrative program of workmen's compensation in Texas.

Formation of Industrial Accident Board

While the Texas Workmen's Compensation Act stipulates that exclusive original jurisdiction shall be vested in the

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[1]Michel Backer, G. F. and T. M. Nial, Workmen's Compensation Insurance, p. 35.

Industrial Accident Board, it does grant to the courts the power to review the board's decisions on appeal. This simply means that the courts are without power to pass upon a claim for compensation in the first instance. There jurisdiction lies only by way of appeal from the board's decisions.

The Industrial Accident Board is a body of three members created for the purpose of administering the compensation law. The board performs quasijudicial functions but is not looked upon as a court but only as an administrative body. Its decisions are similar in nature to judgments but they do not have the force of judgments and can only be given effect by court action.[2] The members of the Industrial Accident Board are appointed by the governor biennially for terms of six years. The act states that one member of the board will at all times, be an employer of labor in some industry covered by the act. Another member shall be an employee covered by the act, and the third member shall be an attorney. The attorney is to act in the capacity of a legal advisor to the board as well as chairman.[3] The act authorizes the board to provide, maintain, and staff an office. The act, among other things, states:

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[2] Brown v. Dallas Railway and Terminal Company, 226 S. W. (2d) 135 (1949).

[3] Vernon's Revised Civil Annotated Statutes of the State of Texas, Title 130, Workmen's Compensation Law, Revision of 1925 with amendments through 1953, Vol. XXII, p. 66.

> The Board may appoint a secretary at a salary not to exceed $2700 a year and may appoint such other clerical and other assistants as may be necessary to properly administer this act. It shall also be allowed a reasonable sum, the amount to be determined by the Legislature, for clerical and other services, office equipment, traveling expenses and all other expenses necessary. The board shall be provided suitable offices in the capitol, where its records shall be kept.[4]

In short the aim of this type of plan is to establish a special tribunal where controversies can be adjudicated promptly without too much technical procedure. This type of system has proven the most efficient in the supervision of claim settlements due to the close contact of all parties involved.[5]

Powers of the Industrial Accident Board

While the Industrial Accident Board is generally thought of as a tribunal of limited powers, it has been granted sufficient authority to enable it to hear and determine all matters concerned with the enforcement of the act. The board may make necessary rules, subpoena witnesses, administer oaths and inquire into all matters of factual data required for the settlement of contested claims. In view of the quasijudicial character of the board it may also determine such legal questions as whether the claimant is covered by

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[4] Ibid., p. 226.

[5] E. F. Gallayher, "Methods of Administering Workmen's Compensation Laws," Bests Insurance News, Vol. LIV, No. 11, March, 1954, p. 18.

insurance, whether he was an employee or independent contractor, and whether he was injured in the course of employment.[6] The act also grants power to the board to inspect any books and records of interested parties, to punish persons guilty of contempt and to disbar unethical practitioners.[7] The board is authorized to require any employee who claims to have sustained an injury to submit himself for examination before it or someone acting under its authority. The refusal of the employee to submit to such examination shall deprive him of his right to compensation during the continuance of such refusal.[8] In addition to its general duty of passing upon claims for compensation, the board is required to keep suitable records of its proceedings and to supply copies of them to interested parties. Any party interested in a claim pending before the courts may be furnished upon request "a certified copy of any order, award, decision or paper on file in the office of said board."[9]

The policy of the compensation law requires that all claims will be handled as speedily as possible.

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[6] Commercial Casualty Insurance Company v. Hilton 55 S. W. (2d) 120 (1932).

[7] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 227.

[8] Ibid., p. 226.

[9] Ibid., p. 231.

In order to facilitate this procedure the legislature has provided that the procedure before the board "shall be as summary as may be under this law."[10] This simply means that the board is not governed by the rules of pleading and evidence that prevail in the courts. The board is free to act in its own way and to adopt such speedy and informal procedure as it may deem necesaary.[11] There is no jury in a board hearing and since review by the courts is through a trial de novo, as though no former trial had been held nor former decision rendered, no record is kept for appellate purposes.[12] While an award of compensation is usually regarded as a final order, not all orders of the board are of this nature. An order directing a claimant to undergo a hernia operation, for example, is not final nor binding upon the claimant.[13] An award or order determining a claim for compensation is in the nature of a judgment and until it is set aside by a court appeal, it is binding upon the parties, subject only to the board's power of modification.[14]

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[10] Ibid., p. 226.

[11] Federal Underwriters Exchange v. Samuel, 160 S. W. (2d) 61 (1942).

[12] Texas Employers Insurance Association v. Kimenez 267 S. W. 752 (1924).

[13] Texas Employers Insurance Association v. Marsden, 92 S. W. (2d) 237 (1936).

[14] Vestal v. Texas Employers Insurance Association, 285 S. W. 1041 (1926).

In other words the final award of the board not appealed has the same effect as a judgment of the court.

According to section Twelve 'D' of Article 8306 of the Texas Compensation Law, the board may, either upon its own motion or upon the application of any interested person who can show a change of condition, mistake or fraud, "review any award or order, ending, diminishing or increasing compensation previously awarded, within the maximum and minimum provided in this law, or change or revoke its previous order denying compensation." It seems to be settled that this provision was not intended to authorize the board to furnish a second trial of the same issues nor to enable it to correct clerical errors of law. There are suggestions in court decisions that the board has power to correct clerical errors, inadvertencies and mistakes which appear upon the record, in the same manner that courts correct their judgments by appropriate nunc pro tunc orders.[15] This point is illustrated in Blair v. Millers' Indemnity Underwriters when the court said:

> It seems to be equally well settled that until some party at interest has perfected an appeal, the Industrial Accident Board retains jurisdiction of the parties and the subject-matter, and can make any orders with reference thereto it thinks proper. The mere fact that the board corrects a clerical error in the award, after the claimant has brought suit to set it aside, does not require him to file a new notice of non-abidance and file a new suit.[16]

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[15] W. M. McKinney, editor, Texas Jurisprudence, Vol. XLV, Workmen's Compensation, p. 754.

[16] Blair v. Millers' Indemnity Underwriters, 220 S. W. 787 (1920).

The board's power to review its awards, however, is limited in several respects. In the first place, it applies only to awards and to orders denying compensation and has no application whatever to orders approving compromise settlements and the like. The courts have consistently stated: "An order approving a compromise agreement is not an award of compensation."[17] When an appeal is taken or a suit is brought to enforce an award the board loses its jurisdiction and its primary power is at an end. Once the insurer has paid the compensation ordered by the board in its award, it is powerless to impose a new liability upon the carrier.[18] It is also clear from the terms of the statute itself that the po er to review awards and orders may be exercised by the board only by showing of definite fraud, mistakes of a factual nature, or a change in the claimant's physical condition.[19] The compensation law does not authorize the board to review its award merely because the claimant is able to produce new evidence or additional evidence to establish an injury that has already been awarded compensation.[20]

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[17] Texas Employers' Insurance Association v. Watkins, 253, S. W. (2d) 536 (1952).

[18] Southern Casualty Company v. Boykin, 298 S. W. 639 (1927).

[19] Texas Jurisprudence, Vol. XLV, op. cit., p. 757.

[20] Associated Employers' Lloyds v. Gibson, 245, S. W. (2d) 738 (1951).

It is easily seen that once an award has been granted by the board that it is very limited in its powers to readjust a decision or award. There does not seem to be a fixed form which is followed by the board in an application for review. They sometimes completely revise the present award while at other times they simply amend the previous award. In any case, no matter what position or method the board may use in revising its decisions, it must immediately send to all parties involved a copy of its subsequent or revised award.

Procedures for Hearing Claims

The purpose of the Industrial Accident Board is to process and make an award in all disputed cases as rapidly as possible. The carrier must be given sufficient time for obtaining all the evidence needed for the hearing. The claimant after giving the required notice of injury to his carrier, which is any time not exceeding thirty days after the accident, files with the board a proper statement of his claim.[21] All that is required in the statement of claim by the claimant, is an intelligible statement of the matters in controversy, identification of the interested parties, a description of the injury in a general way, and a short summary describing the manner in which the injury occurred.[22]

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[21] Industrial Accident Board of Texas, op. cit., p. 10.

[22] Jarrett v. Travelers' Insurance Company, 66 S. W. (2d) 415 (1933).

The claimant may, when he files his claim, request that the board not conduct the hearing until it receives further notice from him. If the board is not directed by the claimant to withhold the hearing of the claim it will schedule the case for a hearing within eight weeks after receipt of the claim. The board schedules all hearings on Tuesday. If, when the claim is filed, no report of injury has been received from the employer, the board will immediately request the employer to file the Employer's Report of Injury form. If the Tuesday upon which a hearing is set happens to fall on a legal holiday or follows a legal holiday, the hearing automatically will be postponed until the following Tuesday. All interested parties will be given at least twelve days notice of the hearing unless the parties have agreed to waive notice and have advised the board to that effect. Notice of the hearing date will be mailed to the carrier upon the Carrier's Notice of Hearing and Statement form and to the claimant upon the Employee's Notice of Hearing and Statement form.

In order that the carrier will have opportunity to investigate the claim fully the notice of the hearing will be mailed to the carrier on the same day the claim is scheduled by the board. In the event the carrier fails to begin payments to the claimant four calendar weeks prior to the hearing the hearing will still be held. If, however,

the carrier begins compensation payments and the claimant is satisfied the hearing will be cancelled and the interested parties notified.[23]

In order that the board staff will have opportunity and sufficient time to consider all the information submitted by the parties in dispute, it is provided that:

> (1) The insurance carrier shall complete Carrier's Notice of Hearing and Statement and return it to the Board as soon as possible, but not later than the date set for the hearing of the claim.
> (2) The claimant, or one of the beneficiaries, if there be more than one, shall complete Employee's Notice of Hearing and Statement form and return it to the board as soon as possible, but not later than the date set for the hearing of the claim.[24]

Any information contained in the Notice of Hearing and Statement form, and any other written matter filed after the date a claim is set for hearing will, in most cases, be considered by the board in making the award if some reasonable excuse can be shown for the late filing. Oral testimony, however, can only be presented on the hearing date.[25] The board may hold hearings or take testimony at any point within the state, provided due notice has been given to all the interested parties. This is pointed out more clearly by the statute itself, which states:

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[23] Industrial Accident Board of Texas, op. cit., p. 11.

[24] Ibid., p. 12.

[25] Ibid.

> Said board or any member thereof may hold hearings or take testimony or make investigations at any point within this state, reporting the result thereof, if the same is made by one member, to the board, or it can employ or use the assistance of an inspector of adjuster for the purpose of adjusting and settling claims for compensation or developing the facts relating to any claim for compensation.[26]

The courts, along this same line, have consistently held that if all parties are not given due notice of the hearing and evidence is not received due to this omission, the award of the board will be nullified. This is pointed out more clearly by the statement of Chief Justice McDonald, of the Civil Court of Appeals in Fort Worth when he said, "When a party to a proceeding is not awarded notice of the hearing of the award is a nullity and the board may set it aside without notice."[27] While the burden of proof rests upon the claimant he is not required to use all the evidence at his disposal nor is he required to have all his witnesses present. The board is authorized to receive statements taken under oath as well as other evidence not admissible in courts of law.[28] Since the proceedings are informal the board is not bound by hard-and-fast rules. The duty of the board is to determine the facts of the controversy in the light of the law and the facts presented. This is pointed out very clearly by

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[26]Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 231.

[27]Fowler v. Texas Employers' Insurance Association, 237 S. W. (2d) 373 (1951).

[28]Texas Jurisprudence, Vol. XLV, op. cit., p. 749.

the statute itself in Article 8307, section four, when it states: "All rulings and decisions of the board relating to disputed claims shall be upon questions of fact and in accord with the provisions of the law."[29] The action of any two members on the board will constitute the action of the board.

In further consideration of this subject it should be noted that either party may cancel a hearing scheduled by the board or ask for a postponement. Many times a claimant will request a hearing and then, begin to receive compensation payments from the carrier. If at this time the two parties reach an agreement there is no need for a board hearing and at the request of both parties the board will cancel a hearing. It should also be noted that until a carrier has begun to pay compensation to the claimant it has no grounds whatsoever to ask for a postponement or cancellation of any board hearing.[30] The procedure the Industrial Accident Board uses in its operation is in many ways favorable to the claimant. This practice is in line with the wording and spirit of the statute itself.

As soon as possible after the hearing of a claim, the board will enter an award and it will become effective on the date of entry shown on the form. Copies of this award

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[29] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 227.

[30] Industrial Accident Board of Texas, op. cit., p. 13.

will be furnished to all the parties involved in the decision or dispute. If either party to a dispute can show good cause for delay the board will delay entry of the award not to exceed ten days. The board, in making a decision, will rely upon the parties to supply it information from which a fair decision may be reached. The following rules respecting the burden of presenting information will guide the board in making awards:

> (a) If the claimant or his attorney presents medical evidence, and the insurance company presents no medical evidence, an award in the case will be made on the basis of the evidence in the board's file on the date of hearing, unless the insurance company, on, or before the date of hearing, shows a good and sufficient reason to the board for its failure to file evidence in defense of the claim.
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> (b) If, on the date of hearing, no medical evidence is filed by the claimant or his attorney, the hearing on the claim will, without tracing, be cancelled from the board's docket without prejudice. Said claim will not be reset for hearing until medical evidence is furnished by claimant or his attorney, as the burden of proof is upon the claimant to establish his claim. Insurance carriers are also required to file medical evidence in each case.
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> (c) Original, carbons and photostatic copies of medical reports will be accepted by the board, but must show to have been personally signed in ink by the physician making same.[31]

Attorneys who represent claimants will be awarded their fees only when a power of attorney or other document filed with the board clearly identifies them. Unless it is otherwise stated, the attorney's fee will be the amount prescribed by the law. The law allows an attorney to receive

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[31] Ibid., p. 15.

