XVII. Workmen's Compensation

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A. Arising Out of and in the Course of Employment

1. Accident.—The major development in workmen's compensation law during the survey period occurred by accident, or rather, by a resolution of what exactly is meant by "accident" within the meaning of the Indiana Workmen's Compensation Act.[1] The historical framework in which the conflicting views of "accident" evolved is best reflected in the case of *Inland Steel Co. v. Almodovar.*[2] The facts in *Almodovar* showed that the claimant had been pulling on an air hose during the course of his employment, one of his usual and ordinary tasks, when his back suddenly "gave way." In addition, medical testimony showed that the claimant had experienced prior medical problems with his back. The result of this event was an award of temporary total disability and a further finding of permanent partial impairment by the Industrial Board of Indiana.

On appeal the employer challenged, *inter alia*, that aspect of the Board's decision classifying Almodovar's injuries as an accident arising out of, and in the course of, the employment. The majority opinion affirmed the decision of the Board[3] and, in so doing, distinguished *United States Steel Corp. v. Dykes*,[4] a supreme court decision which had long been cited for proposition that some unexpected or untoward incident, distinct from the employee's normal routine, is a necessary prerequisite to a compensable accident. The language normally cited states: "The mere showing that he was performing his usual routine everyday task when he suffered a heart attack does not establish a right to workmen's compensation because there was no event or happening beyond the mere employment itself."[5]

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[1] IND. CODE §§ 22-3-2-1 to 21 (1976 & Supp. 1978). *Id.* § 22-3-2-2 (Supp. 1978) provides, in part, as follows:

> [E]very employer and every employee, except as herein stated, shall be required to comply with the provisions of this law, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby.

[2] 361 N.E.2d 181 (Ind. Ct. App.) *transfer denied*, 366 N.E.2d 169 (Ind. 1977).

[3] *Id.* at 188.

[4] 238 Ind. 599, 154 N.E.2d 111 (1958), *distinguished in* Inland Steel Co. v. Almodovar, 361 N.E.2d at 184.

[5] 238 Ind. at 613, 154 N.E.2d at 119.

In *Almodovar*, however the court of appeals went beyond the bare holding of *Dykes* and noted that the supreme court, after reviewing cases cited in a treatise on the subject,[6] concluded: "In each of the above instances the fatal heart attack was preceded by some type of untoward or unexpected incident, *or* there was evidence of the aggravation of a previously deteriorated heart or blood vessel."[7] The court of appeals focused on the disjunctive nature of the quoted language[8] and reasoned that "accident" could very well encompass an unexpected aggravation of a pre-existing condition, as well as the traditional notion of injury arising from an unexpected event.[9]

In a strongly worded dissent, Judge Buchanan expressed disfavor with the conclusion of the majority, stating that "accident" in workmen's compensation law had been "elasticized to the breaking point."[10] Judge Buchanan capsulized his view of the concept of accident by stating: " 'Accident' as a word of art in Workmen's Compensation law has become as mysterious as the Loch Ness monster . . . and awaits the attention of the Supreme Court or the Legislature."[11]

Nevertheless, despite Judge Buchanan's invitation to engage in a fishing expedition, the supreme court refused to disturb the majority opinion in *Almodovar*. The supreme court denied transfer of *Almodovar*, notwithstanding a dissent which indicated agreement with Judge Buchanan's conclusion that the *Almodovar* opinion contravened *Dykes*.[12]

In short order, the "Loch Ness monster" of workmen's compensation law reared its ugly head again, this time in a decision emanating from the court of appeals. In *Ellis v. Hubbell Metals, Inc.*,[13] the facts raised issues identical to those of *Almodovar*. Ellis, while engaged in his normal work tasks, had received a sudden back injury. Again, the evidence showed that Ellis had suffered from a pre-existing back ailment, which had been aggravated by normal work tasks. In *Ellis*, however, the Board did not find that an accident, within the meaning of the Workmen's Compensation Act, had occurred, and, in fact, did not treat the issue in its decision. The

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[6]B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 6.20 (1950), *reviewed in* United States Steel v. Dykes, 238 Ind. at 613, 154 N.E.2d at 119.

