SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

The Staff of the *Indiana Law Review* is pleased to publish its first annual Survey of Recent Developments in Indiana Law. This survey, combining a scholarly and practical approach to recent cases and statutes, emphasizes new developments in Indiana law. No attempt has been made to consider all cases decided or statutes passed during the survey period. This survey covers the period from January 1, 1972, through May 31, 1973. In the future, the survey period will be one year, from June through May.

I. Administrative Law*

That the myriad administrative agencies of government through rule-making and adjudication play a paramount role in setting the values and standards by which people order their everyday lives cannot be gainsaid.[1] Indeed, the significance of the judicial process pales in importance when measured against the direct and frequent impact the administrative process has on the individual.[2] The performance of these pervasive administrative functions is perhaps best characterized as discretion.[3] This discussion is designed to explore judicially imposed constraints on the exercise of administrative discretion in the context of employment termination hearings, workmen's compensation, Industrial Board appeal procedures, standing to challenge admin-

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[1]*See* FTC v. Ruberoid Co., 343 U.S. 470 (1952) (Jackson, J.):

> The rise of administrative bodies probably has been the most significant trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.

Id. at 487. *See also* 1 K. Davis, Administrative Law Treatise § 1.02 (1958) [hereinafter cited as Davis].

[2]For a discussion of the extensiveness of this administrative penetration, see 1 Davis § 1.02 (1970 Supp.). For an early treatment of the problems presented to the legal system by the emergence of the administrative process, see Wyzanski, *The Trend of the Law and Its Impact on Legal Education*, 57 Harv. L. Rev. 558 (1944).

[3]Discretion in the administrative process "refers to an area within which agencies may choose freely between alternative courses of action, basing decisions on *ad hoc* considerations." 1 F. Cooper, State Administrative Law 31-32 (1965) [hereinafter cited as Cooper]. Though discretion is essential to the effective functioning of administrative agencies, there is a recognized need to accommodate this concern for efficiency with the need for principled decision. *See id.* 43.

istrative decisions, and the availability of equitable relief pending appeal of Alcoholic Beverage Commission decisions.[4]

A. Administrative Due Process and Combination of Functions

Recent United States Supreme Court decisions, provide a principled basis upon which to examine the source and scope of the constraints upon administrative discretion. In a series of recent opinions the Court has emphasized the importance of hearings as a safeguard against arbitrary deprivations of protected interests by governmental authority.[5] Concomitantly, the Court has expanded the categories of protected interests consistent with notions of "property" endemic to a society in which the government regulates and/or controls the essentials of life.[6] While the Court has spelled out the rudiments of procedural due process in hearings,[7] it has largely left open the question of the permissibility of specific administrative hearing procedures.

In order to serve the primary fourteenth amendment value of guarding against capricious governmental action, Indiana courts

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[4]The interjection of procedural constraints serves the function of enhancing the likelihood of principled adjudication and thus reduces the danger that decision-making will merely mirror the predilections of the hearing officer. This potential for biased decision forms the basis for much of the criticism of administrative adjudication procedures. *See, e.g., id.* 40; Clark, *Administrative Justice*, 13 AD. L. REV. 6, 8 (1960).

[5]*See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[6]*See* cases cited note 5 *supra*. For a discussion of the need to recognize new categories of property, see Reich, *The New Property*, 73 YALE L. J. 733 (1964). Accompanying these developments is an erosion of the "privilege doctrine" as a limitation on the need to afford affected parties a hearing when governmentally granted interests are involved. *See* DAVIS §§ 7.11-.12; W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 548-55 (1954); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). The characterization of the interest at stake should properly elucidate the scope of the hearing warranted by the interest and the level of judicial review it will trigger. Judicial determination of the interest should not work to eliminate a hearing right and thus permit the government to act arbitrarily. For an analysis of United States Supreme Court treatment of the "privilege doctrine," see Davis, *Requirement of a Trial Type Hearing*, 70 HARV. L. REV. 193, 222-32 (1957), in which the author discusses the proper office of the "privilege" concept as a tool to curtail adjudicative hearings.

[7]While the requisites will vary with the interest at stake, an implementation of the requirement that a person have notice and opportunity to be heard generally requires personal appearance, representation by counsel if desired, presentation of evidence, and confrontation and cross-examination of witnesses. *See* cases cited note 5 *supra*.

have required administrative boards to afford persons a "meaningful hearing" free from bias, hostility, or prejudgment.[8] The emerging issue is the identification of procedural factors which will constrain a reviewing court to hold that an administrative board has violated this mandate. Three Indiana cases have recently addressed the problem of defining the contours of due process in administrative hearings.

In *Guido v. City of Marion*,[9] *City of Mishawaka v. Stewart*,[10] and *Doran v. Board of Education*[11] the Indiana Court of Appeals was presented with the question of whether a combination of investigative, prosecutorial, and adjudicative functions in the same hearing body amounted to a denial of due process. All three opinions reiterated the accepted rule that a combination of functions is not a per se violation of due process in the sense that the bias inherent in such function combinations vitiates the possibility of a fair hearing.[12] However, the approaches taken in reviewing the several boards' decisions indicated that the court was attuned to the problem of such inherent bias.

In *Guido* and *Stewart* the Third District refused to disturb employment dismissals when the record revealed facts from which a reasonable man could have reached the same decision.[13] Though ostensibly an application of the substantial evidence rule,[14] the court's willingness to critically peruse the record can be viewed as an expression of its appreciation of the heightened potential

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[8]Tippecanoe Valley School Corp. v. Leachman, 261 N.E.2d 880 (Ind. 1970); State *ex rel.* Felthoff v. Richards, 203 Ind. 637, 180 N.E. 597 (1932); Tryon v. City of Terre Haute, 136 Ind. App. 125, 193 N.E.2d 377 (1963). *See also* Fuchs, *Judicial Control of Administrative Agencies in Indiana*, 28 IND. L.J. 293, 310-22 (1953).

[9]280 N.E.2d 81 (Ind. Ct. App. 1972).

[10]291 N.E.2d 900 (Ind. Ct. App. 1973).

[11]283 N.E.2d 385 (Ind. Ct. App. 1972).