15 per cent of the first one thousand and 10 per cent of any amount in excess of this sum. Attorneys representing claimants who want the board to authorize reasonable expenses in addition to the percentages authorized by the statute, must make a written request to the board for such consideration. In any event only those attorney's fees and expenses authorized by the board will be deducted from the amount awarded the claimant.[32]

In the event that an interested party wishes to have the award reviewed they must file the request with the board stating the reasons why they want the award set aside or modified. The board will set a date on which the request will be considered. Immediately after the meeting it will notify all parties concerned of its decision, whether to affirm, set aside or modify the previous award.[33]

The Industrial Accident Board and the Court

While the statute does not specify the form that an award shall take, the usual award states the following: (1) recite the giving of due notice of the hearing, (2) state the facts found concerning the injury and the resulting disability, (3) determine the compensation allowable and the manner in which it shall be paid, (4) order the insurer to

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[32] Ibid., p. 16.

[33] Ibid., p. 20.

make payment accordingly and provide for its release.[34] If the claim arises out of death the board usually designates the various beneficiaries and prescribes the policy or manner in which it will share the compensation.

An order denying compensation is generally quite short. It generally states the following:

> (1) Notice of the hearing, (2) states decision that claimant is not entitled to relief, (3) denies or dismisses the claim, (4) discharges the insuror from all liability.[35]

The content of a final order or award of the board is mentioned at this phase of the study, as without a final order or award, no appeal may be taken to the courts.[36] It might also be mentioned that while awards of compensation, orders denying compensation, and orders modifying awards are definitely final decisions, they are by no means the only final orders that the board issues. An order setting a hearing for a certain date, or an order cancelling a hearing is a final decision and is not appealable.

The statute outlines the manner of taking an appeal as follows:

> Any interested party who is not willing and does not consent to abide by the final ruling and decision of said board shall within twenty days after the rendition of said final ruling and decision by said board, file with said board notice that he will not abide by said final ruling and decision. And he shall within twenty days after

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[34] Texas Jurisprudence, Vol. XLV, op. cit., p. 750.

[35] Ibid., p. 751.

[36] Talley v. Texas Employers' Insurance Corporation, 48 S. W. (2d) 988 (1932).

> giving such notice bring suit in the country where the injury occurred to set aside said final ruling and decision and said board shall proceed no further toward the adjustment of such claim, other than hereinafter provided.[37]

The statute also provides:

> If any party to any such final ruling and decision of the board, after having given notice as above provided, fails within twenty days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto.[38]

Upon close examination of the statute it is seen that we have a statute of limitations upon which compliance is mandatory. Unless the notice is given within the proper length of time, and the suit is begun within a specified time, the court has no jurisdiction to review the case.

It is clear from the statute that an appeal may be prosecuted not only by the claimant and the insurer, but also by any person who was a party to the proceedings before the board. It is generally held, however, by the courts that a person who did not appear before the board is not to be regarded as a proper appellant, even though he may have interest of one kind or another in the award. Thus it is held that an inusrance company who issued the policy relied on by the claimant may not bring suit to set aside the award, if it was not a party to the proceedings before the board.[39]

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[37] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 228.

[38] Ibid.

[39] Texas Jurisprudence, Vol. XLV, op. cit., p. 764.

There are many questions of review and processes of filing, and effects of court litigation upon all parties involved in the appealing of decisions of the board. This chapter, however, is devoted to the Industrial Accident Board and its primary consideration in court litigation. In later chapters the position of the court in relation to other parties involved will be dealt with, but at this time in the remainder of this section we will consider only the effect of court litigation upon an award of the Industrial Accident Board.

The legal effect of bringing a suit to set aside an award is to divest the board of all jurisdiction over all parties and issues concerned. Since the court's power to act in a compensation case depends upon prior action by the board, it is clear that unless the board had jurisdiction, the court definitely has none. The filing of a suit to set aside an award brings all the parties and the entire controversy before the court. The court is invested with power to determine every issue involved regardless of whether these had been acted upon previously by the board. This is pointed out more clearly from a portion of a court decision itself which follows:

> The filing of a suit in the district court to set aside an award has the effect of transferring to that court all matters that have been presented to the board, whether acted upon or not.[40]

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[40] Texas Employers' Insurance Association v. Bradshaw, 27 S. W. (2d) 314 (1930).

The court, of course, has the power to award such compensation as it deems necessary so long as it is not in excess of the maximum allowed by the law. Since the jurisdiction of the courts in compensation cases is purely appellate the court has no authority to consider matters wholly foreign to the controversy before the board. The cause of action alleged in a suit to set aside an award must conform to the cause of action pressed before the board.[41] This simply means that one claim may not be made to the board and another different claim presented in the court of appeal.

Once a suit has been duly instituted in the proper court it is handled, generally speaking, as any other action conducted in court. Citation is issued and served, parties are joined and pleadings filed just as in any other suit. Since the verdict might be influenced if the jurors were allowed to know of the previous board's decision, it is a settled rule that they will not be informed of the previous decision either by introduction of evidence, pleading, or remark of counsel.[42]

It is provided in the statute that any order, award or proceeding of the board "when duly attested by any member of the board or its secretary, shall be admissible as evidence of the act of said board in any court of this state."[43]

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[41] Texas Jurisprudence, Vol. XLV, op. cit., p. 782.

[42] Ibid., p. 788.

[43] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., p. 231.

This does not mean that any and all papers involved in the board hearing may be received in a suit to set aside an award. It has been well settled that with the exception of certified copies of the employer's notice of becoming a subscriber under the act, that such papers are inadmissible as proof of any matter to be determined by the jury. The papers of the board hearing are permitted to be filed with the court only for the purpose of helping the court to determine whether it has jurisdiction of the controversy.[44] It is seen from the above that, as a general proposition, it is error to receive in evidence the findings of the board and if it is done it would be grounds for a reversal of the judgment.

Except insofar as the court is regulated by the specific provisions of the act, the trial of compensation suits proceeds under the same rules as any other type of litigation. It should be noted that it is the duty of the court to decide all questions of law but must submit all controverted issues of fact to the jury. The court is under no duty to submit anything to the jury in which there is no dispute. If there is evidence that the court may assume is true and it is not disputed, the court may instruct the jury accordingly.

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44 Texas Jurisprudence, Vol. XLV, op. cit., p. 824.

In this chapter we have viewed the Industrial Accident Board from the standpoint of its formation, its powers, its claim procedure and the effect of the court's decision upon its awards. Looking back on this one can easily see what a powerful instrument the court is in the claims' administrative organization of the Texas Workmen's Compensation Law. The board is probably the most important and yet the smallest part of the workmen's compensation program. It occupies a position of authority and yet, even it, must many times feel the strong arm of the court.

CHAPTER IV

THE CARRIER AND THE CLAIMS PROCESS

While there is no one aspect of insurance company performance which is completely representative, it is probably no exaggeration to say that companies, as a whole, are very much aware of the need for a high level of performance in claims work. One evidence of this awareness is the statement of principles initiated by the Association of Casualty and Surety Executives, showing the casualty insurance companies' approach to the aims and responsibilities of workmen's compensation. These principles should be viewed briefly prior to presentation of the position of the carrier in the claims procedure of workmen's compensation in Texas. The nine principles, in brief form are as follows:

(1) All legitimate claims should be paid promptly and fully.

(2) A frank and friendly attitude should be adopted towards all claimants. If there is any question of compensability, the claimant should be told of the insurer's position at the earliest possible moment.

(3) The best medical and surgical attention possible should be provided in those states whose laws permit the carriers to select the physician and surgeon.

(4) Only when necessary should cases go to hearings. Full use of informal conferences, where possible, should be made.

(5) Payments should be made directly to the beneficiaries. They should be made through the employer only when that method will expedite receipt of payment.

(6) Employers should be given every assistance in obtaining an adequate understanding of the proper operation of the workmen's compensation system.

(7) There should be complete cooperation with the agencies administering the workmen's compensation laws.

(8) Dishonest claims should be fought. It is a duty the carrier owes its policy holders, honest claimants, and itself. But intent to defraud should be clear before it is concluded that the claimant is dishonest.

(9) The great and exacting responsibilities of insurance companies in the proper, economical and efficient administration of workmen's compensation laws must be freely accepted by those engaged in claims management.[1]

The over-all performance of insurance companies may be very different in one state as compared with another because the state laws themselves are so different. There is a very intimate relationship between the law which defines the workmen's compensation act, the state body which administers the law, and the carriers who act as instruments of the administration in putting the law into effect. A liberal law, a good state administration, and a high level of efficiency in insurance company operation are likely to be found together, and the converse is equally true. In preceding chapters we have viewed the Texas Compensation Law and the Industrial Accident Board. In this section of this study,

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[1]Wex S. Malone, Workmen's Compensation Laws and Practices, p. 108.

we shall pass on to a detailed survey of the carrier's position in the claims administrative process of Workmen's Compensation in the State of Texas.

Authorized Carriers

As has been pointed out previously, any employer who desires to avail himself of the benefits of the compensation law may take out insurance against his liability to pay compensation. He may do this by becoming a subscriber to any authorized insurance association. The legislature has created a state agency known as the Texas Employers' Insurance Association for the purpose of granting insurance of this character. Employers, however, are definitely not confined to the use of this association alone, but are expressly permitted to obtain their policies from any licensed private company that is authorized to insure the payment of compensation in the State of Texas.

Texas Employers' Insurance Association

The Texas Compensation Law provides for the creation of the Texas Employers' Insurance Association as follows:

> The Texas Employers' Insurance Association is hereby created a body corporate with the powers provided in this law and with all general powers incident thereto.[2]

In its general structure the association is a mutual insurance association operating under a board of directors elected by the subscribers.

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[2]Vernon's Revised Civil Annotated Statutes of the State of Texas, Title 130, Workmen's Compensation Law, Revision of 1925 with amendments through 1953, Vol. XXII, p. 393.

It is charged with the duty of collecting premiums assessed under the rates fixed by the State Insurance Commission and paying from the fund, obtained through premiums, the just claims of employees.[3] The Governor appoints a board of directors consisting of twelve members who serve one year terms. Each director must be a subscriber in the association to become a member of the board of directors.[4] The board of directors elects a president and other personnel from among themselves as they deem necessary. Seven or more directors constitutes a quorum for the transaction of any business.[5] The board appoints an executive committee which has all the powers of the board. In any meeting of the subscribers each one has one vote. The term "subscriber" as used in this act simply means any employer who becomes a member of the association by paying the required premium for his coverage. If a subscriber has five hundred employees to whom the association is bound to pay compensation he may cast two votes. The subscriber will also be entitled to one additional vote for each additional five hundred employees, but under no circumstances may any one subscriber

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[3] City of Tyler v. Texas Employers' Insurance Association, 288 S. W. 409 (1926).

[4] Texas Employers' Insurance Association v. Russell, 91 S. W. (2d) 317 (1936).

[5] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., p. 394.

cast more than twenty votes. The association did not issue any policies until fifty members had subscribed who had more than two thousand employees. If the association ever drops below fifty subscribers and two thousand insured employees it will not be able to issue any more policies until this quota is again built up.[6]

While the courts have experienced some difficulty in determining the exact nature of the association, a majority of the decisions seem to agree that it is a governmental agency and not a private corporation within the meaning of the general laws regarding corporations.[7] This question appears to have arisen principally out of attempts by cities to tax the association's surplus funds, but in this area taxability seems to still be more or less unsettled. In one case it was held that they were not subject to such taxation, while in another this view was repudiated.[8] The association is, however, subject to the state tax upon premiums collected by compensation insurance carriers.[9]

If, for any reason, the reserves should prove to be insufficient, so that, at the end of any calendar year, there were not enough admitted assets in excess of unearned premiums sufficient enough to pay its losses and expenses, the

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[6] Ibid., p. 394.

[7] Middleton v. Texas Power and Light Company, 185 S. W. 556 (1916).

[8] Texas Jurisprudence, Vol. XLV, op. cit., p. 549.

[9] Texas Employers' Insurance Association v. United States Torpedo Company, 26 W. W. (2d) 1057 (1930).

board of directors may assess the subscribers for the deficit. In the event this situation arises the board of directors may divide the subscribers into different groups on the basis of their loss ratio. This is done for the purpose of making the deficit assessment. This is illustrated by the following court decision:

> The directors of the insurance association may distribute the subscribers into groups for the purpose of segregating the experience of each group as to premiums and losses and for the purpose of paying dividends payable to and levying assessments payable by the subscribers within each group. The board also has power to rearrange any of the groups by withdrawing and transferring subscribers.[10]

On the other hand, the board may declare dividends on the policies in force during each calendar year in which the premiums shall exceed the amount required to pay claims and expenses.

Private Insurance Carriers

When the Workmen's Compensation Law set up the Texas Employers' Insurance Association it also had in mind a legislative design to place all insurance companies seeking to issue policies under the terms of the act in the same position as the Texas Employers' Insurance Company. This was to include mutual and reciprocal companies, provided they had at least fifty subscribers having not less than two thousand

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[10] Texas Employers' Insurance Association v. United States Torpedo Company, 26 S. W. (2d) 1057 (1930).

employees,who lawfully transact a liability business in this state. Too, they were given the same right to insure the liability and pay the compensation provided for in this act as the Texas Employers' Insurance Association.[11]

When an insurance company willfully fails or refuses to pay compensation the Industrial Accident Board will notify it of that fact, and if the action continues the Commissioner of Insurance may revoke its license or permit. If the Association suspends or stops payment of compensation it shall immediately notify the board of that fact, giving the reasons for its actions. Carriers of compensation insurance are authorized to make and enforce reasonable rules for the prevention of injuries on the premises of subscribers. It is for this purpose that their inspectors are given the right of "free access to all such premises during regular working hours."[12] Neither the insurance association nor a private carrier may discriminate between employers entitled to be covered by the act. On the contrary, it is the duty of every insurer to accept any risk offered, regardless of the hazard. In short, insurers have no right to select one employer as a suitable risk and write him, and decline to write another employer qualified to carry compensation insurance.[13]

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[11] Fidelity Union Casualty Company v. Munday, 26 S. W. (2d) 676 (1930).

[12] Harris v. Traders' and General Insurance Company, 82 S. W. (2d) 750 (1935).

[13] United States Fidelity and Guarantee Company v. Nettles, 21 S. W. (2d) 31 (1929).