[7]238 Ind. at 613, 154 N.E.2d at 119 (emphasis added), *noted in* Inland Steel Co. v. Almodovar, 361 N.E.2d at 184.

[8]361 N.E.2d at 184.

[9]*Id.*

[10]*Id.* at 189 (Buchanan, J., dissenting).

[11]*Id. See also* Rivera v. Simmons Co., 329 N.E.2d 39, 42 (Ind. Ct. App. 1975).

[12]366 N.E.2d 169 (Ind. 1977) (Pivarnick, J., dissenting).

[13]366 N.E.2d 207 (Ind. Ct. App. 1977).

court of appeals reversed the decision of the Board, holding that Ellis had suffered an "accidental aggravation" of a pre-existing injury.[14]

The reasoning which led to the court's conclusion began with the traditional definition of "accident" in the workmen's compensation area as some "mishap or untoward event not expected or designed."[15] The court then noted that the gist of the problem with the concept of accident devolved from the fact that two theories were utilized in judicial decisions: (1) The *unexpected cause* theory, which requires some unusual or extraordinary causal element as a prerequisite to an accident; and (2) the *unexpected result* theory, which requires only that the injury itself occur unexpectedly in the normal course of employment activities.[16] After setting forth those competing theories, the court of appeals expressly adopted the unexpected result theory, holding that theory "is more in keeping with the humanitarian purposes that underlie the Workmen's Compensation Act, which the courts are required to liberally construe in favor of the worker."[17]

This adoption of the unexpected result theory of the causal aspect of accident now places Indiana in the solid majority of jurisdictions accepting the more liberal interpretation of the term "accident."[18] At the time of this writing, the unexpected result theory appears to be solidly entrenched in recent decisions.[19] By this point in in the evolution of the meaning of "accident," one would hope that the Loch Ness monster has been finally laid to rest, and that the term "accident" has been transformed into a concept readily understandable by all involved. The *Ellis* decision is a forward-looking, well-reasoned opinion in the workmen's compensation law area and should be well received by both the bench and bar.

2. Aggravation to Injury.—In a case of first impression, the Indiana Court of Appeals held, in *McDaniel v. Sage*,[20] that an employee who seeks medical care on the work premises for a

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[14]*Id.* at 211.

[15]*Id.* at 210 n.3 (citing Haskell & Barker Co. v. Brown, 67 Ind. App. 178, 117 N.E. 555 (1917)).

[16]366 N.E.2d at 212. *See* 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 37-38 (1978).

[17]366 N.E.2d at 212.

[18]*See* 1B A. LARSON, *supra* note 16, § 38.

[19]*See, e.g.*, Calhoun v. Hillenbrand Indus., Inc., 374 N.E.2d 54 (Ind. Ct. App. 1978) (citing and relying on Ellis v. Hubbell Metals, Inc., 366 N.E.2d 207 (Ind. Ct. App. 1977)). *But see* Martinez v. Taylor Forge & Pipe Works, 368 N.E.2d 1168 (Ind. Ct. App. 1977) (unexpected result theory would not allow compensation for gradual hearing loss because there was no evidence that the loss of hearing was of a sudden, or reasonably brief, character).

[20]366 N.E.2d 202 (Ind. Ct. App. 1977).

medical problem not job-related, and sustains further injury as a result, suffers an injury "arising out of and in the course of" his employment and is relegated to the provisions of the Workmen's Compensation Act as his sole and exclusive remedy.[21]

The facts in *McDaniel* disclosed that the appellant had experienced weakness and light-headedness that was not work-related. Appellant then sought care from his employer's medical staff, and, in the course of that treatment, was subjected to an injection that was administered in an allegedly negligent manner, thereby causing further injury. Although accepting the general rule that new or aggravated injury of a job related injury also "arises out of and in the course of" employment, appellant argued that the non-job-related origin of his precipitating illness was sufficient to remove him from coverage of the Act.

