XX. Workmen's Compensation*

A. Procedural Aspects

Two recent decisions by the Second District Court of Appeals deal with procedural issues under the Indiana Workmen's Compensation Act.[1]

In *Bagwell v. Chrysler Corporation*,[2] the court retreated from a previous opinion[3] denouncing the "cumbersome procedures and technicalities of pleading,"[4] and relied upon strict construction of the procedural requirements of the Act to deny compensation. Bagwell sustained an injury in the course of employment on September 28, 1965, and was awarded temporary total disability payments at that time. In July 1967 he filed a claim with the Industrial Board for permanent partial impairment, and the Board subsequently ordered additional payment, for 137 weeks, beginning at the date of the accident. Bagwell filed another application in August 1970, alleging recurrence of the disability but no increase in impairment. This application was opposed by the employer as untimely,[5] since it was filed more than one year after the last date for which compensation was paid.[6] The Board

---

*Mark A. Pope

[1]IND. CODE §§ 22-3-2-1 to -21 (Burns 1974).

[2]341 N.E.2d 799 (Ind. Ct. App. 1976).

[3]*See* Davis v. Webster, 136 Ind. App. 286, 198 N.E.2d 883 (1964).

[4]3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.10 (1976) [hereinafter cited as LARSON].

[5]IND. CODE § 22-3-3-27 (Burns 1974) provides:

> The power and jurisdiction of the industrial board over each case shall be continuing and from time to time, it may, upon its own motion or upon the application of either party, on account of a change in conditions, make such modification or change in the award, ending, lessening, continuing or extending the payments previously awarded, either by agreement or upon hearing, as it may deem just, subject to the maximum and minimum provided for in this act [22-3-2-1—22-3-6-3].
>
> . . . .
>
> The board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two [2] years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one [1] year from the last day for which compensation was paid. The board may at any time correct any clerical error in any finding or award.

[6]The final compensation received by Bagwell was on May 2, 1968.

dismissed the application, ruling that the time period of the first temporary total disability award could not be added to that of the permanent partial disability award to bring the application within the statutory period for applications for modifications of awards.[7]

On appeal, Bagwell argued that the one year limitation period which barred him was not applicable, because he was applying for a change in the award to permanent *total disability*, rather than for an increase in permanent *partial impairment* compensation, and thus he *did* qualify under the procedural statute which allows a two year period for filing claims.[8]

The court held that Bagwell failed under both the one and two year limitations, since his application was not filed within two years of the last date for which compensation was paid under the original award; and that the Board acted within its discretion in dating the permanent partial impairment award from the occurrence of the accident, effectively ordering that award to coincide with the original award for temporary total disability.[9]

The court's strict construction of each of Bagwell's applications, rather than consideration of each as notice of a validly asserted claim, appears out of step with the general view. Other state courts have found sufficient notice of application on less evidence, including a letter written by a claimant's doctor to the Industrial Board requesting a change in an award.[10]

In *Scherger Chevrolet Sales, Inc. v. Eubank*,[11] Eubank was injured in a collision with a school bus and subsequently executed a release of claims against the bus driver and the school corporation, signed in the office of his employer, Scherger. Eubank brought an action against the school corporation and the bus driver, and instituted a separate claim against Scherger under the Workmen's Compensation Act, claiming that he had been forced under threat of discharge to sign the release. Eubank also re-

[7]341 N.E.2d at 801.

[8]IND. CODE § 22-3-3-10 (Burns 1974). A summary of this statute and its application in this case appears in the opinion. 341 N.E.2d at 802.

[9]*Id.* at 803. The court noted that although the Board's usual practice is to date commencement of an award from the initial industrial occurrence, there is no requirement that it do so.

[10]Beida v. Workmen's Comp. App. Bd., 263 Cal. App. 2d 204, 69 Cal. Rptr. 516 (1968). In Budson Co., Contract 926 v. Oikari, 270 F. Supp. 611 (N.D. Ill. 1967), a letter sent by the employee's attorney to the employer concerning disability payments was considered a valid claim, on the ground that it was eventually received by the Deputy Commissioner and thus placed the Board on notice that a claim had been asserted.

