New Developments in Workmen's Compensation Law: Accident Defined and New Thoughts on Crediting

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I. Introduction

Three areas of workmen's compensation law were significantly affected by Indiana decisions during the current survey period.[1] Two of these major developments occurred in *Evans v. Yankeetown Dock Corp.*,[2] a wrongful death action brought against an employer by the decedent-employee's personal representative. In *Evans*, the Indiana Court of Appeals and subsequently the Indiana Supreme Court, in vacating the appellate court's opinion, greatly impacted traditional views of both jurisdictional exclusivity and compensability[3] by redefining a workmen's compensation term of art, "injury by accident." The third major development in Indiana workmen's compensation law related to the crediting of non-workmen's compensation payments made to the employee by the employer against the employee's compensation award.[4]

This Article focuses on the historical backdrop against which each development occurred, the substantive changes resulting from each development and, lastly, what each development means for the Indiana practitioner.

II. Accident — Revisited and Redefined

A. The History

The Indiana Court of Appeals' revisiting and subsequent redefining of accident in *Evans* changed the classical definition of accident which

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[1]The survey period runs from June 1, 1985, to May 31, 1986. During this twelve-month period, seven decisions were rendered in the area of workmen's compensation law. A bill, Senate Bill 426, was introduced in The 1987 Indiana Legislature which, if passed would significantly influence the definition of "accident" for workmen's compensation purposes. Therefore, practitioners faced with this issue should investigate recent legislature developments, if any.

[2]481 N.E.2d 121 (Ind. Ct. App. 1985), *rev'd*, 491 N.E.2d 969 (Ind. 1986).

[3]Liability of the employer under the Compensation Act to any employee or employee's dependent for personal injury or death by accident arising out of or in the course of employment is established under Indiana Code § 22-3-2-6 (1982). The Act requires as prerequisites compensation: (1) an injury; (2) that the injury be by accident; (3) that the injury by accident arise out of the employment; and (4) that the injury occur while in the course of the employment. Ind. Code § 22-3-2-5 (1982).

[4]Indiana State Highway Dep't v. Robertson, 482 N.E.2d 495 (Ind. Ct. App. 1985); Jones & Laughlin Steel Corp. v. Kilburne, 477 N.E.2d 345 (Ind. Ct. App. 1985).

had been in existence for nearly seventy years.[5] Historically, the outcome of numerous actions brought under Indiana's Workmen's Compensation Act turned upon the applicability of the definition of accident, which required a sudden, untoward event.[6] Such results were consistent with judicial decisions of other jurisdictions having statutory language similar to that of Indiana's Workmen's Compensation Act.[7]

Yet, a definition of accident that focused on an "event" often created confusion as to which event was the event at issue. Was an unexpected injury or an unexpected source of injury required for the Workmen's Compensation Act to apply? In response, the Indiana Court of Appeals appeared to sidestep this dilemma in *Ellis v. Hubbell Metals, Inc.*[8] by ruling that the happening necessary to fulfill the accident requirement was an unexpected result as opposed to an unexpected event. However, *Calhoun v. Hillenbrand Industries*[9] and several subsequent cases[10] did essentially dispose of the unexpected result theory, leaving intact the traditional unexpected event definitional requirement of accident as Indiana law.[11]

B. The Winds of Change

While the Indiana Supreme Court reinstated the unexpected event requirement of accident in *Calhoun*,[12] Judge DeBruler's dissent critically

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[5]*See* Haskell & Baker Car Co. v. Brown, 67 Ind. App. 178, 187, 112 N.E. 555, 557 (1917).

[6]*See* Calhoun v. Hillenbrand Indus., 269 Ind. 507, 381 N.E.2d 1242 (1978); Young v. Smalley's Chicken Villa, 458 N.E.2d 686 (Ind. Ct. App. 1984); Houchins v. J. Pierpont's, 469 N.E.2d 786 (Ind. Ct. App. 1984); Estey Piano Corp. v. Steffen, 164 Ind. App. 239, 328 N.E.2d 240 (1975); City of Anderson v. Borton, 132 Ind. App. 684, 178 N.E.2d 904 (1962); American Maize Produce Co. v. Nichiporchick, 108 Ind. App. 502, 24 N.E.2d 801 (1940); Indian Creek Coal & Mining Co. v. Calvert, 68 Ind. App. 474, 119 N.E. 519 (1918).

