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Unexplained Accidents and Assaults: the Problems and Burdens of Proof Under the Texas Workers' Compensation Statute

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UNEXPLAINED ACCIDENTS AND ASSAULTS: THE PROBLEMS AND BURDENS OF PROOF UNDER THE TEXAS WORKERS COMPENSATION STATUTE

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I. INTRODUCTION

Injuries to employees from accidents or assaults are certainly not uncommon bases for recovery under Texas Law.[1] Along with occupational diseases, these injuries form the principal causes for claims under the Workers Compensation Act [hereinafter cited as the "Act"].[2] Generally, the largest body of compensation law deals with accidents resulting in either temporary or permanent disability. Under certain circumstances, however, the issue of disability or eligibility for recovery is subordinate to the threshold inquiry of whether the accident is one which is, in fact, the subject of the Act or which may be attributed to activity not contemplated by the Act.[3]

Recovery for an injury caused by a third person is dependent

1. *E.g.*, Walters v. American States Ins. Co., 654 S.W.2d 423 (Tex. 1983) (claim for workers compensation benefits brought by survivors of an employee who had been shot and killed)..

2. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).

3. *Id.* The general statutory exceptions involve injuries sustained as a result of acts of God; assaults committed by third persons for reasons not arising from employment; injuries while intoxicated; and injuries resulting from the employee's intent to injure himself or another. *Id. See* Texas Employers Ins. Ass'n v. Gregory, 521 S.W.2d 898, 903 (Tex. Civ. App.—Houston [14th District] 1975), *rev'd on other grounds*, 530 S.W.2d 105 (Tex. 1975).

upon the reason for the third party's actions.[4] If unrelated to the employee's employment, the injury is not compensable; conversely, if related to employment, the injury is compensable. The problem arises when the identity and motivation of the assailant are unknown to both parties.[5] When the circumstances of the accident or injury sustained are largely unknown or unexplained, the problem of determining compensability is measurably increased.

The absence of the identity and motivation of the assailant suggest other problems as well, such as the extent to which death or injury can be accurately characterized as the result of an accident or an assault in the unexplained case. For instance, in some unexplained death cases the appearance of accident commonly associated with the risks attendant to the employee's work may well mask an intentional assault committed by another. Similarly, some apparent assaults may result in recovery because the circumstances of the assault may suggest a relationship to the employment as logically as to the lack of one. Allocation of the burden of proof in these problem situtations will ultimately prove determinative of whether recovery is authorized.

II. ACCIDENTS ARISING FROM THE COURSE AND SCOPE OF EMPLOYMENT

As a general principle, any injury sustained by an employee while acting in the course and scope of his employment is compensable under the Act.[6] However, the statutory definition of injury provides for certain exclusions to the general rule if the injury is

> Caused by the employee's wilful 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.[7]

The definition provides for a general principle favoring coverage ex-

4. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967), provides in pertinent part: The term "injury sustained in the course of employment," as used in this Act, shall not include: "(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." *Id.*

5. *E.g.*, *Walters*, 654 S.W.2d at 423.

6. American Gen. Ins. Co. v. Williams, 149 Tex. 1, 227 S.W.2d 788 (1950).

7. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(4) (Vernon 1967).

cept when the injury is the result of the employee's intention to injure himself or another. While there are other recognized statutory modifications of the general rule,[8] the definitional language provides a guide which broadly encompasses all injuries sustained by the employee while at work.

The types of limitations which restrict recovery for accidental injury do not usually involve a failure to establish the relationship between the injury-producing event and the employee's performance of duties encountered in employment, although that is generally the case in unexplained accident cases. Rather, the source of exclusion typically lies in failure to bring that relationship within the parameters of the Act. For instance, an injury sustained by an employee while going to or coming from work is generally excluded from coverage by the terms of the Act.[9] This is true even though a clear relationship between the injury-producing event and the employee's work can be demonstrated. Unless travel is a condition of employment or the transportation of the employee is provided for, paid for, or controlled by the employer, an injury sustained in travel generally is not compensated.[10] The concept of travel as a condition of employment, however, may be construed to include travel by the employee at the direction of the employer, even though regular travel is not an intrinsic feature of the occupation.[11]

The interplay between the travel exclusion and unexplained cases is suggested by the Texas Supreme Court's decision in *Freeman v. Texas Compensation Insurance Co.*[12] The employee in *Freeman* was essentially directed by his employer to travel to a polygraph examiner's office to be tested regarding allegations of misconduct by the

8. For example, article 8309, § 1(3) (Vernon 1967) excludes compensation for an "injury received while in a state of intoxication." *Id.* § 1(3).

9. American States Ins. Co. v. Caddell, 644 S.W.2d 884 (Tex. App.—Tyler 1982, no writ). *See* Southerland v. Christian, Inc., 629 P.2d 799 (Okla. Ct. App. 1981); *but c.f.* Note, *Injuries Sustained by an Employee While Traveling to and from Work are Compensable: and Within the Dual Purpose Exception to the Going and Coming Rule Where the Home has been Established as a Second Jobsite, the Business Purpose of the Journey is Concurrent with that of the Personal Purpose and There is an Incidental Benefit to the Employer—Bramall v. Workers' Compensation Appeals Board (Cal. Ct. App. 1978)*, 27 DRAKE L. REV. 769 (1977-78).

10. TEX. REV. CIV. STAT. ANN. art. 8309 § 1(4) (Vernon 1967).

11. *See* Texas Employers Ins. Ass'n v. Knipe, 150 Tex. 313, 239 S.W.2d 1006 (1951); Liberty Mut. Ins. Co. v. Nelson, 142 Tex. 370, 178 S.W.2d 514 (1944); Federal Underwriters Exch. v. Lehers, 132 Tex. 140, 120 S.W.2d 791 (1938); Consolidated Underwriters v. Breedlove, 114 Tex. 172, 265 S.W. 128 (1924); 1 A. LARSON, *The Law of Workmen's Compensation* § 16.10 (1984).

12. 603 S.W.2d 186 (Tex. 1980).

employee.[13] The court considered the employee to have been involved in a "special mission,"[14] undertaken at the direction of his employer, when he was killed in an automobile accident on his way from the examiner's office after the test had been completed. Under the facts of the case and characterization of the travel as a special mission, the court held the deceased's beneficiaries were entitled to recovery.[15] Normally, an employee on his way home from work would not have been entitled to the same consideration under the Act.[16] *Freeman* suggests, at least by inference, that the special mission concept may result in somewhat greater protection for the employee in returning home from a place other than his usual place of employment.[17]

A second aspect of *Freeman* concerns the unexplained nature of the employee's death. The traffic accident involved only the employee's vehicle and the defense suggested that the defendant had a suicidal intent, perhaps linked to the reasons for the polygraph examination.[18] The evidence, however, was considered insufficient to raise a defensive issue of self-infliction of the fatal wounds as an alternative explanation to accident for the jury's consideration.[19]

Another source of exclusion exists when the injury is the product of a random accident having been caused by a natural disaster. In this type of case, the injury is not the result of a risk to which the employee is subjected by virtue of his employment, rather, the risk of injury exists irrespective of any particular employment or the work of any individual employee.[20] It appears, however, that the consensus on this theory of exclusion is marginal and limited to those cases of

13. *Id.* at 191.

14. *Id.* at 192 (interpreting TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967), relating to the special mission concept). The *Freeman* court cited with approval: Texas Employers Ins. Ass'n v. Knipe, 150 Tex. 313, 239 S.W.2d 1006 (1951); Liberty Mut. Ins. Co. v. Nelson, 142 Tex. 370, 178 S.W.2d 514 (1944); Federal Underwriters Exch. v. Lehers, 132 Tex. 140, 120 S.W.2d 791 (1938); Consolidated Underwriters v. Breedlove, 114 Tex. 172, 265 S.W. 128 (1924). *See* 1 A. LARSON, *supra* note 11, § 16.10.

15. 603 S.W.2d at 193.

16. *Id.*

17. *Id.* at 192.

18. *Id.* at 193. The carrier sought to introduce at trial testimony by the deceased employee's former coworkers which purportedly demonstrated his suicidal tendencies. The supreme court held that these statements were properly excluded by the trial court as too remote in time to show suicide as a viable explanation for the employee's state of mind at the time of the fatal accident. *Id.*

19. *Id.*

20. This example contemplates injuries resulting from what are commonly called "acts of God" as well as those which are merely acts of nature.

true natural disater, rather than the majority of less significant actions common in nature. For example, in *Standard Fire Insurance Co. v. Cuellar*,[21] the San Antonio Court of Appeals held that a truck driver was entitled to recover under the Act for injury suffered as a result of an insect sting sustained while operating his truck. The court held that the bite originated in the claimant's employment, stating:

> The evidence establishes that the insect bite sustained by Cuellar resulted from the effort on his part to discharge in an orderly way the duties of his employment. He was stung while in the performance of his duties of employment, and he was subjected to this risk by carrying out his designated duties. We think it clear that the insect sting was a risk or hazard of his employment and is compensable.[22]

This expression of the relationship between the accident-causing injury and employment is characteristic of the courts' liberal interpretation of the compensation statute.[23] Nevertheless, it is clear that if the accident-producing injury can be termed a risk or hazard of employment in any sense, sympathetic courts will strain to find the connection and order compensation. For example, in *Deatherage v. International Insurance Company*,[24] the Texas Supreme Court held that an employee killed as a result of an apparent accidental fire was entitled to coverage under the Act when it was almost factually impossible to establish that the death occurred while the employee, a caretaker/security guard at an unused plant, was acting in the course and scope of his employment.

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21. 468 S.W.2d 880 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.).

22. *Id.* at 883.

23. *Cuellar* is not unique in interpreting the relationship of the accident to the employment liberally to support an award. A Colorado court, construing its statute in Kitchens v. Department of Labor and Employment, 29 Colo. App. 374, 486 P.2d 474 (1971), upheld an employee's award based on injuries sustained when a co-worker accidentally discharged his hunting rifle while both were awaiting transport to the job site provided by their employer. 29 Colo. App. at —, 486 P.2d at 475. Similarly, a worker injured by sniper fire—apparently unrelated to employment—from an adjacent building while at work was entitled to compensation benefits under the Kansas statute. Hensley v. Glass, 226 Kan. 256, 597 P.2d 641 (1979) (construing KAN. STAT. ANN. § 44-501 (1978)). Not all accidental shootings have been traced to hazards of employment, and awards in other cases have been denied. *See, e.g.*, West Tree Serv. Inc. v. Hopper, 244 Ark. 348, 425 S.W.2d 300 (an eye injury from the firing of a rifle by the employee before the employee had been ordered back to work following lunch held not to have arisen out of employment); Ward v. Halliburton, Co., 76 N.M. 463, 415 P.2d 847 (1966) (employee fatally shot by a jostled shotgun in his trunk as he was placing his uniform in his trunk held not compensable).

24. 615 S.W.2d 181 (Tex. 1981), *on remand*, 628 S.W.2d 209 (Tex. App.—Austin 1982, no writ).

The difficulties posed by cases in which the source of injury is unexplained arise primarily because of the difficulty many courts experience in attempting to ascribe to the employment situation the risk or hazard of a truly unexplained accident.[25] As long as the source of injury is known, the appellate courts can struggle with precedent in applying some standard to the determination of the work relationship of the injury-producing event to the employment. When the exact nature of the accident is unknown, however, a court is deprived of this starting point in the sequence, and the connection must be arrived at by means of presumption, if at all.

The unexplained accident case may arise in one of two ways. First, the nature of the accident itself may be unknown, thus providing no basis for understanding whether the accident could have arisen in the course and within the scope of the employee's employment.[26] Second, the nature of the accident may be determinable, but the causative factor remains unsolved. Thus, for example, in *Deatherage* the evidence demonstrated that the employee was killed in a fire. However, the origin, cause, and even the possible criminal reason for the fire were unknown to the claimant.[27]

Deatherage and *Freeman* serve to demonstrate another interesting aspect of the unexplained accident cases. Substantial case law has arisen in the context of conditions of employment which require the

25. The court of appeals, in ordering a new trial on remand following the Texas Supreme Court's decision in *Deatherage* observed:

> The requirements of the statute are not satisfied by proof that injury occurred while the workman was engaged in or about the furtherance of his employer's affairs or business. He must also show that the injury was of a kind and character that *had to do with and originated in the employer's work, trade business or profession.*

628 S.W.2d at 210 (emphasis added) (citations omitted). The court explained further:

> An injury has to do with, and arises out of the work or business of the employer, when it results from a risk or hazard which is necessarily, or ordinarily, or reasonably inherent in or incident to the conduct of such work or business. Compensation law protects the employee against the risk or hazard taken in order to perform the employer's task.

Id. at 211.

26. The difficulties inherent to unexplained death cases have given rise to the presumption that:

> When an employee is found dead at a place where his duties require him to be, or where he might properly have been in the performance of his duties, during the hours of his work, it has been said that in the absence of evidence that he was not engaged in his master's business, there is [sic] presumption that the accident arose out of and in the course of employment within the meaning of the compensation statute.

Scott v. Millers Mut. Fire Ins. Co., 524 S.W.2d 285, 288 (Tex. 1975).

27. 628 S.W.2d at 210-11.

individual employee to perform his duties in an isolated capacity. Two bodies of case law are apparent: one, which involves employees who work in the capacity of night watchmen or caretakers;[28] the other involving employees who are injured while traveling in the performance of their duties and suffer their accidents while alone.[29] These two general types of situations contain one common denominator: the injury-producing event occurs in a situation in which the injured employee is essentially alone and no managerial, fellow employee, or nonemployee witnesses are present who can provide direct testimony concerning the event.

A. *Special Cases—Night Watchmen and Caretakers*

Employees who are required to live on the premises of the employer or at the job site often perform their duties in isolation from other employees or managerial personnel because their function is to guard or watch property which is not in continual use by the employer.[30] As a consequence, injuries sustained by these employees may be difficult to trace to a particular risk or hazard associated with their duties because their duties will often encompass routine aspects of daily living. Larson, a leading commentator on the subject, expresses a general principle which recognizes this factor of the caretaker's employment activity:

> When an employee is required to live on the premises, either by his contract of employment or by the nature of the employment, and is continuously on call [regardless of whether actually on duty], the entire period of his presence on the premises pursuant to this requirement is deemed included in this course of employment.[31]

Deatherage looked to the policy underlying Larson's suggested rule and held that the fact of the employee's presence on the property conferred a benefit to the employer and, hence, the activity of the em-

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28. *See generally* 1 A. LARSON, *supra* note 11, §§ 10.32, 24.10, 24.32 (caretaker case law).

29. Injuries sustained while traveling are compensable only if the travel falls within one of the statutory exceptions to the travel exclusion. TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967); *Freeman*, 603 S.W.2d at 192. *See also Caddell*, 644 S.W.2d at 887 (injury or death occurring in the use of the public street or highways going to or from the place of enjoyment not compensable).

30. *See Deathereage*, 615 S.W.2d at 181 (Tex. 1981), *on remand*, 628 S.W.2d at 209. *See also* Gaona v. Industrial Comm'n, 128 Ariz. 445, 626 P.2d 609 (Ariz. Ct. App. 1981) (employee who lived on employer's premises for his own reasons, rather than the employer's convenience ineligible for workman's compensation benefits); Bourn v. James, 191 Neb. 635, 216 N.W.2d 739 (1974) (employee "on call" while living on employer's premises eligible).

31. 1 A. LARSON, *supra* note 11, § 24.00.

ployee resulting in injury was compensable under the Act.[32] This approach is extended to those employees who elect to live on their employer's property, as well as those ordered to live there, because the same type of benefit—enhanced security—accrues to the employer regardless of whether the employee's motivation for living on the property is elective or mandated by the employment contract.

Several other decisions have involved unexplained deaths or injuries suffered by employees when performing as watchmen or caretakers when the deaths or injuries were apparently inflicted by assaultive acts.[33] In those cases, the Texas courts have followed a general course of holding recovery proper if the assault was not demonstrated to have been the result of personal animosity between the employee and a third person, and the employer enjoyed some benefit from the employee's presence on the property.[34] In *United States Fidelity and Guaranty Co. v. Whiting*,[35] for example, the employee died as a result of an apparent accidental shooting by a sheriff's deputy who was investigating a report that shots had been fired on the property.[36] In fact, the employee, who served as foreman on the property and took telephone calls for his employer while residing on the property, collected antique guns and his firing prompted the call to the sheriff's department.[37] The employee was shot and killed while attempting to investigate the intrusion upon the property committed by the deputy who had entered the property to investigate the shots.[38] The court held that the employee's legal beneficiaries were entitled to recovery, rejecting the argument that the deceased was killed as a result of personal malice between himself and the deputy who fired the fatal

32. 615 S.W.2d at 182 (see testimony of employer related in opinion.)

33. *E.g.*, Elledge v. Great American Indem. Co., 159 Tex. 288, 320 S.W.2d 328 (1959) (employee found dead on employer's premises after he had been hired by his employer to sleep at plant); Vivier v. Lumberman's Indem. Exch., 250 S.W.2d 417 (Tex. Comm'n App. 1923, judgmt adopted) (nightwatchman killed during a robbery); Southern Sur. v. Shook, 44 S.W.2d 425 (Tex. Civ. App.—Eastland 1931, writ ref'd) (assault during a robbery). *Compare* West v. Home Indem. Co., 444 S.W.2d 786 (Tex. Civ. App.—Beaumont 1969, no writ) (recovery for watchman denied where injury inflicted while he attempted to prevent robbery at a filling station and not on his employer's premises); Service Mut. Ins. Co. v. Vaughn, 130 S.W.2d 392 (Tex. Civ. App.—Beaumont 1939, writ dism'd) (recovery for watchman denied when assault occurred on employer's premises but for reason not related to employment).