Compensation Insurance Policies

A compensation policy written under the provisions of the compensation law is a contract involving three parties, the insurer, the employer, and the employee. While this type of policy is said to be primarily for the benefit of the employee, it is also beneficial to the employer by relieving him from his common-law liability arising out of injury or death to his employees while in his service. The policy transfers the liability of the employer to the shoulders of the insurer or carrier.[14] If an injured employee recovers a judgment against his employer, the insurer must pay the amount of the judgment, plus costs, if the employer has complied with the insurer's regulations and has given timely notice of the bringing of the action.[15]

In order to bind the insurer, the agent acting for it must have either actual or ostensible authority to make the contract, or the insurer must later ratify the transaction.[16] As long as the agent confines his negotiations to matters within the scope of his authority his contract will bind the insurer. If, for example, he accepts an application requesting insurance to be effective as of a certain date, the insurer may not issue a policy as of a later date.[17]

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[14] Miller's Indemnity Underwriters v. Brdud, 270 U. S. 59 (1925).

[15] Trinity Lumber Company v. Ocean Accident and Guarantee Company, 206 S. W. 531 (1918).

[16] Maryland Casualty Company v. Seay, 56 Fed (2d) 322 (1917).

[17] Southern Casualty Company v. Freeman, 13 S. W. (2d) 148 (1928).

When the agent and the employer have agreed upon the type of policy that shall be issued, the employer will sign a written application and pay a deposit premium to the agent. The agent then sends both the application and deposit premium to the insurer for its consideration. If the insurer accepts the application the policy is issued and delivered to the employer.[18]

While an oral contract of insurance is generally lawful in Texas this situation does not exist in regard to compensation insurance. Agreements for compensation insurance must be in writing and contain all the provisions of the entire contract. This is illustrated by a quotation from a decision which states that "any contract or agreement not written into the application and policy shall be void and of no effect."[19] The general form of the policy is prescribed by the Insurance Commission, and no insurance carrier may use any other form in this state. Every contract or agreement of an employer within the act which is designed to transfer his liability to the insurer will be void unless the agreement also covers liability for the payment of compensation. This stipulation is specifically designed to

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[18] Traders and General Insurance Company v. Rhoda Barger, 93 S. W. (2d) 1180 (1936).

[19] Texas Employers' Insurance Association v. Jones, 70 S. W. (2d) 1014 (1934).

protect the employee from coercion between the employer and insurer. This is pointed out more clearly by the reasoning of the court when it said:

> The general rule seems to be that the subscriber and the insurer are not permitted to enter into such a contract of indemnity as will restrict the rights of an employee as they are declared by the compensation act.[20]

Insofar as the terms and provisions of the policy are not dictated by the law they express the agreement of the parties in such matters as the nature of the employment, the employees covered, the protection afforded, and the premium to be paid.[21]

While the policy must provide for the payment of compensation there is nothing in the statute to keep the employer and the insurer from broadening the scope of the contract so that it will cover other matters. Thus a policy may undertake to secure the employer not only against the payment of compensation, but also against the liability imposed by law. This is seen more clearly when the court stated, " a policy may cover the employer's liability both at common law and under the compensation act."[22]

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[20] Oilmens' Reciprocal Association v. Gilleland, 285 S. W. 648 (1926).

[21] Janes Contracting Company v. Home Life and Accident Company, 260 S. W. 839 (1924).

[22] United States Fidelity and Guarantee Company v. Bullard Gin and Mill Company, 245 S. W. 720 (1922).

As has already been intimated, neither the association nor a private carrier of compensation insurance has the power to fix the rates to be charged for protection. The statute imposes this duty upon the Insurance Commission, which is required to "make, establish and promulgate all classifications of hazards and rates of premium respectively applicable to each."[23] These rates must be the same for all carriers operating within the state. If a carrier issued a policy based upon a rate smaller than the one prescribed by the commission it would be contrary to the law and void.[24] Premiums are computed by applying the appropriate rate to the total pay roll. This easily shows that no exact calculation of the total amount of premium can be ascertained at the time the policy is issued but only an estimate can be made, based upon the present pay roll. It might be noted at this time that the employee, as provided by the act itself, does not pay any portion of the premium and if it is ever shown that the employer tried to collect any part of the premium from his employees he may be prosecuted. This is very clearly pointed out by the act itself when it states:

> It shall be unlawful for any subscriber or any employer who seeks to comply with the provisions of this law to either directly or indirectly collect of or from his employees, by any means or pretense whatever, any premium

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[23] Texas Jurisprudence, Vol. XLV, op. cit., p. 562.

[24] Bernard v. Fidelity Union Casualty Company, 296, S. W. 693 (1927).

> under this law, or part thereof paid or to be paid upon any policy of such insurance under this law which covers such employees, or any intended policy of such insurance deisgned to cover such employees.[25]

Compensation policies are construed according to the general rules for interpreting other insurance contracts. Since all relevant statutes become a part of the contract, a policy of this kind will be considered with reference to the compensation law. This simply means that:

> The insurance contract must be construed liberally in favor of employees as its beneficiaries, and applied in such manner as will more nearly and certainly accomplisy the full purpose of the act.[26]

While a compensation policy is usually written for a fixed period of time, it may terminate before the expiration of this period. For example when a co-partnership is dissolved in one of the ways recognized by law, the policy taken out by it automatically terminates and no longer protects the employees, even though a new co-partnership might be formed.[27] If when a policy is issued, the parties agree to insert in the policy a provision permitting either to terminate the contract upon giving a specified notice, the agreement will be allowed. This stipulation, however, must be approved by the Insurance Commission.[28] The parties to a policy may, by proper

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[25] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 197.

[26] Standard Accident Insurance Company v. Barrow, 47 S. W. (2d) 380 (1932).

[27] Traders' and General Insurance Company v. Emmert, 76 S. W. (2d) 208 (1934).

[28] Republic Reciprocal Insurance Association v. Ewing, 27 S. W. (2d) 270 (1930).

endorsement, modify it in any respect they choose, so long as they do not violate the statute.[29]

Liability of Carrier

The liability of the insurance carrier is fixed by the statute itself and is measured by the terms of the policy at the time of the injury. If the policy is a general one, the carrier is responsible for all compensable injuries suffered by the workmen in the usual course of the employer's business.[30] The carrier is also liable regardless of the hazards of the particular job or of its unusual or uncommon character.[31] The court has gone even further and held that although a policy provides that it shall not apply to injuries received while using certain machines, that this will not keep an employee from receiving compensation if injured while using the particular machine if the injury occurred in the course of the employer's usual business.[32] The carrier, of course, would not be liable if the injury had not been suffered while in the course of the employer's business. If an insurer has issued a policy covering

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[29] Commercial Standard Insurance Company v. De Hart, 47 S. W. (2d) 898 (1932).

[30] Standard Accident Insurance Company v. Arnold, I S. W. (2d) 434 (1927).

[31] Constitution Indemnity Company v. Shytles, 47 Fed. (2d) 441 (1918).

[32] Employers' Indemnity Corp. v. Felter, 264, S. W. 137 (1924).

workmen operating a cotton gin he cannot be held responsible for an injury suffered by an employee working in a box factory belonging to the same employer.[33]

Where the policy is limited in its application to a particular employment, particular plant, or to a particular factory the situation is different. In this case the liability of the carrier does not extend beyond the group specifically covered by the policy, and no employee not included within the group may claim benefits.[34]

The carrier is not ordinarily responsible for an injury suffered by an employee other than the subscriber's. The carrier also is not liable for any injury that occurred prior to the effective date of the policy. If there happens to be concurrent insurers they may, in a proper case, prorate the loss or liability. There is no occasion, however, for proration where the employer has taken out separate policies covering his several places of business. In a situation such as this each insurance carrier must stand any losses that occur under his policy, and cannot call upon his fellows for a contribution.[35]

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[33] United States Fidelty and Guarantee Company v. Bullard Gin and Mill Company, 245 S. W. 720 (1922).

[34] Southern Underwriters v. Beadmore, 95 S. W. (2d) 207 (1936).

[35] U. S. Fidelity and Guarantee Company v. Century Indemnity Company, 78 S. W. (2d) 737 (1935).

Medical Treatment

Another phase of liability that faces the carrier is the furnishing and payment of medical, hospital and similar services rendered to the injured employee. The Texas Compensation Law states:

> During the first four weeks of the injury, dating from the date of its infliction, the association shall furnish reasonable medical aid, hospital services and medicines.[36]

In order for the carrier to assume liability for hospital and other attendance it is ordinarily essential for the employee to plead and prove that the services were furnished during the first four weeks.[37] The statute, however, requires the carrier to furnish additional hospital services "during the fourth or any subsequent week of total incapacity requiring the confinement to a hospital."[38] Allowance for medical aid and hospital service after the expiration of the four weeks can only be obtained upon application of the attending physician to the Industrial Accident Board and the carrier. If the carrier fails to furnish hospital and medical services in accordance with the act, the employee

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[36] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 111.

[37] Indemnity Insurance Company of North America v. Garsee, 54 S. W. (2d) 817 (1932).

[38] Vernon's, op. cit.

may seek this service individually and the carrier will be liable.[39]

> The carrier is also automatically liable if the injured employee calls in any available physician or surgeon to administer first aid treatment reasonably necessary in the particular case. This has been liberally construed, as it has been held that an allowance was properly made for an emergency operation which required the skill of a specialist.[40]

Lump Sum Payments

It is evidently the purpose of the Legislature to require that in all ordinary cases compensation should be paid weekly so as to take the place of the wages which the injured workman was receiving. However, "where death or total permanent incapacity results from an injury," the liability of the carrier may be redeemed by the payment of a lump sum by agreement of the parties and approval of the Industrial Accident Board. In fixing a lump sum award the amount is based upon the present value of the total amount that would be received over the installment period under the provisions of the law for total permanent disability or death.[41] If the board approves or orders the carrier to make a lump sum settlement with the beneficiaries or the injured employee they are entitled to a 4 per cent discount, compounded annually, for payment before the claim was actually due.

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[40] Aetna Life Insurance Company v. Harris, 83 S. W. (2d) 1087 (1935).

[41] Texas Jurisprudence, Vol. XLV, op. cit., p. 688.

Inasmuch as the right to a lump sum settlement must be determined in each case by the facts, it is apparent that the claimant must be able to show that the case is a special one. The burden rests on the claimant or claimants to prove that hardships and injustice will result if the carrier fails to redeem its liability by the payment of a lump sum.[42] It is not sufficient to show that any other form of payment would work a hardship; thus, they are required to establish by the evidence that an "injustice" would result.[43] In the absence of any evidence that the case justified the payment of a lump sum award, the carrier's liability should not be redeemed in this manner.

Compromise Agreements

The statute provides that:

> Where the liability of the association or the extent of the injury of the employee is uncertain, indefinite or incapable of being satisfactorily established, the board may approve any compromise, adjustment, settlement or commutation thereof made between the parties.[44]

The liability of the carrier cannot be redeemed, in this manner, unless both agree to enter into it, and unless it

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[42] Ocean Accident and Guaranty Corporation v. McCall, 45 S. W. (2d) 178 (1932).

[43] Traders and General Insurance Company v. Wilson, 96 S. W. (2d) 420 (1936).

[44] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 231.

is supported by a consideration.[45] This agreement also must receive the approval of the Industrial Accident Board. A settlement between the insurer and the insured without the approval of the Industrial Accident Board is void and cannot be enforced in the courts.[46] Until the agreement has the approval of the board and until payment has been made the agreement has no force.[47] This type of an agreement and settlement has the same effect as a judgment and is binding on all parties unless in some way it might be legally set aside. Whenever a party to such an agreement claims to have been induced to execute it through fraud the court is the only forum to which he may go. Once the Industrial Accident Board has approved a compromise agreement it cannot be set aside upon any grounds.[48] It is easy to see from this that the court is the last resort in the process of setting aside a compromise agreement as the Industrial Accident Board has no jurisdiction to set aside such an agreement after approval.

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[45] Farris v. United States Fidelity and Guaranty Co., 251 S. W. 612 (1923).

[46] Woolsey v. Panhandle Refining Company, 97 S. W. (2d) 257 (1936).

[47] Traders' and General Insurance Company v. Bailey, 94 S. W. (2d) 134 (1936).

[48] Sullivan v. Maryland Casualty Company, 82 S. W. (2d) 1089 (1935).

The Carrier and the Court

The jurisdiction of the courts in compensation cases is of an appellate character and has been frequently compared to an appeal from a district or county court to a court of civil appeals. Since the trial must be de novo, it might seem that this type of proceeding could be more properly compared to an appeal from a justice of peace court to a county court. As in appeals of that kind, the court hearing a compensation case must hear and determine the issues as though no former trial had occurred nor former decision rendered. This simply means that in trying a compensation case a court is, in a sense, a court of limited jurisdiction.[49] This is true since the rights and remedies it deals with are derived solely from the statute.

There are several jurisdictional requisites that must have been met in order for any proceedings to occur at all, either by the board or later by the court. This is seen clearly when viewed in the words of the act which follow:

> Unless the association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty days after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within six

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[49] Texas Indemnity Insurance Company v. Pemberton, 9 S. W. (2d) 65 (1928).

> months after the occurrence of same; or, in case of death of the employee or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.[50]

This particular provision of the statute is mandatory, and it must be complied with in order for either the board or the court to have any jurisdiction.

The requisites of the insurer's pleadings will be governed in every situation by the particular circumstances of the case. If the insurer is the dissatisfied party it must, of course, initiate the proceedings. This is done by the filing of a petition which shows that the award was unauthorized or that the claimant is not entitled to compensation.[51] If the suit is brought by the claimant, however, the insurer may either simply file an answer to it or may file a cross-action. The insurer should plead that the injury occurredin the county where the court is situated, that a claim was filed with the board, that the board made an award or order, and that the amount in question is within the court's jurisdiction. If, however, these matters have already been pleaded by the claimant there is no need for repeating them. The insurer, of course is under no obligation

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[50] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 237.

[51] Georgia Casualty Company v. Campbell, 266 S. W. 854 (1924).

to plead that the claimant gave notice of his injury and filed his claim within the time allowed by law. The insurer is also not required to present negative facts that the claimant must prove as a part of his case. This is illustrated by a portion of the court decision which follows:

> An insurer suing to set aside an award is not required to plead that the claimant was not an employee within the meaning of the act, since the burden of proving himself entitled to compensation rests upon the claimant, and if he fails to discharge such burden, he cannot recover.[52]

The answer of the insurer may set up a special defense such as that the award had been paid or had been settled by a compromise agreement. The answer may, however, consist only of a general denial in which any matter that tends to defeat the claimant's course of action may be presented. Under a general denial the insurer may show that no incapacity resulted from the injury, that the disability claimed originated in other causes, or that the claimant was intoxicated at the time of the accident.[53]

It might be added at this time that although the insurer may have instigated the suit, the burden of proof in all litigation of this nature rests with the party who claims compensation. This fact is important as many times the

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[52] Galloway v. Lumberman's Indemnity Exchange, 238 S. W. 646 (1922).