[7]*See generally* 81 AM. JUR. 2D *Workmen's Compensation* § 227 (1976).

[8]174 Ind. App. 86, 366 N.E.2d 207 (1977).

[9]269 Ind. 507, 381 N.E.2d 1242 (1978).

[10]Young v. Smalley's Chicken Villa, 458 N.E.2d 686 (Ind. Ct. App. 1984); Houchins v. J. Pierpont's, 469 N.E.2d 785 (Ind. Ct. App. 1984).

[11]The two conflicting views as to satisfying the "accident" requirement through either the untoward event or unexpected result theory came before the court of appeals in Calhoun v. Hillenbrand Industries, 374 N.E.2d 54 (Ind. Ct. App. 1978). The Industrial Board had denied compensation. The court of appeals concluded an injury was "by accident" if the result was unexpected, even though no unexpected event had occurred. In *Calhoun*, the unexpected result was a backache suffered by the claimant. Accordingly, the court of appeals reversed the Industrial Board's denial of compensation. However, the supreme court, on transfer, disagreed and vacated the opinion of the court of appeals, stating in its now famous language, "It is well settled under our law that in order to show an accident there must be some untoward or unexpected event . . . . It is not sufficient to merely show that a claimant worked for the employer during the period of his life in which his disability arose." *Calhoun*, 269 Ind. at 510-11, 381 N.E.2d at 1244 (citations omitted).

[12]269 Ind. 507, 381 N.E.2d 1242 (1978).

concluded that the Industrial Board had inappropriately isolated a causation question, that is—whether the personal injury had been caused by an accidental means or method, within its analysis of the accident issue.[13] Judge DeBruler was not alone in his criticism of this definition of accident.[14]

Judge Ratliff, in a concurring opinion in *Kerchner v. Kingsley Furniture Co.*,[15] previewed the court of appeals decision in *Evans* by recalling his concurring opinion in *Lovely v. Cooper Industrial Products*,[16] in which he expressed his displeasure with the "unexpected cause" theory of accident. Judge Ratliff adamantly contended that the unexpected cause theory, which is predicated on a sudden, untoward event traceable to a precise date, place, and time, departs from the underlying philosophy and legislative intent of Indiana's Workmen's Compensation Act.[17] Under Judge Ratliff's analysis, the proper focus of an "accident" analysis is on an unexpected or untoward result "arising out of and in the course of employment" rather than on an unexpected or untoward event.[18] While ultimately yielding to the precedential case law in effect, Judge Ratliff concluded by expressing a hope that the courts' current use of the unexpected cause definitional requirement of accident would be overturned and replaced by an unexpected result theory of accident.[19] Two months after *Kerchner*, Judge Ratliff's hopes were realized by the Indiana Court of Appeals decision in *Evans v. Yankeetown Dock Corp.*[20] Yet this fulfillment of Judge Ratliff's hopes was to be short-lived—in less than a year, the Indiana Supreme Court would vacate the appellate court's decision[21] and in doing so, would clarify or, depending on your point of view, totally change the judicial interpretation of the term "injury by accident" as used in Indiana's Workmen's Compensation Act.

C. Evans v. Yankeetown Dock Corp.: *The Decision*

1. *The Court of Appeals*

a) The facts.—The *Evans* case was a wrongful death action brought against the decedent's employer by the decedent's personal representative-spouse.[22] Mrs. Evans contended that the employer was negligent in that

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[13]*Id.* at 512, 381 N.E.2d at 1245 (DeBruler, J., dissenting).
[14]*See* Forte, *It Was No Accident That . . .*, 19 IND. L. REV. 207, 210 (1986).
[15]478 N.E.2d 74 (Ind. Ct. App. 1985).
[16]429 N.E.2d 274, 279-81 (Ind. Ct. App. 1981) (Ratliff, J., concurring), *transfer denied.*
[17]*Id.* at 279.
[18]*Kerchner,* 478 N.E.2d at 78 (Ratliff, J., concurring).
[19]*Id.*
[20]481 N.E.2d 121.
[21]*Evans*, 491 N.E.2d 969.
[22]481 N.E.2d at 123.

it had knowingly employed a mentally ill individual who posed a physical threat to fellow employees and who unquestionably was a proximate cause of her husband's death.[23] Shortly before the start of the workday, a co-employee, Harlan Miller, shot the decedent five times while suffering a hallucinatory delusion that his wife and the decedent were conspiring to kill him by poisoning; these delusions resulted from an alcohol-induced paranoia.[24] Evidence further indicated that the employer's superintendent knew that Harlan Miller had threatened Oscar Evans with bodily harm and shortly after the shooting stated, "[M]aybe I should have done something to prevent it [the shooting]."[25]