34. *Id.*

35. 597 S.W.2d 504, 504 (Tex. Civ. App.—El Paso 1980, no writ).

36. *Id.*

37. *Id.*

38. *Id.* at 506.

shot.[39]

The *Whiting* decision demonstrates a significant problem in the use of the accident/assault dichotomy when attempting to analyze injury-producing events. Clearly, the shooting of the foreman was an assaultive event. Yet, absent a clear demonstration of motive on the part of the deputy, it is equally arguable that the shooting was accidental[40]—because presumably the deputy would not have fired had he known the shots were caused by someone having a right to be on the property at the time. Characterization of the event-producing injury as the result of personal malice is simply unsatisfactory in this sense as a means of resolving difficult cases. In fact, the language of the statutory exclusion for assault suggests an alternative characterization which is discussed later in this article.

B. *Special Cases—Injuries Sustained in Travel*

A second major grouping of cases involves employees who sustain unexplained injuries while traveling alone in the course of their employment. The *Freeman*[41] and *Cuellar*[42] decisions present this type of situation, although *Cuellar* was the clearest from two distinct standpoints. In *Cuellar*, the case involving the compensable bee sting, the driver's regular activity in the course of his employment involved driving trucks and his injury was not fatal, thus the trier of fact was afforded the benefit of his testimony explaining the injury-producing event.[43] A more difficult set of facts confronted the court in *Freeman*,[44] in which the employee was killed in an automobile accident on his way home from an employer-requested polygraph examination. *Freeman* demonstrates the problems in determining whether the employee's death actually occurred within the course and scope of his employment.

A decision rendered by the Tyler Court of Appeals in *American States Insurance Co. v. Caddell*[45] illustrates the types of problems posed when the employee is deceased. The employee in *Caddell* used a company pickup truck to travel from his home in Athens, Texas, to

39. *Id.* at 506-07.
40. *Id.* at 505.
41. 603 S.W.2d at 186. *Supra* notes 12-18 and accompanying text.
42. 468 S.W.2d at 880. *Supra* notes 21-22 and accompanying text.
43. 468 S.W.2d at 883.
44. 603 S.W.2d at 186.
45. 644 S.W.2d 884 (Tex. App.—Tyler 1982, no writ).

Waco, Texas, in order to bid on a job for his employer.[46] The evidence showed chronologically that he had told his wife and secretary he would be driving to Waco to bid on the job, that he had bought gas in Waco, and that he died in a collision on a slick road which happened to be the direct route both from Waco and from his office to his home.[47] The court affirmed the jury verdict for the claimant, finding that the "coming and going" exclusion did not apply to travel necessitated by employment.[48] The court discussed, but apparently dismissed, the argument that at the time of the employee's death he had completed the task of work and was continuing home as he normally would have done on an average work day.[49] The broad language of the Act's exception to the travel exclusion supports the court's reasoning;[50] yet the fact of the employee's death deprived the trier of fact of the only conclusive evidence explaining the employee's actions on the date of his death.

In both *Freeman*[51] and *Caddell*,[52] the reviewing courts found support for jury verdicts favoring compensation in unexplained accident cases by looking to the circumstantial evidence establishing the relationship between the accident and the employee's death. When the result of the accident is death, the likelihood that the accident will be unexplained increases substantially as does reliance on circumstantial evidence to determine whether the logical inference to be drawn from the facts supports a jury finding that the death occurred while the employee was engaged in the activities of his employment.

III. ASSAULTS AND THE RELATIONSHIP OF THE INJURY TO EMPLOYMENT

Injuries which result from assaultive acts rather than accidents may also prove compensable in certain circumstances. Critical to this determination is the relationship between the assault and the employment of the injured employee. An injury sustained while the employee is undeniably working on the job and for a reason clearly connected to the employment provides the easiest case from which the

46. *Id.* at 886.
47. *Id.*
48. *Id.* at 887-88.
49. *Id.* at 886-87.
50. TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967).
51. 603 S.W.2d at 192-93.
52. 644 S.W.2d at 886-88.

determination can be made.[53] However, once other factors begin to enter into the totality of the circumstances surrounding the injury-producing assault, the determination becomes a more complex matter. The starting point for analysis of compensability for assaultive injuries is "course and scope of employment."

A. *Course and Scope of Employment*

The claimant's burden in all workers' compensation actions is to demonstrate that the injury was sustained while the employee was acting within the course and scope of his employment.[54] A substantial body of case law has been devoted to analysis of the parameters of course and scope of employment. When the injury is sustained while the employee is engaged in the normal performance of his duties, particularly at a well-defined workplace or job site,[55] this determination leads to other considerations surrounding the assault which might negate coverage under the Act. Only when the duties, place, or time of work are not so clearly defined does the issue of course and scope of employment truly become a thorny matter of proof and statutory construction.

For example, in *B and B Nursing Home v. Blair*,[56] the Oklahoma Supreme Court confronted a fairly uncommon set of facts which nevertheless lead to a straight-forward conclusion on the issue of course and scope. The claimant, an employee of the nursing home, was assaulted by an unknown assailant for no apparent motive while walking from the institution's main building to the laundry to attend to

53. For example, in Consolidated Underwriters v. Free, 253 S.W. 941 (Tex. Civ. App.—Ft. Worth 1923, writ ref'd), a foreman was injured as a result of an assault committed upon him while attempting to quell a riot on the employer's premises. *See also* Craig v. Electrolux Corp., 212 Kan. 75, 510 P.2d 138 (1973) (robbery of employee whose duties included carrying sums of money collected from employer's customers during employee's rounds held compensable).

54. 615 S.W.2d at 181-82.

55. Consider the difficulties in assessing "workplace" in Beard v. Brown, 616 P.2d 726, 735-36 (Wyo. 1980). In *Beard*, the Wyoming court distinguished between a compensable injury suffered during work-related travel and the claimant's injury which occurred during travel from her place of employment at the end of the workday. Even though claimant was compensated for eleven hours of work for working a nine hour shift, the court rejected the argument that her injury was work-related even though she was technically being compensated by the employer at the time of her accident. The only benefit accruing to the employer during the two additional compensated hours was that the "bonus" kept the employee interested in continuing the employment. No other benefit from the employer could be discerned justifying compensation.

56. 496 P.2d 795 (Okla. 1972).

her laundry duties.[57] These duties were a part of her normal job.[58] The court held that although the injury was inflicted by assault, the employee had been engaged on the employer's premises in performance of her routine duties.[59] Thus, the injury was compensable under the Oklahoma statute.[60] Citing from an earlier opinion, the court held:

> An injury to a workman may be said to arise out of his employment, within the meaning of the Workmen's Compensation Act, when it is apparent, from a consideration of all the circumstances, that a causal connection exists between the connection under which the work is required to be performed and the resulting injury.[61]

The Oklahoma Supreme Court also relied on the policy that the Act be given a liberal construction, which it concluded, requires that a reasonable doubt as to whether an injury arises out of employment be resolved in favor of the employee.[62]

Even though the claimant's injury in *Blair* might not have actually arisen from the employment relationship, the court essentially interpreted legislative policy in favor of compensation in that case. The lack of evidence as to the motivating factor for the assault did not deprive the employee of compensation, because of the clear relationship between the fact of the assault and the employee's performance of her usual duties at her usual place of employment.

The problem which often complicates the issue of the relationship of the injury-producing event to the course and scope of employment involves situations in which the employee is injured away from the normal workplace, in a workplace that is atypical, or during hours which are only circumstantially tied to the performance of the employee's duties. To accommodate the issue raised when an employee is not clearly working on the job when injured, nor in performance of regular duties of the employment, the courts have fashioned doctrines which view the course of employment liberally to tie the fact of employment to the injury-producing event. One doctrine frequently discussed and adopted by the courts is the "positional risk" or "but for"

57. *Id.* at 796.
58. *Id.* at 797.
59. *Id.*
60. 85 OKLA. STAT. tit. 85, § 1 (1970).
61. 496 P.2d at 798 (citing Mullins v. Tanksleary, 376 P.2d 590, 591 (Okla. 1962)).
62. 496 P.2d at 798.

test.[63]

This concept, which has been relied on at least in principle in Texas decisions,[64] is based on the notion that if the employee's injury occurred because the employee was required to be in a specific place at the time of the injury-producing event, the employee is entitled to the benefits of the Act. For example, the employee may be entitled to recovery because the duties of his employment exposed him to a situational risk not inherent in his work. The employee's recovery for a bee sting in *Cuellar* is an example of this type of theory.[65] An otherwise deliberate event might prove compensable when the employee's duties required him to be exposed to the risk and to the ultimate injury caused by the event. For instance, an employee may be entitled to recovery when assaulted if the performance of his duties put the employee in a position in which the risk of assault not inherent in the employment was actualized.[66]

In *Commercial Standard Insurance Co. v. Marin*,[67] the female employee of a service station working alone was raped and murdered by a known assailant.[68] While the risk of rape would not necessarily arise from the nature of her employment, the court concluded that but for the fact of her employment, the employee would not have been exposed to the criminal conduct of her assailant at the time in question.[69] Similarly, a Wisconsin court, in *Allied Manufacturing, Inc. v. Department of Industry, Labor & Human Relations*,[70] reviewed an administrative award of compensation in a claim arising from the murder of an employee based on the finding that the employer's action in

63. *See* 1 A. LARSON, *supra* note 11, § 11.40.

64. *See Cuellar*, 644 S.W.2d at 887-88.

65. *Id.*

66. *See* 1 A. LARSON, *supra* note 11, § 11.33. In Allen v. Dorothy's Laundry & Dry Cleaning Co., 523 S.W.2d 874 (Mo. Ct. App. 1975), the claimant, while delivering laundry, was shot by a sniper who also killed two policemen during the shooting spree. The controlling statute provided that "[t]he term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the improvoked violence or assault against the employee by any person." *Id.* at 876 (quoting MO. REV. STAT. § 287.120(1) (Supp. 1985)). A similar result not based on statutory authority as explicit as that adopted in Missouri, was reached by a federal court applying Texas law in Casualty Reciprocal Exch. v. Johnson, 148 F.2d 228, 230 (5th Cir. 1945). *Accord* Hensley v. Glass, 226 Kan. 256, 597 P.2d 641 (1979).

67. 488 S.W.2d 861 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

68. 488 S.W.2d at 869-70. *See also* Orr v. Holiday Inns, Inc., 6 Kan. App. 2d 335, 627 P.2d 1193 (1981) (similar result).

69. 448 S.W.2d at 871.

70. 45 Wis. 2d 563, 173 N.W.2d 690 (1970).

isolating the employee at a remote location contributed to her murder. The court adopted its version of the positional risk doctrine—defining the employer's creation of a "zone of special danger"[71]—in holding that the employee was entitled to recovery even if the reason for the fatal assault was extraneous to her employment because the fatal injuries had been inflicted and sustained in the work environment.

Creation of a doctrine relating to the nexus between employment and injury-producing event in specific circumstances constitutes a recognition that many cases cannot be easily or fairly resolved by looking to the logical relationship of the type of injury-producing event and the normal risks or hazards associated with employment. Thus, there may be no statistical or logical relationship between an apparent motiveless assault and the performance of the employee's duties but the absence of a logical connection between the two will not necessarily defeat recovery if the exposure to the assault is occasioned by the employee's performance of his duties.

Another important consideration in the threshold analysis of whether the injury occurred while the employee was performing the duties of employment involves the statutory exclusion for injuries sustained when the employee deviates from the duties of employment, and that deviation contributes to an assault.[72] The provocation of an

71. *Id.* at —, 173 N.W.2d at 692. The court, relying on Nash-Kelvinator Corp. v. Industrial Comm'n, 226 Wis. 81, 62 N.W.2d 567 (1954), also suggested that even if the motive for claimant's murder had been demonstrated to be unrelated to her employment, recovery might have been available if the work environment contributed to the circumstances of the assault. 45 Wis. 2d at —, 173 N.W.2d at 693.

72. *See* Erwin v. Texas Employers' Ins. Ass'n, 63 S.W.2d 1076, 1077 (Tex. Civ. App.—El Paso 1933, writ ref'd). TEX. REV. CIV. STAT. ANN. art. 8309, § 1(4) (Vernon 1967), provides:

> An injury caused by the employee's willful intention 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 . . . of the employer received by the employee while engaged in or about the furtherance of the affairs or business of his employer . . . .

Id.

See 1 A. LARSON, *supra* note 11, § 11.15(d) (employee-aggressor situations). In Augustine v. Washington Parish Policy Jury, 383 So.2d 1271 (La. Ct. App. 1980), recovery was denied when the injured employee sustained injuries as a consequence of a calculated fight deliberately staged with a fellow employee—both being armed—after work hours. *Id.* at 1277. Similarly, a court denied compensation in Kurtz v. Liberty Mut. Ins. Co., 472 S.W.2d 766 (Tex. Civ. App.—Waco 1978, no writ), when the injury resulted from a fight among coemployees precipitated by claimant agitating his assailant. *See also* Yelverton v. Kemp Furniture Co., 51 N.C. App. 675, 277 S.E.2d 441, 443 (1981) (fight occurred when men were not performing work for employer).

assault for a reason not arising from the duties of the employment is sufficient to negate recovery, even though the incident occurs at a time and place consistent with the performance of the employee's duties.[73] Resolution of difficult questions in this type of situation are generally dependent upon the quality of explanation given by the aggressor employee as to the motivating cause of the quarrel or dispute and its relationship to employment.[74] Here, as in all unexplained cases, the death of the employee may result in a dearth of evidence probative as to the actual motivation underlying the injury-producing event.

B. *Assaults Committed by Fellow Employees*

A particular and significant class of cases involves injuries sustained by an employee due to an altercation with fellow employees. Logically, the connection between the parties and the location of the assault is the jobsite, which suggests that compensation would be available for this type of injury-producing event. The Act, however, excludes coverage when the reasons for the assault do not arise from the nature of the employment itself.[75] Texas cases have not drawn clear lines in defining the types of motivation for the assault which will justify an award of compensation.

The clearest cases are those in which the assault is predicated on some conflict among employees as to the manner in which the duties of employment are to be performed. In *Commercial Standard Insurance Co. v. Austin*,[76] for instance, two employees argued on the job over the manner in which the claimant was to perform his duties. The other employee was discharged, left the jobsite, then returned an

73. For example, an Indiana court denied recovery in Lincoln v. Whirlpool Corp., 151 Ind. App. 190, 279 N.E.2d 596 (1972), when the employee's horseplay at work escalated into his fatal shooting by a nonemployee juvenile. The court held that the injury did not arise out of employment and was consequently not compensable. 151 Ind. App. at 297 N.E.2d at 601. *Id.* at 601. In contrast, an Arizona court held that when the injuries arise from employment, it is immaterial under ARIZ. REV. STAT. ANN. § 23-943 (F) (1983) whether the injured employee was the aggressor. Colvert v. Industrial Comm'n, 21 Ariz. App. 409, 520 P.2d 322 (1974). *See also* Martinez v. Workers' Compensation Appeals Bd., 127 Cal. Rptr. 150, 15 Cal. 3d 982, 544 P.2d 1350 (1976) (construing California's statutory exclusion for injuries sustained by aggressor-employees in assault cases. *See* CAL. LABOR CODE § 3600(g) (West 1971).

74. Thus, if the employee sustains injuries in an effort to protect his employer's property, the injury may be compensable even if he is the technical aggressor in the situation.

75. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(4) (Vernon 1967) (definition of injury sustained). *See supra* note 72.

76. 128 S.W.2d 836 (Tex. Civ. App.—Beaumont 1939, writ dism'd judgmt cor.).

hour later and killed the claimant.[77] The plaintiff presented sufficient evidence of a connection between the employment and the assault to justify an award of death benefits.[78] *Austin* was followed and expanded in *Phoenix Insurance Co. v. Bradley*,[79] a case in which the claimant, employed as a hotel desk clerk, argued with the relief clerk over whether the claimant had called him at the proper time to take over at the desk.[80] The dispute resulted in the relief clerk assaulting the claimant whose claim was viewed favorably by the reviewing court because it did in fact arise from "the manner in which the work was being done."[81]

Bradley relied on *McClure v. Georgia Casualty Co.*,[82] as well as *Austin*, in reaching its conclusion.[83] *McClure*, however, has been called into question by other courts.[84] In *McClure*, the Commission of Appeals concluded that an injury inflicted by a fellow employee may be compensable even though the motivation for the assault may have been the other employee's malice or deliberate intention to injure.[85] In *Bradley*, the commission reasoned that a connection existed between employment and the injury because the claimant's employment exposed him to both the fellow employee and to the risk of assault at the hands of the fellow employee.[86] In *Texas Indemnity Insurance Co. v. Cheely*[87], the Amarillo Court of Appeals rejected the reasoning advanced in *McClure*, holding that the claimant's burden was to show more than that his fellow employee was assaulted while on the job or while engaged in his employer's business or affairs.[88] Instead, the court of appeals held that the claimant must demonstrate that the assaultive injury was "of such kind and character as had to do with and originated in the employer's work, trade, business, or

77. *Id.* at 837.

78. *Id. See also* Texas Employer's Ins. Ass'n. v. Campos, 666 S.W.2d 286 (Tex. App.—Houston [14th Dist.] 1984, no writ) (employee injured in scuffle with foreman whose testimony showed scuffle based on dispute over employee's performance of work entitled to recovery).

79. 415 S.W.2d 928 (Tex. Civ. App.—Texarkana 1967, no writ).

