XVI. Workers' Compensation

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A. *Compensability of Claims*

Indiana Code section 22-3-2-2 provides compensation to an employee "for personal injury or death by accident arising out of and in the course of employment."[1] Within the last year, the courts have addressed the scope of the statutory language of "arising out of," "in the course of," and "by accident."

1. Arising Out Of and In the Course Of.—In *Clem v. Steveco, Inc.,*[2] the plaintiff filed a suit in civil court asking for compensation and punitive damages not only against his deceased wife's employer, but also against the franchisor of the company for which she worked. The trial court granted the defendant's motion to dismiss. In assuming the facts most favorable to the employer, the court of appeals found that the employee-decedent was a night clerk at a convenience store owned by Steveco, Inc. under a franchise arrangement with the franchisor, Southland Corporation. During the decedent's employment, the store was robbed, and the decedent was abducted and murdered. The allegations in the complaint were based on the failure of the franchisor to provide a reasonably safe place for the employee to work.[3]

In upholding the trial court's dismissal of Steveco, Judge Shields held that the murder of an employee is an act that may arise out of and in the course and scope of the employment, depending upon the facts of the particular case. In the case at bar, the injury or death of the employee was one which might be reasonably anticipated by the employee in view of the fact that the employee's duties included guarding the cash register from theft by third parties.[4] Thus, the employee's death arose out of and in the course of her employment.

The court reversed, however, the trial court's dismissal as to the franchisor, stating that the degree of control or direction the franchisor had over the employee would determine whether or not the plaintiff was entitled to a civil remedy rather than the benefits arising under the Workmen's Compensation Act.[5]

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[1]Ind. Code § 22-3-2-2 (1982).

[2]450 N.E.2d 550 (Ind. Ct. App. 1983).

[3]*Id.* at 551.

[4]*Id.* at 553.

[5]*Id.* at 555-56. It should be noted that the plaintiff-husband attempted to circumvent the Workmen's Compensation Act by asserting that the Act, as applied to him, was unconstitutional. The plaintiff argued that the Act's provisions made a wife a presumptive

In *Blade v. Anaconda Aluminum Co.*,[6] the complaint alleged that the plaintiff's decedent was an employee of the defendant, and that an explosion which killed the decedent was caused by the defendant's intentional failure and refusal to take certain precautionary safety measures for its employees. The court of appeals affirmed the trial court's ruling, and held that the plaintiff's exclusive remedy was under the Workmen's Compensation Act and not in a civil suit against the employer.[7] This was so even though all reasonable inferences of the plaintiff's complaint supported the theory that the employer was guilty of grossly negligent and wanton behavior which caused the decedent's death.[8]

In drawing a fine line between intentional conduct which eventually results in the death of an employee and conduct which is intended to cause the death of an employee, the court approvingly cited the reasoning of *Cunningham v. Aluminum Co. of America:*[9]

> "[T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid, and becomes a certainty."[10]

Thus, even if the employer's conduct is grossly negligent or wanton, the employee's remedies are restricted to those of the Workmen's Compensation Act.

In a case similar to *Blade*, the court of appeals in *Skinner v. Martin*[11]

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dependent and obligated the husband to prove that he was a presumptive dependent of the wife. *See* Ind. Code § 22-3-3-19 (1982). The plaintiff claimed that the evidentiary presumptions "impermissibly discriminate[d] on a gender basis between similarly situated persons." 450 N.E.2d at 552. The appellate court avoided the issue by holding that even if the provision were unconstitutional based upon sex discrimination, the entire Act would not be declared null and void, but only that portion of the Act dealing with the presumptive dependency and who has the burden of proving that dependency. *Id.* at 553. Certainly the exclusive remedies of the Act would not be affected by the allegations of unconstitutionality. For a more complete discussion of the constitutional issues involved in a related case, see Macey, *Constitutional Law, 1984 Survey of Recent Developments in Indiana Law*, 18 Ind. L. Rev. 129, 144-45 (1985) (later decision, discussed under the name *Portman v. Steveco, Inc.*).

[6]452 N.E.2d 1036 (Ind. Ct. App. 1983).

[7]*Id.* at 1038.

[8]*Id.*

[9]417 N.E.2d 1186 (Ind. Ct. App. 1981).

[10]*Id.* at 1190 (quoting W. Prosser, The Law of Torts § 8 (4th ed. 1971)).