In response, the defendant-employer, Yankeetown, generally denied Mrs. Evans' allegations and moved for summary judgment by essentially challenging the trial court's jurisdiction over the complaint.[26] From Yankeetown's point of view, this was a workmen's compensation complaint, which was governed by Indiana's Workmen's Compensation Act and rightfully within the jurisdiction of the Industrial Board.[27] The trial court granted summary judgment in favor of the defendant by holding that an action for workmen's compensation was the sole and exclusive remedy available for the death of Oscar Evans.[28] To support its decision, the trial court found that (1) Oscar Evans and Harlan Miller were indeed co-employees of the defendant, (2) on the date in question, Evans was shot and killed by Miller, and (3) Evans' death was the result of an "accident which arose out of and in the course of" his employment with Yankeetown Dock Corporation.[29]

b) Accident defined.—Simply put, the issue before the court of appeals in *Evans* was whether Indiana's Workmen's Compensation Act granted the Industrial Board exclusive jurisdiction over negligence claims brought against an employer for the wrongful death of an employee.[30] From the vantage point of this issue, the court of appeals quickly grasped the opportunity to attack and clarify the definition of accident, a term of art which had given rise to judicial confusion on more than one occasion.[31] The *Evans* court launched its attack by noting the absence of the qualifying language, "arising out of and in the course of" in the workmen's compensation jurisdictional statute, Indiana Code section 22-3-2-6.[32] This absence, when compared with the qualifying language's

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 123-24.
[30] *Id.* at 123.
[31] *Id.* at 125.
[32] *Id.*

presence in the actual compensation statute, Indiana Code section 22-3-2-2, was of great significance to the court of appeals in that it created a distinction between requirements necessary for jurisdiction and requirements necessary for actual compensation; it was this distinction that, in the words of the *Evans* court, meant "this court for more than a half century has on occasion misconstrued workers' compensation law by contorting pristinely simple legislative language into a virtually unworkable definition of 'accident'."[33]

The court then focused on the actual language of the jurisdictional statute, which states that the Industrial Board is to have exclusive jurisdiction in a claim based on "personal injury or death by accident."[34] After noting that "personal injury or death" is "self-explanatory," the *Evans* court emphasized that the precise language used by Indiana legislators is "by accident," rather than "by an accident," as Indiana courts have frequently construed the jurisdictional statute.[35] Thus, the court of appeals used the omission of the article "an" as the basis for ruling that the jurisdictional requirements of Indiana Code section 22-3-2-6 are met by any accidental injury, where accidental injury is defined as one that was not expected to occur or one that did not occur by design of the employer or injured employee.[36]

Philosophically, the *Evans* court found that a definition of accident that focused on a sudden, untoward event presumed that Indiana's Workmen's Compensation Act was "meant to remedy an 'accident' and thereby be regulated by an 'event'."[37] Such a presumption was clearly erroneous under the court of appeals' interpretation of Indiana'a Workmen's Compensation Act. According to the *Evans* court, "[W]orkmen's compensation laws were enacted to cover liability without fault for *injuries* or *death* in the workplace, as social legislation whereby employers (and ultimately consumers) would bear the burden of risk of insecurity and poverty of injured employees."[38] Therefore, under the *Evans* approach, a court, in determining whether the threshold requirement of "accident" had been met, should focus on the resultant injury to the employee rather than either the injury's unexpected source or the unexpected event that had caused it.[39]

c) A causal connection required.—However, the court of appeals circumscribed the parameters of the change wrought in *Evans* by indicating that considerations relating to the time, manner, and causation of the employee's injury would be shifted from judicial determinations of jurisdic-

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[33]*Id.*
[34]*Id.* at 126.
[35]*Id.*
[36]*Id.*
[37]*Id.*
[38]*Id.* (citing B. Small, Workmen's Compensation Law of Indiana § 1.1 (1950)).
[39]*Id.* at 126-27.

tion to determinations of compensability; that is, these factors would be critical in determining whether the employee's injury "arose out of and in the course of employment" and was therefore compensable.[40]

