

TEXAS DEFENSES CHEAT SHEET

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INJURY - TEX. LAB. CODE. ANN. §401.011(26)

Injury requires a showing of damage or harm to the physical structure of the body, or a disease or infection naturally resulting therefrom. The term includes an occupational disease. Can be proven by lay testimony if common injury, causation of which is within the common knowledge and experience of a layperson. Example: sprain, strain, contusion. Must be proven by expert evidence if not. Example: disc herniation, rotator cuff tear.

COURSE AND SCOPE - ORIGATION - TEX. LAB. CODE. ANN. §401.011(12)

Claimed injury must arise out of an activity of the kind or character that has to do with and originates in the work, business, trade, or profession of the employer.

COURSE AND SCOPE - FURTHERANCE - TEX. LAB. CODE. ANN. §401.011(12)

Claimed injury must arise out of an activity performed by an employee while engaged in or about the furtherance of the affairs or business of the employer.

INTOXICATON -

TEX. LAB. CODE. ANN. §406.032(1)(A), §401.013

An affirmative defense if the injury occurred while the claimant was in a state of intoxication, defined as not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of alcohol, a controlled substance or controlled substance analogue, a dangerous drug, an abusable glue or aerosol paint, or any similar substance, the use of which is regulated under state law. Does not include the loss of such faculties from the voluntary introduction into the body of a substance taken under and in accordance with a prescription written for the employee by his or her doctor or listed a substance by inhalation or absorption incidental to his or her work.

INTOXICATON - PRESUMPTION - TEX. LAB. CODE. ANN. §401.013(c)

On the voluntary introduction into the body of any substance listed under subsection(a)(2)(B) relating to a controlled substance or controlled substance analogue, based on a blood test or urinalysis, it is a rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties.

VOLUNTARY RECREATIONAL, SOCIAL, OR ATHLETIC ACTIVITY -

TEX.LAB.CODE.ANN. §406.032(1)(D)

An affirmative defense if the claimant's injury arose out of voluntary participation in off-duty recreational, social, or athletic activity which was neither expressly nor impliedly required by the claimant's employment.

ACT OF GOD—TEX.LAB. CODE. ANN §406.032 (1)(E)

An affirmative defense if the claimant's injury arose out of an Act of God (such as lightning, storm, catastrophic weather event, extreme heat or cold) and the claimant's work does not expose him or her to a greater risk of injury from said Act of God than ordinarily applies to the general public.

PERSONAL ANIMOSITY -

TEX. LAB. CODE. ANN. §406.032 (1)(C)

An affirmative defense if the claimant's injury arose out of an act of a third person who intended to injure the claimant because of a personal reason not related to his employment.

WILLFUL INTENT TO INJURE SELF OR OTHER PERSON— TEX. LAB. CODE. ANN. §406.032 (1)(B)

An affirmative defense if the claimant's injury was caused by his own willful attempt to injure himself or to unlawfully injure another person.

HORSEPLAY - TEX. LAB. CODE. ANN. §406.032 (2)

An affirmative defense if the claimant was actively involved in horseplay at the time of the injury and the horseplay was a producing cause of the injury.

COURSE AND SCOPE - COMING & GOING RULE - TEX. LAB. CODE. ANN. §401.011(12)

Injuries occurring while traveling from home to work and from work to home are not in the course and scope of employment. The risk of such injuries are not specific to the employment but are shared by society as a whole.

COURSE AND SCOPE - DEVIATION/PERSONAL MISSION - TEX. LAB. CODE. ANN. §401.011(12)

Employee was engaged in a purely personal activity (clocked out and stayed on premises to shop or do something exclusively for personal reasons) at the time of the claimed injury.

NOT AN EMPLOYEE OF THE EMPLOYER - BORROWED SERVANT

The details of the claimant's work were controlled by another employer at the time of the alleged injury.

INDEPENDENT CONTRACTOR -
TEX. LAB. CODE. ANN. §406.122

A person is not an employee if hired as an independent contractor who performs a specific task, provides own equipment, and controls details of work and work product.

NO NEW INJURY – CONTINUATION OF OLD INJURY - TEX. LAB. CODE. ANN. §401.011 (26)

No additional damage or harm occurred. The incident merely caused a flare up of symptoms consistent with the prior injury.

TIMELY REPORTING - 30 DAY NOTICE -
TEX. LAB. CODE. ANN. §409.001

The claimant must report injury to person in supervisory position within 30 days of the date of injury. TEX. LAB. CODE. ANN. §409.002 provides that the carrier is relieved of liability for the alleged injury or occupational disease if the claimant fails to do so.

DWC-41—ONE YEAR FILING—
TEX. LAB. CODE. ANN. § 409.003

The claimant (or representative) must file a DWC-41 (Notice of Injury and Claim for Compensation – NICC) with the Division within one year of the date of injury. TEX. LAB. CODE. ANN. §409.004 provides that the carrier is relieved of liability for the alleged injury or occupational disease if the claimant fails to do so. Other documents that establish a claim are often considered to be a filing that counts as filing of a claim. Failure of the employer to file the DWC-1 in situations triggering its obligation to do so tolls the 1 year deadline.

ELECTION OF REMEDIES

Defense if the claimant pursues benefits outside of W/C. Currently, the claimant must show that the election of remedies to receive benefits outside of the W/C system was detrimental to the carrier's ability to step in and adjust the claim. The carrier takes credit for any benefits previously paid, so generally thought not to be harmful. Not a favored doctrine right now, although it is likely being incorrectly interpreted.

OCCUPATIONAL DISEASE - LAST INJURIOUS EXPOSURE - TEX. LAB. CODE. ANN. §406.031 (b)

Employer at time of last injurious exposure is the claim employer for purposes of occupational disease.

MENTAL TRAUMA INJURY—
TEX. LAB. CODE. ANN. §408.006

To be compensable, a claimed mental trauma injury must be traceable to a definite time, place and cause at work. Not compensable if the result of a legitimate personnel action, such as transfer, promotion, demotion, reprimand, or termination.

HEART ATTACK - TEX. LAB. CODE. ANN. §408.008

Heart attacks are not compensable if the preponderance of the medical evidence indicates the heart attack was the result of the natural progression of a pre-existing heart condition or disease and the heart attack did not occur at a definite time and place, was not caused by a specific event, and was triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus at work.

OCCUPATIONAL DISEASE/REPETITIVE TRAUMA -
TEX. LAB. CODE. ANN. §401.011(34)

The occupational disease must arise out of and in the course and scope of employment and cause damage or harm to the physical structure of the body, including a repetitive trauma injury. Includes disease or infection that naturally results from the work-related disease. Does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.

EXTENT OF INJURY

Defense if the compensable injury is not a "producing cause" of the additionally claimed injuries.

DISABILITY - TEX. LAB. CODE. ANN. §408.011(16)

Defense if evidence fails to establish that the compensable injury is a producing cause of an inability to obtain and retain employment at wages equivalent to the pre-injury average weekly wage because of the compensable injury.

ENTITLEMENT TO TIBS - BONA FIDE OFFERS OF EMPLOYMENT - DWC RULE 129.6

Carrier may deem wages offered by an employer through a bona fide offer of employment to be post-injury earnings (PIE) when it meets specified criteria, including requirements that it contain the following information: the location at which the employee will be working; the schedule the employee will be working; the wages that the employee will be paid; a description of the physical and time requirements that the position will entail; and a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide retraining if necessary. NOTE: SPECIFICITY IS CRUCIAL, AS THESE REQUIREMENTS ARE HEAVILY SCRUTINIZED IN LITIGATION.