[53] Traders' and General Insurance Company v. Williams, 66 S. W. (2d) 780 (1933).

court has left the impression upon a jury that the burden of proof rested with the insurer, which is of course, false. When a situation such as this arises the carrier will automatically appeal upon the grounds that the issues were submitted erroneously. This is illustrated from a decision in which this situation occurred. The court stated, "submission of issues held to be erroneous by reason of failure to show upon whom the burden of proof rested."[54]

The statute provides that once an award is made in favor of the claimant it is the duty of the carrier to take steps to set it aside or else to comply with the award. If the insurer does not contest the award and yet does not pay it, the claimant may instigate a suit to force payment. If a judgment is rendered against the insurer he is also liable for a 12 per cent damage fee upon the amount of the judgment plus the claimant's attorney fee.[55] The Insurance Commission upon the request of the Industrial Accident Board may also revoke the insurer's license when situations such as this arise.

There is a marked distinction between a suit to set aside an award and one to enforce it. A suit to set aside an award, as has been stated, is in the nature of an appeal.

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[54] Texas Employers' Insurance Association v. Lemons, 83 S. W. (2d) 658 (1935).

[55] Texas Jurisprudence, Vol. XLV, op. cit., p. 870.

An action to enforce an award, on the other hand, is an independent proceeding corresponding to a suit upon a judgment.[56] In a suit of this type the insurer is entitled to set up any facts that might constitute a defense. The insurer might state that the award which the claimant was attempting to enforce was an absolute nullity or that it had been modified or set aside. The judgment in a suit to enforce an award corresponds generally with judgments rendered in other civil actions. The court is authorized, in the event the insuror loses, to order immediate payment of the award, assess a penalty of 12 per cent as damages and allow a reasonable attorney's fee for prosecution of the suit.

It is with the completion of the discussion of the Industrial Accident Board, in the preceding chapter of this study, and the completion of the discussion of the carrier in this chapter that we find ourselves ready to undertake an analysis of the position of the employer and employee. The study of the employer and employee will be undertaken together as in the claims process as they, in many respects, face the same problems as a unit. It may seem strange to the reader that the employer and employee's status was not undertaken earlier. In many studies of workmen's compensation this pattern is definitely followed but in a

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[56] Texas Employers' Insurance Association v. Neal, 11 S. W. (2d) 847 (1928).

discussion centering around the claims administrative organization of workmen's compensation; it is necessary for the reader to see the units representing the employer and employee before a discussion of them would be possible.

CHAPTER V

THE EMPLOYER AND EMPLOYEE IN THE CLAIMS PROCESS

Workmen's compensation was the first type of social insurance to be developed extensively in the United States through a legislative program. Compensation legislation is designed to assure prompt payment of benefits to injured employees or to the dependents of those killed in industry, regardless of who was at fault in the accident. Before these laws were passed, if an injured worker sued his employer for damages he had to prove that the employer was negligent. Under the compensation law the question of fault or blame for the accident is not raised, since the cost of work injuries is considered part of the expense of production.

Workmen's compensation is of vital importance to labor as represented by the employee; to industry as represented by the employer; and to society generally as represented by the public. All three have a stake in workmen's compensation insurance. All workmen's compensation laws have one primary, humanitarian purpose: to provide certain and adequate benefits to injured workmen or to the dependents of workmen who are killed in the course of their employment.

The worker's stake is identical with the law's objective with only one important addition. It is, the law is concerned

with the amount of the benefits the worker receives, while the worker himself is also vitally interested in the promptness that he may expect to receive them. This, of course, includes all the weekly indemnity in dollars and services such as medical, hospital, and rehabilitation and accident prevention which tend to make his job safer.

Workmen's compensation is also the responsibility of industry. The law, although elective, is carried by many employers in one form or the other. This, of course, causes the employer to have a vital interest in the plan since he is entitled to receive his full "money's worth," for the insurance premium he pays. This means:

> (1) He has a right to be confident that his workers will receive their benefit checks from the insurance carrier just as promptly and regularly as they have received their paychecks from him as delays often cost money and good will.
> (2) He should know that the very best medical service will be provided for them. Indifferent medical service often means longer disability and higher cost.
> (3) He should be protected against dishonest claims; these will unfairly raise his premium rates.
> (4) At all times he should have the advantage of the expert, up-to-date safety knowledge of trained safety engineers. Fewer accidents mean not only reduced premium rates but also increased production and higher moral.
> (5) He should feel secure in the knowledge that his policy will guard him against damage suits arising when injuries to workers are not covered by the workmen's compensation act. A premium should pay for complete protection.[1]

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[1] H. R. Elbert, "Workmen's Compensation and Who It Serves," The Insurance Graphic, Vol. 87, No. 23, June 23, 1954, p. 13.

Viewing both the attitudes of the employee and the employer in their respective positions, it is easily seen that fundamentally, although they see it from different points of view, both worker and employer have exactly the same stake in workmen's compensation insurance. It is this similarity of positions that prompted this writer to consider the two as a unit in this study.

Election to Become Subscribers

Employers of labor may at their election become subscribers, or what might be termed consenting members to the general scheme of liability and compensation provided by the act.[2] The term "subscribers" includes not only employers covered by the insurance association created by the act, but also anyone who obtains insurance in any company "lawfully transacting a liability or accident business with the state."[3] The procedures and requirements of an employer who elects to become a subscriber are set out in detail in the statute itself when it states:

> Whenever an employer of labor in this State becomes a subscriber to this law, he shall immediately notify the Board of such fact, stating in such notice his name, place of business, character of the business, approximate number of employees, estimated amount of his payroll and the name of the insurance company carrying his insurance, the date of issuing the policy and the date when the same will expire, and whenever any

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[2] Middleton v. Texas Power and Light Company, 185 S. W. 558 (1916).

[3] Marshall Mill and Elevator Company v. Scharnberg, 190 S. W. 229 (1916).

> policy is renewed that fact shall be made known to the Board and the notice thereof shall contain the above facts. The association shall also report the same to the Board, giving the name of the employer, place of business, character of the business, approximate number of employees, estimated amount of payroll, date of issuance and date of expiration of said policy. Any employer or association willfully failing or refusing to make such report shall be liable for and shall pay to the State of Texas a penalty of not more than one thousand dollars for each offense, the same to be recovered by suit in Travis County by the Attorney General or by the district or county attorney under his direction in the district court thereof.[4]

Employees cannot be covered by the act unless the employer has complied with every requirement of the statute.[5] The act cannot be construed in order to permit an employer to cover part of his employees in the same employment and reject the others on the assumption that their duties were slightly different.[6] The situation is somewhat different, however, if the employer is engaged in two separate businesses. In this instance he may become a subscriber to one group and not become a subscriber to the other.[7] In any event, when an employer becomes a subscriber he must notify his employees of this fact. The law states:

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[4] Vernon's Revised Civil Annotated Statutes of the State of Texas, Title 130, Workmen's Compensation Law, Revision of 1925 with amendments through 1953, Vol. XXII, p. 66.

[5] Kampmann v. Cross, 194 S. W. 437 (1917).

[6] Employers' Indemnity Corporation v. Felter, 264 S. W. 137 (1924).

[7] Zurich General Accident and Fidelity Insurance Co. v. Walker, 35 S. W. (2d) 115 (1931).

> Every subscriber shall, as soon as he secures a policy, give notice in writing or in print or in such manner or way as may be directed or approved by the Board to all persons under contract of hire with him that he has provided for payment of compensation for injuries with the association.[8]

When the employee receives notice from the employer that he has taken out compensation insurance he may either accept or reject coverage as provided by the policy issued in compliance with the act. In any event unless the employee gives notice to the employer that he does not wish to be employed under the terms of the act he is bound by it and his rights are controlled by it.[9] If an employee enters the service of a subscriber or remains in it, after notice has been given by the employer that he has adopted the plan of compensation, the employee automatically waives any cause of action against the employer for injuries resulting in the course of his employment.[10] If, however, the employer has not given notice that he is a subscriber, the employee may exercise his common-law right of action to recover damages for injuries resulting in the course of his employment.[11]

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[8] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 396.

[9] Anderson-Berney Realty Company v. Soria, 67 S. W. (2d) 223 (1933).

[10] Scott v. Thompson and Ford Lumber Company, 291 S. W. 565 (1927).

[11] Poe v. Continental Oil and Cotton Company, 231 S. W. 717 (1921).

Exclusiveness of Remedy

All of our workmen's compensation laws are creatures of statutory action. The workmen's compensation laws are all based upon a departure from the common law. The theory upon which the workmen's compensation acts were adopted was to give a more humanitarian and economical system of compensation to the injured workman or his dependents in case of death. New rights, new remedies and new procedural methods were given and adopted by the legislative bodies of our country to make this new system of compensation for injured workmen function properly. The employee and his beneficiaries gained these benefits by making a sacrifice of the old common law and some statutory privileges. In this exchange of benefits the exclusive remedy theory arose.[12] This theory is clearly stated in the case of West Texas Utilities Company v. Renner.

> The whole scheme of our statute is one of reciprocal concessions by employer and employee. In return for the required payment of compensation for the accidental injury the employer is protected from suit at law for the negligent injury. Thus we have the reciprocal yielding and giving up of rights existing at common law for the new and enlarged rights and remedies given by the compensation act.[13]

The Texas Compensation Law which, of course, laid the foundation for the above decision states:

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[12] Albert L. Plummer, "The Exclusive Remedy Theory of the Workmen's Compensation Laws," The Independent Adjuster, September, 1950, p. 9, Vol. 15, No. 3.

[13] West Texas Utilities Company v. Renner, 53 S. W. (2d) 451 (1932).

> The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for.[14]

Under this provision of the statute, if an employer becomes a subscriber he is exempt from all common-law or other statutory liability for personal injuries suffered by employees in his service. This is true in all cases except in one instance where the employer may be held liable in exemplary damages. If the employee is killed through the gross negligence of the employer, his beneficiaries may instigate suit for exemplary damages against the employer.[15]

The court has held that although an employee does not wish to be covered by the act, but still retain his job; he automatically loses his common-law right to sue the employer for damages in the event of an injury. This is illustrated by a portion of the decision which follows:

> In becoming a subscriber under the law, the employer claims its benefits, and thereby voluntarily yields rights which he might otherwise have in substitution for those there

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[14] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 101.

[15] Castleberry v. Frost-Johnson Lumber Company, 283 S. W. 141 (1926).

> prescribed, and by entering or remaining in the service of an employer who has become a subscriber the employee voluntarily effects a comparable change of position.[16]

It is easily seen that both the employer and the employee voluntarily agree that certain rights and remedies existing under the common law shall not be in operation between them. The provisions of the compensation law governs their dealings, which in short simply means that the provisions of the law are a part of the contract of employment.

Claims Against Third Persons

In the absence of any conflicting provision of the act, the collection of compensation does not deprive the injured employee or his beneficiaries of the right to file suit for damages against a third person whose tort or wrongful action caused the injury.[17] The statute is quoted as follows on this point:

> Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the association for compensation under this law, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under this law.[18]

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[16] Oilmen's Reciprocal Association v. Franklin, 286 S. W. 195 (1926).

[17] City of Austin v. Johnson 204 S. W. 1181 (1918).

[18] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 377.

This portion of the statute does not, strictly speaking, make applicable the common-law doctrine of election. The language of the act, when considered as a whole, carries with it a continuing right in the compensated employee as against persons other than the employer.[19] In any event, the amount of compensation received by the employee must be credited upon the amount recovered from the negligent party, and only the excess of the damages over the compensation collected is recoverable.[20]

It might be pointed out at this time that the insurance company is automatically subrogated to the rights of the injured employee in the event that the employee is injured by a negligent third party.[21] The subrogation provision of the statute is constitutional, although it has been contested on numerous occassions.[22] It effects a subrogation of the insurance carrier to the rights of the employee or beneficiaries against all persons responsible for injuries creating a legal liability.[23] The right of subrogation depends on

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[19] Hanson v. Ponder, 300 S. W. 35 (1927).

[20] Texas Employers' Insurance Association v. Brandon 89 S. W. (2d) 982 (1936).

[21] Houston Gas and Fuel Company v. Perry, 91 S. W. (2d) 1052 (1936).

[22] Consolidated Underwriters v. Kirby Lumber Company, 267 S. W. 703 (1924).

[23] Texas Employers' Insurance Association v. Wylie, 19 S. W. 595 (1929).

the existence of a cause of action resting in the employee at the time he was injured and if there was no cause present there is no right of subrogation.[24]

Where the compensation insuror is not a party to the proceeding, the right of the employee or beneficiary to any recovery is limited to any excess damages not paid by the compensation insurance. If no damage was sustained in excess of the compensation paid there can be no recovery by the employee or beneficiary. If, however, the insurance carrier is a party to the suit and asserts its right of subrogation to be reimbursed, the judgment may be for the entire amount of damages sustained by the employee.[25]

In conclusion of this discussion of claims against third persons it might be in order briefly to mention a few of the persons who might be considered as negligent third parties within the meaning of the act. The court has held that an independent contractor may be liable for damages to another's employee who was injured through the negligence of the contractor or his agent or servant.[26] The compensation law gives an injured employee an independent right of action against a subcontractor, where his employer has sublet the whole or any part of the work to be performed.[27]

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[24] United State Casualty Company v. Rice, 18 S. W. (2d) 760 (1929).

[25] Mitchell v. Dillingham, 22 S. W. (2d) 971 (1930).

[26] Har Bour v. Graham Manufacturing Company, 47 S. W. (2d) 700 (1932).

[27] Aetna Life Insurance Company v. Otis Elevator Co., 204 S. W. 376 (1918).

