6. *Appraisement of Property*

Previous law required a verified appraisement of all the decedent's property.[101] Under the Act, the personal representative has only to prepare "a verified written inventory in one or more written instruments, indicating the fair market value of each item" of the decedent's property.[102] However, the Act gives the personal representative the discretion to employ a disinterested appraiser; and, contrary to prior law, the personal representative may employ different appraisers to appraise different assets.[103] The new law also provides that the personal representative may furnish any interested person with a copy of the inventory or any supplement or amendment to it as an alternative to filing a copy with the court.[104]

XX. Workmen's Compensation*

A. *Routine Course of Employment*

During the period covered by this survey, two significant Second District Court of Appeals cases, *Estey Piano Corp. v. Steffen*[1] and *Rivera v. Simmons*,[2] involved the issues of compensability pursuant to Indiana's Workmen's Compensation Act[3] for an injury incurred during the normal and routine course of employment. Based on very similar fact situations, the court approved the Industrial Board's determination to grant compensation in *Estey* and to deny compensation in *Rivera*.

To qualify for workmen's compensation, the employee's injury must result from an accident arising out of employment.[4] Accident is "any unlooked-for mishap or untoward event not expected or designed by the one who suffers the injury."[5] The two

[101] *Id.* § 29-1-12-1 (Burns 1972), *as amended id.* § 29-1-12-1 (Burns Supp. 1975).

[102] *Id.* § 29-1-12-1(a) (Burns Supp. 1975).

[103] *Id.* § 29-1-12-1(b).

[104] *Id.* § 29-1-12-1(c).

*Tony H. Abbott

[1] 328 N.E.2d 240 (Ind. Ct. App. 1975).

[2] 329 N.E.2d 39 (Ind. Ct. App. 1975). *Rivera* was decided less than one month after *Estey*.

[3] IND. CODE §§ 22-3-2-1 *et seq.* (Burns 1974).

[4] *Id.* § 22-3-2-2. *See generally* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 37.20 (1973) [hereinafter cited as LARSON].

[5] Heflin v. Red Front Cash & Carry Stores, 225 Ind. 517, 522, 75 N.E.2d 662, 664 (1947).

ingredients of an accident are unexpectedness and definiteness.[6] The only theoretical controversy regarding the requirement of an accident is whether the two elements of unexpectedness and definiteness are applied to the cause of the injury resulting to the employee or to the injury itself.[7] If the unexpectedness and definiteness tests are applied to the cause of the injury, compensation is less likely to be allowed than when these elements are applied to the injury itself. In determining whether an accident arose out of employment, courts phrase their findings in terms of causation. The degree of causation required by different jurisdictions ranges from a liberal test that the injury can arise from anything in the employment to a strict test that the injury must arise out of an increased risk to the employee.[8]

The employee in *Rivera* incurred a herniated intervertebral disc while lifting a 90-pound die. He had been lifting dies of comparable weight for six years. In *Estey* the injured employee had worked for ten years at sanding piano parts. While lifting a 27-pound piano keyboard, she ruptured a lumbar disc. The employee had been sanding keyboards for one and one-half months prior to the injury; at the outset of this period, she had complained of a back ailment.

In *Estey* all three judges concurred in the result. Presiding Judge Sullivan and Judge Buchanan wrote opinions. Judge Sullivan dealt summarily with the accident requirement by holding that the employee's sharp pain while lifting a piano keyboard constituted an accident.[9] The element of unexpectedness was thus applied here to the injury itself. In the remainder of his opinion, Judge Sullivan discussed the "arising out of of employment" requirement. He subscribed to the position that "an accident arises out of employment when there exists some causal nexus between the injury complained of and the duties or services performed."[10] Judge Buchanan argued strongly that the requirement of an accident should not be so easily satisfied. He stated that the mere fact of being employed at the time of a disability is not sufficient to find an accident.[11] However, Judge Buchanan concurred in

[6] 1A LARSON § 37.20, at 7-3, 7-4. Of these two ingredients, unexpectedness is considered the trademark of an accident. *Id.* at 7-3.

[7] *Id.* at 7-4.

[8] 1 LARSON § 6-20. An additional issue with the "arising under" requirement emerges where the employee brings a condition or disease to the employment. The court then must also decide whether the injury is the result of the employment or follows as the natural consequence of the pre-existing condition. *Id.* § 12.20.

[9] 328 N.E.2d at 243. (Sullivan, P.J.).

[10] *Id.*

[11] *Id.* at 246 (Buchanan, J.).

the result because the Industrial Board found that the lifting of the keyboard constituted the necessary extra exertion for an accidental injury.[12] Judge Buchanan evidently would prefer that the unexpectedness element be applied to the cause of the injury.

In *Rivera* all three judges again concurred in the result, and all three wrote opinions. Judge Buchanan prefaced his opinion with the observation that an employee cannot receive compensation unless "he specifically shows some increased risk or hazard present in his employment which caused the injury."[13] He noted that the employee was not engaged in any unusual or extraordinary employment duty. Although Judge Buchanan apparently was concerned with the lack of causation, he concluded that the employee did not sustain an accident because there was no unexpected event which caused his injury.[14] This commingling of accident and causation concepts does not lend itself to a clear and precise analysis of workmen's compensation cases.

