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To Subscribe, or Not to Subscribe, That is the Question: An Analysis of the Texas Workers' Compensation System

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**SINCE 1913 TEXAS HAS ALLOWED
PRIVATE EMPLOYERS TO OPT IN OR OUT OF
WORKERS' COMPENSATION**



Workers' Compensation vs. Non-Subscriber

- Traditional Workers' Compensation
 - Offers a no-fault system where employees receive benefits regardless of who caused the injury.
- Non-Subscribers
 - This means that injured workers need to pursue personal injury claims **and prove their employer's negligence caused their injuries** to obtain compensation for medical costs, lost wages, and other damages.

Reasons Employers Gave for Not Purchasing Coverage

- Workers' compensation insurance premiums too high.
- Employers had too few employees.
- Law does not require employers to have workers' compensation insurance.
- Employer had to cut costs because of the pandemic.
- Employer had few on-the-job injuries.

Source: Survey of Employer Participation in the Texas Workers' Compensation System, Public Policy Research Institute at Texas A&M University, and the Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2022.

Reasons Employers Gave for Purchasing Coverage

- Employer thought the law required them to have workers' compensation.
- Employer was able to provide injured employees with medical care through a workers' compensation health care network.
- Employer was concerned about lawsuits.
- Employer needed workers' compensation coverage to get government contracts.
- Workers' compensation insurance rates were lower.

Source Survey of Employer Participation in the Texas Workers' Compensation System, Public Policy Research Institute at Texas A&M University, and the Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2022.

Why Opt Out?

- Cost
 - The cost of providing traditional workers insurance coverage can be unaffordable to most employers.
- Control
 - Align the compensation plans to fit the employer's business models.
 - Ability to create your own coverage
 - Purchase an insurance policy or self insure
 - Flexibility to customize care plans and disability pay

Differences in Exposure

- Subscriber
 - If an employer is a subscriber the injured employee claims could live on forever, often end up paying life-time benefits.
- Non-subscriber
 - There is a settlement or an award that resolves the case.

Scenario - forklift operator injured on the job

WC

NS

Claim is resolved entirely through WC	Arbitration or litigation
Medical expenses & lost wages only	Medical expenses, lost wages, pain & suffering, mental anguish, disfigurement, punitive damages
Potential for life-time benefits that could impact the employer's premiums	Resolved with a settlement or award
No contribution claim against a 3rd party available	Can make a contribution claim against a 3 rd party

WC Exception to Punitive Damages in Death Cases

Sec. 408.001. EXCLUSIVE REMEDY; EXEMPLARY DAMAGES. (a) Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.

(b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.

(c) In this section, "gross negligence" has the meaning assigned by Section [41.001](#), Civil Practice and Remedies Code.

(d) A determination under Section [406.032](#), [409.002](#), or [409.004](#) that a work-related injury is noncompensable does not adversely affect the exclusive remedy provisions under Subsection (a).

Diving into Non-Subscriber

- Notification: Must inform the state and employees.
- Injury Benefit Plan: Must design a benefit plan that confirms to state laws.
- Insurance: Often requires additional insurance coverage or creating a self-funded plan.
- Arbitration
 - Most have arbitration agreements
 - However, if the employer is an intra-state motor carrier (i.e. trash or local) it can compel arbitration but an inter-state employer (i.e. over the road) cannot. *Southwest Airlines Co. v. Saxon*, 596 U.S. 450.
- Loss Key Common Law Defenses
 - Contributory negligence
 - Assumption of risk
 - Co-employee negligence

Arbitration

- On June 6, 2022, the Supreme Court of the United States ruled in an unanimous opinion in *Southwest Airlines Co. v. Saxon*, No. 21-309 that airline cargo loaders are exempt from the Federal Arbitration Act (“FAA” or the “Act”) under the Act’s “transportation worker” exemption.
- The Supreme Court reasoned that while not all employees of an airline are exempt from the FAA, ramp employees who load and unload cargo from planes are part of a “class of workers engaged in foreign or interstate commerce” specifically exempted by the Act.
- The Supreme Court’s broad interpretation of this exemption permits airline cargo loaders to bring wage-and-hour claims in court rather than being forced into arbitration.