The Texas courts have also recognized the right of an employee to recover against a physician, who treated him for injuries, and in doing so, caused additional injuries due to negligent treatment and malpractice.[28]

Actions Against Non-Subscribers

The Texas Compensation Law reads as follows:

> Employees whose employers are not at the time of the injury subscribers to said association, and the representatives and beneficiaries of deceased employees who at the time of the injury were working for non-subscribing employers cannot participate in the benefits of said insurance association, but they shall be entitled to bring suit and may recover judgment against such employers, or any of them, for all damages, sustained by reason of any personal injury received in the course of employment or by reason of death resulting from such injury, and the provisions of section one of this law shall be applied in all such actions.[29]

This provision of the compensation law applies to employers who have failed to give notice of their decision to become subscribers, as well as to those who have not taken out compensation insurance.

Section one, referred to in the above quoted provision, declares that:

> In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal

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[28] Hoffman v. Houston Clinic, 41 S. W. (2d) 134 (1931).

[29] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 68.

> injury so sustained, it shall not be a defense:
>
> 1. That the employee was guilty of contributory negligence.
>
> 2. That the injury was caused by the negligence of a fellow employee.
>
> 3. That the employee has assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the willful intention of the employee to bring about the injury, or was so caused while the employee was in a state of intoxication.
>
> 4. In all such actions against an employer who is not a subscriber, as defined hereafter in this law, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment.[30]

It is seen from this that if an employer does not become a subscriber under the act, he is liable to suits for damages recoverable at common law and is denied the rights of making what constitutes the common law defenses.[31] No other penalty is imposed by law upon an employer for failing to carry compensation insurance.[32] The employee, on the other hand, cannot recover against his employer except upon proof of the employer's negligence, or of negligence on the part of some agent acting within the scope of his employment. It must be noted, however, that these provisions do not abolish common-law defenses in suits against employers whose

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[30] Ibid., p. 66.

[31] Marshall Mill and Elevator Company v. Schavnberg, 190 S. W. 229 (1916).

[32] Scottino v. Ledbetter, 56 S. W. (2d) 282 (1933).

employees are expressly excluded from the terms of the act.[33] In short, the provisions of the act have no application whatsoever, except upon the employer who is eligible to its burdens and benefits.

The law leaves employers free to adopt the compensation plan or to remain ungoverned by it. If they choose to remain ungoverned by it, then they are deprived of the right in a suit by an employee for injuries to make use of common-law defenses. It is only necessary for an injured employee to show: (1) that his employer is subject to the act but failed to participate; (2) that the employer was negligent; and, (3) that this negligence was the cause of the injury in order to recover damages.[34]

Claims Defenses

We have already seen that in an action by an employee to recover damages for injuries sustained in the course of employment, an employer who is not a subscriber but is subject to the act may not defend on the grounds that the employee was guilty of contributory negligence. The same employer may not use as his defense the fact that the injury was caused by the negligence of a fellow employee, or that the employee had assumed the risk of injury incident to

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[33] Gordon v. Buster, 257 S. W. 229 (1923).

[34] Railway Express Agency v. Bannister, 46 S. W. (2d) 372 (1932).

employment.[35] The employer may, however, defend on the ground that the injury was caused by the willful intention of the employee to bring about the injury, or that it was received while in a state of intoxication.

The Texas Compensation law states:

> The term injury sustained in the course of employment, . . . shall not include. . . an injury received while in a state of intoxication.[36]

Under this provision of the law proof that the employee was intoxicated at the time of the injury is a complete defense to a claim for compensation.[37] Whether the employee was, at the time of the injury, in a state of intoxication is a question of fact, and if it is proved the court must render a judgment in accordance with this finding, regardless of whether the intoxication contributed to the injury. Under this interpretation it is possible in an accident where several employees are injured for some to recover damages while others are denied recovery because of the intoxication provision.

In another light previously referred to, it is seen that where an injury was caused by a negligent third party, the employee's right to compensation is lost by his settlement with and release of the wrongdoer. This, of course, is

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[35] McGuire and Cavender v. Edwards, 48 S. W. (2d) 372 (1932).

[36] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 406.

[37] Dill v. Texas Indemnity Insurance Company, 63 S. W. (2d) 1016 (1933).

not true if the release was not executed before the insurer paid or assumed to pay compensation. It is also stated in the statute that an employee cannot waive his rights to compensation under this act. This has reference only to an agreement made before an injury occurred or in short, a waiver of rights not yet occurred.[38]

The cause of action in favor of an injured employee is separate and distinct from the cause of action in favor of the legal beneficiaries. The employee, under no circumstances, can waive the rights belonging, in the event of his death, to his legal beneficiaries under the statute.[39] The amount of compensation, paid to the injured employee however, may be deducted from any compensation payable to the beneficiaries in the case of the employees'death from the same injury.

In a preceding chapter we discussed compensable injuries and divided them into three groups which were general, specific, and occupational. These groups of injuries are fairly well stable as to the amount of compensation which may be received in the event an employee is incapacitated by them. There are, however, other injuries which arise from time to time and are not so clearly defined as the general and specific injuries which we previously mentioned.

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[38] Jenkins v. Texas Employers' Insurance Association, 211 S. W. 349 (1919).

[39] Swdin v. Standard Accident Insurance Company, 81 S. W. (2d) 258 (1935).

There is no special classification for this type of injury and no settled rule to go by in order to be sure compensation will be allowed. We can refer to these injuries as perils of particular types of employments or injuries caused by common dangers in certain employments. In almost all cases it is indefinite and undecided whether to allow compensation or not. This author can only enumerate the various injuries in question and show what the preponderance of litigation has allowed. This, of course, cannot be taken as an absolute rule but only as a guide for future consideration. This type of injury has not been previously discussed as the very nature of these injuries, in most cases, is used as a defense against the claim itself.

We have seen in previous chapters that in order for a claim to be compensable the injury must have occurred during the scope and course of employment. The statute states that an injury sustained in the course of employment does not include:

> An injury caused by the act of God, unless the employee is at the time engaged in the performance of duties that subject him to a greater hazard from the act of God responsible for the injury than ordinarily applies to the general public.[40]

This provision of the statute is, of course, applicable only to injuries caused by an act of God. In order for an employee or his beneficiaries to receive compensation under

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[40] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 406.

this provision it must be shown that the employee was subjected to a greater hazard from the act of God than from a public hazard, and that it was the employee's duties that subjected him to this increased hazard.[41] Since sunstroke is an accident which will in most cases meet the above stipulations it has been considered compensable although contested many times. Injuries resulting from freezing have also been held to be compensable; but as always in claims of this nature the claimant must be able to prove that his case falls within the stipulations of the act.[42] In the case of injuries sustained through severe windstorms the compensability of the claim depends on whether the employee, in the performance of his duties, is subjected to a greater hazard from wind than the general public. In this light, it has been held that workmen on oil derricks are subjected to a greater hazard from wind than the ordinary public.[43] It has been held also that a workman employed on a dredge in waters where there are likely to be severe gales is subjected to an increased hazard.[44]

The court has allowed certain acts performed by employees while at work for their personal comfort to be

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[41] Traders and General Insurance Company v. Wimberly, 85 S. W. (2d) 343.

[42] Fidelity Union Casualty Company v. Arnold, 61 S. W. (2d) 90 (1933).

[43] Security Union Casualty Company v. Brown, 297 S. W. 1081 (1927).

[44] Southern Surety Company v. Stubbs, 199 S. W. 343 (1917).

compensable. Again it should be mentioned that the compensability of claims of this nature must be determined by the facts in each particular case. In this light an employee was allowed compensation who was injured while taking a bath. The employee was on twenty-four-hour duty and took the bath on the employer's premises.[45]

In many states compensation is denied for injuries resulting from horseplay by employees. In Texas, however, it is held that a reasonable construction of the compensation law permits, in some instances, recovery for such injuries. The court has said that in some groups of employees horseplay of some kind should be expected. Compensation was allowed for example, when a stage manager playfully discharged a pistol, supposedly unloaded, and wounded a stage hand.[46] In another case in which the question of horseplay arose the court stated:

> If the risk was reasonable incident to the employment and the claimant was injured in the course thereof, it is immaterial that the employees indulging in sportive conduct were acting beyond the scope of their employment.[47]

In the great majority of instances an employee performs his duties during prescribed working hours upon his employer's premises. If he is injured after working hours not

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[45] Southern Surety Company v. Shook, 445 S. W. (2d) 425 (1931).

[46] Cassell v. U. S. Fidelity and Guarantee Company, 283 S. W. 127 (1926).

[47] Standard Accident Insurance Company v. Stanaland, 285 S. W. 878 (1926).

on the employer's premises, and not performing work for the employer whether upon a public highway or elsewhere, the injury is ordinarily not compensable.[48] Not in all cases, however, are risks incidental to employment so specific as to time or place. The court has stated that the compensability of a claim does not necessarily depend upon the location of the injury.[49] In other words, the course of employment is not necessarily limited to the exact moment when the employee reports for duty nor to the moment when his labors for the day are completed, nor to the place where the work is to be done.[50]

The Texas statute gives a right to compensation only to employees who are hired within this state. At the same time the statute allows injuries to be compensable even though the injuries were received by employees while working in another state. In order for an injury to be compensable, however, it must have occurred within one year from the date the employee left the state. If, however, the employee recovers in the other state, either from an insuror or some other party, he has no claim on any party in this state for that particular injury.[51]

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[48] McClure v. Georgia Casualty Company, 251 S. W. 800 (1923).

[49] Lumbermen's Reciprocal Association v. Behnken, 246 S. W. 72 (1922).

[50] Federal Surety Company v. Ragle, 40 S. W. (2d) 63 (1931).

[51] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., Vol. XXII, p. 219.

Employer and Employee and the Courts

In the consideration of the employee and employer, in their relationship to the courts several factors previously brought out should again be brought to our attention. The courts have only appellate jurisdiction in the setting aside or enforcement of awards for compensation. The burden of proof to show cause for compensation always rests with the claimant. The courts when considering a compensation claim must interpret the statute in the light most favorable to the employee. The courts must conduct a compensation case as an entirely new trial, rather than reviewing the previous decision of the Industrial Accident Board.

Since resort to the courts completely nullifies the board's award, it is clear that, regardless of whom the plaintiff in the suit may be, the burden rests upon the claimant's pleading to show that the court has jurisdiction and that an award of compensation is called for by the statute.[52] This means, of course, that when the insurer files suit to set aside an award, the claimant may not ordinarily file an answer to the petition, but must file a cross action, stating the necessary facts and praying for compensation.[53] It is seen from this that whether the

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[52] Texas Reciprocal Association v. Leger, 77 S. W. (2d) 677 (1936).

[53] Texas Employers' Insurance Association v. Howard, 61 S. W. (2d) 132 (1933).

claimant is the plaintiff or the defendant, his pleadings must be essentially the same.

From what has been said above it is clear that the petition of an injured workman seeking relief in the courts must show the following:

> 1. That at the specified time he was in the employment of another;
> 2. That his employer was a subscriber to the act;
> 3. That he suffered the injury in the course of his employment in the county where the court is situated;
> 4. That a proper notice of the injury was given;
> 5. That a claim for compensation was filed within the statutory period;
> 6. That the amount of compensation claimed is a sum within the court's jurisdiction;
> 7. That the board heard and determined the claim and made an award;
> 8. That a notice of non-abidance was given within the time allowed by the law;
> 9. That suit was brought within twenty days after filing of the notice.[54]

If the claimant fails to plead any of the previously mentioned matters it is not necessarily fatal to the outcome of his case. If they were set out in the insurer's pleadings the claimant does not have to repeat them. The position of the employer in a proceeding of this type rests in the hands of the insurer.

In submitting the issues in a compensation case to the jury it is the duty of the court to present them in a

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[54] W. M. McKinney, editor, Texas Jurisprudence, Vol. XLV, Workmen's Compensation, p. 797.

specific and affirmative manner.[55] This simply means that the various contentions of the parties in question should be presented to the jury in a clear and direct manner.

The conduct of the trial is de novo, which does not allow either party to make any extended reference to the proceedings taken before the board.[56] The claimant's counsel, however, in his opening remarks may tell the jury that this case is before them because the insurance company is dissatisfied with the award.[57] The claimant's counsel may also state that a large premium had been paid the insurance company, even though the company contends that the claimant was not an employee of the insured, if there is some evidence that he was an employee.[58]

Except when the case is dismissed for jurisdictional reasons, the judgment in a compensation case is based upon the verdict returned by the jury.[59] If the verdict reveals that the case is not compensable, or that the claimant did

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[55] Liberty Mutual Insurance Company v. Boggs, 66 S. W. (2d) 787 (1933).

[56] Texas Indemnity Insurance Company v. McCurry 41 S.W. (2d) 215 (1931).

[57] Texas Employers' Insurance Association v. Little, 96 S. W. (2d) 677 (1936).

[58] Traders and General Insurance Company v. Parker, 91 S. W. (2d) 505 (1935).

[59] Associated Indemnity Corporation v. Torbett, 72 S. W. (2d) 1109 (1934).

not comply with the statute, the judgment must be rendered in favor of the insuror. If, however, it appears that the claimant has made out his case it becomes the duty of the court to enter a judgment for compensation within the terms of the statute. The amount of compensation will be determined by the character and extent of the injury and the average weekly earnings of the employee. A judgment awarding compensation is final as to the degree of injury, duration of disability, and to the amount of compensation to which the claimant is entitled.[60] A judgment dismissing the case for lack of jurisdiction or lack of evidence, or facts, however is not final. A judgment of this nature is not always binding on the rights of the parties and cannot be used as a defense in a subsequent suit on the same cause of action.[61]

We have seen from this discussion that the employer has little or no responsibility in a compensation case if he is a subscriber. The employee, which in all instances is the claimant, has several specified allegations he must prove in order for the injury to be compensated. If, however, his pleadings are adequate and he has followed the processes of the statute, he has little to fear in the outcome of a compensation case to which he is a party. The process of filing claims seem very complex but upon close examination

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[60] Federal Surety Company v. Cook, 24 S. W. (2d) 394 (1930).

[61] Associated Indemnity Corporation v. Torbett, 72 S. W. (2d) 1109 (1934).

it is easily seen that if an employee suffers an injury, while in the course of employment, he is almost certain to obtain the relief he is entitled to under the statute.

CHAPTER VI

SOCIAL AND ECONOMIC ASPECTS OF CLAIMS ADMINISTRATION

The claims administrative processes provided for in the Texas Workmen's Compensation Law have been viewed in detail in previous portions of this study. We have surveyed the various groups involved and the position they occupy in the claims administrative organization. We have not only seen this, but among other things have seen what constitutes a compensable injury, what benefits may be derived from the statute, and the position of the court in relation to the Industrial Accident Board, the carrier and the employee.