Judge White stated that the sudden onset of severe pain is an unexpected event which qualifies as an accident.[15] Although Judge White was quick to find an accident, he concurred in the result because there were no findings of facts which would "lead inevitably to the conclusion that Rivera's injury arose out of his employment."[16] Presiding Judge Sullivan clearly stated in his opinion that he disagreed with the standard Judge Buchanan applied in determining that there was no accidental injury. He also stated that Judge Buchanan was wrong in believing that an injury sustained as a result of routine work could not be compensated.[17] Yet, Judge Sullivan concurred in the result.

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[12] *Id.* at 245.

[13] 329 N.E.2d at 41 (Buchanan, J.).

[14] *Id.* at 43.

[15] *Id.* at 44. Judge White, concurring, wrote: "[T]he onset of pain, especially the sudden onset of severe pain, is an untoward event and most certainly is an 'accident' so far as the person who suffers the pain is concerned."

[16] *Id.*

[17] *Id.* Presiding Judge Sullivan stated:

> My concurrence here is made in the full belief that the Board in this case applied an erroneous standard in determining "that there was no untoward event, injury, accident or accidental injury to plaintiff while employed by defendant."
>
> It is apparent to me that the Board reasoned as did Judge Buchanan in *Estey*, that an injury sustained as a result of "usual, customary and routine work" could not be compensable. As stated in *Estey*, . . . I do not think such to be the law in Indiana *at this time*.

(Emphasis in original).

B. Willful Employee Misconduct

In *Motor Freight Corp. v. Jarvis*,[18] the Second District Court of Appeals affirmed the Industrial Board's award of compensation to the employee. The employee, Jarvis, drove a tractor-trailer unit owned by his employer, Motor Freight Corporation (MFC), from Indianapolis, Indiana, to Chillicothe, Missouri. After the delivery of the trailer unit, MFC informed Jarvis that he was needed at home because his wife was ill. With only a three and one-half hour layover, Jarvis began his return trip to Indianapolis. He was injured in an accident and claimed benefits as a result of his injuries. MFC denied liability on the grounds that Jarvis had committed willful acts of misconduct in violation of Indiana Code section 22-3-2-8.[19] The specific acts of misconduct against Jarvis were the commission of a misdemeanor, the willful failure to obey a written rule of the employer, and the willful failure to perform a duty required by statute. All three acts of misconduct were grounded upon Jarvis' violation of a federal regulation requiring an 8-hour rest period between every 10 consecutive hours of duty.[20]

The court of appeals affirmed the Industrial Board's finding that MFC's knowledge and acquiescence in Jarvis' conduct and Jarvis' lack of knowledge of the federal regulation would defeat the defense of employee misconduct. The court also supported the Industrial Board's finding that there was insufficient proof that Jarvis' conduct proximately caused his injury.

Although the defense asserted by MCF conformed to traditional notions of employee misconduct,[21] it is difficult to justify denying compensation to an employee pursuant to a state's workmen's compensation act if he violates a separate federal regulation. This is especially true since the Indiana Workmen's Compensation Act does not provide for penalties to an employer if he

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[18]324 N.E.2d 500 (Ind. Ct. App. 1975).

[19]IND. CODE § 22-3-2-8 (Burns 1974). The section provides as follows:

> No compensation shall be allowed for an injury or death due to the employee's intentionally self-inflicted injury, his intoxication, his commission of a felony or misdemeanor, his wilful failure or refusal to use a safety appliance, his wilful failure or refusal to obey a reasonable written or printed rule of the employer which has been posted in a conspicuous position in the place of work, or his wilful failure or refusal to perform any statutory duty. The burden of proof shall be on the defendant.

[20]49 C.F.R. § 395.3 (1974) (U.S. Department of Transportation regulation).

[21]*See* B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 11-1 (1950).

violates a statute, even where such violations might result in a benefit to the employer.[22]

C. *Aggravation*

In *Noble County Highway Department v. Sorgenfrei*,[23] the Second District Court of Appeals affirmed an award of compensation for the death of an employee who died as a result of the combined effects of an industrial accident and latent leukemia. The employee was injured on May 14, 1969. On January 29, 1970, the employee discovered that he had leukemia; on February 12, 1970, the employee died. The Industrial Board followed the medical testimony in holding that the leukemic condition was aggravated by the industrial accident and that a combined effect of the industrial accident and leukemia hastened the employee's death. The court stated that the employee's death was a proximate result of his industrial injury and it made no difference whether the hastened death was viewed as a "combination" or "aggravation" case.[24] The court based its decision on medical testimony, which was considered sufficient to satisfy the causal connection requirement contained in the "arising out of" portion of the Workmen's Compensation Act.[25] This analysis conforms to the normal rule that the employer takes the employee as he finds him.[26]

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[22]For an example of an employer's violation of a statute resulting in a benefit to him see Vargo, *Workmen's Compensation, 1974 Survey of Indiana Law*, 8 IND. L. REV. 289, 294-95 (1974).

[23]321 N.E.2d 766 (Ind. Ct. App. 1975).

[24]*See generally* B. SMALL, *supra* note 21, §§ 6.20-.21.

[25]IND. CODE § 22-3-2-2 (Burns Supp. 1975). *See* LARSON § 7.4.

[26]LARSON § 12.20, at 3-249.