[12]Marcello v. Bonds, 349 U.S. 302 (1954); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Fahey v. Mallone, 322 U.S. 245 (1946). For discussions of the combination of functions problem, see 1 COOPER 339-43; 2 DAVIS § 1302; Cary, *Why I Oppose the Divorce of the Judicial Function From Federal Regulatory Agenies*, 51 A.B.A.J. 33 (1965); Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389 (1948).

[13]280 N.E.2d at 86; 291 N.E.2d at 904.

[14]For a discussion of the use of the "substantial evidence rule" as a device for limiting the scope of judicial review, see Note, *Judicial Review of Removals of Municipal Policemen and Firemen in Indiana*, 26 IND. L.J. 397, 401 n.9 (1951).

for bias when functions are combined.[15] Of similar import is the decision in *Doran* in which the First District held that it was inherently unfair for a board to receive *ex parte* evidence from a lawyer serving as both legal adviser and prosecuting attorney for the school board.[16] Such a procedure, the court stated, held too great a potential for prejudgment to pass constitutional muster.[17] In this setting the *Doran* appellant was substantially prejudiced in that he was not afforded an opportunity to cross-examine or rebut the evidence upon which the board purported to rely. The court suggested that the proper procedure would have been for the attorney to have avoided discussion of the case with board members prior to the hearing.[18] This judicial explication of procedural proprieties coupled with the blanket statement that the conduct in issue was a gross abuse of discretion signaled a judicial cognizance of the need to insulate individuals from the type of bias which inures in combination of functions situations.

The impression that *Doran* involved more than a case in which the board clearly provided only a sham hearing is butressed by a review of the cases cited to support the holding. In *Jeffersonville Redevelopment Commission v. City of Jeffersonville*[19] the fatal defect was that the appellant had not been permitted to examine any of the city's witnesses. In *Monon Railroad v. Public Service Commission*[20] the critical hearing was entirely *ex parte* and subsequent to the formal hearing. Neither of these cases is entirely on point with the situation in *Doran* in which the appellant was permitted to examine witnesses as to the truth of the allegations against him and the *ex parte* investigation preceded the hearing. The court could have adopted these distinctions and affirmed the trial court's dismissal of the action on the ground that the evidence offered at the hearing provided a substantial basis for the decision and that the plaintiff-appellant had not been substantially prejudiced by the indiscreet actions of the board in eliciting *ex parte* evidence. The refusal to take

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[15]The willingness of reviewing courts to subject administrative actions to higher scrutiny when institutional or personal bias is more likely to color the determination has been embraced as an enlightened judicial reaction to a recognized problem. 1 COOPER 349; 2 DAVIS § 12.04, at 165.

[16]283 N.E.2d at 389.

[17]*Id.*

[18]*Id.* at 391.

[19]248 Ind. 568, 229 N.E.2d 825 (1967).

[20]241 Ind. 142, 170 N.E.2d 441 (1960).

this approach can be interpreted as a judicial hesitancy to provide hearing officials with *carte blanche* to ignore procedural niceties under the guise of a constitutionally permissible combination of functions.

While it is difficult to discern exactly what legal significance Indiana courts afford the combination of functions challenge to procedural fairness, the following suggestions appear warranted. Function combination is constitutionally permissible and perhaps essential when small local boards are charged with performing quasi-judicial functions. That is, the recognized evil of institutional bias will not cause a board to disqualify itself. However, such boards are concomitantly charged with a duty to avoid *ex parte* investigations and communcations which may taint their formal determinations with due process infirmities. Finally, function combination should trigger heightened judicial review of both the record and the factual complex surrounding the hearing. Such intensified review should serve as an additional safeguard against an abuse of discretion by administrative officials and insure future respondents a "meaningful administrative hearing."[21]

B. Findings of Fact

In *Transport Motor Express, Inc. v. Smith*[22] the court of appeals reversed and remanded an award of the Industrial Board with instructions "to certify to the court . . . the findings of fact on which its award is based, said findings being specific enough to permit this court intelligently to review said award."[23] A second award was certified to the court, and in the second opinion[24] the court again addressed itself to essentially the same issue in an attempt to clarify how specific a finding of facts must be.[25] This award was also reversed and remanded with instructions to find the essential facts specifically and in such pertinent detail that the appellate court would be able to intelligently review the award.[26]

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[21] *See* cases cited note 8 *supra.*

[22] 279 N.E.2d 262 (Ind. Ct. App. 1972) [hereinafter cited as *Transport Motor I*].

[23] *Id.* at 266.

[24] 289 N.E.2d 737 (Ind. Ct. App. 1972) [hereinafter cited as *Transport Motor II*]. [When the reference is to both opinions, the citation will be *Transport Motor*].

[25] *Id.* at 744.

[26] *Id.* at 754.

The *Transport Motor* opinions represent a radical departure from prior standards for judicial review of administrative findings.[27] Rather than accepting general findings which merely recite the language of a statute, the court of appeals required that findings of fact be specific and detailed.[28] The significance of the specific findings issue is illustrated by the fact that seven cases have been reversed and remanded on the authority of *Transport Motor*.[29]

Transport Motor II[30] represents a painstaking attempt by the court of appeals to provide agencies and attorneys with guidance as to what a specific finding of fact is and how it can be achieved. The essence of *Transport Motor II* is founded upon the purposes served by the specific findings requirement. Specific findings of fact not only enable a reviewing court to decide whether or not an award is contrary to the law but also explain to the parties how they won or lost their cases.[31] Furthermore, when an agency is required to demonstrate that the award granted is consistent with the basic facts disclosed by the evidence, better reasoned and more fully informed decisions are assured.[32]

Though agencies have the obvious burden of making specific findings of fact, parties have the practical burden of assisting an agency by making available proposed findings of the facts they

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[27]Although *Transport Motor II's* standard was directed to the Industrial Board, it applies to all administrative bodies whose findings of fact are binding on the reviewing court. Carlton v. Board of Zoning Appeals, 252 Ind. 56, 245 N.E.2d 337 (1969); Kosciusko County R.E.M.C. v. Public Serv. Comm'n, 222 Ind. 666, 77 N.E.2d 572 (1948); Allis Chalmers Mfg. Co. v. Review Bd. of Ind. Employment Sec. Div., 121 Ind. App. 227, 98 N.E.2d 512 (1951).