Any movement which affects as many people at so many different social levels is sure to leave its influence upon society. In previous chapters we have considered only the claims machinery itself and its operations. The significance of the claims processes, both social and economic, have never been mentioned. The value of any study such as this would be worthless unless the reader is allowed, not only to view the machinery itself but to see the position of importance workmen's compensation holds in the mode of living of the people it affects.

There is nothing new or revolutionary about an employer having certain responsibilities toward his workers. In the

days of the craftsmen and his apprentice, accidents to workers were comparatively few. Usually an employer had no more than two or three helpers and if one of them was injured, local public opinion made it the decent policy for an employer to give the workman a helping hand.

The Eighteenth Century, however, brought significant changes all over the world. The factory system developed and mass production and large-scale employment came into being. This change in technology brought with it the end, in most cases, of the personal relationship between the employer and employee. The change from tools to power-driven machinery brought about a tremendous increase in the frequency and severity of industrial accidents. Under these new conditions the question of who was responsible for an accident became the utmost of importance. The decision as to how much an employer should do for an injured employee came more and more to the attention of the courts.

The responsibility of the employer for injury to his employees was theoretically recognized in England and the United States under the common law. That law, as practiced by many of the states in this country, required the employer to provide safe tools; to enforce adequate safety rules; to use reasonable care in hiring; and, to instruct the employees as to the hazards of their duties.[1] These

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[1]Bureau of Labor Statistics, "Industrial Accidents," Monthly Labor Review, p. 8.

restrictions might seem to place a grave responsibility upon the employer. In actual practice, however, the injured worker had hardly any rights for injuries arising out of industrial accidents.

Under the common law the employer had three very important defenses.

> (1) Fellow-Servant Rule: An employer could not be held liable for injury caused by the negligence or carelessness of fellow-employees.
> (2) Contributory Negligence: The employer had no responsibility if the negligence of the employee contributed to the cause of the accident.
> (3) Assumption of Risk: This doctrine assumed that the employee had accepted all the obvious and customary risks of his occupation and that his wages had taken these into account.[2]

The employee, therefore, in order to recover had to establish negligence on the part of his employer.

In the latter half of the Nineteenth Century, as industry grew, the courts began to be jammed with cases involving injured workers and the widows of workers. Some states tried to modify or abolish the employer's defenses through new laws in order to increase the worker's chances for recovery. These new efforts failed as they were based on an unsound assumption that a personal blame could be fixed for every industrial accident.

Soon it became apparent that a great injustice was being done. The responsibility for injured workers was one

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[2] E. H. Downey, Workmen's Compensation, p. 41.

which must be borne by all industry and distributed to society as a whole. It was with this realization that the problem of the injured worker fell upon the doorstep of the insurance industry and the principles underlying insurance in general.

Of all the various kinds of economic undertakings few have greater importance than insurance. There is the closest connection between the social and economic problems of our day and this matter of insurance. A strong and vigorous man is in general able to take care of himself; but there are certain contingencies against which individually he cannot safeguard himself. Through association with his fellowmen, however, he can make economic provision for these circumstances. This is true because what may be a risk for the individual becomes a normal occurrence when great masses of people are taken into consideration. It is not necessary here to elaborate more fully this well known principle upon which insurance rests.

The important point is that society felt that the problem of the injured worker could be handled more effectively through insurance. For this reason insurance has been chosen as the instrument through which the shocks of the injured worker should be lessened and cushioned. This is no new phenomenon. Many countries which take a broad view of the economic situation and are moved by an earnest desire

to lessen suffering have promoted these aims by the extension of the scope of insurance.

Payment of Benefits

There is not any other phase of claims administration which is as important to all parties as the payment of benefits. We have discussed previously the amount of compensation an injured worker might hope to receive for various types and degrees of injuries. Now we will approach this subject from a different angle entirely.

The ends sought in the administration of a compensation law are the prompt and full payment of claims. Combined with this aim there is a desire for the inexpensive, speedy and equitable determination of disputes. This aim can only be achieved by an effective supervision of settlements and appropriate tribunals for adjusting controversies. In the case of most claimants a costly remedy is no remedy at all. Many times a delay in payment will be the same as a denial of justice to the disabled workman.

In Texas the statute requires prompt notification of an injury and early medical attention. The workman, however, cannot hope to receive a compensation check for at least two weeks and probably later. This delay is due to the fact that no injury is compensable unless it incapacitates the workman for at least one week. Compensation be[illegible]s to

accrue on the eighth day after the inception of the injury. Since compensation is payable on a weekly basis it will take two weeks from the time the injury is suffered before a compensation payment is due. Allowing for the claim to be processed it generally takes from fifteen to thirty days for the workmen's compensation payments to begin.[3]

The Problem of Cooperation

Another problem of a social nature which is essential to the payment of benefits is that of cooperation. The cooperation of employers is essential to an efficient claims procedure. This fact is true, as many times a delayed report of an accident will cause a slowed-up payment of benefits. The Industrial Accident Board has prepared a small pamphlet which contains all the rules that the statute requires of a subscriber. These rules are sent to every subscriber so he may know his responsibilities. Among other things employers carrying workmen's compensation insurance are required by law:

> To keep records of all on-the-job injuries to employees;
> To report to the Industrial Accident Board all accidents causing injury and absence of employees from work for more than one day;
> To report to the Board all notifications from employees of the manifestation of an occupational disease;
> To furnish to the Board reasonably obtainable information relating to any injury to an employee demanded by the Board;

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[3]United States Chamber of Commerce, Insurance Department, Analysis of Workmen's Compensation Laws and Coverages, p. 12.

> To make supplemental report on incapacitated employees either when they return to work or at the end of sixty days, whichever occurs earlier.[4]

This attempt by the Industrial Accident Board to clarify the aspects of the law by publishing its rules has probably, in some respects, aided the speeding up of compensation payments.

Cooperation on the part of the employer begins, not after the accident occurs, but when the policy is taken out. When the carrier's representative first contacts the prospective subscriber he should explain the policy fully. The carrier's representative should instruct the subscriber on how to obtain facts and make full and accurate reports of all accidents. Accurate reporting eliminates later delays and trouble.

Cooperation is not only a factor of importance to the employer and carrier, but these should both try to cooperate with the worker. Some industrial workers have little formal education and some of them speak little or no English. It is essential that every worker who is under the protection of the statute understand the benefits to which he is entitled and the circumstances under which he is entitled to them.

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[4]Industrial Accident Board, Rules of the Industrial Accident Board, p. 4.

Insurance carriers should also carry their contacts with employers through to contacts with workers. The representative who is responsible for making out reports of injury is instructed by carriers as to the importance of educating department heads and supervisors, who, in turn, must pass the information in the statute on to the worker. Workers must be told that neglect to report injuries not only may delay payments but also may result in delayed medical treatment.

Immediately upon receipt of the first report on an injury case, the board sends the injured employee a form letter. This letter explains his rights under the law, states his weekly wage as reported by his employer, and asks him to write the board if he has any questions.[5] When compensation payments cease, another report must be made, accompanied by a receipt from the employee and a report from his doctor if the disability has exceeded four weeks, or if the accident has resulted in a permanent condition.[6] The fact that the report shall state whether the incapacity lasted for longer than four weeks is due to a stipulation in the statute. This stipulation provides that if the incapacity lasts for four weeks or longer the claimant is

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[5]George Vail, "Tthics in Texas Adjustments," The Independent Adjuster, Vol. XVII, No. 3, p. 10.

[6]Ibid., p. 11.

due compensation from the date of the injury rather than from the eighth day after the injury.[7]

Many insurance companies have joined forces in a combined effort to keep standards in claims administration on a very high plane. This cooperation between companies was responsible for the creation of a nation-wide organization called the Combined Claims Committee. This committee is composed of home-office claims executives who come together from all parts of the country to discuss claim problems of mutual interest.[8] This cooperative effort is mentioned as several Texas Compensation insurors are members of the committee. Some of the Texas insurors, among others, who are members of the committee are as follows:

(1) Maryland Casualty Company
(2) Ocean Accident and Guarantee Corporation
(3) Republic Casualty Company [9]
(4) Travelers Insurance Company

Local organizations, called "Claim Manager's Councils," act as subcommittees of the Combined Claims Committee. At the present time there are nearly twenty of these councils in operation. One of the largest councils, located in

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[7] Vernon's Revised Civil Annotated Statutes of the State of Texas, Title 130, Workmen's Compensation Law, Revision of 1925 with Amendments through 1953, Vol. XXII, p. 66.

[8] Marshall Dawson, Problems of Workmen's Compensation Administration in the U. S. and Canada, S. W. Department of Labor Bulletin No. 672, p. 31.

[9] Ibid., p. 33.

Dallas, serves a great part of the southwest. The members of these councils are claim managers of insurance company branch offices. One of the main functions of the councils, as provided in their constitution, is that of promoting the prompt payment of benefits. Regional problems affecting the handling of claims are discussed by the councils, and steps are taken to correct difficulties. Questions which cannot be settled by the councils are referred to the Combined Claims Committee.[10]

Of all the factors which contribute to the prompt payment of benefits, perhaps the one most important and indispensable is good teamwork between state compensation officials and insurance carriers. In workmen's compensation, administration and accomplishment are practically the same. It has been proven time and again that neither can be achieved without the other. The close relationships between the compensation officials and insurance carriers is seen by the fact that at least 95 per cent of all compensation claims are settled by direct agreement between the parties involved without resorting to the courts.[11]

The home-office representatives of some insurance companies have been spending increasingly more time each year traveling throughout the country and visiting the

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[10] Ibid., p. 35.

[11] Albert W. Whitney, "Compensation Schedules of Awards," U. S. Bureau of Labor Statistics, Bulletin No. 212, p. 193.

boards and commissions of every state in which their companies write workmen's compensation. Executives of companies whose activities are confined to a single state pay regular visits to their state supervisors. Detailed reports of these meetings, which are sent to the home offices, indicate that much good is accomplished by these meetings.[12]

Problems which arise in the handling of claims are frankly discussed at the meetings with the administrative officials. If payments are slower than they should be or if contested cases are too numerous, the causes are thoroughly considered in an attempt to locate the source of the trouble. The importance of these friendly contacts, frank exchange of ideas, and constructive criticism cannot be overestimated. The closer relationships which they foster between the administrating parties cannot help but be of benefit to injured workers throughout the country.[13]

Competition

David McCahan said many years ago that, "competition, sanely regulated, has been the livelihood of insurance development in the past and is the surest pledge of advancement for the future.[14]

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[12] Charles B. Petrie, "Report on Compensation," The Weekly Underwriter, Vol. CLXX, No. 16, p. 967.

[13] Ibid., p. 969.

[14] David McCahan, State Insurance in the United States, p. 279.

A friendly rivalry between the various claims offices of an insurance company almost invariably results in a much better over-all efficiency record for the company and increased promptness in payment of benefits. There are several ways in which this spirit of competition may be put to constructive use.

Some carriers keep separate records for their claims offices which show the time taken to accomplish each step in the claims process. Other companies submit a monthly report showing the percentage of first payments made on time during the previous month. These records are compiled by the home office and distributed to its branches so that each office can see its relative standing. Naturally, each office is anxious to maintain as high a first-payment percentage as possible, and as a result they are constantly looking for reasons for delays and doing all they can to prevent them.

Competition and cooperation are thus two major factors recognized by both carriers and administrators as contributing directly to promptness in payment of benefits. These are not theoretical concepts. They have been put into practice and have proven to be successful. In short they are a workable means to a very desirable end which is the prompt payment of claims.

Contested Cases

Contested compensation cases constitute a serious problem for both carriers and state compensation officials. For the worker they mean uncertainty, and, whatever the outcome of the case, much delay.

Fortunately, only a small fraction of all compensation cases are contested. This is definitely one of the most beneficial effects of workmen's compensation laws. Under the old common law a large number of injury claims involved long-drawn-out legal contests in which the worker had the burden of proving negligence on the part of his employer.

The right to contest a claim, however, is guaranteed by the statute. If the injured worker and his insuror cannot agree on the settlement of a claim, the case is heard by the Industrial Accident Board. If they are unable to bring about a settlement, the case is then carried to the courts.

Insurance carriers have the first opportunity, and therefore the prime responsibility, for seeing that contests are avoided. One company reports that out of 83,500 compensation claims paid by it during the first ten months of 1944 it received only fifty-four suits. Another company had only twenty cases appealed out of 66,000 claims paid in 1944.[15] In such companies, field representatives compete to

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[15] Sam H. Griff and Ted F. Silvey, Collect Workmen's Compensation, p. 9.

keep down the number of contested cases, as part of their campaign for a better overall promptness record. Claims examiners in the home offices are requested to keep a careful check on all contested cases which appear to be unnecessarily brought to hearings.

Practically all writers on workmen's compensation seem to have the same opinion that is expressed by Frank Lang, who heads the Division of Research of the Association of Casualty and Surety Executives, concerning contested cases.

> (1) They should be few in proportion to the total number of claims.
> (2) Only a small fraction should be appealed to the courts.
> (3) The commission's original award should be upheld by the courts in a reasonably large majority of cases.[16]

The Claims Bureau

To fulfill their responsibility to the industrial workers and the insurance-buying public, insurance companies have organized a Claims Bureau. This organization was organized in 1929 for the purpose of combating fraudulent claims in all casualty fields.

The Claims Bureau has seven field offices located throughout the country. Investigations are made of fraudulent claims and unethical practices on the part of physicians and lawyers. In the Index Bureau, where more than a million cards are kept on file, general statistics are

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[16] Frank Lang, Workmen's Compensation Insurance; Monopoly or Free Competition, p. 69.

kept of claims throughout the country. The Bureau operates nation-wide. It has held fraudulent claims to a minimum.[17]

Medical Aid

Competent and adequate medical aid for injured workers is of the utmost importance to all parties concerned. It is important to the workers because on it depends the speed and degree of their recovery. It is important to employers and insurance carriers because they pay the bills. It is important to physicians because of the broad scope and rapid expansion of industrial medicine as a phase of medical practice. Finally, medical aid is of important to administrators, because their duty is to see that injured workers receive adequate and proper medical attention.[18]

The Texas statute allows the employee free choice of his physician but this discretion is subject to control by the compensation authorities in case of abuse. The statute allows reasonable medical aid, hospital services, nursing, chiropractic services and medicines. If, after the four-week period, medical attention is still required certification of such need is made by the physician to the Industrial Accident Board and the carrier. In no circumstances may this medical aid exceed ninety-one days from the date of

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[17] Ibid., p. 61.