80. *Id.* at 929.

81. *Id.* at 934.

82. 251 S.W. 800 (Tex. Comm'n App. 1923, opinion adopted).

83. 415 S.W.2d at 933.

84. *E.g.*, Texas Indem. Ins. Co. v. Cheely, 232 S.W.2d 124, 126 (Tex. Civ. App.—Amarillo 1950, writ ref'd) (rejected *McClure*, holding that the claimant's burden was to show more than that his fellow employee was assaulted while on the job).

85. 251 S.W.2d at 804.

86. 415 S.W.2d at 933-34 (quoting *McClure*, 251 S.W.2d at 803).

87. 232 S.W.2d at 124.

88. *Id.* at 126.

profession."[89]

In a more recent decision, *United Pacific Insurance Co. v. Farley*,[90] the Waco Court of Appeals considered an employee's claim for injuries resulting from a fellow employee's assault upon him. The claimant had hired the other worker and paid him personally for work done on behalf of the employer company.[91] The claimant was assaulted over a dispute concerning his refusal to pay the other employee for wages claimed.[92] The appellate court looked to the fact that the motivation for the assault was clearly traceable to a matter arising from employment, particularly since it concerned a pay dispute, and also to the fact that the assault was the product of an argument which took place while the claimant was on the job.[93] Additionally, *Farley* noted the lack of any evidence that there had been a "personal grudge that preexisted" between the two employees.[94] The court also suggested a more restrictive approach than the one adopted in the commission's opinion in *McClure* by observing:

> The mere fact that two employees of the same employer, or one of them and a third person not employed by the same employer, engage in a fight, is not controlling of the question of whether or not one of the employees who receives an injury while engaged in it is entitled to compensation.[95]

While more restrictive in its approach than *McClure*, *Farley* appears to suggest that an assault committed by a fellow employee is more likely to arise from the employment relationship than one committed by a third person. Absent a showing of antecedent malice on the part of the fellow employee, or of a motive clearly unrelated to employment, it is arguable that an unexpressed presumption favors such claims simply because no other apparent motivation which would exclude coverage exists. Similarly, the strong case would almost always involve an assault committed on the job site, or an assault following an argument which took place on the job site during the normal hours of employment.[96]

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89. *Id.*
90. 566 S.W.2d 677 (Tex. Civ. App.—Waco 1978, no writ).
91. *Id.* at 679.
92. *Id.* at 680.
93. *Id.*
94. *Id.* at 681.
95. *Id.*
96. Mayo v. Safeway Stores, Inc., 93 Idaho 161, 457 P.2d 400 (1969). (Death of a store manager while at work caused by violent assault committed by an assistant manager held compensable when no prior difficulties between the two were demonstrated). *See also* Van

C. *Assaults Apparently Committed by Third Persons*

Under the Texas Act, injuries sustained as a result of an assault committed upon the employee are compensable,[97] unless the assault is committed by a third person for a reason unrelated to the employment relationship.[98] This rule is not entirely comprehensive because of problems inherent in determining whether the motivation for the assault justifies exclusion from coverage under the statutory language. The determination is also complicated by the fact that in a significant number of cases, the assaulted employee has died from his wounds, or as in the *Blair* case,[99] remains alive, but is simply unable to identify the assailant or to provide any insight into the motivation for the assault.

Analysis of the issues in third party assault cases is often rendered more difficult by the lack of sufficient facts from which the critical questions can be answered. Therefore, it is desirable to categorize typical fact situations as starting points for analysis.

1. Assaults "Obviously" Directed at Employees Because of Their Employment

The easiest questions arise in those cases in which all parties generally agree that the facts support the inference of employment-motivated assault by the third person. For instance, robberies in which the injured employee victim is the person charged with responsibility for the enterprise's funds and those funds are taken by force provide the typical case in which recovery is virtually assured.[100] Even

Duzee v. Industrial Comm'n, 25 Ariz. App. 395, 543 P.2d 1152 (1975) (injuries sustained by employee attempting to break up fight among co-workers during work hours compensable); Alpine Roofing Co. v. Dalton, 36 Colo. App. 315, 539 P.2d 487 (1975) (employee assaulted by foreman upon discharge could recover even though employee called foreman a vulgar name, apparently precipitating assault). *Accord* Brannum v. Spring Lakes Country Club, Inc., 203 Kan. 658, 455 P.2d 546 (1969) (assaulting employee disgruntled over work assignments).

97. *Marin*, 488 S.W.2d at 869 ("an assault arises out of the employment if the risk of assault is increased because of the nature of the work, or if the reason for the assault is a quarrel having its origin in the work").

98. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).

99. 496 P.2d 795 (Okla. 1972).

100. *Vivier*, 250 S.W. at 417 (nightwatchman's death compensable when assailant's motive was robbery); Texas Employer's Ins. Assoc. v. Lawrence, 14 S.W.2d 949 (Tex. Civ. App.—Eastland 1929, writ ref'd) (death of employee from gas explosion occurring in tent which employee was required to occupy in camp controlled by employer held compensable). *See also* Workman's Compensation Appeal Bd. v. DelCimmuto, 23 Pa. Commw. 43, 350 A.2d 459 (1976) (uniformed security guard fatally shot in store parking lot, held compensable). *Cf.* West v. Home Indem. Co., 444 S.W.2d 786 (Tex. Civ. App.—Beaumont 1969, no writ).

though the assailant's motivation may have in fact involved the particular employee robbed and assaulted, the fact that the robbery involves both the employee personally and the performance of his duties for his employer serves to negate operation of the statutory exclusion.[101] Arguably, even if the evidence disclosed a motive personal to both the employee and his assailant, the nexus between the assaultive act and the employee's ostensible performance of duties in behalf of the employer would justify compensation for the injury sustained. This approach is suggested by the factual context of the *Marin* case[102] in which the deceased female service station attendant was robbed, raped, and killed at her place of employment. The evidence suggested some prior relationship between the employee and her assailant which might have supported the conclusion that her rape was the result of a personal, rather than employment related, motivation on the part of the assailant.[103] However, the proof of this suggested prior relationship was simply inadequate. Even though the assailant confessed to the crime, the confession itself was not specific as to motivation or prior relationship. Moreover, the court strained to find that the employment duties of the deceased employee necessarily exposed her to the fatal attack;[104] a theory which would not justify an award of benefits in a case in which the prior relationship, personal animus, or specific motive was more clearly demonstrated by the evidence.

A clearer situation is illustrated by *Vivier v. Texas Lumberman's Indemnity Exchange*,[105] another nightwatchman case. There an employee was assaulted during his hours of employment by assailants in the process of committing a burglary on the employer's premises.[106] A sadistic murder committed upon an employee during the course of a robbery was similarly compensable in *Southern Surety v. Shook*.[107] The Eastland Court of Appeals concluded in *Shook*, that the assailant entered upon the property for the purpose of committing robbery,

(nightwatchman shot while trying to prevent robbery at filling station while there to buy cigarettes and drink and not at premises he was employed to guard did not sustain compensable injury).

101. *Shook*, 44 S.W.2d at 425 (joint motive of assailant robbery and sadistic assault).

102. 488 S.W.2d at 863, 869-70.

103. *Id.* at 863. *See also* Employers Ins. Co. v. Wright, 108 Ga. App. 380, 133 S.E.2d 39 (1963) (female employee of laundry pick-up station raped on premises by assailant pretending to be customer held compensable).

104. 488 S.W.2d at 869-70.

105. 250 S.W. 417 (Tex. Comm'n App. 1923, judgmt adopted).

106. *Id.* at 417-18.

107. 44 S.W.2d 425 (Tex. Civ. App.—Eastland 1931, writ ref'd).

thereby supplying a causal connection between the murder and the scope of the employee's normal activity at work.[108] The deceased employee in *Shook* was employed in a quasi-watchman capacity as an oil field pumper and was required to live on the property where the well was located.[109] Even though he was actually assaulted while hunting on adjacent land, the court concluded that he was essentially on duty during the entire time he was on the property or within hearing distance of the pump.[110] Since a critical duty of his employment was to attend to the well when the engine ceased functioning, the court interpreted his duties to include any activity performed while the employee listened for breakdowns in the pumping operation.[111] The nature of the employment itself may have suggested a greater connection between assaultive injuries and employment than might otherwise be suspected. If the employee is injured in the performance of customary work activities, any act directed at the employer by a third person which results in injury to the employee may prove compensable based upon a liberal interpretation of the employee's duties.

2. Assaults "Obviously" Directed at the Employee For Reasons Extraneous to Employment

In terms of proof, a more difficult set of cases arise from assaults motivated by reasons clearly unrelated to the employee's employment. These cases often involve assaults committed upon the employee at the workplace or during the performance of the employee's duties, circumstances which at least implicate the employment relationship as a factor in the assault. Texas courts have looked to evidence of antecedent malice existing between the employee and the assailant as a factor demonstrating that the employment was not the motivation for the assault.[112] Typically, Texas cases have involved assaults committed on the job, but growing out of domestic disputes. For example, in *Liberty Mutual Insurance Co. v. Upton*,[113] the employee was killed by her husband while at work and while engaged in the normal activities of her employment. The evidence demonstrated

108. *Id.* at 426-27.

109. *Id.* at 425. *See also Lawrence*, 14 S.W.2d at 951 (employee killed by gas explosion and fire while asleep on employer's property in quarters provided by employer was entitled to compensation).

110. *Id.* at 427.

111. *Id.* at 427-28.

112. *See Vivier*, 250 S.W. at 418.

113. 492 S.W.2d 623 (Tex. Civ. App.—Fort Worth 1973, no writ).

that the killing resulted from a domestic quarrel between the couple, thus recovery was precluded by the statutory exclusion.[114] Similarly, the black-jack beating of the employee in *Fidelity and Casualty Co. v. Cogdill*,[115] was not compensable because circumstantial evidence showed the attack on the employee, a movie projectionist, was prompted by the assailant's suspicion that the employee was involved in an extra-marital affair with the assailant's wife.[116]

Evidence of antecedent malice, or a cause for the assault predating or extraneous to the employee's employment, is also sufficient to overcome the expressed preference for recovery in the caretaker situation. In *Service Mutual Insurance Co. v. Vaughn*,[117] the employee was a nightwatchman hired to guard his employer's machinery. His daughter and her husband had separated, precipitating threats against the employee from the estranged son-in-law.[118] Hopkins, the son-in-law, killed Vaughn by striking him with a hammer while the latter was guarding the machinery, as per his employment contract.[119] The court concluded the evidence showed antecedent malice between the assailant and his victim which excluded coverage under the Act even though the injury occurred while the employee was performing the duties of his employment.[120]

In those cases in which the insurer can show that the assault was clearly motivated for reasons unrelated to the employee's employment, recovery would appear precluded under the statute unless the claimant can suggest a dual motivation necessarily involving the employment as a factor. Thus, even if the assailant initially intends to assault the employee finding the latter at work, the injury may still be compensable if a secondary motive, such as robbery of the employer or his business, is also established by the evidence and the evidence presents a strong enough correlation between the assailant's motivation and the injury actually sustained. In any event, when the evidence shows the possibility that both motivations prompted the assault, the question should be resolved in favor of recovery since the assault cannot be shown to be wholly unrelated to employment.[121]

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114. *Id.* at 626.
115. 164 S.W.2d 217 (Tex. Civ. App.—San Antonio 1942, writ ref'd).
116. *Id.* at 218.
117. 130 S.W.2d 392 (Tex. Civ. App.—Beaumont 1939, writ dism'd judgmt cor.).
118. *Id.* at 393.
119. *Id.*
120. *Id.* at 394-95.
121. By analogy, consider the dual purpose doctrine which permits recovery for an injury

3. Unexplained Assaults

Unexplained assaults resulting in injury or death to employees pose the most interesting problems in interpreting and applying the statutory exclusion from coverage. The assault may be unexplained for different reasons. Typically, the assault is unexplained because the identity of the assailant is unknown and the circumstances ambiguous,[122] or because the motivation or prior relationship between a known assailant and employee are undetermined.[123] Not atypically, the circumstances of the injury-producing event may be sufficiently ambiguous so that the source of injury may itself be imprecisely categorized.[124] For instance, in *Deatherage* the immediate cause of the employee's death clearly was attributable to fire since his remains were discovered among the debris of the burned-out trailer in which he lived while on his employer's property.[125] The evidence suggested the possibility of a brush fire in the area on a date close in time to the employee's date of death, but its origin or connection with the fire at the trailer were not demonstrated.[126] It is conceivable that the fire that produced the claimant's deceased's death was accidental in origin, or was the product of arson—in which case the facts would have suggested an issue relating to assaultive act committed by a third person.[127] Difficulty in characterizating injury-producing events may

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sustained during employment-related travel, even though the employee is also engaged in his personal affairs during the trip. *See* Marks' Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181 (1929); TEX. REV. CIV. STAT. ANN. art. 3809, § 16 (Vernon 1967) (codifying the dual purpose doctrine in cases in which the trip would not have been made but for the employment purpose and the injury would not otherwise have been sustained). *See also* Workmen's Compensation Appeal Bd. v. Plum, 20 Pa. Commw. 35, 340 A.2d 637, 640 (1975) ("inconsequential or innocent departures from course of employment will not bar compensation").

122. *E.g.*, *Walters*, 654 S.W.2d at 425 (identity of assailant unknown); *Blair*, 496 P.2d at 796 (identity of assailant unknown).

123. *Marin*, 488 S.W.2d at 863 (evidence that assailant confessed, claiming he and employee had prior relationship, including consensual sexual relations and that cause of murder was her rejection of his offer of marriage, not dispositive of issue of assailant's motivation: ". . . it is clear that the jury refused to accept this version of the killing").

124. Proof of the cause of fatal injury itself may pose problems for trial counsel, particularly in cases in which so-called "natural causes" are indefinite in origin, such as heart attacks. *See* Rogers v. State Accident Ins. Fund, 289 Or. 633, 616 P.2d 485 (1980). *See generally* Sullivan, *When Death is the Issue: Uses of Pathological Testimony and Autopsy Reports at Trial*, 19 WILLAMETTE L.J. 579 (1983) (suggesting uses of expert testimony and autopsy reports as means of examining alternative theories of causation of death).

125. 628 S.W.2d at 211.

126. *Id.* at 212.

127. Arson is an intentional criminal act, as defined by TEX. PENAL CODE ANN. § 28.02 (Vernon Supp. 1984).

well invade analysis of the apparent unexplained assault in a case like this and speculation as to causation might provide the parties with interesting routes of investigation. However, in the absence of proof of an apparent assault such as wounds on the body of the injured or deceased employee which in all medical probability were produced by the acts of another person,[128] reliance on the third party theory of exclusion is simply not feasible. When the evidence clearly indicates an assaultive act of some type, the threshold factor involved in analyzing the case in terms of the statutory exclusion is reached.

The identity of the assailant is not a critical factor in those cases in which the evidence suggests a theory of the assault directly related to employment. Thus, an assault may be unexplained in the sense that the identity of the assailant is unknown, yet is essentially explained if it occurs during the commission of a robbery of the employer.[129] The closer question is presented when the assaultive act was directed exclusively at the employee. For instance, in the *Blair* case,[130] the Oklahoma court specifically noted the absence of any evidence that the employee had been robbed, thereby suggesting that the reason for the assault was personal to the assailant, the employee, or both of them[131] might have been established. Similarly, an assault which occurs while the employee is either going to or leaving work is less likely to result in compensation given the combined effect of the travel exception and the decreased likelihood that the employment relationship motivated the attack.

The Fort Worth Court of Civil Appeals in *Wall v. Royal Indemnity Co.*,[132] relied on the force of this combination of exceptions to justify exclusion based on the murder of an employee by assailants lying in wait for him while on his way home from work. Speculatively, of course, an employment-based motivation for the assault can not be ruled out in this type of case, particularly when the identity of the assailant is unknown. In theory and in fact, the assailant could well be a fellow employee or a third person whose quarrel with the

128. *See* Sullivan, *supra* note 124, at 602-06.

129. *Marin*, 488 S.W.2d at 865 ("the intentional killing of an on-duty employee, for the purpose of robbing him, is an injury sustained in the course of employment").

130. 496 P.2d at 796 ("She was neither sexually assaulted nor robbed"). *But see Fiorello*, 280 N.Y.S.2d at 884 (robbery of employee's wallet and ring and assault occurred at employer's parking lot while victim was on way to job deemed compensable under New York statute).

131. The inference that a personally motivated assault would not also result in robbery would seem speculative, at best.

132. 299 S.W. 319 (Tex. Civ. App.—Fort Worth 1927, no writ).

employee arose from the nature of the latter's duties of employment.[133] Absent claimant's ability to show this type of connection, however, the combined effect of the two theories of exclusion would appear virtually impossible to overcome. It is reasonable to assume that some claimants entitled to compensation under the Act will be denied benefits because the circumstances do not suggest a strong enough relationship to the employment to justify compensation and because the evidence necessary to make the connection is simply unavailable.[134]

The converse situation is always potentially present in the unexplained assault case. An apparent motive linked to employment may, in fact, cover a personal motive known only to the assailant and the employee/victim. Existence of antecedent malice which would satisfy the statutory requirement for exclusion may remain undisclosed to the parties, resulting in compensation for some claimants who would not be entitled if all of the facts were presented to the court.