To illustrate the proper approach towards issues of jurisdiction and compensability, the *Evans* court utilized an example of an employee suffering a heart attack while engaged in routine labor.[41] Because the employee's injury was clearly unintended by both employee and employer, the injury was accidental and clearly within the jurisdictional ambit of the Industrial Board.[42] Yet the injury's cause is determinative of the issue of compensability. If the employee's heart attack is shown to have resulted from a pre-existing heart condition, the injury did not arise from his employment and is not compensable.[43] However, if the heart attack resulted from unusual exertion demanded by the employee's work, his injury is deemed to have arisen out of and in the course of employment.[44]

The *Evans* court went on to note that a critical reading of cases such as the classic heart attack case of *United States Steel Corp. v. Dykes*[45] reveals that the claims in these cases were not decided upon an interpretation of "accident," but rather were decided upon the fact that the injuries either did not arise out of employment or did not occur in the course of employment.[46] The court then concluded that its approach to redefining accident would not change the law as it has been applied — that is, the causal connection required for compensability would remain unscathed.[47] However, from this point forward, the causal requirement would be a critical element of an analysis of whether the accident "arose out of and was suffered in the course of" the employment.

d) Jurisdictional questions.—In attempting to clarify the interaction between the compensation statute, Indiana Code section 22-3-2-2, and the jurisdictional statute, Indiana Code section 22-3-2-6, the *Evans* court held that the qualifying language "arising out of or in the course of" was not to be considered in analysis of the jurisdictional question.[48] However, later in the main opinion, the court noted:

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[40]*Id.* at 129-30. Acts of willful or wanton misconduct by the employer against the employee were "most likely" not included within the definition of accident. *Id.* Additionally, the court did not change or criticize the prohibition of compensation for the employee's injury that is knowingly self-inflicted, a result of intoxication, a commission of an offense, a failure to use safety appliances, or a failure to obey a reasonable written or printed rule of the employer conspicuously posted under Indiana Code § 22-3-2-8. *Id.* at 128 n.7.

[41]*Id.* at 129.

[42]*Id.*

[43]*Id.*

[44]*Id.*

[45]238 Ind. 599, 154 N.E.2d 111 (1958).

[46]*Evans,* 481 N.E.2d at 129.

[47]*Id.*

[48]*Id.* at 125.

> [T]hus, the language "arising out of and in the course of employment" qualifies, not just "accident," but the entire jurisdictional threshold, "personal injury or death by accident." To do otherwise, of course, would cause a conflict in identical phraseology merely because it was located in separate statutes: "accident" as "event" in Indiana Code 22-3-2-2 and "accident" as "condition" in Indiana Code 22-3-2-6. We can hardly credit our legislature with such an absurd intention. Thus, our definition of "by accident" from the jurisdictional statute necessarily alters the meaning of the claim statute.[49]

While this apparent inconsistency was not addressed by the *Evans* majority, Judge Conover, in his concurring opinion, urged that the jurisdictional rule must retain the qualifying language "arise out of and in the course of employment."[50] Judge Conover stated that if this were not the case, the Industrial Board would be given exclusive jurisdiction over cases that involved off-the-job injury or death.[51] To illustrate the absurdity of this result, Judge Conover posed the hypothetical of an employee injured when struck by his employer's truck in the middle of town; under the majority's approach, the Industrial Board would be given exclusive jurisdiction in this hypothetical.[52] Because such jurisdiction was never intended by the legislature, Judge Conover opined that "the qualifier 'arising out of and in the course of employment' is an integral part of the rule."[53]

In *Segally v. Ancerys*,[54] the Third District Court of Appeals apparently agreed with Judge Conover because it failed to follow the *Evans* jurisdictional decision as to the judicial removal of the qualifying phraseology "arise out of and in the course of employment." While *Segally* did not formally address *Evans* in its decision, its analysis clearly relied on a pre-*Evans* jurisdictional test.[55] Similarly, in *Ski World, Inc. v. Fife*,[56] the First District Court of Appeals explicitly refused to apply the *Evans* test and chose for its jurisdictional analysis the pre-*Evans* test set forth in *Skinner v. Martin*.[57] Thus, with *Segally* and *Ski World* standing in direct conflict with *Evans*, a situation ripe for supreme court clarification arose.