In rejecting this contention, the court of appeals relied on alternative theories to support a finding of coverage under the Act. First, the court analogized appellant's activity to a temporary departure from work, undertaken for the purpose of comfort or convenience to the employer.[22] The court reasoned that the relevant considerations were not the cause or facts of the original injury, but rather were the circumstances which caused the aggravation (visit to employer's health care facility). The question then becomes whether those circumstances are of the sort which could reasonably be expected to arise in the course of employment. The *McDaniel* court answered that question affirmatively.[23] On an alternative theory, the court simply held that when an employee seeks medical care from a physician located on the company's premises, such activity is so incidental to employment as to dictate the conclusion that a resultant injury will be deemed to have arisen out of his employment, notwithstanding the non-work-related origin of the illness or injury that precipitated the aggravating event.[24]

B. Horseplay.

Horseplay is the doctrine of workmen's compensation law which precludes compensation for those injuries which arise "in moments of diversion from work" when men play pranks on each other.[25] The rationale for non-compensation is that such incidents are common knowledge and constitute a risk of employment assumed by the

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[21]*Id.* at 205.

[22]*Id.* at 204-05 (citing B. SMALL, *supra* note 6, § 7.5).

[23]366 N.E.2d at 205.

[24]*Id.* (citing 127 A.L.R. 1108 (1940)).

[25]Chicago I. & L. Ry. v. Clendennin, 81 Ind. App. 323, 143 N.E. 303 (1924).

employee. Or, as a pragmatist may put it, boys will be boys, and the workmen's compensation system should not be required to compensate for injuries received as a result of non-work-related frolicking.

The two major exceptions to this rule are that, first, an innocent victim of horseplay will not be denied compensation,[26] and second, compensation will be allowed where an employer's knowledge of, and acquiescence in, such conduct makes horseplay a condition incident to employment.[27] The issue in *Pepka Spring Co. v. Jones*[28] was whether Jones was an innocent victim of a co-employee's horseplay so as to qualify him for compensation under the Act.

The facts disclosed that Jones had initiated "spring-throwing" at a co-employee, an activity that, apparently, would be particularly pervasive in a spring factory. After throwing a spring, Jones left his job to get a drink of water and returned directly to work-related activities. While so engaged, Jones was struck in the eye by a spring thrown by the co-employee Jones had previously pelted. The problem raised on appeal resulted from Jones' admitted participation in spring-throwing. The question of his participation *immediately* prior to the accident was, however, the subject of conflicting testimony.

The court of appeals deferred to the findings of the Board and held that there were reasonable inferences drawn by the Board, based on competent evidence, which could support a finding that Jones had returned to work and abandoned his horseplay at the time of the accident.[29] The dissent criticized the majority's deference to the Board under the facts of the case. The dissent emphasized that the findings of the Board indicated that Jones had thrown a spring at the co-employee, got a drink of water, returned to work for three to five minutes, and was then hit with a spring thrown by the same co-employee. According to the dissent, these findings removed all doubt as to the inducement of the co-employee's throwing a spring at Jones, and established an ongoing pattern of horseplay.[30] The dissent also felt these facts refuted the finding that Jones was an innocent victim.[31]

The resolution of the *Pepka Spring Co.* opinions, if one is possible, is found in the emphasis the majority gave to the facts. For the majority, the time that Jones was back to work, whether three to

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[26]*See, e.g.*, Woodlawn Cemetery Ass'n v. Graham, 149 Ind. App. 431, 273 N.E.2d 546 (1971); *In re* Loper, 64 Ind. App. 571, 116 N.E. 324 (1917). *See generally* B. SMALL, *supra* note 6, § 6.9.

[27]*See* authorities cited in note 26 *supra*.

[28]371 N.E.2d 389 (Ind. Ct. App. 1978).

[29]*Id.* at 390.

[30]*Id.* at 393 (White, J., dissenting).

[31]*Id.*

five minutes or three to five hours, was immaterial, so long as there could exist a reasonable inference that Jones had withdrawn from the horseplay. The dissent, on the other hand, appeared to conclude that the relatively short period of time between the "first throw" and the "return throw" *ipso facto* precluded a finding that Jones had withdrawn from horseplay. On the whole, the de-emphasis of the temporal aspect of horseplay situations by the majority appears to be the better approach, at least insofar as it encourages *recovery* compensation to the employee injured on the job site (for whatever reason).

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