For example, the facts in *Walters v. American States Insurance Co.*[135] are illustrative of the type of problem encountered in an unexplained death case. The evidence adduced at trial showed that at least twice in the week preceding his murder, Richard Lamport, the claimant's employer, received business calls concerning the possibility of him making a business presentation on a Saturday morning in 1978.[136] The evening before the presentation Lamport called his employee, Ivan Justice, and directed him to pick up a portfolio commonly used in the company's business presentations at their office.[137] Lamport also asked Justice to stop by the Lamport residence to discuss the next morning's presentation.[138] According to the testimony of Lamport's girlfriend, they discussed the presentation at their Friday evening meeting.[139] She also testified that next to the phone in the townhouse they shared she found a note in Lamport's handwrit-

133. Consider Justice Cadena's analysis of *Wall*, in *Marin*, 488 S.W.2d at 866-67, discussing the doctrine of antecedent malice and counsel's apparent pleading error in bringing the assault within the statutory exclusion by claiming that the deceased's assailants deliberately sought him out.

134. The best examples are demonstrated by the facts in the appellate court opinions of *Walters*, 654 S.W.2d at 424-25 and *Deatherage*, 628 S.W.2d at 209.

135. 654 S.W.2d 423 (Tex. 1983).

136. *Id.* at 426-27.

137. *Id.* at 427.

138. *Id.*

139. 636 S.W.2d 794, 795 (Tex. App.—Tyler 1982).

ing containing a reference to "Marina Hotel, 11:00."[140] The next morning Justice drove by Lamport's residence and they left together.[141] Their bodies were discovered a few hours later lying in a field off a road located somewhere between the Lamport residence and the Dallas-Fort Worth International Airport—the location of Airport Marina Hotel.[142] Both men had been shot in the back, fatally, and Justice's body contained three gunshot wounds, apparently inflicted from a distance.[143]

Justice's ex-wife sued for workers' compensation benefits on behalf of their minor son,[144] pleading that Justice was killed while in the course and scope of his employment under the theory that his employer, Lamport, had directed him to accompany him to the business meeting on the date of their deaths.[145] The insurer defended on the ground that the employee was not engaged in the course and scope of his employment at the time of his death.[146]

At trial the insurer argued that since Justice was killed by the obvious act of a third party, the statutory exclusion came into play and recovery should be denied.[147] The jury returned a unanimous verdict, however, finding that Justice was killed while in the course and scope of employment.[148]

On appeal, the Tyler Court of Appeals reversed,[149] adopting the position advanced by the insurer in its no evidence point.[150] The court of appeals held that because the claimant had failed to show that the assaultive act of the deceased employee's killer was motivated by some aspect of the employee's employment relationship, there was no evidence to prove that he was killed in the course and scope of his employment.[151] The Texas Supreme Court did not reach the issue

140. *Id.*

141. *Id.*

142. 654 S.W.2d at 427.

143. *Id.*

144. TEX. REV. CIV. STAT. ANN. art. 8306, § 8(a) (Vernon Supp. 1984).

145. 654 S.W.2d at 424.

146. *Id.* at 425. The insurer did not allege any specific facts showing that the employee was not engaged in employment activity, but merely alleged this legal conclusion in his original answer. *Id.*

147. *Id.*

148. *Id.*

149. 636 S.W.2d at 794.

150. *See* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362 (1960). *See* TEX. R. CIV. P. 301, 418.

151. 636 S.W.2d at 796-97.

relating to the allocation of the burden of proving the motivation for the assault. Instead, it held that claimant had met her burden of presenting some evidence to show that the assault was related to employment and reversed the lower court's decision on the "no evidence" point.[152]

Walters[153] raises a number of possibilities in terms of the unexplained nature of the assault causing the employee's death. For example, the identity of the assailant was never discovered by the parties or law enforcement agencies investigating the apparent murder.[154] While murder was the apparent cause of death in terms of application of the theory of criminal law to the facts, the evidence did not conclusively rule out the possibility of bizarre accident. Further, the homicide did not occur at the workplace or during the normal hours of business on the day of claimant's death.[155] No evidence of robbery or an independent motive toward the employee was demonstrated or suggested by the facts.[156] The insurer's position was based upon the autopsy report of the cause of death as homicide,[157] a medico-legal determination from which the insurer extrapolated that the legal conclusion of murder was applicable.[158] Flowing from the theory that the employee's death was the result of murder, the insurer argued consistently that in the case of a murder committed by an unknown assailant, the claimant has the burden of demonstrating that the murder was precipitated by the employment relationship in order to justify an award of death benefits under the Act.[159]

IV. PROBLEMS POSED BY UNEXPLAINED ASSAULTS

Even when the injury-producing event is properly characterized

152. 654 S.W.2d at 424. The majority in *Walters* narrowed the scope of its review to the issues expressly preserved for review which involved the sufficiency of the evidence supporting the jury's answer to the issue submitted to the jury at trial.

153. 654 S.W.2d 243 (Tex. 1983).

154. *Id.* at 427.

155. *Id.*

156. *Id.* at 426-27.

157. 636 S.W.2d at 795. *See* Sullivan, *supra* note 124, at 595 n.60, 596-97 n.63 (example B).

158. The court of appeals adopted the insurer's position: "If there is one thing certain in this case, Justice's death was not an accident." 636 S.W.2d at 797. On appeal to the Texas Supreme Court, Justice McGee in his concurring opinion, drew a similar conclusion: "[o]nce it was established that Justice's death was the result of a homicide—an intentional injury inflicted by a third person—American States discharged its burden." 654 S.W.2d at 429.

159. TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon Supp. 1984).

as an assault, as opposed to an accident, the problem of determining whether the injury is compensable is not fully solved. In fact, given the language of the statutory exclusion,[160] the problem is simply posed for the parties and the jury. The essential question in terms of the matters of proof is motivation for the assault and the perspective from which motivation must be assessed. The latter requires definitive statutory construction by the Texas Supreme Court which was not provided by its opinion in *Walters*.[161] The key issue lies in distinguishing between a motivation for the assault when viewed solely from the perspective of the assailant[162] and when viewed from the perspective of the injured employee.[163]

If motivation is to be considered by reference to the assailant's actual motivation, significant problems of proof are presented for claimants in unexplained assault cases, particularly when the assault has resulted in the employee's death at the hands of his assailant. On the other hand, if the issue of an employment related motive for the assault is viewed from the perspective of the employee, the potential for denial of benefits is reduced by excluding those cases in which no pre-existing relationship between the employee and the assailant can be demonstrated.[164] Thus, if the focal point for the court's considera-

160. *Id.*

161. The majority opinion of the supreme court in *Walters*, 654 S.W.2d at 423, does not specifically address the issue. But Justice McGee, in his concurring opinion points out: "[t]hus, in any case involving an intentional assault upon the employee, the claimant must persuade the trier of fact that the attack was not motivated by reasons personal to the employee, but was directed against him because of his employment." *Id.* at 429. (citing Highlands Underwriters Ins. Co. v. McGrath, 485 S.W.2d 593 (Tex. Civ. App.—El Paso 1972, no writ)).

162. In contrast to Justice McGee's characterization of the court's opinion, the *Highlands* court noted that the determination focuses on "reasons personal to the assailant and the one assaulted." 485 S.W.2d at 595. A Pennsylvania court in Cleland Simpson Co. v. Workmen's Compensation Appeal Bd., 16 Pa. Commw. Ct. 566, 332 A.2d 862 (1975), construed the relevant statute, PA. STAT. ANN. tit. 77, § 411 (Purdon Supp. 1984-85), to focus on motivation for the assault personal to the assailant, rather than to the employee. *But see* California Compensation & Fire Co. v. Workmen's Compensation Appeals Bd., 65 Cal. 2d 155, 436 P.2d 67, 65 Cal. Rptr. 155 (1968) (no reason to deny compensation to employee whose duties exposed her to peculiar risk of assault merely because assailant motivated by personal reasons).

163. The comment to 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 21.20 (1970) explains that "[t]he statute uses the phrase 'because of reasons personal to him.' This has been interpreted by the courts to mean 'because of reasons personal to the employee,' as shown in the instruction." (citing Vivier v. Lumbermen's Indem. Exch., 250 S.W. 417 (Tex. Comm'n App. 1923, judgmt adopted); American Gen. Ins. Co. v. Williams, 222 S.W.2d 907, 914-15 (Tex. Civ. App.—Beaumont 1949), *rev'd on other grounds*, 227 S.W.2d 788 (Tex. 1950)).

164. *See, e.g., Highlands*, 485 S.W.2d at 596 (evidence failed to show a prior motivation of

tion is truly antecedent malice, as suggested by a number of the cases,[165] the proper perspective for resolution of the threshold issue necessarily requires consideration of the motive as a matter personal to the employee, and not the assailant. For instance, if the assailant's motivation is rape without regard to the identity of the victim, that motivation would not preclude recovery even though it might bear no causal relationship to the fact of the victim's employment, other than being committed while the victim was performing in normal duties of employment.[166] If the motivation is to be judged from the perspective of the assailant and the rape merely evidences a general criminal intention, recovery might be precluded on the theory that rape is not a risk unique or inherent to the nature of the victim's employment.[167]

The comment to the appropriate section of Texas Pattern Jury Charges suggests that the proper consideration is whether the motivation for the assault can be characterized as personal to the employee, and not to the assailant.[168] The pattern instruction provides that "[a]n injury is not in the course of employment if it is caused by the act of another person intended to injure the employee because of reasons personal to the employee and not directed against him as an em-

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the assailant unrelated to employment). *See also* Mayo v. Safeway Stores, Inc., 93 Idaho 161, 457 P.2d 400 (1969) (evidence failed to show either occupational or personal motive for assault).

165. *See, e.g., Cogdill*, 164 S.W.2d at 217 (recovery denied due to assailant's suspicion that employee engaged in extramarital affair with assailant's wife); *Vaughn*, 130 S.W.2d at 392 (denial of recovery based on prior threats against employee by estranged son-in-law).

166. *Marin*, 488 S.W.2d at 869-70.

167. *Id. Compare Marin* with the cases in which the assault is apparently motivated by the employee's affair, or suspected affair, *with* the spouse of the assailant and recovery is precluded. *See, e.g.*, Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972) (evidence indicated murders committed because husband believed employee had replaced him in his wife's affection); Gutierrez v. Artesia Pub. Schools, 92 N.M. 109, 583 P.2d 476 (N.M. Ct. App. 1978) (no recovery because murder motivated by assailant's knowledge that his wife and victim had engaged in sexual intercourse); Freeman v. Callow, 525 S.W.2d 371 (Mo. App. 1975) (no recovery because assault motivated by private quarrel over employee's claimed interest in customer's wife); Ellis v. Rose Oil Co., 190 So.2d 450 (Miss. 1966) (no recovery because shooting motivated by employee was having an affair with third party's wife).

Other cases have held injuries sustained while at work, but resulting from similar motivation, compensable. *See, e.g.*, Ross v. Workmen's Compensation Appeals Bd., 21 Cal. App. 3d 949, 99 Cal. Rptr. 79 (1971) (recovery allowed for employee shot by customer's jealous husband because employee allegedly had an "affair" with customer); Goings v. Edwards, 222 So.2d 530 (La. Ct. App. 1969) (recovery allowed where employee assaulted while walking in company-owned parking and roadway); Powell v. Gold Crown Stamp Co., 204 So.2d 61 (La. Ct. App. 1967) (recovery allowed when husband accused employee of kissing his employee-wife and then fatally shot her).

168. *See supra* note 163.

ployee or because of his employment."[169] The pattern instruction defines the rather vague statutory reference to "him" in the language of the exclusion by directly stating that the personal nature of the motivation must be personal to the employee.[170] The comment relies on cases construing the statutory reference to "him" to specifically refer to the employee, rather than the assailant, in making this determination.[171]

Assuming the determination is to be made based on the evidence of a motivation personal to the employee, some fact patterns suggest difficulty even with this starting point. For example, in *Velasquez v. Industrial Commission*,[172] a Colorado court held that employees shot by a co-employee while at work and on the employer's premises were not entitled to benefits under the statute because the assailant's motivation was his belief that the other employees had been making obscene telephone calls to his wife.[173] The court ruled that the employees injured in the shooting had failed to show that the shooting could not have happened at some other time or place and thus, that the injuries would not have occurred but for the fact of their employment.[174] The troubling aspect of this opinion is that it suggests that the assailant's motive, being directed at his co-employees specifically, should dominate the analysis of the work-related aspect of the issue.

At first blush, the Colorado court's approach would appear consistent with *Upton*[175] and other cases in which personal disputes have spilled over into employment, suggesting the possibility of an employment related injury.[176] Were this clearly the case, the court's approach was probably correct, applying the same skepticism toward co-worker assaults as that suggested by *Farley*[177] in holding that the mere fact that a co-worker commits the assault is not sufficient to demonstrate a compensable injury under the Texas Act.[178] However,

169. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 21.20 (1970).

170. *Id.*

171. *See supra* note 163.

172. 41 Colo. App. 201, 581 P.2d 748 (1978).

173. 41 Colo. App. —, 581 P.2d at 748.

174. 41 Colo. App. —, 581 P.2d at 748.

175. 492 S.W.2d at 623.

176. *E.g.*, Epperson v. Industrial Comm'n, 26 Ariz. App. 467, 549 P.2d 247 (1976) (domestic dispute between husband and employee wife finally resulting in assaultive injury while employee was at work not compensable since cause did not arise out of the duties of employment).

177. 566 S.W.2d at 677.

178. *Id.* at 681.

if the injured employees in *Velasquez*[179] were not aware of their coworker's suspicion, then the Colorado court seems to have unfairly inferred existence of antecedent malice which would have justified its decision.[180] The interpretation may have been correct under the Colorado statute,[181] and if so, suggests a different posture than that recognized by the Comment to Texas Pattern Jury Charges[182] which relies solely on the assailant's motivation as determinative of the relationship between the assault and the victimized worker's employment.

The implication of *Velasquez* for Texas cases is clear: if the motivation must be personal to the employee for the insurer to successfully defend on the basis of the exclusion, can the insurer assert a motivation of the assailant directed toward the employee for a nonemployment related reason with success even though the injured employee is unaware of the assailant's motive? Typically, a successful defense based on this theory has been predicated on facts in which antecedent malice or a nonemployment motive involves both the employee and his assailant actively in the proof so that there is no real issue concerning the employee's possible understanding of the motivation of his assailant. For example, in *Gutierrez v. Artesia Public Schools*,[183] the victim of a murder had been having an affair with his assailant's wife. The assailant apparently acted out of his knowledge of the affair, killing the employee while he was at school, but not while he was teaching.[184] The fact that the employee was killed as a result of a wilful or criminal assault not arising from employment provided the basis for the court's conclusion that the deceased employee's beneficiaries were not entitled to compensation.[185] The case also typifies the usual situation in which the employee is aware of the reason for the assault by virtue of his participation in some activity giving rise to the assailant's motivation. The difficulties posed by focusing on the assailant's motivation rather than the employee's involvement, knowledge, or understanding of the factor giving rise to the assault become clearer when

179. 141 Colo. App. at 201, 581 P.2d at 748.

180. *But see* Siebert v. Hoch, 199 Kan. 299, 428 P.2d 825 (1967), in which the Kansas Supreme Court suggested that even assaults for private reasons might be compensable if the fact of employment facilitated the assault and, thus, the injured employee's employment becomes a contributing factor to the assault.

181. COLO. REV. STAT. § 8-52-102 (1984 Supp.).

182. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 21.10 (1970).

183. 92 N.M. 112, 583 P.2d 476 (N.M. Ct. App. 1978).

184. 92 N.M. at —, 583 P.2d at 477.

185. *Id.* (relying on N.M. STAT. ANN. § 59-10-13.3 (1953)).

viewed in light of peculiar problems associated with unexplained assault cases.

A. *Proof of Identity of the Assailant*

A critical problem in focusing on the assailant's motivation as the key factor in determining compensability in third party assault cases, arises when the identity of the assailant is simply not known to the injured employee. The problem is particularly acute in the unexplained case when the employee has been killed by the attacker and no other witnesses to the conduct causing the death are available. In this case, the trier of fact is deprived of even the testimony of the assaulted employee who might testify concerning the identity or lack of previous relationship with the assailant. The identity of the assailant in *Walters v. American States Insurance Company*,[186] for example, was not known to the parties prior to trial, at least in part because law enforcement officials had not solved the apparent criminal homicide or even focused their investigation on a particular suspect. Moreover, because the employee was killed as a result of the assailant's act, his testimony concerning the circumstances of his death was not available, rendering the assault truly unexplained.

The burden upon the employee to demonstrate compensability based on the assailant's motivation is complicated by the problem of an unidentified assailant. Alternative resolutions of the problem in relationship to the principal issue of compensability are not satisfactory. Failure of the claimant to carry his burden as to motivation could be deemed fatal in all cases, including those in which the claimant simply has insufficient data concerning the assailant to allege a claim in good faith. In many cases, this approach unjustly penalizes those claimants who have suffered the most severe injury, including death, and wholly fails to promote the Act's goal of liberal interpretation for the benefit of workers.[187] Conversely, excusing the claimant's burden in those cases in which the assailant's identity is unknown, but retaining the burden in all other cases might encourage subterfuge on the part of claimants likely to be deprived of benefits by disclosure of the identity and motive of the assailant.

Apart from these considerations, the inherent unfairness of requiring the claimant to solve criminal offenses that cannot be solved

186. 654 S.W.2d at 421.

187. *See* concurring opinion of McGee, J. in *Walters*, 654 S.W.2d at 430 (citing Huffman v. Southern Underwriters, 139 Tex. 354, 128 S.W.2d 4 (1939)).

by law enforcement agencies charged with the responsibilities of investigation and prosecution also appears contrary to both public policy and a liberal interpretation of the Act.[188] Predicating the success of the claimant's case on the competence, diligence, or success of law enforcement officials similarly charged with identifying criminal offenders would at best reward claimants haphazardly and randomly.