2. *The Indiana Supreme Court*

a) Setting the stage.—Resolution of this conflict between the districts

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[49] *Id.* at 129.
[50] *Id.* at 130 (Conover, J., concurring).
[51] *Id.*
[52] *Id.*
[53] *Id.* at 131.
[54] 486 N.E.2d 578 (Ind. Ct. App. 1986).
[55] *Id.* at 580-83.
[56] 489 N.E.2d 72 (Ind. Ct. App. 1986).
[57] 455 N.E.2d 1168 (Ind. Ct. App. 1983).

came with the Indiana Supreme Court's acceptance of transfer and vacation of the court of appeals' decision in *Evans v. Yankeetown Dock Corp.*[58] On transfer, the supreme court addressed three issues: (1) whether the qualifying language "arising out of and in the course of employment" was necessary to jurisdictional analysis; (2) what was the appropriate definition of the term "by accident;" and (3) whether summary judgment was proper under the facts of the case.[59]

The analysis of these issues was prefaced by the court's focus on broad public policy considerations of workmen's compensation in general, which serves the interest of the injured worker by providing a perhaps more limited compensation in return for a guarantee of compensation by avoiding common law defenses.[60] The court found that the employer and his insurance carrier also benefitted by relief from the prospect of large damage verdicts and a guarantee of some degree of certainty in planning for anticipated costs of employee injuries.[61] Finally, the court postured itself by noting that the duty and the responsibility to determine such public policy and to adopt legislation reflecting these public policy considerations are those of the legislature and that the courts are limited to the interpretation of ambiguous statutes.[62]

b) Clarifying questions of jurisdiction.—With fundamental public policy in place, the *Evans* court quickly decided that Indiana Code section 22-3-2-6 was clear and unambiguous; as a result, the court was prohibited from construing it.[63] Specifically, the court focused on the interplay of Indiana Code section 22-3-2-6 with other portions of the Workmen's Compensation Act, including the express definition of injury and personal injury,[64] and found this interplay to be clear, unambiguous, and without need of judicial construction.[65]

In considering the court of appeals' decision in *Evans*, the supreme court noted that the appellate court had rejected the statutory definition.[66] Such rejection was inappropriate, given the unambiguous nature of the statutes relating to the definition of accident and their use in the jurisdiction and compensation sections of the Indiana Workmen's Compensation Act.[67]

To clarify Indiana law, the supreme court reinstated the pre-*Evans*

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[58]491 N.E.2d 969 (Ind. 1986).
[59]*Id.* at 971.
[60]*Id.*
[61]*Id.*
[62]*Id.*
[63]*Id.* at 972.
[64]IND. CODE § 22-3-6-1(c) (1982).
[65]*Evans,* 491 N.E.2d at 973.
[66]*Id.*
[67]*Id.*

jurisdictional test originally formulated in *Skinner v. Martin*.[68] Under this test, Indiana Code section 22-3-2-6 "excludes all rights and remedies of an employee against his employer for personal injury or death if the following three statutory jurisdictional prerequisites are met:

A. personal injury or death by accident;
B. personal injury or death arising out of employment;
C. personal injury or death arising in the course of employment."[69]

Any action for employee injury or death that does not meet all three prerequisites is not within the jurisdiction of the Industrial Board and therefore may be brought in court.[70]

c) Looking at the definition of accident.—Turning to the definition of accident, the *Evans* court consistently reinforced its finding that Indiana Code section 22-3-2-6 is unambiguous. To the court, application of the statutory language "by accident" was to be done on a literal basis rather than by a re-interpretation of the language which necessitated the insertion of the article "an" before the word "accident."[71] In effect, the supreme court, in focusing on the statutory language, redefined accident without the finding of ambiguity made by the court of appeals. As a result, the statutory terminology "injury or death by accident," as used under Indiana's Workmen's Compensation Act, was held to be any unexpected injury or death, and previous case holdings were expressly overruled to the extent that they were inconsistent with this definition.[72]

Yet the supreme court carefully circumscribed the boundaries of its decision by distinguishing the jurisdictional issue of *Evans* from the causation issue of *Calhoun v. Hillenbrand Industries*.[73] To clarify this distinction, the court simply noted that analysis of causation issues is most properly addressed under the portion of the statute dealing with the term, "arising out of" the employment.[74] Accordingly, the *Calhoun* decision remains correct as it relates to a required showing of the causal connection between injury and employment—that is, a claimant must make more than a mere showing that he was working for the employer during the period in which the disability arose in order to establish causation.[75] Implicitly, by such reference to *Calhoun*, the supreme court steadfastly preserved the causation requirement for compensability.