[18] American Medical Association, Bureau of Medical Economics, Medical Relations Under Workmen's Compensation, Bulletin No. 127, p. 10.

injury. In the event, however, the injured workman is hospitalized due to a total or partial incapacity he may receive hospital services for one hundred and eighty days from the date of the injury. This lengthy period can only be obtained by the physician certifying and petitioning the board and carrier.[19]

The attitude of physicians and medical organizations toward the compensation law, the administrators, and the insurance carriers, has been an important factor in the operation of the compensation system. Because of the narrow limitation of payment for medical aid to injured workers provided by the early compensation acts, physicians complained that part of the burden of the movement was on their shoulders. In recent years the medical profession has gradually begun to realize the importance of workmen's compensation insurance to the field of medicine itself.

This change has been due to the increased benefits allowed in the statutes as well as the ease with which they are paid for their services. In the 1930's physicians often had trouble collecting bills for services to their regular patients. This problem has never faced the physician in the field of workmen's compensation.[20]

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[19] Vernon's Revised Civil Annotated Statutes of the State of Texas, op. cit., p. 43.

[20] Maurice T. Harrell, "Cooperation with Medical and Legal Organizations," The Weekly Underwriter, Vol. CLXX, No. 20, p. 1218.

Certainly the satisfying operation of workmen's compensation depends largely upon competent medical treatment of workers. The physicians must provide medical reports and in contested cases give unbiased testimony. The ability of compensation officers to have full cooperation of the medical profession in the compensation program is an important factor in administration.

The task of watching over the honesty of the injured worker and his physician has often over-shadowed the necessity of making sure the worker is receiving the best possible medical attention. The size of the claim is often watched more carefully than the condition of the worker. Texas has relieved much of this stress. The detailed structure of the statute itself has eliminated malingering to a large extent. Many states have not gone to the degree of care in their statute that Texas has experienced. The Industrial Accident Board keeps records of the duration of injuries and constantly uses them for comparative purposes when a claimant is suspected of malingering.[21]

Since the supervision of the cure of injured workers is often left to the insurance carrier; the attitude of this agent is of the greatest importance to the worker and to the state. This factor has seldom received adequate

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[21] U. S. Department of Labor, Claims Administration in Workmen's Compensation, Bureau of Labor Statistics, Bulletin No. 734, p. 84.

consideration in administrative studies. The insurance companies many times value a physician's skill on the witness stand more than his skill to practice medicine.[22] This attitude grew from the employer's liability insurance practice which was the predecessor of compensation insurance.

This attitude is not the attitude of the majority of companies. The carriers which have superior medical supervision connected with their claims offices point with pride to their high standard of performance and ethics. On the other hand, until fair medical supervision is practiced by all carriers, the report of unfairness on the part of any carrier will cause workers to look upon adjusters and doctors with suspicion.

The element of suspicion has consequently become a factor in the medical care of workers. In the absence of legislation imposing upon carriers minimum standards as to organization for service to injured workers, the solution remains in the carrier's hands. In this absence of co-operation to maintain standards of medical supervision some companies have acted upon their own initiative. Instead of making their medical supervision a subordinate feature of the claims department, they have set up their own medical department as a scientific-minded agency for supervision of compensation claims.

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[22]W. F. Dodd, Administration of Workmen's Compensation, p. 491.

Cost as a Factor in Administration

"Cost" is a relative, not an absolute, concept; it has no meaning except in relation to something. Even its meaning may vary according to the point of view. But, from the point of view of the intelligent consumer, cost nearly always means price in relation to value received. Every objective analysis must therefore take into account not only these two factors but also the points of view of both producer and consumer.

These principles are elementary in the fields of trade. In workmen's compensation, however, the failure to keep them in mind has been the cause of much confusion and distrust. In workmen's compensation, cost must be considered from the standpoints of both producer or administrator, and consumer or insured.

Administrative cost in workmen's compensation is complicated by the fact that it is twofold. There is the cost to the state of administering the law through the board and also the cost to the insurance carriers for providing protection. This situation undoubtedly has few parallels in the fields of trade. The manufacturer may decide what quantity he will sell in each package as well as what quality. In workmen's compensation the quantity is determined by the statute of state. Once determined it is then up to the carrier to provide the protection or quantity according to specifications. The

quality is to a large extent left to his own discretion. The employer who purchases compensation insurance is not only interested in the dollars-and-cents cost of the premium but also the value received in protection for the amount paid. This value involves not only the benefits to be provided in case of loss but also the way in which these are to be provided.

In Texas the rates for compensation insurance as well as rates of other insurance are made by the Texas Board of Insurance Commissioners at Austin. These rates are published and sent to every carrier writing workmen's compensation in Texas. Changes in rates which occur from time to time are sent to the various carriers.

Rate making is a very technical science, and the scope of this study does not permit a detailed explanation of the exact acturial processes involved. Reduced to its simplest terms, the procedure is more or less as follows.

The first step in making rates is to have some unit of measurement by which to compute them. This measurement is referred to as the basis of exposure. The basis of exposure chosen for workmen's compensation insurance is wages or pay roll.[23]

This unit was used not only because employers keep payroll records but also because workmen's compensation benefits

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[23]H. Husen, Workmen's Compensation in Texas, p. 221.

are stated by the law in terms of percentages of workmen's wages. Compensation rates in Texas are expressed as so much per one hundred dollars of payroll. In Texas this rate fluctuates between two and three dollars most of the time for employees in oil refineries.[24] This simply means that the employer pays two dollars insurance for each one hundred dollars he pays his workers in wages. The rate for oil refinery employees, of course, will not apply to other types of employments.

The commission determines the rates for different employees by classifying the occupations according to the degree of hazard. On the basis of long experience and careful study of rewards of deaths, injuries, and occupational diseases sustained in all types of business, a list of classifications has been devised in which all business operations are listed for rating purposes as to the degree of hazard they present.

The rate set by the Commission, on a particular classification does not necessarily represent the final rate paid by the employer. Two employers in identical types of business may have very different accident records, depending on methods of operation, safety consciousness, and other factors. In recognition of these differences a system of merit rating is applied that deducts from or adds to the

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[24] Ibid., p. 223.

base rate for the employer's classification. Compensation insurance rates, as we have seen, are scientifically determined, rigidly controlled, and applied in such a way as to encourage employers to reduce accidents.

It may be interesting at this point to note exactly what becomes of the premium income which is so scientifically determined. The distribution of the insurance dollar collected by the various companies in Texas of course will vary from company to company. There is, however, a definite breakdown that the majority of companies attempt to maintain.

The basic division most companies attempt to follow is roughly sixty cents of each dollar for losses and forty cents for expenses.[25] A recent survey, however, conducted by the National Council on Compensation Insurance seems to disprove these figures. This author will use the figures presented by the Council as of October 1, 1953. The Texas Board of Insurance Commissioners voted to join the Council in 1953, and for the last year has used its figures to compute the Texas rates.[26]

The normal conception of the breakdown of the compensation dollar is that fifty-nine cents is used for losses paid to or on behalf of the injured workman with forty-one

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[25] Lang, op. cit., p. 166.

[26] H. F. Richardson, "Workmen's Compensation Report," Bests' Insurance News, p. 65.

cents left for the insurance company. It is true that in the manual rates, forty-one cents is allotted for expenses of all descriptions including taxes. This forty-one cents supposedly allows the company two-and-one-half cents profit out of each dollar.[27]

The fact is, however, that a relatively small proportion of the compensation business is written at the base manual rate. This is due to the operation of premium discounts allowed by merit rating. The effect of these premium discounts is sufficient to depress the total premium collected by carriers by five-and-six-tenths per cent. This simply means the net premium is five-and-six-tenths per cent lower than the premium that would have developed had all the risks been written at manual rates.

This leaves the company with ninety-four and four-tenths cents out of each dollar to begin with instead of a one-hundred-cent dollar. This new dollar is divided with fifty-nine cents still going for losses but leaving only thirty-five and four-tenths cents for expenses, taxes and profit instead of the usual calculated forty-one cents.[28]

The carriers of compensation have been forced in recent years to accept a smaller premium dollar but a higher average

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[27] Ibid., p. 66.

[28] Ibid., p. 67.

claim cost. The Insurance Commission reports that the cost of each claim has increased from 1947 to 1951 from $45.41 to $60.36, or a yearly average of 6.6 per cent. A great deal of this expense is due to an increase of medical costs during the same period of 12 per cent.[29]

This increased expense is a bitter pill for the carriers to swallow. They do, however, have one bright spot concerning cost. Whereas the loss ratio for 1951 was 65 per cent, and for the first six months of 1952 was 64 per cent, a drop was noticed in the first six months of 1953 to 58 per cent.[30] This drop again places the carriers in a sound business situation, since their loss ratio is less than the percentage allocated for the payment of losses.

Industrial Accident Prevention

Industrial accident prevention is a vital aspect in the functioning of workmen's compensation. Important as the efficient handling of claims and medical aid is to the worker, it is even more important to stress the prevention of occupational accidents. It is always better to lock the stable before the horse is gone rather than pay for the horse after it is gone.

The benefits of industrial accident prevention are universally recognized. These include savings to the

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[29] Ibid., p. 65.

[30] Ibid., p. 66.

employer in terms of increased production, decreased overhead, decreased labor turnover, and savings in dollars through lowered compensation insurance premiums.

The responsibility of any carrier to aid in the prevention of industrial accidents is so widely accepted that the principle is never questioned. This responsibility has been well stated by McCahan:

> Safety heads the list of services which an insurance carrier should render its policy holders, since the elimination of accidents not only preserves the lives and bodies of employees, but by reducing the amount of money necessary for paying compensation benefits, ultimately decreases the cost of the insurance.[31]

There has been a continuous improvement in industrial safety conditions from 1913 to 1943. In fact, the worker to today has a better than two-and-one-half-to-one chance over his 1913 brother of never being exposed to an industrial accident that may take his life. During this period also, there has been a continuous decrease in the industrial accident severity rate. From 1931, when total severity figures were first available, until 1943, the severity rate has dropped from 1.72 to 1.20.[32]

Unquestionably, industry itself deserves very great credit for its contribution to this achievement. In thousands of plants, management, foremen and key workers,

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[31] McCahan, op. cit., p. 78.

[32] Ibid., p. 79.

have carried on sustained and effective safety efforts through the years. To them too much praise cannot be given.

Methods of Prevention

The simplest and most direct way of preventing accidents, caused by machinery, is by the use of mechanical methods of safeguarding. A serious hazard in older plants is that of exposed gears. Safety engineers have installed simple sheet metal guards to prevent contact with such types of gears. These guards have greatly lessened the hazard.

The prevention of accidents at the "point of operation," of dangerous machines is a difficult problem. The workman must be protected without interferring with the efficient operation of the machine. In such cases guards cannot be used. In these cases, too, it is frequently found that a machine may be redesigned so as to reduce the hazard.

Grinding wheels have always presented several types of hazards. The wheels themselves today are now covered with a steel hood to prevent the escape of fragments in case of breakage. The operator's eyes are protected from flying particles by a glass screen. This enables him to be protected and at the same time to be able to watch his work. Dust resulting from grinding is not allowed to enter the room but is carried away through a pipe by means of suction.

This type of mechanical safeguard is just one example of what industry itself does to eliminate causes of accidents brought about by machinery.[33]

Safety work, however, has become largely organized into three main spearheads of activity. These are:

> (1) Inspection, surveys, and consultation services for the assureds;
> (2) Research and laboratory work in accident hazards, occupational disease exposures, and work procedures to develop safer work environment and safer conduct of the individual in that environment;
> (3) Close cooperation with the National Safety Council and other agencies working for greater industrial safety.[34]

In 1948 when the President of the United States issued a call for action to reduce the number of industrial injuries and deaths, the response of the states and territories to this call was unprecedented. At the close of the conference in Washington in March, 1949, it was recommended that the Governor of each State call a safety conference.

The main objective for this movement was to have the job accidents reduced by 50 per cent by the end of 1952. At the follow-up conference held in Washington in June, 1950, it was reported that accidents in 1949 were 7 per

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[33] Michel Backer and Nial, op. cit., p. 381.

[34] Ferdinand Schnitzer, "Consequences of Industrial Accidents," Monthly Labor Review, p. 31.

cent less than those in 1948 which indicated that a good start had been made.[35]

Safety work on a large scale such as this is very costly. In a recent study the expenditures of insurance carriers doing business in Texas alone over a seventeen-year period, 1930 to 1947, were estimated at $68,000,000. This figure includes expenditures for inspection, literature, safety campaigns, and placement of on-the-job safety engineers. During 1943, insurance carriers throughout the country spent $20,000,000 for industrial accident prevention work. No other single agency has spent as much on industrial accident prevention as insurance companies.[36]

In accident prevention, insurance companies have been stimulated by competition and their unanimous desire to reduce compensation claims. The humanitarian aspects of accident prevention are self-evident. The value of these efforts has been increased by the combined knowledge and experience of each company. Their efforts have been applied throughout the nation, without any hindrance due to state boundaries.

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[35] R. E. Faricy, "Report of the Committee on Safety," Workmen's Compensation Problems, p. 198.

[36] E. E. Muntz, "Industrial Accidents," Review: Texas and Southwestern Edition, Vol. XXVIII, No. 5.

CHAPTER VII

CRITICISM OF THE TEXAS SYSTEM

Many times in the preceding chapters of this study the purpose of workmen's compensation has been mentioned. The object of workmen's compensation, in its simplest form, is to effect a more humanitarian and economical system for financing the loss suffered by employees when injured in the service of industry.

This study has been devoted, almost in its entirety, to the claims processes which operate as a result of the Texas Workmen's Compensation Law. The study has attempted to point out the various groups which participate in the payment of claims to injured employees. The various positions of each group have been pointed out from the statute itself as well as from court decisions illustrating the interpretation of the statute in the claim process.