[28]For a history of the Indiana appellate courts' past approaches in this area, see B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 12.7 (1950).

[29]Rivera v. Simmons Co., 298 N.E.2d 477 (Ind. Ct. App. 1973); Estey Piano Corp. v. Steffen, 295 N.E.2d 855 (Ind. Ct. App. 1973); TRW, Inc. v. West, 293 N.E.2d 517 (Ind. Ct. App. 1973); Bohn Aluminum & Brass Co. v. Kinney, 291 N.E.2d 705 (Ind. Ct. App. 1973); Page v. Board of Comm'rs, 283 N.E.2d 571 (Ind. Ct. App. 1972); Johnson v. Thomas & Skinner, Inc., 282 N.E.2d 346 (Ind. Ct. App. 1972); Robinson v. Twigg Indus., Inc., 281 N.E.2d 135 (Ind. Ct. App. 1972).

[30]289 N.E.2d 737 (Ind. Ct. App. 1972).

[31]289 N.E.2d at 742, *quoting from* B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 12.7 (1950).

[32]*Id.* at 744.

contend should be found.[33] These proposed findings should also meet the requirement of being specific enough for intelligent review.[34] Consequently, attorneys and agencies become more aware of the actual problems they face when they are required to work with specifics. Logically, the law should become clearer in its application as precise questions are specifically reviewed, rather than as vague questions are generally reviewed.

The full effectuation of the policy purposes underlying the *Transport Motor II* standard cannot be attained until there is an understanding of what is meant by a "specific and detailed finding of fact". A reading of the *Transport Motor II* opinion reveals the following three points. First, although the court accurately uses such terms as "subsidiary," "basic," "detailed," "underlying," "evidentiary," and "ultimate" throughout the opinion, the terms are neither necessary nor important to working with the *Transport Motor II* requirement.[35] Second, the opinion does not require that there be a specific finding of fact on every element of a claimant's burden of proof, but only on those elements which are disputed.[36] Third, when there exists a disputed issue between the parties, the facts upon which the resolution of the disputed issue is based must be stated and explained. These three points can best be illustrated by the following example.

Claimant appears before Agency contending that he is eligible for an award. By statute, Agency can only grant an award if elements X, Y, and Z are proved. Party also appears before Agency and contends that Claimant is not eligible for an award because element X does not exist. Party does not dispute the existence of elements Y and Z. At this point, since there is no dispute between Claimant and Party as to the existence of elements Y and Z, it is rather unimportant whether Agency makes specific findings of fact or merely utters the general language of the statute when rendering a decision as to elements Y and Z.[37]

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[33] *Id.* at 750.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 744.

[37] An illustration of an adequate finding with respect to the uncontested elements Y and Z is—if Y equals "an accidental injury" and Z equals "in the course and scope of employment," then the finding that C sustained "an accidental injury in the course and scope of his employment" though "general to the point of [complete] obscurity" is acceptable to the court. *Id.* at 745. However, should Y and/or Z be disputed, then such a general finding is inadequate.

Thus, Y and Z, though elements of Claimant's burden of proof, are not elements of specific inquiry.

The unimportance of Y and Z, however, magnifies the importance of X. Element X is now the "basic issue"[38] before Agency, and the "contested issue"[39] or point of dispute between Claimant and Party.[40] The existence or nonexistence of element X must be supported by specific findings of fact. Claimant and Party introduce evidence designed to show facts that will prove or disprove the existence of element X.

Agency now has before it all the evidence from which it must find the "underlying or basic"[41] facts upon which the resolution of the existence or nonexistence of element X will be based. Should Agency decide in favor of Claimant, minimum specificity requires Agency to explain why Claimant's evidence[42] shows the facts which prove X's existence. However, a proper finding is not limited to Claimant, but also explains why Party's evidence fails to show facts and/or why facts fail to prove the nonexistence of element X.[43]

When Agency resolves the dispute between Claimant and Party by stating and explaining why element X exists in terms of *all* the "underlying or basic" facts, the findings of fact made attain the degree of specificity required by *Transport Motor II*. For then the court knows precisely what Agency meant when it rendered the award, and the court is not required "to determine the credibility of witnesses, . . . resolve conflicts, . . . choose between permissible inferences nor to presume with what result" Agency evaluated the evidence.[44] This constitutes an intelligent review.

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[38]The "basic issue" before the Industrial Board and the court of appeals in both *Transport Motor* opinions was whether or not Transport Motor Express, Inc., was a coemployer of the deceased. *Id.* at 739. The "basic issue" is also referred to as the question of "ultimate fact." *Id.* at 740.

[39]The "contested issue" is also referred to as the "disputed issue" or the "ultimate fact." *Id.* at 744.

[40]Claimant and Party should submit proposed findings of fact on the "disputed issue."

[41]289 N.E.2d at 747.

[42]*Id.* at 746.

[43]*Id.* at 747.

[44]*Id.* The simplified example implies that Claimant's evidence would prove different "basic facts" than would Party's evidence. However, should the "basic facts" be stipulated, Claimant's evidence would attempt to show different "factual inferences" than would Party's evidence. If Agency simply stated the "basic facts" in its findings, the findings would not be suf-

Thus, in rendering the award, Agency would state that element X exists, state why it exists in terms of Claimant's evidence and facts, and state why Party's evidence and facts fail to contradict the existence of element X. Once element X is determined, conceded elements Y and Z are stated, and Agency answers the statutory question that X, Y, and Z equal an award. Should Agency have found for Party in this example, thereby rendering a negative award,[45] the same degree of specificity would be required to explain why Party's evidence proves the nonexistence of element X and why Claimant's evidence fails to prove X's existence.[46]

Assuming Claimant has won, and Party appeals from an award based upon specific findings of fact, it is incorrect for Party to raise as an issue the sufficiency of the evidence to sustain the award.[47] This is easily understandable since, in terms of the example, Party is arguing that the evidence does not equal X, Y, and Z. Party's correct approach is to argue that Claimant's evidence is insufficient to sustain any specifically challenged fact

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ficiently specific. In this instance, it is the "factual inferences" which are in dispute and Agency must explain which inferences are chosen and why. Basic facts and factual inferences can be disputed simultaneously. *Id.* at 745.