[11]335 N.E.2d 238 (Ind. Ct. App. 1975).

fused to cash the $84 check given him as consideration for the release. A one-member Board found that the settlement was valid and that it precluded any workmen's compensation award. However, the Full Industrial Board found that Eubank had not given the release voluntarily and, therefore, the settlement did not preclude an award. From this finding and subsequent remand to the single member Board, Scherger appealed.

The court of appeals dismissed Scherger's brief on the ground that the order which remanded the case to the one-member Board was not a final award and therefore not appealable.[12]

B. Employee Conduct and Judicial Review

Statutory provisions limiting judicial review in workmen's compensation cases were essential factors in three cases decided during the survey period.

In *Gentry v. Jordan*,[13] Mrs. Gentry was denied compensation for the death of her husband, based on a finding that Gentry's accident and subsequent death did not arise out of and in the course of his employment with Jordan.[14] The decedent left work at a service station at approximately 7:30 p.m. Early the next morning he returned, said that his personal auto was disabled, and requested permission to use the service station wrecker. Another employee allowed him to take the wrecker, but warned that Gentry did so on his own responsibility.[15] Later, Gentry was found dead in the wrecker, having crashed into a bridge abutment.

Plaintiff argued on appeal that the accident arose out of activity that was "partly business and partly personal," a contention based on "special errand" and "dual purpose" doctrines.[16] The Industrial Board had found that since decedent's activity was personal and not within his duties at that station, and since he was not being paid for the activity, his death did not arise out of the course of his employment.

The court of appeals, refusing to consider witness credibility or to weigh conflicting evidence, affirmed. Finding substantial probative evidence to support the Board's decision, the court held that application of the doctrines relied on by Gentry on appeal

---

[12]*Id. See* IND. CODE § 22-3-4-8 (Burns 1974), which provides for appeals from the decisions by the Full Industrial Board.

[13]337 N.E.2d 530 (Ind. Ct. App. 1975).

[14]The court noted that, although the Board's negative award in this case was based on evidence, a negative award may be supported by an absence of evidence. *Id.* at 532 n.1.

[15]*Id.* at 531.

[16]A comprehensive discussion of the "dual-purpose" doctrine is found in 1 LARSON, *supra* note 3, §§ 18.12-18.24 (1972).

would amount to a hearing de novo. Determining that Mrs. Gentry had failed to carry her burden of proof before the Board, the court concluded that it could reverse only "if reasonable men would have been bound to reach a conclusion contrary to the Board's decision."[17]

In *DeMichaeli & Associates v. Sanders*,[18] employee Sanders was en route to the employer's Indianapolis warehouse from his principal place of employment in Greenfield, Indiana, when he was involved in a fatal car collision. Sanders had been sent by his employer to the warehouse and therefore was clearly within the scope of his employment. However, testimony at the hearing by both the investigating officer and the driver of the other auto that Sanders had failed to stop at a posted stop sign was sufficient to establish an inference that: "[*T*]*he decedent* [Sanders] *did not stop his vehicle at the posted stop sign at the intersection or, if he did stop, he did not grant the right-of-way to the vehicle driven by Betty L. Estes . . . .*"[19]

The Board determined that this inference was insufficient to prove commission of a misdemeanor by Sanders and concluded that defendant had failed to carry the burden of proof that *"this misdemeanor, even if shown, proximately caused the decedent's death."*[20]

The court of appeals reversed, commenting:

> The Board's findings are remarkable. Reading them one is reminded of a trained horse who has methodically cleared each jump in the obstacle course and would logically be expected to sail over the last easy hurdle, but suddenly veers off on a frolic of his own.[21]

The court acknowleged that the statute explicitly places the burden of proof of misconduct precluding compensation on the defendant.[22] Finding that the employer had sustained that burden,

---

[17]337 N.E.2d at 532.