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 974.
[72] *Id.* at 975.
[73] 269 Ind. 507, 381 N.E.2d 1242 (1978).
[74] *Evans*, 491 N.E.2d at 975.
[75] *Id.*

Finally, the court applied its interpretation of Indiana's Workmen's Compensation Act to the case at bar. Because the trial court had correctly found that Oscar Evans was an employee and that he suffered death by accident that arose out of and in the course of his employment,[76] the exclusive remedy provisions of Indiana's Workmen's Compensation Act barred an action at law against Evans' employer.[77] Therefore the lower court's grant of summary judgment in favor of the employer was appropriate.[78]

D. Evans' *Effect on the Practitioner*

Although the court of appeals did attempt to establish a new jurisdictional test, the *Evans* case ultimately served to affirm a jurisdictional test already in place and in use. However, in this reaffirmation, the supreme court appeared to alter radically the definition of accident. But on closer analysis, this alteration has less impact on practice under Indiana's Workmen's Compensation Act than would appear upon an initial reading of the case.

While it is true that a small number of cases will be affected by *Evans'* definitional change, a practitioner, in all likelihood, would have resolved most of these clear accident cases, or at least the issue of accident, prior to a hearing before the Industrial Board. In the remaining cases, the changing of the definition of accident will place more importance on medical-legal analysis. *Evans* requires that the practitioner pay closer attention to the claimant's prior medical history as it relates to the issue of whether the accident was unexpected or the result of a pre-existing condition and therefore more probably expected. A gray area may emerge from those cases defended on the basis of "no accident" with regard to the expectation of injury. Consequently, further clarification will undoubtedly be forthcoming as this approach is taken and collides with the granting of compensation for the aggravation of pre-existing injuries.

Nevertheless, the *Evans*' decision greatly clarifies the accident issue; such clarification will unquestionably result in less litigation on the issue of accident. In the future, the practitioner's emphasis will shift to the causal connection under the "arising out of the employment" portion of the statute. In the area of causation, negligible event cases such as *City of Anderson v. Borton,*[79] *Young v. Smalley's Chicken Villa,*[80] and *Houchins v. J. Pierpont's,*[81] will remain good law, either under the

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[76] *Id.*
[77] *Id.* at 976.
[78] *Id.*
[79] 132 Ind. App. 684, 178 N.E.2d 904 (1962).
[80] 458 N.E.2d 686 (Ind. Ct. App. 1984).
[81] 469 N.E.2d 786 (Ind. Ct. App. 1984).

approach that the accident was expected or, alternatively, that the situation is not compensable because the injury did not "arise out of" the employment and accordingly fails to satisfy the proximate causation requirement of the Act. Thus the practitioner will, for the most part, make the same analysis under a different section of the Act in the future.

III. Credits

A. The Historical Trilogy

While Indiana Code section 22-3-3-10(a) clearly limits disability payments for injuries occurring after July 1, 1979, to fifty-two weeks of temporary total disability benefits,[82] uncertainty arose in terms of credits for payments under Indiana Code section 22-3-3-23.[83] Historically, the provision appears to have been an attempt to bar an employee from benefits to which he was entitled under Indiana's Workmen's Compensation Act if the injured employee received benefits under a group disability policy.[84]

However, in *United Toolcraft v. Sousley*,[85] the Indiana Court of Appeals held that acceptance of group benefits, which were paid to the employee under the mistaken belief that his condition had resulted from illness and not injury "arising out of and in the course" of his employment, did not bar recovery of workmen's compensation benefits. Rather the *Sousley* court, by noting the employee's concession that the employer was properly allowed a credit against the workmen's compensation award for payments made under the disability policy, implicitly agreed with the crediting.[86]

Following *Sousley*, the law of payment crediting was somewhat confused due to conflicting approaches and narrowly drawn exceptions. In *Inland Steel Co. v. Almodovar,*[87] the parties' factual stipulation to the single hearing member clearly indicated that both a credit for overpayment of temporary total disability benefits and a credit for receipt of non-occupational group insurance benefits would be allowed to the employer.

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[82]Ind. Code § 22-3-3-10 (1982).

[83]Ind. Code § 22-3-3-23(a) (1982) reads:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of Chapters 2 through 6 were not due and payable when made, may, subject to the approval of the industrial board, be deducted from the amount to be paid as compensation. However, the deduction shall be made from the distal end of the period during which compensation must be paid, except in cases of temporary disability.

[84]*See* United Toolcraft v. Sousley, 128 Ind. App. 181, 147 N.E.2d 558 (1958).