[45]In this example Claimant has the burden of proof.

[46]289 N.E.2d at 747. This example does not cover the situation in which Claimant fails to submit any evidence to prove element X. In such a case, a proper finding by Agency would be that element X does not exist because there is "no evidence" showing that it does. *Id.* at 745. The court stressed the fact that such a situation requires a "no evidence" finding. It was also noted that when an agency renders a negative award, there must be specific findings. Nonetheless, the court discussed a Massachusetts procedure of searching the record before requiring a specific finding to determine if there is any evidence which would warrant a contrary finding. If no evidence was found, the court would affirm the negative award. *See* Roney's Case, 316 Mass. 732, 56 N.E.2d 859 (1944). After recognizing the Massachusetts procedure, the court indicated that it would not be utilized until some "future" case warranted it. It appears, however, that the "future" was that same day when the court affirmed a negative award of the Industrial Board by examining the evidence of record and concluding that the evidence did not lead inescapably to the opposite conclusion. Robinson v. Twigg Indus., Inc., 289 N.E.2d 733 (Ind. Ct. App. 1972). The correctness of the *Robinson* decision is unimportant. However, its reasoning marks a dramatic departure from that of *Transport Motor II* in the area of negative awards. Nevertheless, it now appears that *Robinson* has been subjugated to *Transport Motor II* in light of the reversal and remand in Rivera v. Simmons Co., 298 N.E.2d 477 (Ind. Ct. App. 1973).

[47]289 N.E.2d at 749. *See* Cole v. Sheehan Constr. Co., 222 Ind. 274, 281, 53 N.E.2d 172, 175 (1944).

found which supports the existence of element X or that the evidence requires the finding of a pertinent fact which Agency failed to find. Likewise, Party can argue that the specific facts found are insufficient to prove element X.[48]

C. Injunctive Relief from Administrative Actions

In *State ex rel. Indiana Alcoholic Beverage Commission v. Lake Superior Court*,[49] the Indiana Supreme Court held that the separation of powers doctrine restricted the court's power to enjoin administrative action. The Lake County Superior Court stayed the execution of a Commission order revoking plaintiff's liquor license pending judicial review. After the scheduled license expiration date, the Commission brought an original action in the supreme court for a writ of prohibition and mandate forbidding the superior court from further restraining the Commission from closing the plaintiff's premises.[50] The court reasoned that the extension of the stay amounted to a renewal of the license and thus resulted in judicial usurpation of a function delegated solely to the Commission.[51] This, the court held, was prohibited by the separation of powers doctrine. Similarly, in *Indiana Alcoholic Beverage Commission v. Progressive Enterprises, Inc.*,[52] the court held that a preliminary injunction could not be used to permit appellee to operate after the license expiration date. The effect of these holdings is to curtail the utility of temporary injunctive relief as a means of preserving the status quo pending judicial

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[48]289 N.E.2d at 750.

The frustration of the court of appeals in utilizing *Transport Motor II* as a basis for reversing and remanding an award was most artfully expressed by Presiding Judge Buchanan when he stated:

> The message has not been carried to Garcia, even though our Per Curiam opinion in the second *Transport Motor Express* case extensively examined and analyzed the authorities and we thought set up as explicit guidelines as are possible in this area of administrative law.

Bohn Aluminum & Brass Co. v. Kinney, 291 N.E.2d 705, 707 (Ind. Ct. App. 1973).

[49]284 N.E.2d 746 (Ind. 1972).

[50]The plaintiff's license was revoked on October 12, 1971, and Lake Superior Court Judge Giorgi granted plaintiff's motion for a stay pending review on October 14, 1971. After the license expiration date, the Commission moved to have the stay vacated. A judge pro-tempore granted the Commission's motion, but three days later Judge Giorgi vacated the judge pro-tempore's order and reinstated the original stay.

[51]284 N.E.2d at 749.

[52]286 N.E.2d 836 (Ind. 1972).

review of commission determinations.[53] The court, however, left open the question of the applicability of this separation of powers rationale to stays authorized by the Administrative Adjudications Act.[54]

D. Procedure on Appeal

The Indiana Supreme Court, in *Clary v. National Friction Products, Inc.*,[55] clarified an area of substantial confusion concerning the proper application of the Indiana Rules of Trial Procedure to appellate review of administrative agency action. In *Clary* the appellants sought review of negative awards from the Industrial Board by filing timely motions to correct errors pursuant to Trial Rule 59.[56] Upon denial of the motions, the appellants sought, and obtained, review by the court of appeals. Appellee board contended on appeal that the Indiana Workmen's Compensation Act of 1929,[57] which requires that an assignment of error be filed within thirty days from the date of the award,[58] dictated the proper procedure for perfecting an appeal.

The court of appeals accepted the board's contention and dismissed the appeal.[59] The Indiana Supreme Court, after granting a petition to transfer, dismissed the appellant's appeal and held that the proper procedure governing appeals from administrative agency action is controlled by the empowering statutes of the agency, not by the rules of trial procedure.[60] The court stated that

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[53]The legislature amended the governing statute replacing the power to grant stays with the requirements that the court hear an appeal within twenty-four days from the date of filing and enter judgment within seven days after the hearing. IND. CODE § 7-2-3-2 (1972 Supp.).

[54]IND. CODE §§ 4-22-1-1 to -30 (1971).

[55]290 N.E.2d 53 (Ind. 1972).

[56]Indiana Rule of Trial Procedure 59 states in part:

> (c) when motion to correct errors must be filed. A motion to correct errors shall be filed not later than sixty (60) days after the entry of judgment. . . .
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> (g) . . . [I]n all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefore each error relied upon however and whenever arising up to the time of filing such motion . . . .

[57]IND. CODE §§ 22-3-2-1 to -6-3 (1971).

[58]IND. CODE § 22-3-4-8 (1971).

[59]283 N.E.2d 574 (Ind. Ct. App. 1972).