Common Law Defenses

- While you lose common law defenses of:
 - Contributory negligence
 - Assumption of risk
 - Co-employee negligence
- You can still claim the following defenses:
 - Employee was intoxicated. Texas Labor Code Section 406.032(1)(A)
 - Employee deliberately hurt themselves. Texas Labor Code Section 406.033
 - Commonly known hazard - Texas Supreme Court has made it clear that an employer does not owe a duty to its employees to warn them about hazards that they are fully aware of.
 - Third party claims
 - A sole proximate cause defense, new and independent cause, unavoidable accident, sudden emergency, failure to mitigate damages, SOL, Act of God

Third Party Claims

- Because this is a *negligence action*, rather than a claim for worker's comp benefits, comparative responsibility provisions and defenses (except contributory negligence) in Chapter 33 apply.
Lawrence v. CDB Servs., Inc., 44 S.W.3d 544, 548 (Tex. 2001); Russell v. Wendy's, 219 S.W.3d at 641
- If you can show a third party is 50% or more at fault that can reduce the amount you pay.
 - Employee's negligence is disregarded for purposes of calculating employers responsibility
 - Tex Civ. Prac & Rem Code Sec. 33.013
- A third party cannot be compelled to attend arbitration but can be named as a responsible third party and fault can be assigned to them by the factfinder.
 - If you have a good claim against a 3rd party you may want to try and keep your case in trial court and out of arbitration.
 - Third Party would get the benefit of the Plaintiff on the verdict form
- Could pursue 3rd party in litigation to get them to contribute their amount.

Non-Subscriber Pros and Cons

- Pros
 - Lower overall costs
 - Ability to tailor Injury Benefit Plan
 - Final settlement/award avoids lengthy open claims
- Cons
 - Cost of arbitration
 - Defense costs (experts, depositions, etc.)
 - Training on plan for all Texas employees

Let's Hear from the Clients

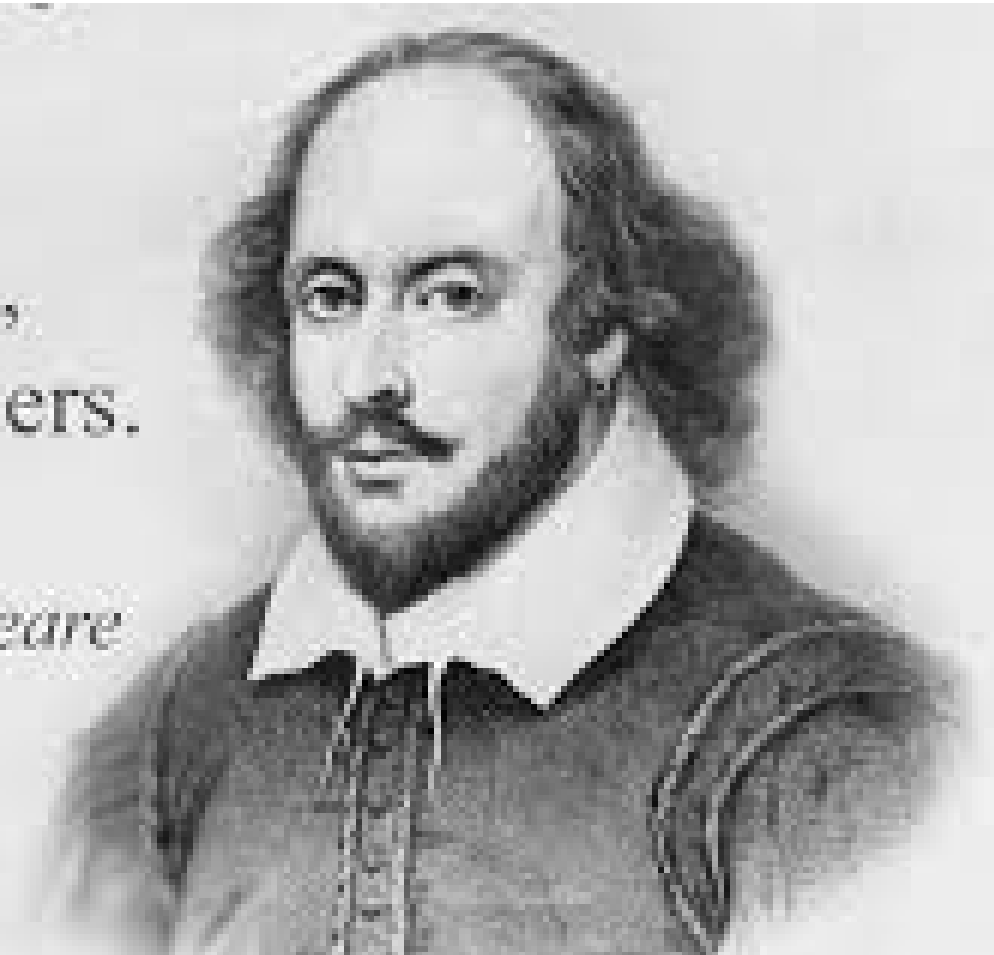
- McLane Company - Subscriber
- AutoZone - Non-subscriber
- What factors were considered?