[85]*Id.*

[86]*Id.* at 188, 147 N.E.2d at 562.

[87]172 Ind. App. 556, 361 N.E.2d 181 (1977).

On review, the court seemed to agree that the claimant should not be allowed a double recovery by retaining both the non-occupational disability benefits and the workmen's compensation benefits.[88] Yet the *Almodovar* court subsequently ruled that the Industrial Board did not have jurisdiction to make such a crediting determination because insufficient facts to establish jurisdiction were presented in the record.[89]

Of apparent concern to the *Almodovar* court was the need for some type of plaintiff indemnification in the event that a non-occupational carrier was involved and sought recovery from the plaintiff for funds paid erroneously under the belief that the incident was non-work-related.[90] Consequently, the court of appeals established an implied rule that if the employer, and not some insurance company, paid the "non-occupational" benefit to the plaintiff pursuant to a contract that gave the employer a right to deduct such payments from its liability to the plaintiff for the compensation award of the Industrial Board, then the Industrial Board would have jurisdiction to make an appropriate award for such credits.[91] However, if the benefits were paid by an insurance company, which was not the employer's compensation carrier, the Industrial Board had no jurisdiction to attempt to adjudicate the plaintiff's liability or non-liability to such insurer.[92]

Although the Indiana Supreme Court denied transfer in *Almodovar,* Justice Pivarnik dissented from this denial and Justice Prentiss concurred with the dissent.[93] The dissent noted that the majority, in failing to grant transfer, supported the lower court's failure to state the grounds for its denial of credits for the money expended for hospital and medical costs.[94] In addition, the dissent found the stipulations entered into by the parties at the beginning of the hearing to be anything but ambiguous.[95] In this regard, Justice Pivarnik noted that both parties stipulated to the amounts paid and further stipulated that Inland was to receive full credit for the amounts paid in the event that there was a workmen's compensation award in favor of the petitioner.[96]

The decision in *Freel v. Foster Forbes Glass Co.*[97] completes this historical trilogy. In *Freel*, the surviving dependents of the disabled employee appealed an Industrial Board award of temporary total disability

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[88]*Id.* at 566-67, 361 N.E.2d at 188.

[89]*Id.* at 567, 361 N.E.2d at 188.

[90]*Id.*

[91]*Id.*

[92]*Id.*

[93]Inland Steel Co. v. Almodovar, 266 Ind. 638, 366 N.E.2d 169 (1977) (Pivarnik, J. dissenting).

[94]*Id.* at 639, 366 N.E.2d at 170.

[95]*Id.*

[96]*Id.*

[97]449 N.E.2d 1148 (Ind. Ct. App. 1983).

benefits made subject to a credit equaling amounts paid by the employer under a wage continuation plan.[98] The wage continuation plan in *Freel* was not a part of a union contract and was silent as to the interplay with benefits available to injured employees under workmen's compensation.[99] The employer was self-insured for Workmen's Compensation Act benefits as well as for sickness and accident benefits.[100] The *Freel* court, in its analysis, noted the absence of authority for the proposition that a contract that provides benefits to an employee on some basis other than workmen's compensation should specifically provide for credits to the workmen's compensation carrier before the same may be applied.[101]

In addition, the court of appeals focused on the purposes of Indiana's Workmen's Compensation Act, which it saw as the avoidance of litigation and the placement of the burden of caring for the injured employee upon the industry employing the employee and the consumers of that industry's products.[102] The court reasoned that if a credit was not available, the employee would recover twice for the same injury; in addition, the injured employee would receive more money for the period of disability than he would have been able to earn had there been no injury.[103] To the *Freel* court, such a potential situation was totally inconsistent with the purposes of Indiana's Workmen's Compensation Act.[104] Moreover, the court of appeals opined that any employer who voluntarily paid an employee in his time of need should not be penalized by the denial of a full credit against any workmen's compensation award for such payments — any ruling to the contrary would inevitably cause employers to be less generous.[105]

B. Changes in Crediting

It was against this historical backdrop that two Indiana cases dealing with credits occurred. In *Jones & Laughlin Steel Corp. v. Kilburne*,[106] the court of appeals addressed the issue of whether amounts paid pursuant to a union-established permanent disability pension plan should be set-off against workmen's compensation awards. While the pension plan in *Kilburne* was funded entirely by the employer, the court found that it was a separately bargained employment benefit which was designed to supplement workmen's compensation and that pension benefits paid in