[60]290 N.E.2d at 56.

all appeals emanating from administrative agency determinations, whether petitioner seeks judicial review or intra-agency review, must be brought in conformity with procedures applicable to the particular reviewing body.[61] Moreover, it is clear that appeals taken from a trial court review of administrative action are governed by the Indiana Rules of Trial Procedure.[62]

E. Standing to Obtain Judicial Review of Administrative Actions

In *Metropolitan Development Commission v. Cullison,*[63] the Indiana Court of Appeals reiterated Indiana's long established rule of standing for persons seeking judicial review of an administrative agency decision. The Metropolitan Development Commission of Marion County and the Department of Metropolitan Development of the City of Indianapolis brought a petition for certiorari, pursuant to an enabling statute,[64] to review a decision of the Board of Zoning Appeals. The trial court granted the Board's motion to dismiss the petition on the grounds that the Commissions were not "person(s) aggrieved" within the meaning of the statute. The court of appeals, in considering the definitional aspects of "aggrieved," relied on the holding in *McFarland v. Pierce,*[65] Indiana's initial case on standing for judicial review. In *McFarland,* the Indiana Supreme Court, citing numerous cases decided in other jurisdictions, stated:

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[61]Cole v. Sheehan Constr. Co., 222 Ind. 274, 53 N.E.2d 172 (1944); Slinkard v. Extruded Alloys, 277 N.E.2d 176 (Ind. Ct. App. 1971).

[62]Indiana State Personnel Bd. v. Wilson, 271 N.E.2d 488 (Ind. 1971); Bradburn v. County Dep't of Pub. Welfare, 266 N.E.2d 805 (Ind. Ct. App. 1971).

[63]277 N.E.2d 905 (Ind. Ct. App. 1972).

[64]IND. CODE § 18-7-2-76 (1971). This section states in part:

> Petition for writ of certiorari from decision.—Every decision of a board of zoning appeals shall be subject to review by certiorari . . . .
>
> Subject to the above limitations, any person aggrieved by a decision of the board of zoning appeals may present to the circuit or superior court of the county in which the premises affected are located a petition duly verified, setting forth that such decision is illegal in whole or in part, and specifying the grounds of the illegality. . . .

From 1965 to 1969, the second paragraph above read:

> Any person, including the executive director of the Metropolitan Planning Department, aggrieved by a decision of the board of zoning appeals may present . . . .

Ch. 434, § 21, [1965] Ind. Acts 1375.

[65]151 Ind. 546, 45 N.E. 706 (1897).

> The word "aggrieved," in the statute refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation. To be "aggrieved" is to have a legal right, the infringement of which by the decree complained of will cause pecuniary injury. The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal.[66]

Since *McFarland,* the Indiana courts have consistently adhered to a standing requirement of economic injury to some legally protected, private interest.[67] Furthermore, it appears that this requirement is to be applied in all cases regardless of whether statutory standing or nonstatutory standing is involved.[68] In light of current trends in the law of administrative standing, it would appear that the private legal right standard is unnecessarily restrictive in its application to contemporary situations and is contrary to the mainstream approach of liberalizing the constitutionally mandated doctrine of standing.[69]

Since 1968,[70] the doctrinal area of standing for judicial re-

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[66]151 Ind. at 548, 45 N.E. at 707 (citations omitted).

[67]Wiedenhoft v. Michigan City, 250 Ind. 327, 236 N.E.2d 40 (1968); Klein v. City of Indianapolis, 248 Ind. 117, 224 N.E.2d 42 (1967); Fidelity Trust Co. v. Downing, 224 Ind. 457, 68 N.E.2d 789 (1946); Terre Haute Gas Corp. v. Johnson, 221 Ind. 499, 45 N.E.2d 484 (1942).

[68]Insurance Comm'n v. Mutual Medical Ins., Inc., 251 Ind. 296, 241 N.E.2d 56 (1968) (proceeding under the Administrative Adjudication and Court Review Acts); Wiedenhoft v. Michigan City, 250 Ind. 327, 236 N.E.2d 40 (1968) (proceeding under the Redevelopment of Cities and Towns Act of 1953); Fadell v. Kovacik, 242 Ind. 610, 181 N.E.2d 228 (1962) (no enabling statute); Campbell-Smith-Ritchie Co. v. Souders, 64 Ind. App. 138, 115 N.E. 354 (1917) (no enabling statute).

[69]Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); DAVIS §§ 22.00-.10 (1970 Supp.); Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450 (1970).

[70]In Flast v. Cohen, 392 U.S. 83 (1968), the United States Supreme Court granted standing for judicial review to federal taxpayers attempting to challenge the constitutionality of a federal statute. The *Flast* case, coupled with Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968), substantially reversed the prior standing requirement of infringement of a "private legal right" as promulgated in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). *See* note 76 *infra. See also* Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601 (1968).

view has experienced a swift revitalization, especially on the federal level.[71] In *Association of Data Processing Service Organizations v. Camp*[72] and *Barlow v. Collins*,[73] the United States Supreme Court promulgated a bifurcated standard for approaching standing questions. Essentially, the Court held that standing for judicial review should be found when the appellant suffers actual injury, either economic or otherwise, as a result of agency action,[74] and the appellant is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[75] The residual effect of *Data Processing/Barlow* has put to rest the "private legal right" concept promulgated in *Perkins v. Lukens Steel Co.*[76] and has opened judicial review to situations in which neither economic deprivation nor purely private legal interests exist.[77] Clearly, public policy supports this public interest standard as potentially aggrieved persons are frequently not cognizant of administrative agency actions and the overall ramifications thereof, nor are they willing to assume steep litigation expenses on an individual basis.[78] These

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[71] *See* note 69 *supra*. *See also* Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972); Note, *Standing to Challenge Administrative Action: The Concept of Personal Stake*, 39 GEO. WASH. L. REV. 570 (1971).

[72] 397 U.S. 150 (1970).

[73] 397 U.S. 159 (1970).

[74] 397 U.S. at 152.

[75] *Id.* at 153.

[76] 310 U.S. 113 (1940). In *Perkins*, the United States Supreme Court stated:

> Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.

Id. at 125.

In *Data Processing/Barlow*, the Court distinguished *Perkins* by stating that the "legal interest" test goes to the merits, while standing presents a threshold question quite apart from the Article III "case" or "controversy" issue. 397 U.S. at 153 & n.1. Apparently, then, the cumulative effect of *Data Processing/Barlow* is to abrogate the *Perkins* "legal interest" test. *See* DAVIS § 22.00-1, at 701 (1970 Supp.).