We have seen the various types of injuries which have been classed as compensable and the statutory benefit for each. The promptness of payment and the waiting period stipulations have been pointed out.

The procedure of the courts in contested claims has been dealt with in regard to each group. The presenting of evidence, the conducting of the trial and the effect of a

judgment have all been reviewed as these affect the employee's recovery. The position and relation of the employee and employer have constantly been contrasted in reviewing the work of the Industrial Accident Board and the carrier.

The claims process in workman's compensation has been handled exactly as it actually functions. The process has not been criticized or commended at any point in the study. The various groups in exercising their functions have not been questioned as to their efficiency. The content of the statute has not been viewed in a critical nature.

With this in mind, the concluding chapter in this study will be in the form of a critical analysis of the study and weak features of the Texas system.

Coverage of Persons and Employments

In examining the coverage of workmen's compensation, the first thing to be considered is how the law of the state applies to various employments. In Texas the act is elective and does not cover all employments. Employers with less than three employees are not covered. Domestic servants, ranch hands, farm laborers, and employees of electric or steam railways are specifically excluded. The law covers workers outside the state if the contract of hire was made in Texas one year prior to the injury.

The fact that a state operates under an elective law is considered by most authorities to be undesirable. They

base this belief upon the fact that in many states having the elective plan it is estimated that only about half the employers subject to the law elect to come under its provisions.[1] The fear that compulsory laws would be held unconstitutional was the main reason most states first adopted the elective system. The cause for this fear concerning constitutionality, however, has long been removed. There is no reason today why each state cannot have a compulsory statute if it so desires.

A mine disaster in Kentucky points out the need for compulsory statutes. A few years ago a mine caved in and fifty-two miners were trapped. As a result more than a score of widows were compelled to seek aid from the Red Cross for relief. The employer had elected not to accept the workmen's compensation act.[2]

The compulsory type of statute is preferable both for employers and workers. Regarding employers, it stops unfair competition, and for the employees, it makes certain that injured workers will actually be paid benefits.

The exclusion of some employers as well as some groups of employees from coverage from the act has been criticized. Most states, including Texas, have some exclusions. The

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[1] U. S. Department of Labor, State Workmen's Compensation Laws as of December 1952, p. 6.

[2] Douglas A. Campbell, "Basic Principles of Workmen's Compensation," Workers Compensation Problems, Proceedings of Thirty-Fifth Annual Convention of International Association of Industrial Accident Boards and Commissioners, p. 119, U. S. Department of Labor Bulletin 96, (1949).

movement to make the statutes all inclusive has never met with too much success. The Texas statute seems more liberal than those found in most states in the matter of exclusions.

Injuries

When an employment has been brought under the law, the next important point to be considered is what kind of injuries are covered and how these must occur if the workers are to receive benefits. In Texas, injuries which arise out of and in the course of employment are in general thought to be compensable. The injuries are divided into specific, general and occupational diseases for the purpose of determining compensation.

The greatest gap in the coverage of injuries is the failure of nineteen states to provide compensation for occupational diseases.[3] Texas is to be commended for it provisions for occupational diseases. Not only has the Texas statute provided adequate provision in this field but its statute has been used as a model by many states in recent years in adding occupational diseases to their compensable list.[4]

The Texas statute prohibits any employee from signing away his compensation rights. This is important as in a

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[3] V. A. Zimmer, How Good is Your Workmen's Compensation Law, U. S. Department of Labor, Bulletin No. 70, 1944, p. 4.

[4] U. S. Department of Labor, op. cit., p. 7.

few states this practice is permitted. The practice of employers and carriers working together to influence employees to sign away their compensation rights was widespread in the early days of compensation.[5] Waivers are contrary to the basic principle of workmen's compensation protection. In effect they put the handicapped worker in the position of forfeiting his rights to compensation benefits, as the price of a job. The waiver system could well destroy or legally nullify a workmen's compensation act, if pursued to a logical conclusion.

A prolonged waiting period, or the time following an injury for which compensation is not paid, has the effect of limiting the coverage of injuries. The Texas statute provides for a waiting period of seven days. This simply means that compensation does not begin to accrue until the eighth day following the injury. This period of seven days is favored by a majority of the states. There are, however, eleven states in which the waiting period is less than this.[6]

Benefit Payments

Workmen's compensation laws are intended to provide a degree of security to the worker in case of injury received

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[5] Bernard S. Shientag, "Crime of Uninsurance Under Workmen's Compensation," Monthly Labor Review, U. S. Bureau of Labor Statistics, September, 1940, p. 130.

[6] Zimmer, op. cit., p. 5.

on the job; or a degree of security to his dependents if he is killed. Although this form of compensation is a substitute for wages, it was never intended by the law that it should equal wages and destroy the incentive to work. The purpose is strictly to ease or prevent hardship until the worker is able to go back to his employment.

After the waiting period is ended, compensation payments should be made on the basis of a percentage of the worker's weekly earnings. The National Conferences on Labor-Legislation have recommended that the scale for benefits should be 66-2/3 per cent of the average weekly earnings.[7] The Texas statute allows for 60 per cent of the average weekly earnings. This figure is not far from what the National Conferences on Labor Legislation advocate.

If this was the complete picture the position of Texas, in regard to other states, would be very favorable. Such, as was shown earlier, is not the case. Texas has placed a maximum of twenty-five dollars a week on its allowable benefits. Many workers make one hundred a week and over during certain periods of the year. Twenty-five dollars is definitively not 60 per cent of their weekly wages. This situation is one of the big faults of the Texas Compensation statute. It appears to give fairly liberal benefits but in

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[7] Ibid.

actuality these are very small in relation to those given in other states.

Even though the Texas statute has a fairly high percentage as a base for computation of benefits, many times workers receive less than one third of their wages as compensation. This low maximum does not allow the worker to maintain any form of standard of living except at the subsistence level. The minimum of nine dollars per week provided for in the statute is below subsistence levels in all cases.[8]

The length of payments for various injuries provided for in the Texas statute is also very low in comparison to other states. An example of this may be seen in that Wisconsin allows payments for five hundred weeks for the loss of an arm. The Texas statute only allows two hundred weeks of benefits for this injury.[9]

The benefit scale has been called the heart of the compensation system. The protection of the worker and his family rest upon the adequacy of the benefit scales. The claims machinery can award compensation by interpreting the act, but the provisions of the act itself serve as the basis for this process. If the stipulations of the act are not liberal the awards of the claims processes will surely not

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[8] Ibid., p. 7.

[9] U. S. Department of Labor, op. cit., p. 9.

be liberal. The situation of the Texas workman under the compensation statute is beyond question much better than it was under the common law, but in many cases the benefits have been so low that the injured worker has at times become dependent upon private charity or public relief.

Medical Care

The provision for medical care has the widest application of any feature of the workmen's compensation law. In the Texas statute virtually all injured workers may receive medical aid. There is no waiting period on medical attention; he is allowed the best. The employee may choose his own doctor if he desires; in many cases he uses a company doctor or one suggested by the employer.

The statute merely places a general limitation upon medical care in that it must be reasonable for the type of injury incurred. If the need for medical care lasts over a week and compensation begins to accrue; medical care will be available for the employee for the same period of time he receives compensation.

Texas, as does a majority of the states, now provides full medical aid. The fact has become widely recognized that expert and complete medical care is not only humane but economical. This is a generally accepted fact because expert medical attention at the time of the injury speeds recovery and lessens the chance of permanent disability.

Claims Machinery

In establishing the workmen's compensation system one of the main purposes was to provide a prompt, simple, convenient and inexpensive method of settling the claims of injured workers. This purpose has not been completely realized. Remedies provided through statutory administrative agencies have demonstrated their superiority over common-law remedies as determined by the courts.

Existing measurements of the kind of claim-settlement service now rendered by the state agencies show that there has been little change in performance since the survey made by the Bureau of Labor Statistics in 1920. Especially during the years from 1940 to 1945 there was a marked increase in the number of contested cases. This increase necessarily caused a widening lag in the payment of compensation.[10]

It has been said that the benefits actually received by the worker are not necessarily what the laws provide but are what the claims administration machinery delivers. In the legislative plan for setting up a compensation agency the crucial question is whether or not the administration should be given final authority. The answer to this question profoundly affects the routine of claim settlement. The

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[10] Marshall Dawson, "Claims Administration," Monthly Labor Review, p. 1321.

administration that is given final authority has a free hand in simplifying its procedure. If decisions are subject to court review it is necessary to develop a system that in appealed cases will furnish the courts an acceptable basis for the administrative decisions.

The Texas Statute is administered by the Industrial Accident Board. An administrative body such as this seems to be the most effective that has been designed. Practically all authorities on the subject of workmen's compensation feel that this type of agency is by far the most efficient. An administrative procedure which allows court appeals of board awards necessarily is more complicated than one which does not permit such appeals. The Texas statute has been fairly detailed in specifying the manner in which appeals may be taken to the courts. The statute has also been very specific regarding submissible evidence and the manner of pleading of both parties in a contested claim.

The Texas statute requires that the employer report all injuries which incapacitate a workman for more than one day. This is a very commendable feature. Under some laws and administrations the reporting of injuries by employers has been relaxed or omitted entirely. In a situation such as this not a wheel turns to pay the injured worker until he makes out and sends the administering authority an accident notice. Several states require the worker to obtain for the

administering authority the employer's and the physician's report, in addition to his own report or claim. As a rule, under such practices, the task of processing the claim for payment does not even start until about a month after the date of injury.[11] There must be a prompt program of injury reporting by the employer if payments are to be prompt.

All compensation authorities are constantly advocating an earlier first payment of compensation. In Texas the injured worker cannot hope to receive a compensation check less than two weeks from the date of the injury. This is not always practiced by carriers in severe cases in which it is evident that the workman will be incapacitated for over one month. In all other cases it is generally about three weeks to a month before the workman receives a check. Texas is not the only state that has this delay. Practically all states have waiting periods of from one to two weeks and this waiting period is the primary cause of the slow payment.[12]

The arguments supporting a waiting period are very strong and feasable. If there was not such a feature the administration would become flooded with minor injury claims. The cost of processing these claims alone would be greater than the claims themselves.[13] In severe cases, however, in

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[11]Dawson, op. cit., p. 1324.

[12]Zimmer, op. cit., p. 9.

[13]Zimmer, op. cit., p. 5.

which there is no doubt as to the amount and period of compensation the workman is entitled to receive; it would be feasible to have payments begin at once.

The procedure for hearing claims in Texas is relatively simple although frequently misunderstood. The fault does not lie in the statute itself but in the ill-informed workman. The employer as well as the carrier should inform the workman concerning the process of having his claim reviewed by the Industrial Accident Board. The board should notify each injured workman of his rights as soon as a report of his injury is received.

These difficulties could be removed by an educational program. This type of program would aid allthe parties involved. A great many employees have a feeling of distrust toward insurance companies. If the employee understood fully his rights under the statute the feeling of suspicion by most claimants would be removed. The elimination of this suspicion would facilitate as well as improve the existing situation in the claims process.

Security for Payment

One purpose of workmen's compensation laws is to make certain that the injured worker will receive his benefit payments. The Texas statute provides that any carrier which is authorized to do compensation business in this state by the Insurance Commission may write workmen's compensation.

Any company that wishes to enter the field of workmen's compensation must have at least fifty subscribers who wish to cover at least two thousand employees. This provision eliminates the possibility of an exceptionally small company from writing this type of coverage. The carrier, whose volume falls below this minimum must automatically cease to issue further policies.

The Industrial Accident Board tries to have hearings arranged for the convenience of the claimant. When the claimant requests certain special arrangements by the board, such as a special date for hearings, the board usually tries to oblige. Postponements are handled in the same manner. These are small considerations but they do aid the claimant in his effort to secure compensation.

The Texas Workmen's Compensation Act allows complete freedom of appeal from the decision of the board both upon questions of fact and law. This is followed by a trial de novo in the lower courts with further opportunity for appeals to the higher courts. A study of the cost to the workers of such appeals was made for the Texas Stated Federation of Labor. Tables prepared in that study show that in all the Texas Employers' Insurance Association cases appealed during 1940 to 1942, the board's award totaled $685,102, the court judgments $623,828, the claimant's legal expense $207,943, and the claimant's net recovery $415,885.

These figures, showing a loss of $269,216, seem to question the advisability of appealing a board's award.[14]

Many administrators seem to feel that the easy procedure for appealing compensation cases is a definite security for the claimant. This may be true but in view of the study referred to above it does not seem to be to his best financial interest. The greater number of claims which are appealed to the courts are decided in favor of the claimant. This does not mean that the judgment was larger than the award but merely that compensation is allowed and few claimants are denied compensation entirely.[15]

Conclusion

The conclusion of this study by no means concludes the story of the claims process in workmen's compensation. That story is an important part of industrial growth and presents a continually changing aspect. The Texas Compensation Law is constantly being amended, and carriers are constantly trying to expand and improve their services to employers and workers. This simply means that some of the facts in this study, though correct as they stand now, will inevitably soon be out of date.

Such frequent changes, while complicating the writing of factual information, are nevertheless important signposts.

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[14] Dawson, op. cit., p. 1336.

[15] Ibid.

They reflect credit upon all the parties involved who have tried to make the compensation movement one of progress.

The quality of performance cannot be measured on any statistical chart. No graph can measure the efficiency of a safety engineer whose studies may mean the difference between life and death. The performance of a claim adjuster who sees to it that an injured worker gets his check on the day it is due is not visible upon a chart. The difference between superior and average medical service cannot be shown in lines and figures upon a graph.

The disabled workers who receive prompt compensation checks; handicapped workers who support their families; workers who are well because they received medical attention all point to the progress of our claims administrative machinery. Not only these, but the thousands who are protected in Texas from industrial injuries, are monuments to the quality of service being rendered.

The energy necessary to achieve a high level of performance is not often self-generated. The incentive for such an effort must come from a variety of forces. This effort has been achieved by the combining of several groups into a common purpose. This purpose being the just and equitable settlement of workmen's compensation claims of injured workmen.

The employee has a right, according to law, to certain medical, surgical, hospital, and weekly indemnity benefits and to death benefits for his dependents. Administrators attempt to make his job safer, his chances of recovery greater and his security real while out of work. These benefits for the worker are rightfully his as measured by the social conscience of the Texas Workmen's Compensation Law.

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