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[98] *Id.* at 1149.
[99] *Id.* at 1149-50.
[100] *Id.* at 1150.
[101] *Id.* at 1151.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] 477 N.E.2d 345 (Ind. Ct. App. 1985).

fulfillment of this plan were separate and apart from workmen's compensation awards.[107] As a result, the *Kilburne* court approved of the Industrial Board's refusal to deduct the pension plan benefits from its award.[108]

Of particular import to the *Kilburne* decision was the pension plan's contractual language addressing deductions for the payment of workmen's compensation.[109] Also contained within this portion of the pension plan was an exemption for payments received by participants for a permanent incapacity retirement occurring prior to age 65; the exemption prohibited the crediting of payments against a compensation award.[110] Finally, the *Kilburne* court dispelled the notion of "double recovery" involved in this particular factual situation by indicating that the claimant would not receive payments greater than his regular salary if he received both workmen's compensation and pension benefits.[111]

In the second crediting case in the survey period, *Indiana State Highway Department v. Robertson,*[112] the claimant demonstrated a novel approach to Indiana Code section 22-3-3-23. In *Robertson*, the employee sought to avoid the Workmen's Compensation Act's exclusive remedy provision in an action against her employer, the State Highway Department; the action was premised on allegations of negligent design, construction, and maintenance of an intersection where the employee was injured.[113] Although the trial court denied the defendant-employer's motion for summary judgment based upon workmen's compensation's exclusive remedy provisions, the Indiana Court of Appeals found the plaintiff's injury to be a compensable work-related accident and, therefore, any action at law was barred by the exclusive remedy provisions.[114]

In attempting to persuade the appellate court, the plaintiff argued that the State Highway Department should be subject to suit based upon a dual capacity theory.[115] Alternatively, the plaintiff contended that the exclusivity provision of Indiana's Workmen's Compensation Act was inapplicable because the employee received wage compensation as a merit employee for disabilities from injuries occurring while on the job under a provision of the Indiana Administrative Code, rather than under the provisions of the Workmen's Compensation Act.[116]

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[107] *Id.* at 349.
[108] *Id.* at 348.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] 482 N.E.2d 495 (Ind. Ct. App. 1985).
[113] *Id.* at 496.
[114] *Id.* at 498.
[115] *Id.* at 497.
[116] *Id.*

In overturning the lower court's denial of summary judgment, the *Robertson* court noted that under 31 Indiana Administrative Code 2-11-5, the state provided the employee full pay for lost time as opposed to temporary total disability benefits of 66⅔% of statutory wages as provided under Indiana's Workmen's Compensation Act.[117] In addition, the court found that payments under the administrative code provision were "not due and payable when made" and would therefore not operate to remove the matter from the Act or its exclusive remedy provisions because removal would render Indiana Code section 22-3-3-23(a) a nullity.[118] Finally, the *Robertson* court found support for crediting payments made against workmen's compensation awards under the terms of 31 Indiana Administrative Code 2-11-5 itself, which provides for a credit offset of funds paid under it when an employee also seeks temporary total disability compensation during the single year of applicability.[119]

C. Meaning for the Practitioner

While the area of crediting remains somewhat unclear, several general rules for the application of Indiana Code section 22-3-3-23 can be gleaned from the above cases. These rules are:

(1) while it appears that a contractual agreement giving rise to such credit is most helpful to the employer seeking to enforce a credit, such agreement is really not necessary;

(2) if payments for workmen's compensation are made directly from the employer or from the employer's insurer, it appears that the credit will be granted;

(3) a troublesome area arises where there may be a subrogation or lien claim against the employee for repayment of funds by the insurance carrier or entity making medical or disability payments;

(4) where a pension plan or other benefits are bargained for as a part of negotiations in a union contract, payments made under such plans will not be allowed as a credit against a workmen's compensation award in the absence of specific contractual provisions granting credits; and

(5) excess payments amounting to more than the employee's normal wages apparently provide strong grounds for allowing a credit, although a failure to exceed wages does not necessarily result in a denial of credits.

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[117] *Id.* at 498.
[118] *Id.*
[119] *Id.*

These guidelines appear to arise from public concern over the possibility of an employee being subject to subrogation actions by non-workmen's compensation insurance carriers or other entities providing such funds and competing public policy against double recovery by the claimant. Crediting is also an area where further judicial interpretation is expected.