[77] Sierra Club v. Morton, 405 U.S. 727 (1972); Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970). *See generally* Note, *Public Interest Right to Participate in Federal Administrative Agency Proceedings: Scope and Effect*, 47 IND. L.J. 682 (1972).

[78] Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969) [hereinafter cited as Berger, *Arbitrariness*]; Jaffe, *The Citizen as*

factors, then, would militate against foreclosing judicial access to all but those directly and financially aggrieved. Similarly, due to the often competing functions shared by two or more agencies or boards, one agency is frequently better able to recognize deficiencies in the decision of another agency and is in a more advantageous position, documentarily and financially, to rebut and litigate such a decision.[79]

In *Cullison*, the court, while recognizing the constitutional mandate of access to judicial review for aggrieved persons, refused to expand Indiana's standing doctrine to the parameters outlined by the United States Supreme Court[80] and stated that it has never been judicially held in Indiana "that the Legislature must provide aggrieved persons with an official representative to assert that right for their benefit."[81] In so holding, the court failed to recognize the possible injury to the Commissions resulting from the Board's variance proceeding. Pursuant to the Consolidated First Class Cities and Counties Act,[82] the Division of Planning and Zoning of the Department of Metropolitan Development is required to perform all urban renewal and redevelopment planning functions,[83] as well as all investigative and research duties with respect to living and housing conditions within the city-county boundaries.[84] Similarly, the Metropolitan Development Commission is responsible for a myriad of duties and functions including the promulgation of comprehensive master plans for the socio-economic development of the city-county area,[85] and the formulation and recommendation of zoning ordinances for the effectuation of orderly growth and development.[86] Given these stat-

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Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. PA. L. REV. 1033 (1968) [hereinafter cited as Jaffe, *Citizen*]; Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973) [hereinafter cited as Scott, *Standing*].

[79] *E.g.*, United States *ex rel.* Chapman v. FPC, 345 U.S. 153 (1953).

[80] *See* text accompanying notes 74 & 75 *supra*.

[81] 277 N.E.2d 905, 908 (Ind. Ct. App. 1972).

[82] IND. CODE §§ 18-4-1-1 to -5-4 (1971) (also known as the "Uni-Gov" Act).

[83] *Id.* § 18-4-8-3.

[84] *Id.* § 18-7-11-8(f).

[85] *Id.* §§ 18-7-3-31, -2-36.

[86] *Id.* § 18-7-2-38. This section states in part:

After the certification of a comprehensive (master) plan . . . the metropolitan plan commission shall recommend to the county council

utory duties and powers, it is apparent that deficient zoning variances could impede the Commissions' planning functions and, thereby, threaten the effective development of the city-county polity.

Concomitantly, the possible infringement on the duties and responsibilities statutorily given to the Commissions *arguably* places the Commissions within the zone of interests to be protected by these statutes[87]—namely, efficient and orderly planning and development with a view towards enhancing the social, economic, and aesthetic growth of the city-county area. It would thus appear that the standing requirements enunciated in *Data Processing/Barlow*[88] were met by the appellant Commissions, and the case should have proceeded to the merits. Moreover, it would appear that the court's holding raises a fundamental question concerning the constitutional validity of Indiana's traditional "legal interest" standing requirement. Both the Indiana[89] and the United States[90] Constitutions require that "due process" be accorded all justiciable claims. It is arguable that the *Cullison* court's restrictive definition of "person(s) aggrieved" will effectively thwart good faith claimants, who have suffered actual injury, and prevent the exercise of their right to unfettered access to a judicial forum. At its inception, the "legal interest" test goes to the merits of the case by requiring the appellant to show injury to a legally recognized right or interest.[91] These rights, however, are nar-

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an ordinance or ordinances for zoning or districting of all lands to the end that adequate light, air, convenience of access, and safety from fire, flood and other danger may be secured; . . . that the public health, safety, comfort, morals, convenience and general public welfare may be promoted. . . .

[87]*See* notes 83-86 *supra.*

[88]*See* text accompanying notes 74 & 75 *supra.*

[89]IND CONST. art. 1, § 12:

All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

[90]U.S. CONST. amend. XIV, § 1:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

[91]*See* text accompanying note 76 *supra.*

rowly confined to those involving property, contractual relationships, tortious invasion, and statutorily conferred privilege.[92]

Conversely, the bifurcated standard promulgated in *Data Processing/Barlow* requires, as a prerequisite to conferral of standing, an assertion or allegation of injury to an interest which is *arguably* within a zone of statutorily or constitutionally protected interests.[93] In juxtaposition to the rights recognized in the traditional standing requirement, the zone of protected interests under the *Data Processing/Barlow* requirement is expansive and encompasses " 'aesthetic, conservational, and recreational' as well as economic values."[94]

With respect to the "due process" mandate, it seems clear that the traditional standing requirement is unduly restrictive in both a procedural and substantive manner. The burden of adequately pleading and showing sufficient injury to a few carefully circumscribed substantive rights would tend to constrict judicial access, even to those appellants exhibiting substantial injury. Furthermore, the contemporary standing requirement more closely comports with "due process" judicial access for two reasons. First, the injury complained of must only "arguably" affect some protected interest. Procedurally, this would seem to require only an allegation of manifestly probable injury. Second, the broadening of litigable categories will encompass many substantially aggrieved persons within the ambit of judicial review. Certainly, it appears that the dictates of the due process clause require such contemporary analysis.[95] Lacking such a judicial approach, many "per-

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[92]Tennessee Power Co. v. TVA, 306 U.S. 118, 137-38 (1937). *See also* DAVIS § 22.00-1, at 705-06 (1970 Supp.).

[93]397 U.S. at 153, 164.