B. *Proof of the Assailant's Motive*

Even if the identity of the assailant is known, the problem of determining compensability based on the assailant's motivation is still not solved. The reasons are simple. First, an assailant's motivation may or may not be revealed even if he is apprehended. In *Commercial Standard Insurance Co. v. Marin*,[189] for instance, the confession of the assailant provided no clear motivation for his attack and failed to demonstrate either a personal or an employment-related basis.[190] Second, the assailant may simply elect to exercise his Fifth Amendment right not to testify or make any incriminating statement.[191] Although identified, his motivation may be undisclosed by virtue of his insulation from meaningful cross-examination. Third, even if the assailant makes a statement, voluntarily testifies, or is coerced into disclosure, problems arise because the source of the testimony inherently lacks credibility. Conceivably, the assailant will design testimony to protect himself from criminal liability, suggesting the possibility of fabricated defenses to the criminal charges which, if believed in the collateral civil proceedings, would deprive worthy claimants of their just recovery. Similarly, the statement of the criminal offender may generally lack credibility based on the character of the accused demonstrated by his criminal activity.

A further problem in requiring proof of the assailant's motivation is suggested by *Travelers Insurance Co. v. Hampton*.[192] There,

188. The public policy issue focuses on the extent to which a burden can legitimately be placed on a citizen to essentially solve a crime thus far unsolved by law enforcement agencies.

189. 488 S.W.2d 861 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

190. *Id.* at 863.

191. U.S. CONST. amend. V. In *Marin*, the parties to the civil action had use not only of the assailant's confession, but also of his deposition. The assailant, thus, waived his rights under the fifth amendment, whether or not the waiver might properly have been deemed "knowing and intelligent." 488 S.W.2d at 863.

192. 414 S.W.2d 712 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.). *See also* Cummings v. United Resort Hotels, Inc., 85 Nev. 23, 449 P.2d 245 (1969) (holding injury compensable where employee fatally stabbed by fellow employee suffering from mental illness, where employer had actual or constructive knowledge of mentally ill employee's condition.)

the employee was killed along with his co-worker as they closed and locked the store.[193] The assailant was the co-worker's insane cousin.[194] The cousin's insanity negated the presence of a deliberate intent or a rational motivation for the assault, therefore, recovery was not denied even though the assault did not arise from the employment or conditions of work.[195] Similarly, a Pennsylvania court, while apparently focusing on the assailant's motivation in determining compensability in *Cleland Simpson Co. v. Workmen's Compensation Appeal Board*,[196] noted that when the assault is committed by an irrational, insane coworker for reasons not necessarily arising from employment, recovery is available to the injured employee.[197]

The limitation applied to third party assaults based on insanity or lack of capacity can be reconciled with the definitions of culpability employed by the Texas Penal Code,[198] but suggest a greater set of problems. For example, when the identity of the assailant is unknown, the worthy employee may well be deprived of recovery under the Act, although recovery would be available upon proof that the assailant acted irrationally or insanely.[199] The degree of culpability required for exclusion on the basis of third party acts, moreover, indicates the need for determinations more appropriately assigned to criminal proceedings than proceedings under the compensation statute.[200] The lack of apparent motive in many unexplained assault

193. 414 S.W.2d at 713.

194. *Id.*

195. *Id.* at 717.

196. 16 Pa. Commw. 566, 332 A.2d 862 (1975) (construing 77 PA. STAT. 411) (Purdon Supp. 1984-85)). *Compare Cleland Simpson with* Toler v. Industrial Comm'n, 22 Ariz. App. 365, 527 P.2d 767 (1974) (in which the employee assailant was intoxicated at the time of an unprovoked assault). The court specifically looked to the lack of prior animosity between the assailant and injured employee in upholding compensation. The *Cleland* court would have apparently excuded coverage in a similar situation had the assailant's motivation been demonstrated to be unrelated to any employment aspect, unless the level of intoxication would have rendered the assailant wholly incapable of forming an intent.

197. 16 Pa. Commw. at —, 332 A.2d at 865.

198. TEX. PENAL CODE ANN. §§ 6.02-.03 (Vernon 1974) defines the degrees of culpability and requirement of culpability to establish a criminal act.

199. *Id.*

200. For example, in *Walters*, the only medico-legal conclusion concerning cause of death was the pathologist's finding that the death was a homicide. 636 S.W.2d at 795; 654 S.W.2d at 425, 429. The court of appeals apparently accepted the insurer's argument that a finding of homicide necessarily established murder in noting: "If there is one thing certain in this case, Justice's death was not an accident." 636 S.W.2d at 797. TEX. PENAL CODE ANN. § 19.01 (Vernon 1974), however, defines five distinct degrees of "criminal homicide," all of which require proof of a culpable mental state. Unsolved offenses simply cannot be characterized

cases might also lead to a logical inference that any assault resulting in injury necessarily stems from a degree of irrationality or insanity. Although this conclusion is not supported by the general approach of the Penal Code,[201] it might be deemed viable in terms of assessing the credibility or merit of a defense to a compensation action based on a third party assault.

C. *Proof of Course and Scope of Employment in Questionable Cases*

Problems associated with failure to identify the assailant and determine the motivation for the assault are accentuated when the threshold determination of the employee's connection with work at the time of the assault is itself an issue in the case.[202] Some jurisdictions appear to have resolved the unexplained assault cases, at least partially, by simply requiring the claimant to demonstrate a nexus between the assault and the employee's employment, as illustrated by the New York court in *Seymour v. Rivera Appliances Corp.*[203] This nexus may be established by simply showing that the assault occurred while the employee was performing the duties of employment, even though the assault cannot be shown to have been attributable to the employee's working environment.[204] This position was taken by the Maryland Court of Appeals in *Giant Food, Inc. v. Gooch*.[205] There, the Maryland court held compensable the injuries sustained by an employee shot by a jealous husband who erroneously believed the employee had been having an affair with the assailant's wife.[206] The shooting occurred on the employer's parking lot when the employee

within the context of the penal code categorization precisely because the degree of criminal intent cannot be accurately established except in the context of a criminal trial, which requires some "solution" of the offense producing an accused, or defendant. *Id.*

201. Under Texas criminal law, proof of motive is not an essential element of the offense unless specifically required by the statutory language defining the offense. Motiveless offenses, however, are not necessarily the products of irrationality or insanity. Texas law defines insanity as a defense only when the actor suffers from a "mental disease or defect" rendering him incapable of knowing that his conduct was wrong or of conforming his conduct to the requirements of the law violated.

202. *See, e.g., Walters*, 654 S.W.2d at 427 (facts unclear whether assault committed during employment).

203. 28 N.Y.2d 406, 271 N.E.2d 224, 322 N.Y.S.2d 243 (1971) (fatal shooting of employee who had intervened in fight between co-employees at work on preceding day compensable when assailant was participant in prior day's argument).

204. 271 N.E.2d at 225.

205. 245 Md. 160, 225 A.2d 431 (1967).

206. 245 Md. at —, 225 A.2d at 432.

was not actually engaged in his duties of employment.[207] Nevertheless, because the court determined that the assault had occurred while the employee was going to perform the duties of his employment, the injuries were held to have occurred while the employee was acting in the course of his employment and thus compensable under the Maryland statute.[208]

The *Gooch* court's approach has not been uniformly adopted in assault cases apparently because of less favorable legislation in other jurisdictions.[209] However, in most situations the variance in judicial interpretation is focused on the motivation for the assault because the facts suggest a strong correlation between the place of the assault and the employee's employment. The distinguishing feature is, therefore, whether the appellate court and legislature view the locational nexus as sufficient to justify compensation,[210] or require a showing that the assault occurred not only in the course of employment, but arose from the employment.[211]

The more difficult problem is posed by facts in which the injuries are sustained away from the normal place or hours of employment,

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207. *Id.*

208. *Id.* The court construed MD. CODE ANN. art. 101, §§ 15, 67 & (6) (1957), to negate the distinctions between injuries arising out of employment and those merely occurring in the course of employment.

209. *E.g.*, Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972) (on-the-job shooting of wife and co-employee by jealous husband held not compensable because their deaths did not "arise of the employment"). *See also* Belden Hotel Co. v. Industrial Comm'n, 44 Ill. 2d 253, 255 N.E.2d 439 (1970) (holding on-the-job shooting of employee by jealous husband of hotel maid not compensable as arising out of and in the course of employment).

210. *See Gooch*, 225 A.2d at 431; *Seymour*, 271 N.E.2d at 224. *See also* Inland Mfg. Div., Gen. Motors Corp. v. Lawson, 14 Ohio Misc. 129, 232 N.E.2d 657, *aff'd*, 15 Ohio App. 192, 240 N.E.2d 100, 102 (1967) (employee injured in fall while she was leaving cafeteria located on empoyer's premises held to be entitled to workmen's compensation benefits).

211. Texas courts have applied the arising from employment standard. *See, e.g.*, Moore v. Means, 549 S.W.2d 417, 418 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) (mere fact that employer is injured by another employee at work does not in and of itself make the injury compensable). *Cf. Deatherage*, 628 S.W.2d at 210 (opinion of court of appeals on remand) (stating that under certain circumstances, worker's compensation beneficiaries may be entitled to presumption of course of employment). This standard was initially applied by the court of appeals in *Walters*, 636 S.W.2d at 796. *Accord* Dufloth v. City of Monticello, 241 N.W.2d 645 (Minn. 1976) (construing statute to require proof of more than mere presence of employee at employment to show that assault was in some sense causally related to employment); Lathrop v. Tobin-Hamilton Shoe Mfg. Co., 402 S.W.2d 16 (Mo. App. 1966) (liability for assault occurring while employee at work but not resulting from employment directly requires showing of some risk inherent in employment to which general public is not exposed); Wood v. Aetna Cas. and Sur. Co., 116 Ga. App. 284, 157 S.E.2d 60 (1967) (fatal shooting of assistant manager at grocery store by husband of former employee did not arise out of employment).

either because the employment situation itself is susceptible to fluctuation in terms of duties performed or because the place of performance is subject to change. Thus, in *Freeman*,[212] the Texas Supreme Court held that the deceased suffered his fatal injuries while in the performance of a special mission at the bequest or instruction of his employer, rather than extending the travel exception to deprive his heirs of benefits.[213] In *General Fire and Casualty Co. v. Bellflower*,[214] the Georgia Court of Appeals considered facts typical of irregular employment. There, the injured employee, a bus driver, was shot by a stranger while returning from a restaurant on a direct route to his hotel room, which had been provided by his employer in compliance with a company policy.[215] The driver was off duty at the time of the assault, but technically subject to being called to duty at virtually any time while on the road.[216] It appears that the assault did not arise from any risk to which the employee was uniquely exposed because of his employment. The court's reasoning was apparently tailored to fit the irregularity of his employment in terms of hours and place of work, a result which would have probably been different for an employee working in a more regular context and assaulted while traveling between a local restaurant and his home.[217]

Irregular employment may be subject to more liberal interpretation than employment which requires the employee to perform his duties at a specific location during normal hours of employment. To some extent the *Bellflower* reasoning may reflect the same judicial concern with problems peculiar to employment which is not fixed by time and place, much as the caretaker/watchman cases suggest a flexible judicial perspective with regard to the definition of customary duties of employment to afford compensation for injuries sustained while the employee is simply on or near the property, performing the function of guarding the property even while engaged in personal activities.[218]

212. 603 S.W.2d at 192.

213. *Id.* at 193.

214. 123 Ga. App. 864, 182 S.E.2d 678 (1971). *See also* Olinger Const. Co. v. Mosbey, 427 N.E.2d 910 (Ind. App. 1981) (court found employee who died from accident that occurred in a motel room while away from home arose out of and in course of his employment because employee was away from home because of his work).

215. 123 Ga. App. at —, 182 S.E.2d at 680.

216. *Id.* (applying GA. CODE § 114-102 (1973)).

217. *Cf. Caddell*, 644 S.W.2d 884 (employee held within the scope of employment when traveling from job site to office).

218. *Shook*, 44 S.W.2d at 425.

The *Walters* case[219] also presents an unusual set of facts complicating the threshold decision whether the assault has a sufficient relationship to the employment to justify a finding of the nexus essential to recovery under whatever standard is adopted by the Texas courts. In *Walters* the evidence suggested that the employee accompanied his employer, at the latter's direction, on a excursion to make a business presentation.[220] The circumstances of the excursion were sufficient to result in the jury's affirmative answer to the special issue inquiring whether the injuries were sustained by the employee while engaged in his employment. However, the absence of direct evidence concerning the actual assault and the deaths of both the employee and employer left the claimant without any direct evidence of the facts surrounding the fatal assault or motivation of the assailant.[221] This type of situation, which might be readily indentified with the manner in which professionals conduct business activity, particularly in terms of client negotiations and relations, may present problems of proof simply because the employee subjected to the unexplained assault may not be able to establish a necessary relationship between the assault and his employment, such as is normally present when the assault occurs at the workplace during usual hours of employment. However, recovery should not be precluded simply because the working pattern of the employee does not fit within easily recognized concepts of the workplace, because the workplace may well be dictated by the demands of the employer and nature of the employment.[222] Flexibility in viewing alternative work situations and environments is, therefore, critical if worthy claimants are not to be denied recovery simply because the unexplained nature of the assault fails to demonstrate a necessary relationship to the place or hours of employment.

V. ALLOCATING THE BURDEN OF PROOF

The central problem in all unexplained death or injury cases con-

219. 654 S.W.2d at 423.

220. *Id.* at 426-27.

221. *Id.* at 427.

222. For example, in Graybeal v. Board of Supervisors, 216 Va. 77, 216 S.E.2d 52 (1975), the court held that injuries sustained by a prosecutor from a bombing at his home at night by an accused he had prosecuted were compensable. Clearly, the motivation for the assault could be attributable to his performance of duties required by employment. *But see* Barnes v. Panaro, 238 A.2d 608 (Del. 1968), in which the court held that a bartender injured at home after working hours by a bottle thrown by an individual with whom he had had an altercation while at work earlier the same day could not recover under the applicable statute.

cerns the allocation of the burden of either proving nonapplicability of the alternative statutory bases for exclusion from coverage, or the applicability of the exclusion. In proving the nonapplicability of an exclusion, the claimant is confronted with the problem of essentially proving a negative fact—that the cause of death or injury is not recognized by the statutory exclusions as not justifying an award of compensation. With respect to the applicability of an exclusion, the burden is placed on the insurer to prove that the cause of the injury falls within that group of causes for which compensation is not justified. The determination that legislation should be interpreted to allocate the burden in either direction will ultimately pose special problems of proof for claimants or insurers because the critical feature of the unexplained injury case is that it is unexplained in some significant sense, either as to causality in the immediate sense, or as to motivation or purpose in the ultimate sense. The starting point for analysis of unexplained death or injury cases, as in all cases, is the claimant's threshold burden of demonstrating that the injury was sustained while the claimant was in the performance of his duties, or in the course and scope of the duties of his employment.

A. *The Claimant's Burden to Prove the Injury is Sustained in the Course and Scope of Employment*

The threshold burden for claimant's seeking compensation under the Texas statute is aptly expressed by the language of the appropriate approved instruction:

> "Injury in the course of employment" means any injury 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.[223]

The instruction provides a broad sense of the relationship between the injury-producing event and the worker's employment as the focal point for establishing the worker's right to recovery under the Act. The definition provided also suggests depths of the problem which must be considered in individual cases. For example, the definition does not limit recovery for injuries to those sustained on the employer's premises,[224] as might be expected by an historical reading of the intent expressed in worker compensation legislation. However,

223. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 21.10 (1970).
224. *Id.*

the definition does not expressly deal with situations in which the injuries sustained occur in places other than the workplace or on the employer's premises. This opens up a wide range of activities for interpretation by the appellate courts, particularly when the normal activities of the employee are in some sense transient. For instance, in *London Guarantee and Accident Co. v. McCoy*,[225] the Colorado Supreme Court considered an unusual case involving a traveling salesman who stopped at the home of a friend to make a telephone call necessary for business. While in the home, the friend's father-in-law became homicidal and killed the employee and threatened his wife and daughters.[226] The court concluded that the death was compensable because the duties of employment placed the deceased in a place which exposed him to the criminal attack at that particular time.[227] This type of broad interpretation of work-relatedness of the injury, particularly when the injury-producing event is an assault committed by a third person for a reason apparently unrelated to the employment, suggests the extent to which the duties of employment may expand the potential range of cases resulting in recovery beyond the standard view of the workplace.[228] The *McCoy* decision is perhaps no more bizarre than *Cuellar*,[229] in which a Texas court of appeals held an insect sting compensable because the employee's work exposed him to the sting of the particular insect by placing him in a location in which the sting could and did occur.[230]

Similarly, the limitation upon recovery to those injuries sustained while the employee is engaged in or about the furtherance of his em-

225. 97 Colo. 13, 45 P.2d 900 (1935).

226. *Id.* at —, 45 P.2d at 901.

227. *Id.* at —, 45 P.2d at 902. *Compare McCoy with* Travelers Ins. Co. v. Hampton, 414 S.W.2d 712, (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.) (employee killed by co-employee's insane cousin held compensable); Cleland Simpson Co. v. Workmen's Compensation Appeal Bd., 332 A.2d 862 (Pa. Commw. Ct. 1975) (injury or death by insane, irrational fellow worker is compensable). *See supra* note 196 and accompanying text.