[18]340 N.E.2d 796 (Ind. Ct. App. 1976), also discussed in Shaffer, *Administrative Law, supra* at 41.

[19]340 N.E.2d at 800 (court's emphasis).

[20]*Id.* (court's emphasis).

[21]*Id.* at 801. The court, varying the metaphor, found the Board's conclusion "too fast a horse for us to ride."

[22]IND. CODE § 22-3-2-8 (Burns 1971) states in pertinent part:

> No compensation shall be allowed for any injury or death due to the employee's intentionally self-inflicted injury, his intoxication, his commission of a felony or misdemeanor . . . or his wilful failure or refusal to perform any statutory duty. The burden of proof shall be on the defendant.

See also B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 11.1 (1950).

since the only reasonable conclusion from the evidence was that decedent's death was proximately caused by his commission of a misdemeanor, the court determined as a matter of law that compensation should be denied.[23]

Judge White concurred in the majority opinion that decedent's failure to stop was a misdemeanor and proximately caused his death, but dissented from that portion of the decision denying compensation. He found that the statute was intended to deny compensation only for acts of willful misconduct and, since the act committed by Sanders was mere negligence, compensation should be allowed.[24]

In *Board of Commissioners v. Dudley*,[25] the Industrial Board awarded compensation to Dudley for injuries received during the course of his employment in a two-truck collision. The case turned on the cause of the collision: the employee argued a defect in his truck's mechanism;[26] the employer argued intoxication on the employee's part. The Full Board awarded compensation after hearing evidence that a blood sample taken from the employee while he was unconscious immediately after the accident indicated that he was intoxicated. The court of appeals on first hearing reversed, citing *DeMichaeli* and holding that the only possible inference from the evidence before the Board was that Dudley was intoxicated and that the intoxication was the proximate cause of the accident.[27] Judge White, concurring and dissenting, noted that

---

Dean Small adds that for misconduct to preclude an award, that misconduct must be the proximate cause of the accident for which an award is sought.

[23]The only reasonable inference supportable by the Board's findings and the evidence, leads inescapably to the conclusion that the Decedent's death was due to his commission of a misdemeanor in failing to stop or yield the right of way . . . .

. . . .

Therefore, as reasonable men could *only* conclude that the Decedent's death was proximately caused by his commission of a misdemeanor the question is one of law, and compensation should be denied and the Board's decision must be reversed.

340 N.E.2d at 805-06 (court's emphasis).

[24]*Id.* at 806-07. Professor Larson appears to disagree with Judge White's view of the statute: "There is therefore no occasion to distinguish between negligent fault and willful fault, since fault itself can have no bearing on the process of drawing the boundaries of compensability." *See generally* 1A LARSON, *supra* note 3, §§ 30.10-30.20 (1973).

[25]344 N.E.2d 853 (Ind. Ct. App. 1976), also discussed in Shaffer, *Administrative Law*, *supra* at 41.

[26]Dudley had received notice from General Motors that his truck might be defective. Evidence at the hearing indicated, however, that this defect was not applicable to Dudley's vehicle.

[27]340 N.E.2d at 808.

the Board had made no findings of fact, but had merely recited the stipulated evidence.[28]

On rehearing Judge Sullivan joined with Judge White to reverse the Board and remand for a finding of facts and entry of an award based on those facts.

Judge Buchanan dissented, contending that the Board's original findings clearly implied that Dudley was intoxicated. He cited *DeMichaeli* and the original court of appeals opinion, concluding that the evidence could support only one reasonable decision, a decision which the Board did not reach.[29]

---

[28]*Id.* at 815-16.

[29]Judicial review of workmen's compensation awards is confined to questions of law, as in any appeal. However, recent cases indicate a tendency to review the facts established by the Board, and to reverse on the basis of that reconsideration. Appellate court review of Industrial Board awards is discussed in 3 LARSON, *supra* note 3, §§ 80.00-80.50 (1976).