[11]455 N.E.2d 1168 (Ind. Ct. App. 1983).

affirmed the trial court's sustaining of the defendant's motion to dismiss the employee's complaint against a fellow employee based upon that fellow employee-defendant's intentional tort. In this case, Skinner was on a coffee break when Martin approached him and requested that Skinner perform certain acts at his work area. Skinner replied that he would do so after he finished his coffee break. Martin responded by commenting on the work habits of Skinner. After a conversation filled with expletives, Martin struck Skinner on the jaw causing injury. Skinner thereafter filed for benefits under the Workmen's Compensation Act and also brought a civil suit against Martin for damages.[12]

In dismissing the Skinner suit, the court held that the actions of the fellow employee arose out of and in the course of employment. The court reasoned that the coffee break was an act incidental to the employment and, thus, was in the course of the employment. The court further reasoned that the request made by Martin of Skinner to perform certain acts was related to the work and, hence, arose out of the employment contract. Since the words and conduct of the parties were not exclusively personal, but concerned the duties of the parties, the court found that the actions arose out of the employment.[13] Moreover, the court held that Skinner was precluded from alleging that the injuries did not arise out of or in the course of the employment due to the fact that Skinner had applied for and received compensation under the Workmen's Compensation Act.[14] Thus, the dismissal was based on the common law principle that one may not file suit against his fellow servant, which has been codified in Indiana.[15]

The court of appeals in *Donahue v. Youngstown Sheet & Tube Co.*[16] addressed the problem as to what point in time the employee's activities terminate and his personal activities begin, either when going to or departing from the place of employment. The Youngstown Sheet & Tube Company's complex where Donahue was employed encompassed buildings, bridges, roads, and factories throughout a multiblock area. Bordering the facility were two public roads known as Dickey and Riley.[17]

Donahue worked in the pipe mill cafeteria. A clockhouse at the pipe mill gate was designated for employees of the pipe mill; however, Donahue chose to clock out at the tin mill gate. The tin mill gate was located on Dickey Road, with Youngstown Steel plants on each side. Traffic control signals, under the exclusive control and maintenance of the defendant, regulated travel by cars along the road and controlled

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[12]*Id.* at 1169.
[13]*Id.* at 1170.
[14]*Id.* at 1171.
[15]*See* Ind. Code § 22-3-2-6 (1982).
[16]456 N.E.2d 751 (Ind. Ct. App. 1983).
[17]*Id.* at 753.

movement by pedestrians to and from the plants on both sides of the road.[18] After Donahue finished her regularly scheduled duties at approximately 10:30 p.m, she walked to her vehicle, drove it onto Dickey Road, and parked on Dickey Road across from the tin mill clockhouse. After clocking out, she started across Dickey Road and was struck by a vehicle driven by a nonfellow employee.[19] The Industrial Board, on a divided vote, found against the plaintiff on the basis that her injuries did not result from an accident arising out of and in the course of her employment as a cafeteria employee.[20]

In reversing the Industrial Board, Judge Robertson reasoned that the act of clocking out was incidental to Donahue's employment and, thus, arose out of and was in the course of her employment.[21] This reasoning was supported by several facts. Despite the presence of a clockhouse at the pipe mill, Donahue, along with other employees, customarily clocked out at the tin mill clockhouse. Moreover, the supervisor, who had knowledge of such activities, did not attempt to restrict these actions. In addition, Youngstown exercised exclusive control over the traffic signals.[22]

Finally, Judge Robertson determined that the situs of the accident had a bearing on the majority's decision. Because Donahue was supposed to park her automobile in a lot connecting Riley Road, the employer should have anticipated that she would have entered her automobile, driven down Riley Road to Dickey Road and down to the clockhouse, especially in view of the lateness of the hour. This procedure would have been more likely than her walking to the other clockhouse, which would have taken her away from the parking lot where her automobile was parked and, therefore, would have prolonged her walking in the late evening hours. The court found it was immaterial that the accident itself occurred on a public road rather than on the premises owned by Youngstown, since Youngstown exerted some control over the intersection.[23]

In a concurring opinion, Judge Neal noted that although Dickey Road is a public road, "[i]n reality, Dickey Place is one of the interior roads used by the plant, and persons doing business there, as an internal route of communication and transportation."[24] The fact that Donahue chose one place to clock out as opposed to another was of no relevance since fault is usually not grounds for disqualification under the Workmen's Compensation Act.[25]

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[18] *Id.* at 754.
[19] *Id.* at 753.
[20] *Id.* at 751-52.
[21] *Id.* at 755.
[22] *Id.*
[23] *Id.* at 756.
[24] *Id.* (Neal, J., concurring).
[25] *Id.* at 757.