228. Of course, the facts in *McCoy* deal with employment requiring travel and consequent exposure to a greater range of risks than those which might normally be associated with employment at a single work place. *Cf. Bellflower*, 123 Ga. App. at 864, 182 S.E.2d at 678 (when the nature of employment requires the employee to confront the risks of the street to which the general public may also be exposed, injuries sustained as a consequence of exposure to those risks are compensable). *See also* Jecker v. Western Alliance Ins. Co., 369 S.W.2d 776, 778 (Tex. 1963) (when an injury occurs to the employee while traveling on public streets and the trip was pursuant to an expressed requirement of his employment contract, the injury is considered to arise out of employment for compensation purposes).

229. 468 S.W.2d at 880.

230. *Id.* at 883.

ployer's interests raises interesting issues concerning joint missions or situations in which a personal motive may be discerned from the employee's acts, as well as a motive arising from the employment.[231] The determination that the employee is engaged in the furtherance of his employer's interests is often difficult in those cases which do not occur on the employer's premises during normal hours of employment. Texas courts have held, in light of the problems in determining the nature of the employee's activity at the time of death or injury, that the purpose of the employee's activities may be established by statements made by the employee prior to the time of the injury concerning his activity.[232]

The problem of discerning the employee's concerns in a difficult case has suggested an approach favoring compensation on part of Texas courts. The Tyler Court of Appeals considered an unexplained death case in *American States Insurance Co. v. Caddell*[233] which presented several problems, including applicability of the coming and going exclusion and travel exception to that general rule and the problems of proof for claimants seeking recovery in death cases. The employee apparently traveled at the direction of his supervisor in the business, yet at the time of his death it was uncertain whether he was merely returning home after completing his work, or returning to continue work at his office at home.[234] The mission undertaken, however, was totally motivated by employment and not by personal reasons.[235] The evidence pointed to the employment motive for the trip and also to the conclusion that the employee was prepared to continue work at home at the completion of his trip.[236] Because the insurer appealed only on a no evidence point of error,[237] the court of appeals

231. *See Caddell*, 644 S.W.2d at 887 (discussion of dual purpose doctrine).

232. Statements made by the employee tending to show his state of mind and immediate purpose are admissible to demonstrate an employment motivation for subsequent acts. *Walters*, 654 S.W.2d at 427 (citing Great Am. Indem. Co. v. Elledge, 312 S.W.2d 722, 724 (Tex. Civ. App.—Houston 1958), *aff'd*, 159 Tex. 228, 320 S.W.2d 328, 329 (1959)). *See also* Mid-Continent Casualty Co. v. Conrad, 368 S.W.2d 686, 687 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.) (testimony that deceased had said he was having trouble with the truck he was road testing for his employer prior to the accident was admissible to show state of mind and immediate purpose).

233. 644 S.W.2d 884.

234. *Id.* at 887-88.

235. *Id.* at 887.

236. *Id.* at 887-88.

237. *See* Calvert, *supra* note 150, at 362-65. When reviewing no evidence points, Texas appellate courts are required to consider only evidence supporting the verdict and all reasonable inferences supporting that verdict and to disregard all contrary evidence and inferences.

indulged all inferences favorable to the claimant to construe that there was at least some evidence to support the jury verdict for the employee.[238] In this circumstance the employee's beneficiaries prevailed, at least in part, because of the phrasing of appellant's point of error. Had the insurer raised an issue related to factual insufficiency of the evidence supporting the conclusion that the employee was not merely returning home after work, the court of appeals could have decided the case adversely to the claimant.[239] *Caddell* demonstrates not only the problem of proof in the unexplained death case, but the necessity for properly presenting evidentiary sufficiency issues for appellate review to obtain the most favorable posture for review from the court of appeals.[240]

The significance of interplay between the evidence available and the approach taken by an appellant on appeal in a difficult case is illustrated by the disposition of the *Deatherage* appeal.[241] There, the issue central to the litigation was whether the injury arose from the worker's employment as a watchman on his employer's property.[242] The Texas Supreme Court, considering the lower court's reversal of the claimant's jury verdict based on the insurer's no evidence point of error, ruled that there was legally admissible evidence introduced which would support the jury finding that the worker suffered his

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Elliot v. Great Nat'l Life Ins. Co., 611 S.W.2d 620 (Tex. 1981); Stodgill v. Texas Employers' Ins. Ass'n, 582 S.W.2d 102 (Tex. 1979).

238. 644 S.W.2d at 886.

239. *See Deatherage*, 628 S.W.2d at 210.

240. The *Caddell* court noted:

> Appellant's first point of error complains that the trial court erred in overruling defendant's motion for judgment notwithstanding the verdict because there was *no evidence*, or in the alternative, *factually insufficient evidence* that Bennie Caddell was within the course and scope of his employment at the time of his death. *We construe this point of error as raising only a "no evidence" point.*

644 S.W.2d at 886 (emphasis added) (citing Calvert, *supra* note 150, at 362). Because a no evidence point limits the court's review to evidence favorable to the verdict only, the *Caddell* court disposed of this issue by holding that, reviewing the evidence "in light most favorable to the verdict and judgment," there was "some evidence that Caddell was within the course of his employment at the time of his death." 644 S.W.2d at 888. By attempting to combine the no evidence and factual insufficiency points of error, appellant's counsel apparently committed a grave strategic error. Construction of the point by the court as a no evidence point resulted in application of the most rigorous standard of review against the insurer. Had the court ruled favorably on the point, however, counsel would have permitted further appeal to the supreme court without reserving the right to subsequent review on remand. *See Deatherage*, 615 S.W.2d 181 (Tex. 1981), *on remand*, 628 S.W.2d 209 (Tex. App.—Austin 1982, no writ).

241. 615 S.W.2d 181 (Tex. 1981), *on remand*, 628 S.W.2d 209 (Tex. App. Austin 1982, no writ).

242. 615 S.W.2d at 181.

death while in the course and scope of his employment.[243] On remand to the Austin Court of Appeals, however, the claimant was once again deprived of his verdict.[244] That court held that the evidence was factually insufficient to support the jury finding since the evidence failed to demonstrate that the injury sustained by the employee resulted from an accident which necessarily arose during the course of employment.[245] The court held:

> The requirements of the statute are not satisfied by proof that injury occurred while the workman was engaged in or about the furtherance of his employer's affairs or business. He must also show that the injury was of a kind and character that had to do with and originated in the employer's work, trade, business, or profession . . . . It was appellee's burden, of course, to prove that her husband's death occurred in the course of employment.[246]

The court explained its reasoning:

> An injury has to do with, and arises out of the work or business of the employer, when it necessarily results from a risk or hazard which is necessarily, or ordinarily, or reasonably inherent in or incident to the conduct of such work or business. Compensation law protects the employee against the risk or hazard taken in order to perform the employer's task.[247]

The court observed that certain circumstances, including death by assault or during a conflagration at the plant a watchman is employed to protect, would justify compensation.[248] However, the court also concluded that simply because the employee died in a fire at a trailer in which he lived while watching his employer's property the claimant did not establish a sufficient connection between the duties of employment and circumstances of the death to justify an award of compensation.[249] The court's conclusion proscribes an ultimately impossible burden of proof for the claimant.[250] There would appear no greater justification for assuming that an assaulted watchman died while per-

243. *Id.* at 183.
244. 628 S.W.2d at 209.
245. *Id.* at 211.
246. *Id.* at 210.
247. *Id.* at 211.
248. *Id.*
249. *Id.* The court essentially held that the claimant had failed to discharge her burden of proving that her husband's death occurred in the scope of his employment, citing Service Mut. Ins. Co. v. Banke, 155 S.W.2d 668 (Tex. Civ. App.—San Antonio 1941, writ ref'd), for the general rule regarding the burden of proof in worker's compensation cases. 628 S.W.2d at 210.
250. *See, e.g.*, Great Am. Indem. Co. v. Elledge, 320 S.W.2d 328 (Tex. 1959) (nightwatchman's unexplained death on employer's premises compensable).

forming his duties—absent some evidence of robbery of the employer's property; for example, than that Deatherage died as a result of a risk inherent in living in quarters provided on his employer's property. Yet, in *Shook*,[251] another court of appeals had been willing to draw exactly such a conclusion in an assault case on the theory that the employee's duties required continuing vigilance while on or near the property. Even assuming the court of appeals correctly decided *Deatherage* on the facts, the case is troublesome because of the problems of proof inherent in watchman cases which, by their very nature, are likely to be dependent upon reconstruction of a fatal accident or assault through circumstantial evidence only.[252]

B. *The Burden of Proof in Unexplained Death and Injury Cases*

The significance of allocation of the burden of proof in unexplained cases is critical since it will likely be determinative of recovery for deserving claimants. This is true even though other factors, such as failure to properly plead, failure to protect the record on specially requested issues or instructions, or mistakes in presentation of issues for appellate review may result in recovery in cases which otherwise might be lost because of evidentiary problems. When the facts surrounding an accidental or intentional injury or assault can only be determined speculatively or, at best, circumstantially, allocation of the burden of proof with respect to the threshold issue of whether the injury was sustained in the course of employment will necessarily create problems of proof for either claimants or insurers. For example, the absence of direct evidence concerning an employee's apparently accidental death may create a significant hurdle in demonstrating the connection or nexus between the injury-producing event and the employment.[253] In cases in which the death or injury can be fairly characterized as "accidental" the claimant's burden can be met by showing sufficient facts to establish the nexus. Accidental deaths or injuries which occur at the workplace and during the normal hours of employment would appear to present the easiest cases since the nexus is almost necessarily established by the context in which the injury is

251. Southern Sur. Co. v. Shook, 44 S.W.2d 425 (Tex. Civ. App.—Eastland 1931, writ ref'd).

252. This problem suggests the desirability of adoption of the presumption favoring recovery in unexplained death or injury cases. *See supra* note 36.

253. For example, the exact time of death in *Deatherage*, 615 S.W.2d at 182, was inconclusive and established by circumstantial evidence based on the decedent's last contacts with others and the report of an apparent related fire in the vicinity of his burned-out trailer.

sustained.[254]

In cases of death or injury apparently sustained as a result of intentional acts committed by third persons, however, the burden of proof becomes a more complex matter. Clearly, the claimant remains under the general burden of proving that the injury has been sustained by the employee in the course of employment.[255] However, because of the statutory exclusion for injuries arising from assaults attributable to personal, nonemployment motives, a secondary problem of proof exists in these cases.[256] Whether the burden is placed upon the claimant to establish that the motivation of the assault was related to employment or upon the insurer to prove a nonemployment motivation will make a substantial difference in resolution of difficult, unexplained cases. The truly unexplained case, so characterized because of the lack of facts concerning the assailant, his motivation, or his prior relationship with either the employee or the employer, suggests a serious problem for the claimant required to establish that his injury was not the result of some motivation unrelated to employment.

The difference between unexplained accidents and unexplained assaults indicates the disparity in treatment given claimants when the court simply engages in characterization of the injury-producing event and does so improperly. If the injury-producing event should correctly be characterized as "accidental" in nature but some fact suggests assault as the possible explanation for the event, characterization of the event as an assault necessarily increasing the claimant's burden of proof will result in unfairness to an otherwise worthy claimant. Conversely, mischaracterization of the injury-producing event as an accident may lessen the burden of proof placed upon potentially worthy or unworthy claimants. Further, the problem in terminology may be accentuated by the parameters given the term "accident."[257]

254. In Sandmeyer v. City of Bemidji, 281 Minn. 217, 161 N.W.2d 318 (1968), for instance, the court held that a fatal injury sustained by a police officer during off-duty target practice was compensable based on departmental policy encouraging such practice, even though it was not sustained during the employee's normal hours of employment.

255. *Deatherage*, 615 S.W.2d at 182.

256. Justice McGee, in his concurring opinion in *Walters*, observed: "I am, however, persuaded that basic fairness justifies a relaxation of the claimant's burden of proof in cases of unexplained assaults, particularly when the victim's death has removed the only possible witness." 654 S.W.2d at 430.

257. Consider the characterization of a fatal shooting of an employer as an accident within the meaning of the applicable statute in *In re* Robinson, 23 Or. App. 126, 541 P.2d 506 (1975). *Accord* Lustgarten v. Victor Pulmbing Supply, 61 A.D.2d 875, 402 N.Y.S.2d 241 (1978); Conyers v. Rush Bar, 38 A.D.2d 987, 329 N.Y.S.2d 168, (App. Div., 1972).

One of the concerns of the Texas Supreme Court expressed during the oral argument of the *Walters*[258] case involved whether the death of an employee from an apparent assault by a third party might properly be deemed an accident as to that employee if the assailant's motive for the assaultive act was actually directed at another employee or another person.[259] Because the employee killed in the *Walters* case apparently accompanied his employer on the business trip and the employer was also found dead, a motive directed at the employer which resulted in both their deaths might be viewed as an "accident" with respect to the employee.[260] In essence, because the employer was the object of the assault, the fact of the employee's involvement in the overall sequence of events which left him dead was, in a sense, an accident, if only because the assault could have probably occurred in other circumstances not involving the employee. This type of result is suggested by the facts in *Hampton*,[261] which was decided on other grounds. There, the assailant was related to the coworker who was also killed in the attack.[262] Had the claimant not been present with the coworker at the time of the assault, it appears likely he would not have been killed by the cousin, whose acts were shown to be the product of his insanity. Another similarly broad definition of accident is suggested by the facts developed in *In re Peters' Case*,[263] a Massachusetts Supreme Judicial Court decision. There, the injured employee was having lunch with a co-worker who was a union official.[264] A former employee confronted the co-worker, who advised the claimant to run and call the police.[265] The former employee caught the claimant as he ran and assaulted him.[266] Although the case did not turn on the characterization of the incident as an accident,[267] the facts lend themselves to the view that the employee suffered injury accidentally,

258. 654 S.W.2d at 423.

259. In *Walters*, the court of appeals expressly rejected the claimant's reliance on *Deatherage*, concluding that the employee's death was not an accident and, thus, that the accidental death presumption recognized in *Deatherage* was inapplicable. 636 S.W.2d at 797.

260. Thus, in a sense, accident might be applied to any injury sustained by an assaulted employee whom the specific intent of the actor was not to inflict injury on the employee.

261. 414 S.W.2d at 712.

262. *Id.*

263. 362 Mass. 888, 291 N.E.2d 158 (1972).

264. 362 Mass. 888, 291 N.E.2d at 158.

265. *Id.*

266. 362 Mass. 888, 291 N.E.2d at 158-59.

267. 362 Mass. 888, 291 N.E.2d at 159 (the injured employee was not the original subject of the dispute).

not being the object of the initial confrontation, and apparently only because he happened to be present at the time of the original difficulties between his co-worker and the assailant.

1. The Presumption in Accidental Death or Injury Cases

Although most unexplained accidents resulting in death or injury at the job site during the normal hours of employment can be resolved without difficulty, problems emerge when the workplace is not standardized or defined by duties of employment uniformly performed by numbers of employees working together. Typically, the accidental death or injury cases which present problems in terms of proof are those involving employees working in isolated circumstances or whose duties require travel or performance of individualized work. In those cases, the claimant may have a difficult time in establishing that the accident was sustained in the course of employment.

The disposition of the *Deatherage* case by the court of appeals after an initial reversal in the Texas Supreme Court illustrates the type of problem often faced by claimants forced to demonstrate not only that the accident was sustained during performance of the duties of employment, but also that it arose from the nature of risks inherent in employment itself.[268] The supreme court discussed, but did not apply, the recognized presumption which is available in unexplained accidental death cases in Texas:

> When an employee is found dead at a place where his duties require him to be, or where he might properly have been in the performance of his duties, during the hours of his work, it has been said that in the absence of evidence that he was not engaged in his master's business, there is presumption that the accident arose out of and in the course of the employment within the meaning of the compensation statute.[269]

Interestingly, the court held that this presumption, recognized in *Scott v. Millers Mutual Fire Ins. Co.*,[270] was not applicable in *Deatherage* since there was some evidence supporting the jury finding that the death occurred while the employee was engaged in his employer's business.[271] On remand, however, the court of appeals concluded that that evidence was insufficient to support the verdict factually[272] and,

268. 628 S.W.2d at 210.
269. 615 S.W.2d at 183. *See* 1 A. LARSON, *supra* note 11, § 24.10.
270. 524 S.W.2d 285 (Tex. 1974).
271. 615 S.W.2d at 183.
272. 628 S.W.2d at 211.

because review of factual insufficiency claims are committed exclusively to the jurisdiction of the courts of appeals,[273] it appears the claimant erred in providing any evidence instead of relying on the presumption entirely. If the opinion on remand withstands further scrutiny, problems of proof for claimants may be complicated by the strategic decision of whether the case should be predicated on available evidence or reliance on the presumption recognized but not applied in *Deatherage*.[274]

Apart from the presumption which may be available to claimants in unexplained accidental death cases, other expressions of law favor those employees most likely to be injured in factually unexplained accidents. For instance, Larson cites a general rule concerning watchman and caretaker cases which expresses reasoning similar to that relied on by the court in *Southern Surety Co. v. Shook*:[275]

> When an employee is required to live on the premises, either by his contract of employment or by the nature of the employment, and is continuously on call [whether or not actually on duty], the entire period of his presence on the premises pursuant to this requirement is deemed included in this course of employment.[276]

This rule broadly interprets the duties of employment of the caretaker to reflect the employer's actual interest in his duties and residence on the premises, that is, the prevention or detection of potential injury to the employer's property. By fashioning the rule to mirror the reality of the employer's interest in employing the worker, Larson and subscribing courts demonstrate a clear preference for compensating worthy claimants rather than protecting against unjustified recovery by unworthy claimants.[277]

Similarly, the Texas Supreme Court has recognized a rule of law favorable to those employees whose injuries are likely to result from

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273. Calvert, *supra* note 150, at 369. *See also* Strange v. Treasure City, 608 S.W.2d 604, 610 (Tex. 1980) (Texas Supreme Court has no jurisdiction to consider factual sufficiency points of error); Sagebrush Sales Co. v. Strauss, 605 S.W.2d 857, 861 (Tex. 1980) (factual insufficiency points are within exclusive jurisdiction of the court of civil appeals).