1/3 of Texas Employers are Non-Subscribers

- AutoZone
- Amazon
- McDonald's
- Walmart
- Home Depot
- HEB
- Dollar General
- Target
- R+L Carriers
- ExxonMobil
- AT&T
- Baker Hughes
- Schlumberger
- Kroger
- Academy Sports

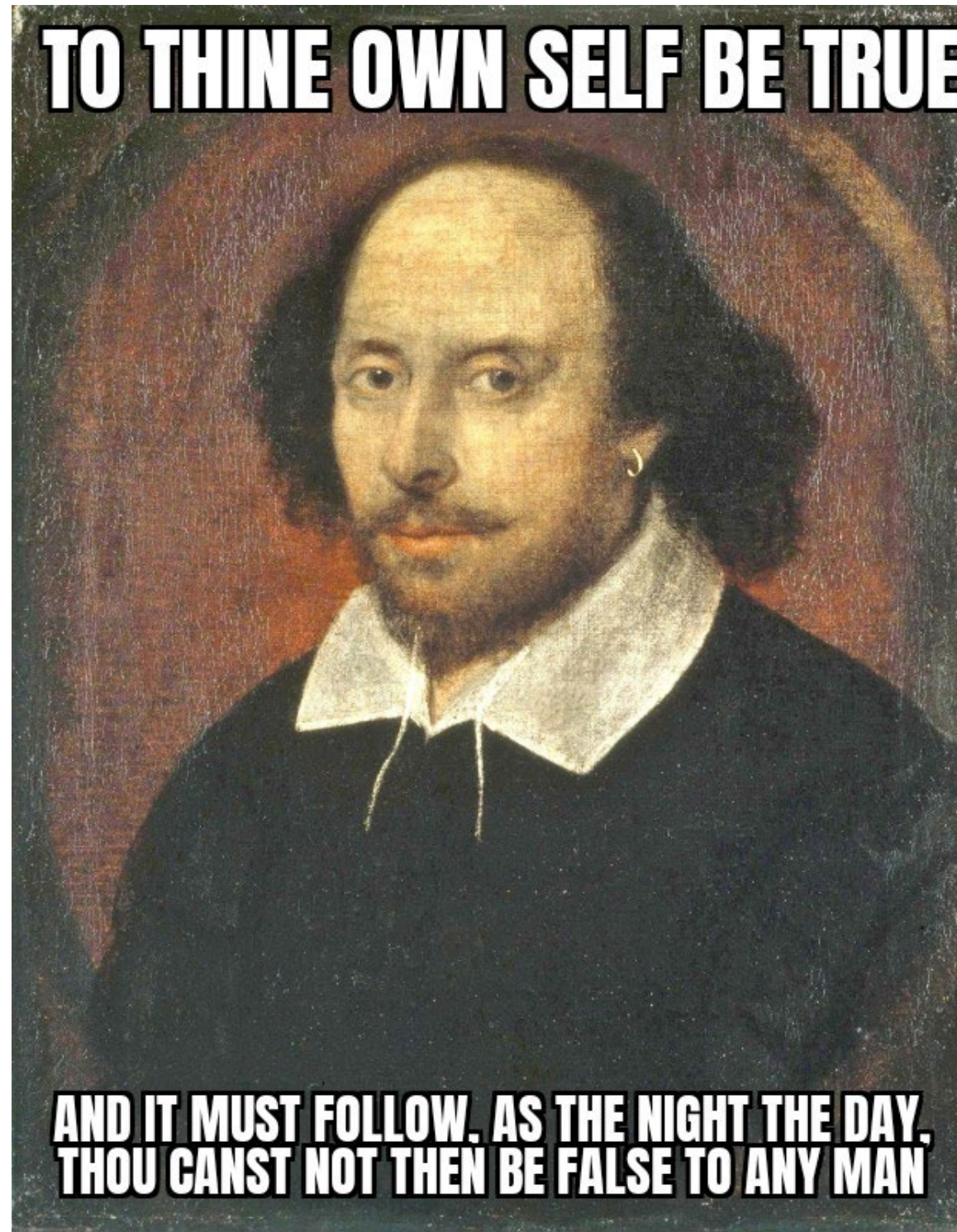
First thing we do,
let's kill all the lawyers.