Judge Ratliff, dissenting, did not disagree with the majority's reasoning or the conclusion reached therein, but would have affirmed the Industrial Board for the sole reason that, in his opinion, the issue of whether an accident arose in the course of employment was a question of fact for the trier of fact and not a question of law.[26] Thus, if there were factors supporting the Industrial Board's conclusions, the Board's decision should be undisturbed. Judge Ratliff believed such facts existed which supported the Industrial Board's ruling that the injury did not arise out of the course of employment, and that decision should have remained undisturbed.[27]

2. By Accident.—What constitutes an accident in order to qualify an employee for benefits within the context of the Workmen's Compensation Act was addressed in *Young v. Smalley's Chicken Villa, Inc.*[28] Douglas Young's duties as an employee included twisting and bending in order to pick up and deposit chickens in deep fryers. After spending several hours performing these duties, Young bent over to pick up a several of pieces of chicken and immediately felt severe pain in his lower back. Subsequent medical examination disclosed that Young suffered a herniated disc. The sole issue on appeal was whether or not the act of bending over to pick up the chicken, which was the employee's customary duty and was unaccompanied by any sudden twisting, turning, or other trauma, was an accident within the meaning of the Indiana Workmen's Compensation Act.[29]

The court of appeals applied the unexpected result theory[30] and sustained the Industrial Board in denying benefits.[31] The unexpected result theory is similar to the unexpected cause[32] and unexpected event theories.[33] In applying this rule, the court noted that nothing the employee

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[26]*Id.* (Ratliff, J., dissenting).

[27]*Id.* at 757-58.

[28]458 N.E.2d 686 (Ind. Ct. App. 1984).

[29]*Id.* at 687.

[30]*Id.* The court defined the unexpected result theory as when an accident occurs "'where everything preceding the injury was normal, and only the injury itself was unexpected, e.g., where a worker bends over, stoops, turns, lifts something, etc., which activity is part of his everyday work duties, and yet, . . . he is unexpectedly injured.'" *Id.* (quoting Ellis v. Hubbell Metals, Inc., 174 Ind. App. 86, 93, 366 N.E.2d 207, 212 (1977), *transfer denied*, May 16, 1978). The court noted, however, that the Indiana Supreme Court has ruled that there must be "'an unlooked for mishap or untoward event not expected or designed.'" 458 N.E.2d at 687 (quoting Calhoun v. Hillenbrand Indus., Inc., 269 Ind. 507, 511, 381 N.E.2d 1242, 1244 (1978)).

[31]458 N.E.2d at 688.

[32]The court defined the unexpected cause theory as where "'an "accident" cannot occur in the absence of some kind of increased risk or hazard, e.g., a fall, slip, trip, unusual exertion, malfunction of machine, break, collision . . . .'" *Id.* at 687 (quoting Ellis V. Hubbell Metals, Inc., 174 Ind. App. 86, 93, 366 N.E.2d 207, 211 (1977), *transfer denied*, May 16, 1978).

[33]The court noted that the unexpected event theory of an accident is a broad term which is defined by the unexpected cause and unexpected result theories. 458 N.E.2d at

did on that day was out of the ordinary and that, despite no unexpected event or cause, the employee had suffered a herniated disc. Such an injury without unexpected trauma or unexpected events is not compensable. The employee must show something other than the fact that he was injured while at his place of employment.[34]

In a concurring opinion, Judge Neal assailed the legislature for the poor choice of words "by accident."[35] In his opinion, the unexpected nature of the injury is irrelevant, and the focus should be elsewhere: "A worker should be compensated for injuries which are an intrinsic and predictable hazard of the employment and disability induced over a course of time as well as injuries which are 'unlooked for mishap or untoward event not expected or designed.' "[36] Thus, there might be some suggestion to the legislature to alter or delete the words "by accident."