274. For a discussion of the analogy between assault and accident cases and the effect of presumptions, compare the majority and concurring supreme court opinions in *Walters*, 654 S.W.2d at 425-26, 429-30.

275. 44 S.W.2d at 425.

276. 1 A. LARSON, *supra* note 11, § 24.00. *See also* Insurance Co. of N. Am. v. Estep, 501 S.W.2d 352 (Tex. Civ. App.—Amarillo 1973, writ ref'd. n.r.e.) (applying similar reasoning to that expressed by Larson).

277. This approach is consistent with a liberal interpretation of the Workers Compensation Act in favor of the employee and his beneficiaries. *See Walters*, 654 S.W.2d at 430 (McGee, J., concurring).

activity not uniquely associated with a workplace.[278] This rule, relied on by Justice Cadena in *Marin*,[279] provides that "[a]lthough risks of the street are dangers which an employee shares in common with the general public, if the performance of his duties make it necessary for the employee to be on the streets, the risks he there encounters are held to be incident to his employment."[280] This posture suggests that the appellate courts favorably view those claimants able to demonstrate that the accidental injury sustained occurred as a consequence of their performance of duties exposing them to general risk of accident. The approach would also appear to favor claimants injured as a result of intentional acts, if uniformly applied to all risks inherent in daily activity encountered by the employee. However, the latter proposition is dependent upon the allocation of the burden of proof with regard to motive in assault cases; the "risks of the street" approach is only favorable to those employee/claimants not required to disprove existence of a nonemployment motive for the assaults causing their injuries when proof of motivation is virtually impossible.

Although the cumulative impact of these expressions of law would appear highly favorable to claimants, the court of appeals opinion in *Deatherage* portrays the lack of favor with which individual courts may view the paucity of evidence in unexplained cases.[281] *Deatherage* is difficult to reconcile, moreover, with the general tendency of Texas courts to view both caretaker and accident claims with favor. Given the prior cases and the type of reasoning displayed by the court in *Cuellar*—"We think it clear that the insect sting was risk or hazard of his employment and is compensable"[282]—it is unreasonable to assume that the *Deatherage* opinion on remand will ultimately prove to be the definitive statement of law in unexplained accident cases.

2. Unexplained Assault Cases—Problems for Claimants and Insurers

The relative ease with which claimants may succeed in cases readily characterized as accidents differs markedly from the uncertainty and potential problems encountered in the assault cases. Be-

278. Jecker v. Western Alliance Ins. Co.,369 S.W.2d 776 (Tex. 1963).
279. 488 S.W.2d at 861.
280. *Id.* at 869.
281. 628 S.W.2d at 210-11.
282. 468 S.W.2d at 883.

cause the assault, or intentional act committed by a third person, provides a theory for denial of compensation if proved by the evidence to have resulted from a motivation not arising from the employment, Texas courts have failed to reach a consensus concerning exactly how the statutory exclusion should operate.

The lack of consensus can best be discerned through the differing approaches taken by the court in *Highlands Underwriters Insurance Co. v. McGrath*[283] and by the commentary to the applicable section of Texas Pattern Jury Charges.[284] *McGrath* concerned a claim by dependents of a truckdriver shot to death.[285] The court distinguished between employment serving as the *cause* of the attack as opposed to the *occasion* for the attack in concluding:

> The general rule is that if the assault is unconnected with the employment, or is for reasons personal to the assailant and the one assaulted, or is not because the relation of employer and employee exists, and the employment is not the cause, though it may be the occasion, of the wrongful act, and may give a convenient opportunity for its execution, it is ordinarily held that the injury does not arise out of the employment. *The burden of proof is upon the claimant to show that an assault upon him was directed against him as an employee or because of his employment.*[286]

The *McGrath* court's conclusion is, therefore, that the burden is upon the claimant in the unexplained death or injury case and that burden is to show an employment motivation for the assault.[287] The practical effect of the *McGrath* approach is to require the claimant to prove that the assault did not occur for a reason unrelated to employment in the unexplained case because the lack of evidence of the identity or motive of the assailant would render proof of an employment motive impossible in many cases. Even in *Blair*,[288] for example, the Oklahoma Supreme Court implied that evidence of robbery of the employee might have been a factor dictating a different result. Thus, the mere suggestion that the assault is motivated by a reason extraneous to employment, such as robbery, would require a claimant laboring under the *McGrath* standard to disprove that the nonemployment

283. 485 S.W.2d at 593.

284. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 21.20 (1970) (commentary).

285. 485 S.W.2d at 594.

286. *Id.* at 595 (emphasis added).

287. *Id.* at 596.

288. 496 P.2d at 796.

motivation was the only motivation for the assault in order to sustain his burden.

The position taken by the commentary to the pattern jury charge would indicate a different test for the exclusion, based on construction of the word "him" in the statute.[289] Under the commentary's theory, recovery would be denied only if the motivation were demonstrated as personal to the employee.[290] Thus, those cases in which the assailant's motive was not related to employment would result in denial of benefits only if the motivation was also personal to the employee.[291] The significance of the traditional reference to antecedent malice, a concept implying some degree of relationship between the employee and assailant antedating the assault, is apparent from the commentary approach.[292] Only in those cases in which a motivation personal to the employee for the assault is demonstrated would recovery be unavailable; the claimant would never have any reason to suggest that situation as part of his burden of proof. Once the commentary position is adopted, the burden is clearly placed on the insurer to demonstrate that the employee's death or injury truly resulted in an assailant's motivation not related to the employee's work. The innocent employee—innocent in the sense of the employee having no knowledge of his assailant's apparent motivation—would be protected in such cases from his own lack of knowledge, rather than penalized.

Other jurisdictions have dealt with the problem uniquely posed by the unexplained assault either by creating a judicial presumption in favor of the injured employee,[293] or by creation of a statutory pre-

289. *See supra* note 163.

290. *Id.*

291. For example, in *Vaughn*, 130 S.W.2d at 395, the deceased was engaged in the duties of his employment as a night watchman. He was killed, not because of any aspect of his employment, but because of his assailant's personal animus toward him arising out of an ongoing family dispute. *Accord* Interstate United Corp. v. The Indus. Comm'n, 65 Ill. 2d 434, 358 N.E.2d 1137 (1976) (evidence failed to show that the assault was provoked by a dispute with a customer rather than an argument with a fellow employee over matter not concerning employment).

292. An interesting discussion of the antecedent malice theory is provided by the court in *Highlands*, 485 S.W.2d at 596-97. The facts recounted in the *Highlands* lawsuit itself clearly demonstrate antecedent malice existing between the deceased employee and his assailant, who was identified in probability but not conclusively. *Id.* at 595-96.

293. The judicial presumption concept was advanced by Justice McGee in his concurring opinion in *Walters*:

> In my opinion, when the cause of death is the intentional act of an unknown assailant whose motives cannot be discerned, these same facts should also give rise to a rebuttable presumption that the assailant acted for reasons other than those personal to

sumption favoring the employee.[294] This approach has by no means been uniform, however, as Larson notes in his treatise.[295] Other jurisdictions seem to suggest that recovery is barred in cases in which the assailant's motive, irrespective of the employee's knowledge or understanding of the reason for the motive, is shown to have no connection with the employee's work.[296] Under this formulation, of course, the employee would be unable to overcome proof of a nonemployment motivation on the part of the assailant except by presentation of controverting evidence as to the motivation. No middle ground for the innocent employee is recognized as justifying compensation.

Under any rule, it is almost certain that unworthy claimants will collect in some unexplained assault cases, particularly when the assaults prove fatal, depriving the claimants of even that employee's testimony denying any understanding of the reason for the assault. Equally certain, of course, is the converse: any rule that places the

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the employee. With the aid of such a presumption, the evidence is legally sufficient to support the judgment on the jury's verdict.

654 S.W.2d at 430.

The Georgia Supreme Court, in Barge v. City of College Park, 148 Ga. App. 480, 251 S.E.2d 580 (1978), applied a presumption in holding compensation proper when a uniformed police officer was killed in an execution-style slaying while on his way to work. The court concluded that he was continuously on call and that the circumstances of his work and death combined to create a presumption that his death arose out of and in the course of his employment. 148 Ga. App. 480, 251 S.E.2d at 582-83. Other courts have effectively recognized a type of presumption in applying the positional risk doctrine. *See, e.g.*, McLean's Case, 323 Mass. 35, 80 N.E.2d 40, 43 (1948) (taxi driver beaten but not robbed, no apparent motive, held: injury compensable because "employment brought him in contact with the risk that in fact caused his injuries").

294. *See, e.g.*, Slotnick v. Howard Stores Corp., 58 A.D.2d 959, 397 N.Y.S.2d 179 (1977) (applying New York's statutory presumption that the accident arose out of the employment); Fireman's Fund Am. Ins. Co. v. Gomes, 544 P.2d 1013 (Alaska 1976) (applying Alaska's statutory presumption that injury was work related); Allen v. Dorothy's Laundry & Dry Cleaning Co., 523 S.W.2d 874 (Mo. Ct. App. 1975) (1969 amendment eliminated the need of an affirmative showing that an assault arose out of the employment in the case of a neutral, unprovoked assault which arose in course of employment); Valenti v. Valenti, 28 A.D.2d 572, 279 N.Y.S.2d 474, 477 (1967) (applying New York's statutory presumption).

295. 1 A. LARSON, *supra* note 11, § 11.33.

296. *See, e.g.*, Mullins v. Tanksleary, 376 P.2d 590, 591 (Okla. 1962) (suggesting in dicta that an unexplained assault not compensable, limited by Burrell v. Prewitt, 445 P.2d 279, 281 (Okla. 1968) and further limited by *Blair*, 496 P.2d at 799). This approach was taken by the court of appeals in *Walters*, 654 S.W.2d at 423. *Cf.* Wolfe v. Shorey, 290 A.2d 892 (Me. 1972) (employee assaulted during delivery of mail to post office had burden to show assault arose out of employment or performance of duties of employment); American Brake Shoe Co. v. Industrial Comm'n, 20 Ill.2d 132, 169 N.E.2d 256, 259 (1960) (burden of employee to show injury resulted from horseplay on employer's premises could not be discharged in apparent assault case by showing no prior discord, threats, or fights between claimant and coemployee). This approach was taken by the court of appeals in *Walters*, 654 S.W.2d at 423.

burden of proof regarding the motivation for the assault on claimants will result in worthy claimants being deprived of benefits under the Act because of inability to meet the burden in the unexplained case.

C. *Procedural Requirements*

Because there is conflict in the Texas courts of appeals regarding the burden of proof in unexplained death or injury cases, both claimant's and insurer's counsel must be careful to protect the record for appeal as well as to protect their clients' interests at trial. At least part of the problem in discerning the proper action at trial stems from the unspecified nature of the problems of proof under the Act. For example, the statutory exclusions for injuries resulting from acts of God,[297] voluntary intoxication,[298] fellow employee,[299] or third party assault,[300] and acts of employee aggression[301] are not defined as affirmative defenses under the Act with respect to pleading burdens.[302] Consequently, unresolved issues may remain with respect to the proper approach to be taken by counsel with regard to pleading and submission of requested special issues or instructions.

1. The Pleading Burden in Unexplained Death or Injury Cases

The general burden of pleading required in the unexplained death or injury case is placed upon claimants to show facts demonstrating that the injuries were sustained in the course of the employee's employment. Two problems flow from the initial pleading burden. First, the pleading itself may demonstrate a possible exclusion from coverage, such as when the petition shows that the worker was injured by an apparent act of God or by an assault apparently

297. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(1) (Vernon 1967) (defining "injury sustained in the course of employment"). *See* Traders and Gen. Ins. Co. v. Ross, 263 S.W.2d 673, 675 (Tex. Civ. App.—Galveston 1953, writ ref'd).

298. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(3) (Vernon 1967). *See* Texas Employer's Ins. Ass'n v. Monroe, 216 S.W.2d 659, 661 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e.).

299. TEX. REV. CIV. STAT. ANN. art. 8309, §§ 1(2), (4) (Vernon 1967). *See* Phoenix Ins. Co. v. Bradley, 415 S.W.2d 928, 933 (Tex. Civ. App.—Texarkana 1967, no writ).

300. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(2) (Vernon 1967). *See* Liberty Mut. Ins. Co. v. Upton, 492 S.W.2d 623 (Tex. Civ. App.—Ft. Worth 1973, no writ).

301. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(4) (Vernon 1967). *See* Kurtz v. Liberty Mut. Ins. Co., 572 S.W.2d 766 (Tex. Civ. App.—Waco 1978, no writ).

302. *See Ross*, 263 S.W.2d 673, 675. *See also Walters*, 654 S.W.2d at 428-30 (McGee, J., concurring). Instead of affirmative defenses, these statutory exclusions are characterized as "inferential rebuttal issues" which, if raised by the evidence, must be negated by the claimant in order to prove his case. *Id.* at 428-30.

committed by a third person. In this situation, the question posed is whether the insurer is required to plead defensively the basis for the statutory exclusion which would be applicable if the facts supported the defensive theory.

Second, the claimant may plead sufficient facts to establish compensability under the Act, but the carrier will wish to defend on the basis of other facts arguably showing a statutory basis for exclusion. The question raised concerns the specificity with which the carrier must plead in order to properly present and preserve its theory of defense. In *United States Fire Insurance Co. v. Monn*,[303] the Fort Worth Court of Appeals pointed out that a party is not entitled to submission of any issue when it is raised only by general denial and not by an affirmative written plea.[304] At a minimum, *Monn* points to the carrier's need to plead sufficiently to justify inclusion of a requested issue in the court's charge, rather than rely on a general denial to preserve its position. The extent of pleading required, however, may be dependent on the facts of an individual case, including the extent to which the claimant's pleading itself suggests facts which would justify minimal defensive pleading in order to support a requested instruction or issue.[305]

In *Walters*, the insurer did not rely on a simple general denial, but pleaded that the injury did not occur in the course of the deceased's employment.[306] The defensive pleading did not specifically refer to the basis for statutory exclusion on which the carrier relied, but taken with the facts pleaded by the claimant, it might fairly be assumed that the exclusion related to intentional assault by a third person. The issue of the defensive pleading was discussed by the supreme court during oral argument, but provided only a tangential issue in the case since the point appealed from involved "no evidence" and the carrier did not preserve any issue on the question of the trial

303. 643 S.W.2d 207 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); TEX. REV. CIV. P. 279.

304. *Id.* at 208.

305. In *Walters*, for instance, the court suggested that the insurer's failure to request an instruction modifying the general course and scope of employment instruction narrowed the focus of review to the threshold question. Since the jury was not instructed on the issue of third-party assault, the court effectively held that the insurer waived the essential factual issue underlying its no evidence point of error. 654 S.W.2d at 425, 427. *See also* Scott v. Atchison, Topeka & Santa Fe R.R., 572 S.W.2d 273, 277 (Tex. 1978) (judgment must be supported by pleadings and evidence).

306. 654 S.W.2d at 425.

court's charge in its appeal to the court of appeals.[307] The discussion in oral argument did include issues related to the sufficiency of the defensive plea filed by the insurer, as it might affect the sufficiency of evidence to support the jury's finding that the employee was killed in the course of his employment. Counsel for the insurer also suggested that claimants might be required to plead negatively with respect to statutory bases for exclusion, a posture that might be justified when the pleading of the claimant includes facts that fairly raise an issue relative to a statutory basis for exclusion of benefits.[308]

In theory, of course, an alternative burden of pleading could be placed on insurers. The insurer could simply be held to the standard of pleading defensively as in the case of affirmative defenses generally.[309] Since the parties have ample opportunity to investigate the case and, in fact, the insurer will usually have investigated the facts prior to counsel even entering the case, the requirement that the insurer definitively plead the statutory basis for exclusion and facts relied upon not appear unduly burdensome. This approach appears consistent with recognition that the insurer has the burden of proof on the statutory exclusion, should the Texas Supreme Court ultimately adopt that posture.

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307. *Id.* at 425, 427. The *Walters* majority expressly noted:

> The defendant, American States, did not object to the issue, the instruction, or the burden of proof. American States did not request an instruction on that part of the Workers' Compensation Act that excludes coverage for an injury caused by the 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 employment. On appeal, defendant American States focused on that provision. American States had no point in the court of appeals complaining of the special issue or the instruction. The question that was preserved and is now before us is whether the answer to the issue submitted has support in the evidence.

Id. at 425 (citation omitted).

308. For example, if the claimant were to plead specifically that the employee was killed or injured by lightning—an act of God—it might also be necessary for claimant to plead additional facts demonstrating his theory of liability in order to overcome a motion to dismiss. See Whetro v. Awkerman, 383 Mich. 235, 174 N.W.2d 783 (1970) for a substantive discussion of lightning and tornado cases. Similarly, the insurer in *Walters*, 654 S.W.2d 423, might have specially excepted to claimant's general allegation that he was injured while in the course and scope of his employment, forcing him to plead specifically.