William Shakespeare



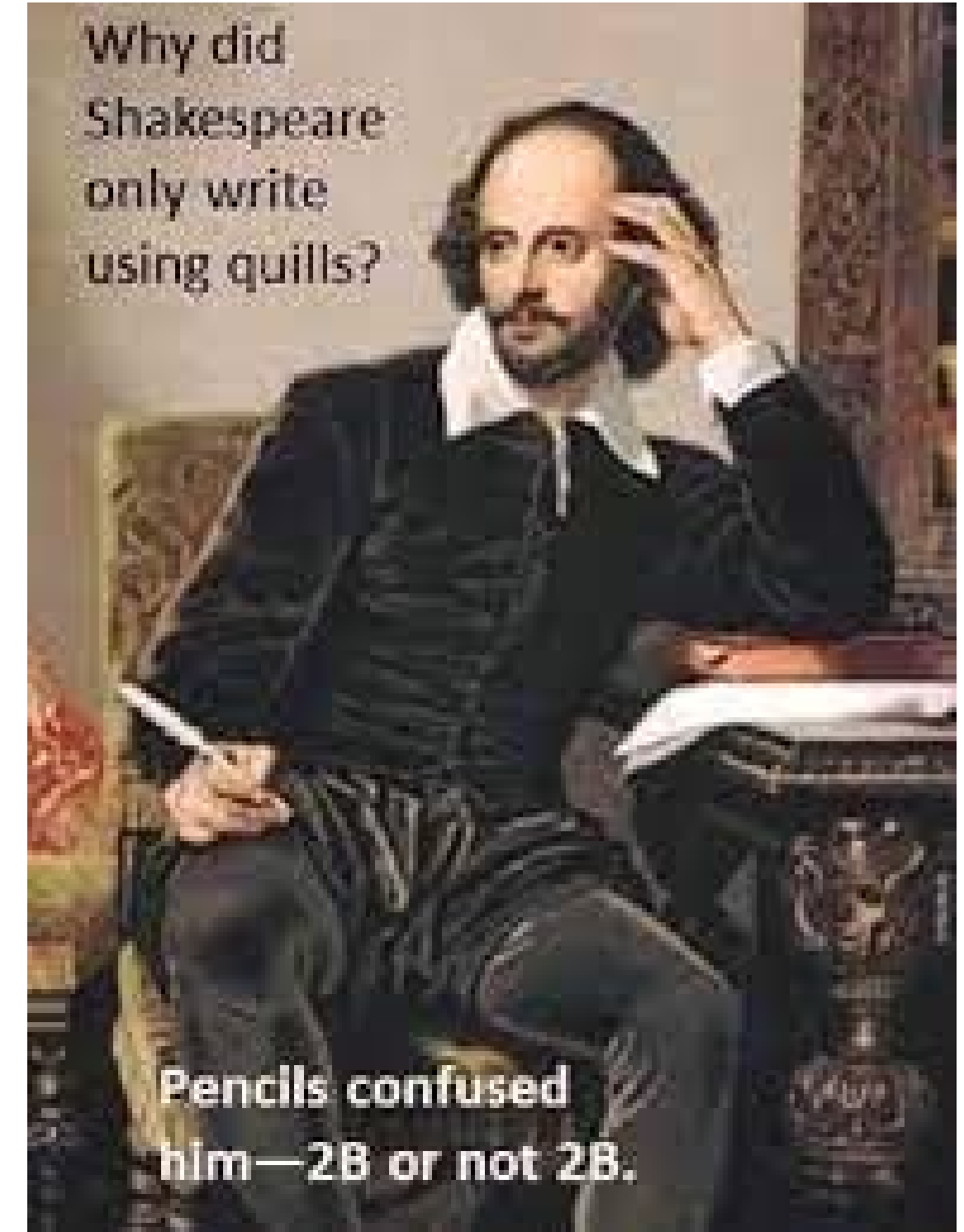
TO THINE OWN SELF BE TRUE

**AND IT MUST FOLLOW, AS THE NIGHT THE DAY,
THOU CANST NOT THEN BE FALSE TO ANY MAN**



Why did
Shakespeare
only write
using quills?

Pencils confused
him—2B or not 2B.



Pop-Up CLE Question

What Shakespeare play did the line 'To be or not to be' from?

- a) Macbeth
- b) Hamlet
- c) Romeo and Juliet
- d) Much Ado About Nothing

THANK YOU! If you have any questions, please contact one of the presenters



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