In *Holloway v. Madison-Grant United School Corp.*,[37] the court of appeals sustained the Industrial Board's denial of Workmen's Compensation benefits to an assistant superintendent of the defendant's school system who died of a heart attack suffered during a hotly contested and controversial school board meeting. Although the court denied the claim, it did so only because the Industrial Board had ruled against the claimant. The court noted that the standard of review of Industrial Board decisions is not one of reweighing the evidence, but simply one of determining whether or not there were sufficient facts upon which the Board could have reached the ultimate conclusion of fact.[38]

The opinion demonstrates the difficulties inherent in proving that a heart attack is causally connected to one's employment when no trauma or other external injury is connected with the heart attack, especially when the victim has a substantial arteriosclerotic condition. The court noted that it is not necessary that the claimant prove some unusual exertion or sudden shock in order to connect his heart attack with the employment.[39] The court stated that a nonphysical, psychological, mental, or emotional stimulus associated with unusual events or happenings within the work environment could in and of itself be the cause of the heart attack, satisfying the requirements of "accident" within the meaning of the statute.[40] The court also noted that "where the triggering event is not so colorful and the contribution of stress from employment is of a more protracted nature, such as worry, overwork, frustration, or

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687 (citing Ellis v. Hubbell Metals, Inc., 174 Ind. App. 86, 93, 366 N.E.2d 207, 211 (1977), *transfer denied*, May 16, 1978).

[34]458 N.E.2d at 688.

[35]*Id.* (Neal, J., concurring).

[36]*Id.* at 689.

[37]448 N.E.2d 27 (Ind. Ct. App. 1983).

[38]*Id.* at 31.

[39]*Id.* at 30.

[40]*Id.* (quoting Harris v. Rainsoft of Allen County, Inc., 416 N.E.2d 1320, 1323 (Ind. Ct. App. 1981)).

tension, the question becomes a closer one . . . and must be left to the trier of fact."[41]

B. Benefits Derived from Compensable Claims

Under Indiana law, an employer is obligated to furnish medical services to his employee for a work-related injury.[42] In the event the employee selects his own physician without the prior approval of the employer, the question arises as to whether or not the employer is obligated to pay for medical services.

In *Richmond State Hospital v. Waldren*,[43] the court of appeals, in a very limited holding, stated that "when the employer has no knowledge of the need for medical services and no opportunity to tender the medical services and when no emergency or other good cause is shown, he cannot be held liable for them."[44] In *Richmond*, the plaintiff sought the services of her own physician in addition to the physicians supplied by the hospital. Upon her personally chosen physician's recommendation, she entered the hospital and was treated for phlebitis. The defendant admitted that the plaintiff had suffered an injury to her right ankle in May of 1979, but denied that the phlebitis condition for which she was being treated was causally connected to the original accident.[45] The court noted that under the applicable statute, the employee may "select medical treatment under three circumstances: (1) in an emergency; (2) if the employer fails to provide needed medical care; or (3) for other good reason. Because the claimant bears the burden of proving facts necessary to establish her claim, Waldren bore the burden to prove that one of these circumstances existed."[46] Although the Hearing Officer found that the plaintiff had good cause to seek medical treatment from her physician, the court reversed, noting that the fact supporting such cause was not stated within the award.[47]

In *Wanatah Trucking v. Baert*[48] the court held that an award for permanent total disability survives the death of the employee and inures to the benefit of his dependents, even when the death is not causally

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[41]448 N.E.2d at 31 (citation omitted).

[42]*See* IND. CODE § 22-3-3-4 (1982).

[43]446 N.E.2d 1333 (Ind. Ct. App. 1983).

[44]*Id.* at 1336.

[45]*Id.* at 1334.

[46]*Id.* at 1336 (citation omitted).

[47]*Id.* It should be noted that the Hearing Officer and this author are one and the same person. The good cause for the plaintiff seeking her own medical treatment was the fact that the employer had taken the position that the phlebitis condition was not work-related and, therefore, he was not obligated to pay for the treatment. Thus, any prior notice or request to the employer to provide medical treatment would have been a futile act and, as such, the plaintiff should not have had to notify the defendant of her actions.

[48]448 N.E.2d 48 (Ind. Ct. App. 1983).

connected to his employment.[49] The court noted that Workmen's Compensation benefits are generally paid for one of two different reasons: that the employee is entitled to wages he has lost pursuant to an earning impairment theory, or that the employee is entitled to compensation for a physical injury pursuant to a physical impairment theory.[50] The court reasoned that when the injury has become permanent, the theory for payment of compensation is pursuant to the physical impairment theory; thus, compensation due and owing to the claimant for any type of permanent injury or permanent loss of physical function survives the life of the employee.[51]