309. TEX. R. CIV. P. 94. *See generally* Hess v. American States Ins. Co., 589 S.W.2d 548, 551 (Tex. Civ. App.—Amarillo 1979, no writ) (failure of employer to plead and request an affirmative defense constituted a waiver of that defense); Digby v. Hatley, 574 S.W.2d 186 (Tex. Civ. App.—San Antonio 1978, no writ) (waiver is an affirmative defense and must be pleaded).

2. Special Issues Practice

General concerns of special issues practice are inapplicable to the defensive issues of statutory exlcusions under the Act since these have been characterized as "inferential rebuttal issues" on which special issues are not to be submitted, pursuant to Rule 277 of the Texas Rules of Civil Procedure.[310] Instead of operating as affirmative defenses which must be strictly pleaded or waived,[311] these defensive matters are to be considered in the overall context of whether injury has been sustained in the course of employment.[312] Thus, in *Transport Insurance Co. v. Liggins*,[313] a case involving the "act of God" theory of exclusion, the court held that the issues relating to the defensive theory of act of God and greater hazard of employee exposure to such acts than suffered by the general public did not form the basis for separate special issues.[314] Rather, the correct approach for the trial court was to simply include the relevant instructions on these issues in its definition instruction on course of employment.[315]

Liggins is consistent with the approach taken by the pattern jury instructions concerning intentional acts committed by third persons.[316] Those instructions direct that the defensive theory of third party assault is to be incorporated in the course of employment issue if raised by the evidence.[317] If the issue is fairly raised by the pleadings and evidence, the trial court's refusal to modify the general instruction constitutes error, unless there is a failure to preserve

310. TEX. R. CIV. P. 277. *But see Scott*, 572 S.W.2d at 279 (definition of course and scope of employment should incorporate statutory exclusion if raised by the pleadings and evidence); 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 21.10 (1970). The commentary notes that the statutory exclusion should be included in the course of employment instruction issue and definition. But, if the general course of employment instruction is not given, a special issue on the statutory defense is appropriate. *Id.* 21.21. The commentary further notes that "in no case should the statutory defense be submitted" in modifying the "course of employment" instruction and as separate special issue. *Id.* 21.10. In *Scott*, however, the Texas Supreme Court appears to have expressly rejected use of a special issue to place the issue of the statutory exclusion before the jury. 572 S.W.2d at 279.

311. *See, e.g., Hess*, 589 S.W.2d at 551 (affirmative defenses are waived if not strictly pled); *Digby*, 574 S.W.2d at 189. (affirmative defenses must be specifically pleaded or waived).

312. *See supra* note 310. *See* Dallas County v. Romans, 563 S.W.2d 827, 830 (Tex. Civ. App.—Tyler 1978, no writ); *Farley*, 566 S.W.2d at 681-82.

313. 625 S.W.2d 780, 784 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

314. *Id.*

315. *Id.*

316. *See supra* note 310.

317. *Id.*

error.[318]

In *Walters*, the insurer submitted the proposed modification of the course of employment definition, but did not raise a point on appeal based on the trial court's refusal to include the instruction in its charge to the jury.[319] Clearly, the trial court's action would be subject to reversal upon a showing of evidence sufficient to raise an issue concerning the motivation for the assault. However, the insurer presented no evidence at trial demonstrating any motivation for the assailant's attack and thus, offered no evidence to show that the killing of the employee was motivated by a reason personal to him, as opposed to a motivation generally unrelated to employment viewed from the assailant's perspective. Even had the latter standard been adopted, the trial court's action was correct if the burden is properly construed as the insurer's in requiring a showing of motivation not related to employment.[320] In the truly unexplained assault case, it would appear that a total lack of evidence would preclude the modification of the general instruction on course of employment unless the statute is construed to place the burden on the employee to negate the inference of a nonemployment related reason for the assault.

VI. POLICY CONSIDERATIONS IN ALLOCATING THE BURDEN OF PROOF

The relative lack of direction provided by the language of the workers compensation statute with respect to the burden of proof in unexplained accident and assault cases could have permitted the Texas Supreme Court to fashion definitive rules in *Walters*.[321] In retrospect, it would appear that the court's effort with respect to acci-

318. *Id.* TEX. R. CIV. P. 273, 279, 274. *See Walters*, 654 S.W.2d at 425; *Monn*, 643 S.W.2d at 208-09.

319. The failure to preserve the issue on appeal constituted a waiver of any complaint that the trial court failed to properly instruct the jury. *Walters*, 654 S.W.2d at 427.

320. In fact, the claimant in *Walters* moved for a partial instructed verdict on the issue of insurer's failure to offer evidence demonstrating a nonemployment-related motivation for the fatal assault. 654 S.W.2d at 425. The motion was orally granted by the trial court but the written motion was inadvertently omitted from the record on appeal and never became a factor in the subsequent decisions. *Id.*

321. Interestingly, the *Walters* majority focused on a narrow application of traditional rules to the evidence presented at trial, forming its opinion in light of the issues raised—and waived—by the insurer on appeal. *See supra* note 307. The concurring opinion, however, applied the same principles against the claimant, but also suggested that the problem of the burden of proof in unexplained assault cases justified adoption of a presumption favoring injured employees. 654 S.W.2d at 430 (McGee J., concurring).

dental deaths in *Deatherage*[322] was subverted in part by the court's failure to adopt a comprehensive policy toward the problems posed by unexplained cases.[323] At least three arguments suggest that the court should fashion rules which place the burden of proof in unexplained cases upon the insurer, conceding at the outset that in the truly unexplained cases, the insurer will almost certainly not be able to carry its burden.

A. *The Goal of Compensating all Meritorious Claims*

The general goal of the workers' compensation statute is to protect employees while affording employers and their insurance carriers a serious measure of protection against monetarily significant jury verdicts in industrial accident cases.[324] This goal is achieved by promoting the resolution of claims through the administrative system, permitting recourse to judicial determinations in those cases in which genuine concern over the amount of award or legal justification for board action precludes settlement. The Act provides that the courts are to construe its provisions liberally in order to compensate meritorious claims,[325] a reasonable legislative preference considering the loss of alternative theories for litigation which are not available to the employee as a consequence of employer subscription to the Act.[326]

The problem with unexplained cases is that any system of presumptions or allocation of burdens of proof will necessarily result in either meritorious claims being denied or nonmeritorious claims being compensated, depending upon the position taken by the courts. By definition, unexplained cases will not be accurately resolved in all

322. *See supra* notes 270-74 and accompanying text.

323. The court could have extended the benefit of the presumption available in unexplained accident cases to include proof that the injury arose from a risk of employment, as well as in the course of employment.

324. *See generally* New York Cent. Ry v. White, 243 U.S. 188 (1916) (upholding workers compensation legislation against constitutional challenge).

325. *See Walters*, 654 S.W.2d at 430 (citing Huffman v. Southern Underwriters, 128 S.W.2d 4 (Tex. 1939)).

326. Often, coverage under the Act may preclude an injured employee from pursuing far more lucrative remedies available under negligence theory—particularly when the nature of injury is more offensive than physically debilitating. *Compare* Arnold v. State, 94 N.M. 278, 609 P.2d 725 (Ct. App. 1980) (rape of resident employee of mental health facility by mentally retarded student arose out of and in course of her employment and thus, her sole remedy was under worker's compensation statute) *with* Smith v. Lannert, 429 S.W.2d 8 (Mo. Ct. App. 1968) (spanking of female employee by male supervisor not an accident arising from employment when employee was engaged in activity expressly forbidden by employer; thus, employee was not barred from pursuing non-Act remedy of suit for assault and battery).

cases precisely because the lack of factual evidence to explain the cause of death or injury satisfactorily will necessarily inject an element of randomness in the resolution of the legal issues involved. To insure that meritorious claims will be awarded, the supreme court should look to the necessity of resolving uncertain or unexplained cases in favor of the injured worker or the deceased worker's beneficiaries under the Act. The *Blair* court elected to rely on Oklahoma's statutory preference of liberal construction designed to promote compensation in holding that the employee, injured as a result of an unexplained assault, was entitled to benefits under the statute.[327]

The goal of a liberal construction of the Texas Act would similarly be best served by a judicial determination that unexplained cases be resolved either by a presumption favoring injured workers,[328] or simply by construing the burden of proof as to a statutory defense as the insurer's.[329]

B. *The General Problem of Unfairness in Requiring Proof of a Negative*

The trial of the unexplained accident or assault case is particularly difficult because the lack of evidence of the essential fact—the cause or motivation for the injury-producing event—precludes an easy approach to the course of employment issue in the absence of an instruction concerning the burden of proving potential bases for exclusion of benefits.

The statute could simply be interpreted as requiring positive proof of an employment-related motive for an assault; for instance, the inclusion of the statutory defense as a modification of the course of employment instruction fails to give the jury adequate direction as to how to resolve a case in which the evidence is either conflicting, or simply suggestive of alternative explanations which may be reasonable.[330] The lack of instruction is especially critical in this respect if

327. 496 P.2d 798. Oklahoma's Worker's Compensation Statute is found at OKLA. STAT. ANN. tit. 85, § 1 (West 1970).

328. *See supra* notes 26 & 293.

329. *But see Walters*, 654 S.W.2d at 429 (McGee, J., concurring) (citing *McGrath*, 485 S.W.2d at 593).

330. The instruction simply tracks the statute. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 21.10, 21.21 (1970). The court of appeals noted in *Walters*:

> In the instant case, the motive of Justice's assailant is unknown. The jury could therefore could do no more than speculate and surmise between the competing theories on why appellant was murdered. Where evidence is in equipoise, that is in a

some evidence suggests an alternative explanation in which joint motives for the assault may be present.

The lack of direct evidence concerning the assailant's motive in an unexplained case, or the lack of probative testimony in a case in which the assailant's identity may be known but information as to motive is not, creates an unreasonable hurdle for a claimant forced to discharge the burden of proving an employment-related motivation for the assault. In effect, the only course of action for a claimant in such a posture may be to attempt to disprove the existence of nonemployment related motivation on the part of the assailant. This might be accomplished in a case in which the assailant is identified with direct testimony from the injured employee that no prior relationship or animus existed between himself and his assailant. The denial of antecedent malice in such a case might satisfy the burden, but only provided the claimant's duty was to show that the motive was not personal to him as an employee. If the burden is fixed on the assailant's motive, as viewed from the assailant's perspective, even this live testimony would probably be legally inadequate to discharge the burden. Moreover, this possible approach would simply not be available in the hardest unexplained cases, those in which the assault results in the employee's death.

In a case in which the employee has suffered a fatal injury, the lack of his testimony at trial precludes even establishing his lack of knowledge of any motive which might have prompted his assailant's attack. In this situation, the claimant can only sustain the burden of proof by establishing the motive of the assailant as one either related to employment, or one not unrelated to the employment relationship. The latter possibility is predicated on a determination that the fact of the employee's death occurs either at the workplace or while engaged in furtherance of the employer's affairs, can be sufficient to show the nexus between the employment and the injury, a position left in doubt by the language of the *McGrath* opinion.[331]

The case law does demonstrate that in some cases insurers have been able to develop evidence of antecedent malice existing between

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state where the existence of a fact is no more probable than its nonexistence, there is no evidence. Adams v. Smith, 479 S.W.2d 390 (Tex. Civ. App.—Amarillo 1972, no writ); Calvert v. Union Producing Co., 402 S.W.2d 221 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

636 S.W.2d at 797. The court erred in characterizing the evidence as presenting competing theories, when, in fact, no theories of motive were suggested or argued by either side at trial.

331. 485 S.W.2d at 593.

the employee and his assailant sufficient to avoid recovery for an injury unrelated to the worker's employment.[332] The allocation of the burden of proof upon the insurer does not necessarily preclude the insurer from discharging that burden in all cases, taking the claim from the unexplained category, and providing enough evidence to explain the basis for the assault. By placing the burden on claimants, the insurer's interest in investigating all aspects of the case will be deemphasized as the insurer comes to rely on the claimant's difficulties in disproving the negative fact—that the injury was not sustained due to an assault motivated by a reason other than the employee's work—in preparing its case for trial.

A similar situation in which claimants consistently failed to overcome an unfair burden of proof occurred in uninsured motorist actions. The applicable statute required the plaintiff policyholder to show that the other motorist involved in the accident was uninsured in order to recover against his own insurer under uninsured motorist coverage.[333] The burden was so great that considerable attention was devoted to creation of legal fictions[334] designed to assist worthy claimants and scholarly comment on the problem.[335] Eventually, the legislature amended the statute to provide that the insurer could plead defensively that the defendant motorist was, in fact, covered by insurance at the time of the accident,[336] a burden more easily discharged by the industry in part because of accessibility to records of insurance coverage. Ultimately, the unfairness of the burden of proving the negative placed upon claimants prompted redress in the legislative

332. *See Upton*, 492 S.W.2d at 627-28; *Highlands*, 485 S.W.2d at 596-97; *Cogdill*, 164 S.W.2d at 218-19; *Vaughn*, 130 S.W.2d at 394-96.

333. Home Indem. Co. v. Tyler, 522 S.W.2d 594 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); Stanfield v. Kroll, 484 S.W.2d 603 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.). Both cases applied the general rule that plaintiff must establish absence of insurance on part of defendant to recover against own insurer under uninsured motorist policy coverage. *See also* State Farm Mut. Auto. Ins. Co. v. Matlock, 462 S.W.2d 277 (Tex. 1970) (insured claiming benefits under uninsured motorist provision has burden of proving absence of insurance on attending vehicle and its driver).

334. In noting the difficulty in proving a negative, the court in Royal Indem. Co. v. Senterfitt, 474 S.W.2d 941, 943 (Tex. Civ. App.—Austin 1971, no writ), observed that the plaintiff's burden was merely to establish convincing quantum of proof that all reasonable efforts to ascertain existence of an applicable policy had been pursued and that such efforts had proved fruitless.

335. *See, e.g.*, Johnson, *Proving Motorist Uninsured*, 35 TEX. B.J. 337 (1972) (for discussion of the Texas uninsured motorist statute).

336. TEX. INS. CODE ANN. § 5.06-1(7) (Vernon 1981) now provides: "If a dispute exists as to whether a motor vehicle is uninsured, the burden of proof as to that issue shall be upon the insurer." *Id.*

branch which effected the goals attempted by the judiciary in its recognition of legal fictions designed to reduce the inherent unfairness in the statutorily-created burden of proof.

In the case of the compensation statute, the language of the exclusion provisions does not settle the burden of proof issue.[337] Appropriate judicial action, rather than legislation, could properly remedy current injustice resulting from the statutory ambiguity.[338]

C. *Spreading the Cost of Compensating All Claims Throughout the Industry*

A final argument for allocating the burden of proving a statutory basis for exclusion rests on the theory that costs of compensating unworthy claims should be spread throughout the industry. Rather than rejecting worthy claims simply because problems of proof preclude claimants from discharging their burden of proof, the goal of a liberal interpretation of the Act would best be served by placing the burden of proving the exclusion on the insurer. Even though this would likely result in some unexplained cases being resolved improperly in favor of compensation—assuming the explanations, if available, would support the insurer's claim for exclusion—the cost of these cases would be spread over the entire industry, resulting in only small incremental increases in premiums necessary to pay the cost. The numbers of truly unexplained cases appears small and for the most part, probably involves deaths of employees as a higher percentage of death cases than as a percentage of injury cases generally. Death of the employee is likely to be a critical factor in the continued support of his family unit defined by the Act to include his beneficiaries.[339] Thus, an uncompensated death case will tend to result in a greater burden for the beneficiaries than an uncompensated injury case in which the employee may be able to return to work or to engage in continued work in a different job capacity. Resolving the burden of proof problem to protect insurers from unworthy claims may have the salutary effect of preventing the small increase in overall cost necessary to compensate those claims, but the likelihood that worthy

337. Compare the conclusions drawn by the commentary to the pattern jury charges, the court's opinion in *McGrath*, and Justice McGee's characterization of the *McGrath* opinion. *See supra* notes 110-12.

338. Thus, the adoption of a presumption in unexplained accident cases, *see supra* note 26, and the proposed presumption in unexplained assault cases, *see supra* note 293, are matters properly within the scope of the judiciary's power.

339. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 8(b), 8a (Vernon Supp. 1985).

claims will also fail poses far greater problems. The problems are, of course, far greater for the family unit forced to live without statutory benefits. They may also suggest societal costs in terms of increased welfare payments required for sustaining the family unit until the injured employee can return to work or, in the case of death of the employee, significant long term costs necessary to maintain support for the family unit.

The concept of spreading costs throughout the industry affected by liberalization of tort law is not unique. In fact, it may be the single most significant rationale for the expansion of the doctrine of strict liability, particularly in products cases, and underlies the theory of insurance. There is no just reason for recognition of rules unfavorable to claimants under the workers compensation statute merely to avoid increasing premium costs to employers necessary to compensate all claims which are unexplained in nature. This is particularly true since some or most of these costs would be justified by awards of benefits were the cases not unexplained.

VII. CONCLUSION

The goal of this paper is to suggest the wide range of problems associated with employee accidents and assaults which cannot be fully explained in the context of the jury trial because of lack of evidence. Significant problems are posed for both claimants and insurers attempting to reconcile Texas case law in these unexplained accident or assault cases, particularly when the employee has sustained a fatal injury. The Texas Supreme Court should take the initiative to confront the problems associated with ill-defined or conflicting interpretations of the burden of proof in these cases and develop a unified, cohesive approach to provide the plaintiff and defense bar with clear guidelines for future litigation. The goal of a liberal construction of the Act not only requires recognition of substantive rules designed to afford optimal bases for recovery for injured workers or their beneficiaries but also an approach which sets intelligible parameters for the conduct of settlement negotiations and preparation for trial in contested cases.