[94]*Id* at 154, *citing* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[95]Although it appears that absolute access to a judicial forum has never been raised to the level of a "due process" mandate, there is considerable authority to the effect that appearances of administrative arbitrariness will trigger a more liberal approach. *E.g.*, Greene v. McElroy, 360 U.S. 474 (1959); Nebbia v. New York, 291 U.S. 502 (1934); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In *Greene*, the Court stated:

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process.

son(s) aggrieved" by administrative agency action will find the judiciary unavailing, and their substantial interests unprotected from arbitrary and capricious action.[96]

F. Workmen's Compensation

In *Frampton v. Indiana Central Gas Co.*,[97] the Indiana Supreme Court created a unique[98] right of action for retaliatory discharges involving workmen's compensation claims. The claimant originally brought an action in circuit court against her employer for her discharge from employment, allegedly in retaliation for filing a workmen's compensation claim. The circuit court dismissed the complaint for failure to state a claim upon which relief could be granted. The court of appeals affirmed.[99] The supreme court, holding that the employee-claimant's allegation of retaliatory discharge was sufficient to establish a judicially cognizable claim, reversed. The court stated that the Workmen's Compensation Act[100] created "a *duty* in the employer to compensate the employees for work-related injuries and a *right* in the employee to receive such compensation."[101] The court concluded that

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360 U.S. at 507.

> Professor Jaffe has proffered the following in a similar vein:
> Where the citizen is demanding his legally prescribed due in the form of money, property or the specific performance of an act, or where he is resisting claims upon his property or his person, it is a *fundamental* tenet of our legal system that there should be a tribunal which will provide a disinterested determination of his claim.

Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034 (1968) (emphasis added). *See* Berger, *Arbitrariness* 980-88. *See generally* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement*, 78 YALE L.J. 816 (1969); Scott, *Standing*.

[96]Sierra Club v. Morton, 405 U.S. 727, 755-56 (1971) (Blackmun, J., dissenting). This danger was cogently recognized by Justice Blackmun:

> Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

Id.

[97]297 N.E.2d 425 (Ind. 1973).

[98]Indiana is the only jurisdiction providing a judicially created right of action for discharge in retaliation for filing a compensation or occupational disease claim.

[99]287 N.E.2d 902 (Ind. Ct. App. 1972).

[100]IND. CODE §§ 22-3-2-1 to -6-3 (1971).

[101]297 N.E.2d at 427.

if the employee is unable to protect his right or to compel the employer's performance of his duty, the public policy underlying the Workmen's Compensation Act would be frustrated.

The court recognized that prior to the *Frampton* case, employers could effectively thwart the employee's exercise of his right to bring a compensation claim by the threat of discharge; the employee, left with a choice between bringing his claim or suffering the loss of his employment, would often choose to continue his employment and thus lose his statutory right to compensation. As a result, the employer could circumvent his obligation.

This landmark decision was founded on three basic premises. First, the Workmen's Compensation Act is designed to provide relief to injured workers, regardless of any fault theories. The policy underlying the Act is to transfer the economic loss due to industrial accidents from the worker to the industry which, in turn, passes it along to the consuming public. Accordingly, the Act must be liberally construed in favor of the employee so as not to vitiate its purposes. Second, equitable principles militate against the judicial toleration of such unconscionable employer action. Third, Indiana Code section 22-3-2-15, which proscribes the employer's use of any "device" in avoidance of his statutory obligations, clearly manifests a legislative policy judgment which the courts should enforce.

In *Lincoln v. Whirlpool Corp.*,[102] the Indiana Court of Appeals refused to sustain a strong challenge to Indiana's long-standing interpretation of the "horseplay doctrine." An employee, while waiting to go on his lunch break, actively engaged in horseplay with a fourteen year old boy. After the employee playfully struck the boy on the leg with his belt, the boy went into a nearby house, returned with a gun, and fatally shot the employee.

Judge Staton held that the employee's death did not "arise out of" his employment and, hence, was not compensable. The court stated that the statutory requirement, that the injury "arise out of" the employment, mandates a risk analysis approach to determine whether the employment "increased the risk" of injury to the employee beyond that to which the general public is exposed. The court's "increased risk" inquiry demanded, as a practical matter, the discovery of some causal connection between the employment and the injury.

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[102]279 N.E.2d 596 (Ind. Ct. App. 1972).

The court concluded that the horseplay in which the decedent had engaged did not constitute any part of the enterprise conducted by his employer and, hence, was not integral to the employment. Thus the *Lincoln* holding stolidly reaffirmed the traditional Indiana rule that a participant in horseplay will be denied compensation except in four situations; when the employer, with knowledge, permits horseplay to continue without attempting to prevent it;[103] when the instrumentalities used in the horseplay are incidental to the work environment;[104] when innocent victims of the horseplay seek recovery;[105] and when horseplay is expected to occur due to the type of work activity and a practice so strong as to become a custom is established, i.e., "air goose" cases.[106]

The horseplay doctrine has recently come under heavy attack by legal writers.[107] In spite of this, the court concluded, without

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[103]Kunkel v. Arnold, 131 Ind. App. 219, 158 N.E.2d 660 (1959).

[104]*In re* Loper, 64 Ind. App. 571, 116 N.E. 324 (1917).

[105]Woodlawn Cemetery Ass'n v. Graham, 273 N.E.2d 546 (Ind. Ct. App. 1971).

[106]*In re* Loper, 64 Ind. App. 571, 116 N.E. 324 (1917).

[107]Horovitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L.J. 1 (1961); Horovitz, *The Litigious Phrase: "Arising Out of Employment,"* 3 NACCA L.J. 15 (1949). Horovitz believes that horseplay is a by-product of industry and is created by the strains and fatigue from human and mechanical impacts when men are put into close association. Since the basic policy of Workmen's Compensation Acts is to provide benefits to victims of industrially-related injuries, without regard to fault, there is no reason to deny benefits to horseplay participants, if the horseplay is a by-product of the industry. Although few jurisdictions have adopted Horovitz's broad rule, Michigan, Mississippi, and Arkansas have favored such an approach and have awarded compensation to horseplay victims who were considered aggressors or active participants. *See*, Southern Cotton Oil Div. v. Childress, 237 Ark. 909, 377 S.W.2d 167 (1964); Crilley v. Ballon, 353 Mich. 303, 91 N.W.2d 493 (1958); Taylor v. Traders & Gen. Ins. Co., 250 Miss. 416, 164 So. 2d 905 (1964).