In *Freel v. Foster Forbes Glass Co.*,[52] the court, in a landmark Indiana decision, permitted a defendant-employer to take credit for payments made due to an employee's injury even though the payments were not mandated by an Industrial Board award nor temporary total disability benefits, but were simply payments made by the employer under the terms of a union contract between the defendant and the employee's union. The defendant and the union had entered into a contract whereby the employees would receive 100% of their wages if the employee was sick or injured for any reason, work-related or other.[53]

In *Freel*, the plaintiff suffered an injury arising out of and in the course of his employment; the defendant then commenced payments pursuant to its wage continuation plan. Under the terms of the plan, the defendant paid the employee approximately $15,000. After the employee returned to work, he filed an application for benefits, including those for temporary total disability. The Industrial Board found that the claimant was entitled to approximately $6,000 in benefits, but gave the employer full credit for the $15,000 paid, thus finding that the employee was not entitled to any further benefits.[54] The employer did not have workmen's compensation insurance, but was self-insured and had complied with the statute in becoming self-insured. The employer, however, had failed to submit the wage continuation plan to the Industrial Board for approval pursuant to Indiana Code section 22-3-5-4. The court noted that under this code section the employer was obligated only to file its self-insured status; it was not required to file a substitute system of payment for temporary total disability benefits.[55]

The rationale of the decision is simply that an employee should not be entitled to a double recovery for a single injury. Assuming the wage

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[49]*Id.* at 53.

[50]*Id.*

[51]*Id.*

[52]449 N.E.2d 1148 (Ind. Ct. App. 1983).

[53]*Id.* at 1149.

[54]*Id.* at 1150.

[55]*Id.* at 1152.

continuation plan was to compensate the employee for the time that he was disabled from work and not for any physical impairment, the credit to the employer should be in terms of weeks and not in terms of monies paid. Therefore, the credit should not be against any impairment that the employee may have suffered. This would be in accord with the physical impairment theory enunciated in *Wanatah*,[56] and is in accord with the wage continuation plan, which obligated the employer to pay for the benefits while the employee was off work and not for any other period.

C. Jurisdiction of Industrial Board Cases

In *Overshiner v. Indiana State Highway Commission*,[57] the court held that the assignment of error, which must be filed with the court of appeals in order to invoke the jurisdiction of that court,[58] need not be filed until such time as the record is filed.[59] Thus, when a plaintiff files a petition for extension of time to file the record, he impliedly requests an extension of time for the assignment of error to be filed.[60] The court noted that such a rule is reasonable in light of the fact that the assignment of error in an Industrial Board case is not similar to the motion to correct errors in a civil case.[61] In the civil courts, the motion to correct errors is for the benefit of the trial court as well as the benefit of the appellate court. In an Industrial Board case, however, the assignment of error is solely for the benefit of the appellate court.[62]

D. Statute of Limitations Affecting the Filing of Claims

In *Overshiner*, the court also held that the claimant must file his Form 14 application for a change or modification of an award within two years from the last date for which compensation was paid under an award made either by agreement or upon hearing, or within one year if such request is for an increase of permanent partial impairment benefits.[63] This is in accord with provisions of Indiana Code section 22-3-3-27.[64]

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[56]*See supra* notes 48-51 and accompanying text.

[57]448 N.E.2d 1245 (Ind. Ct. App. 1983).

[58]*See* Ind. Code § 22-3-4-8 (1982).

[59]448 N.E.2d at 1247.

[60]*Id.* at 1246.

[61]*Id.* at 1247.

[62]*Id.*

[63]*Id.* at 1248-49.

[64]This code section 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

In *Overshiner*, the claimant and the employer had entered into a Form 12 agreement which had been approved by the Industrial Board. The agreement then became an award obligating the defendant-employer to pay compensation benefits beginning on January 14, 1975, and the defendant was to continue such payments until terminated in accordance with the Workmen's Compensation Act. The defendant stopped making payments on August 4, 1977, and the Form 14 application for modification of the award was not filed until January 9, 1981, almost three and one-half years after the last date compensation was paid.[65]

The court noted that the statute ran two years from the date compensation was last paid even though the employer did not attempt to enter into settlement negotiations with the claimant. Thus, the court held that the statute of limitations barred the plaintiff's claim, since he did not offer any legally recognized justification for the three and one-half year delay.[66]

> 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.
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> Upon making any such change, the board shall immediately send to each of the parties a copy of the modified award. No such modification shall affect the previous award as to any money paid thereunder.
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> 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 permanant 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.

IND. CODE § 22-3-3-27 (1982).

[65] 448 N.E.2d at 1247-48.

[66] *Id.* at 1249.