Professor Larson, in his authoritative treatise on workmen's compensation, states that judicial difficulty with horseplay cases results from confusion between the "arising out of" and "in the course of" employment issues. A. LARSON, WORKMEN'S COMPENSATION § 23.61 (1952). He states that the former is mistakenly thought to be the principal issue. Larson says that whenever a controversy originates from the nature of a course of conduct undertaken by the claimant, the issue concerns a question of "in the course of" employment. But, when the controversy stems from the nature of the source of injury to the claimant, it involves a question of "arising out of" the employment. Thus, if it is determined that the activity (horseplay) itself qualifies as part of the employment and the harm (injury) arises out of that activity, then, logically the harm must arise out of the employment.

comment, that the criticism of the horseplay doctrine was invalid. Consequently, any future attack on the horseplay doctrine in Indiana would appear to necessitate an approach within the traditional framework.

The court of appeals, in *Johnson v. Thomas & Skinner, Inc.*,[108] interpreted the language in Indiana Code section 22-3-3-27 providing for a one year application period for increased permanent partial disability. Prior to this holding, there were conflicting views as to the meaning of the time limitation contained in section 27.

One view was based on the proposition that since section 27 created a right not recognized at common law, the time limitation contained in the statute was "of the essence." Thus, it was reasoned that the employee-claimant must exercise his statutorily created right within the prescribed time period or it would be irretrievably lost. This view has been denominated as the "condition annexed to a statutory right of action" theory.[109] This theory elevates the statutorily prescribed condition to a precedent position with the failure to satisfy the condition eliminating the claimant's right of action. The prevailing view characterized the one year time limitation as a statute of limitations.[110] Cast in this form, the remedy provided by section 27 would be barred, but not the right of action.

In *Johnson* the appellant-employee attempted to file an application for increased disability pursuant to section 27 after the one year time period had expired. He contended that he was mentally incompetent during the one year time period and, therefore, came within the provisions of Indiana Code section 22-3-3-30, which tolls time limitations running against minors or incompetents.

The appellee-employer maintained that section 27 was not a statute of limitations but a "condition annexed to a statutory right" and was unaffected by the tolling provisions of section 30. In short, the employer argued that the employee's right was barred since he failed to bring his action within the stated period.

The Industrial Board, accepting the employer's position dis-

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[108]287 N.E.2d 894 (Ind. Ct. App. 1972).

[109]Wilson v. Betz Corp., 130 Ind. App. 83, 159 N.E.2d 402 (1959); McGinnis v. American Foundry Co., 128 Ind. App. 660, 149 N.E.2d 309 (1958).

[110]*In re* Riggs, 78 Ind. App. 634, 137 N.E. 72 (1922); *In re* Hogan, 75 Ind. App. 53, 129 N.E. 633 (1921).

missed the employee's application.[111] The court of appeals reversed and held that prior case law[112] interpreting section 27 compelled the conclusion that the time proviso constituted a statute of limitations. The court did not discuss the policy reasons behind its decision but the holding is clearly consonant with the prevailing trend toward more liberal construction of the Workmen's Compensation Act to insure the promotion of its humane purposes.

After receiving an award from the Industrial Board for the death of her husband and while still collecting benefits under that award, a widow settled a wrongful death claim with a third party tortfeasor allegedly responsible for her husband's death. A dispute arose between the widow and the employer as to the proper computation of attorney's fees chargeable to the employer under Indiana Code section 22-3-2-13. The statute requires a reimbursed employer to pay his pro rata share of expenses and attorney's fees when recovery is obtained from a third party tortfeasor. In *Indiana State Highway Commission v. White*[113] the Indiana Supreme Court held that the statute requires the fees generated by an attorney in securing reimbursements for an employer or compensation carrier through an action against a third party tortfeasor to be paid by the employer based upon the *gross award,* not upon the amount paid to the employee at the reimbursement date.

The beneficiary contended that the attorney's fees incurred in settling the third party tortfeasor claim should be calculated on the basis of the total amount awarded by the Industrial Board. The employer contended that his ratable portion of the fee expense should be based only on the amount paid to the employee at the date of reimbursement. The court determined that the legislative policy underlying section 13 was to safeguard the employee or his dependents from bearing the burden of legal expenses incident to the recovery of an employer's subrogation claim. The court reasoned that the employee could rest upon his statutory right to an award and collect the entire amount despite the existence of a valid third party claim. The employer or compensation carrier would then be forced to pursue the third party action (subrogation suit) independently and pay the entire amount of attorney's fees. The court concluded that there should be no

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[111]The Industrial Board held that it lacked subject matter jurisdiction due to the claimant's failure to comply with the statute's one year time limitation.

[112]*See* cases cited note 109 *supra.*

[113]291 N.E.2d 550 (Ind. 1973).

reduction in the amount of the employee's award simply because the employee institutes the action rather than the employer.

It would appear that the court's holding would require employers to pay their statutorily prescribed allocation of attorney's fees based on the gross amount of an award *only* when the amount of the recovery from the third party tortfeasor equals or exceeds the amount of the award. If the amount of recovery from the third party tortfeasor is less than that of the gross award, then the ratable basis of the legal expense would be the amount recovered and not the total award made to the employee.[114]

II. Civil Procedure and Jurisdiction

*William F. Harvey**

The following survey of significant cases involving various aspects of civil procedure and jurisdiction in the chronological order of a law suit should be regarded as an overview rather than an extensive analysis.

A. Jurisdiction and Service of Process

In *Neill v. Ridner*,[1] a case of major impact in Indiana, a bastardy proceeding was commenced by plaintiff, seeking support for twins born in 1969. Defendant was eventually served in Kentucky. Defendant argued that there was no personal

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[114]If the total gross award was the basis for computing attorney's fees in all circumstances, it would be possible for the attorney to receive fees in excess of the total third party recovery. For example, assume that the gross award to the employee is $20,000 and the amount recovered in the third party action is $1,000. If the attorney's fees were based upon the gross award, the attorney could receive $5000 under the statutorily prescribed 25% fee in cases in which recovery is received prior to suit. In such a situation the attorney would receive a fee five times greater than the amount of the third party recovery.

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[1]286 N.E.2d 427 (Ind. Ct. App. 1972).