1995 Developments in Worker's Compensation

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Introduction

This Article surveys the developments in Indiana's Worker's Compensation law during 1995. The Article reviews a wide variety of cases and issues affecting Indiana practitioners. Areas of special significance include the apportionment statute's definition of disability, the statute of limitations for modifications of awards, and challenges to the Worker's Compensation Act's exclusive remedy.

I. In the Course of and Arising Out of

A. Construction Management & Design, Inc. v. Vanderweele

"To recover under the Act, a claimant must establish that an injury or death occurred 'by accident arising out of and in the course of employment.'"[1] In *Construction Management & Design, Inc. v. Vanderweele,*[2] Vanderweele was a construction worker who, while working at a home under construction, noticed that a van on the adjacent property's driveway began to spin its wheels causing it to slide off the driveway. Vanderweele slipped and fell while walking down the adjacent property's driveway in his attempt to help the driver. The Indiana Court of Appeals was asked to review the decision of the Worker's Compensation Board (the "Board") chaired by G. Terrence Coriden. The Board had affirmed the hearing member's decision finding that Vanderweele's head injury of February 15, 1994 arose out of and in the course of his employment. The court of appeals enunciated the two factors that must be present in order for a worker's compensation claim to be found compensable under Indiana's Worker's Compensation Act. First, the injury must be "in the course of employment," and second, it must be "arising out of employment."[3]

The court of appeals explained that the question of whether an injury arises out of and in the course of employment is typically fact-sensitive.[4] However, when there are stipulated facts to which both parties agree, as in this case, the

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1. Rogers v. Bethlehem Steel Corp., 655 N.E.2d 73, 75 (Ind. Ct. App. 1995) (citing Ind. Code § 22-3-2-2 (1993); Evans v. Yankeetown Dock Corp., 491 N.E.2d 969, 973 (Ind. 1986)).

2. 660 N.E.2d 1046 (Ind. Ct. App. 1996).

3. The court of appeals was required to undergo the same fundamental analysis in four other cases decided in 1995. However, the *Vanderweele* case provides the most thorough analysis.

4. *Vanderweele*, 660 N.E.2d at 1049 (citing Burke v. Wilfong, 638 N.E.2d 865 (Ind. Ct. App. 1994)).

court considers the question to be "one of law."[5] The "in the course of employment" factor refers to where, when and how the accident occurs. The *Vanderweele* court explained that "an accident occurs in the course of employment when it takes place within the period of employment, at a place where an employee may reasonably be, and while fulfilling the duties of employment or is engaged in doing something incidental thereto."[6] The court cited *Thiellen v. Graves*[7] for an illustration of the "in the course of employment" test. In that case, Thiellen was injured while leaving the employer's premises on his motorcycle. Although Thiellen was no longer engaged in his work duties, he was still upon the premises of his employer when he was injured and was found to be in the course of his employment at the time of his injury. Thus, the *Thiellen* case lent further support to preexisting case law defining the employer's boundaries as the point at which its worker's compensation liability ends,[8] unless one of two factual exceptions exists.[9]

Under the first exception, liability extends beyond the employer's boundaries when the employee may reasonably be found there as part of his job duties.[10] Under the second, liability extends when activities incidental to employment duties result in injury while the employee is beyond the employer's boundaries, such as when an injury occurs to an employee engaged in acts that "are necessary to the life, comfort, and convenience of the workman, while at work, though personal to himself, and technically not acts of service . . . ."[11] The *Vanderweele* court concluded that Vanderweele was not reasonably expected to be upon the adjacent driveway and his being there was not incidental to his employment. Consequently, Vanderweele's off-premises injury did not "fit within any of the recognized exceptions to the requirement that the injury occur[] on the employer's premises . . . ."[12]

Having reached the conclusion that Vanderweele's injury did not occur in the

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5. *Id.* (citing Lowell Health Care Ctr. v. Jordan, 641 N.E.2d 675 (Ind. Ct. App. 1994)).

6. *Id.* (citing *Burke,* 638 N.E.2d at 868 (quoting Wayne Adams Buick, Inc. v. Ference, 421 N.E.2d 733, 735 (Ind. Ct. App. 1981))).

7. 530 N.E.2d 765 (Ind. Ct. App. 1988).

8. *Vanderweele*, 660 N.E.2d at 1050. The court quotes Markley v. Richmond Glove Corp., 156 N.E.2d 407, 413 (Ind. App. 1959) (stating that "[t]his rule provides a definite standard by which liability can be determined").

9. A thorough discussion of the two exceptions can be found in *Wayne Adams Buick, Inc.*, 421 N.E.2d at 733.

10. *Vanderweele*, 660 N.E.2d at 1050. *See also Markley,* 156 N.E.2d at 413.

11. *Vanderweele*, 660 N.E.2d at 1050 (citing Praeter v. Briquetting Corp., 251 N.E.2d 810, 812-13 (Ind. Ct. App. 1961) (quoting Holand-St. Louis Sugar Co. v. Shraluka, 116 N.E. 330, 331 (Ind. App. 1917))). Although the court indicates that activities "incidental" to employment occurring off the employer's premises still remain "within the course of employment," the quote specifically states "an accident occurring in the performance of such acts is deemed to have *arisen out of the employment.*" *Id.* (emphasis added). This suggests some overlap in the "in course of" and "arising out of" tests in the area of acts incidental to employment.

12. *Id.*

course of employment, the court nevertheless identified an additional factor to be considered in making "in the course of" determinations. The factor can be described as the circumstantial factor wherein a court must look to the "circumstances of the accident"[13] (i.e., what was the employee doing at the time of the accident?). If the employee is either engaged in his employment duties or activity incidental thereto, the injury would be in the course of employment regardless of where the injury occurred. This circumstantial factor appears to essentially restate the second exception to the rule that injuries must occur on the work premises during normal work hours to be considered in the course of employment. Moreover, its focus upon the employee's activity tends to blur the distinction between the "in the course of employment" prong and the "arising out of employment" prong.

Although the *Vanderweele* court concluded that Vanderweele's injury did not occur in the course of employment, it also went on to consider the "arising out of employment" criteria.[14] The court stated "[f]or an accident to arise out of employment, there must be a causal relationship between the employment and injury. Such a connection is established when the accident occurs out of a risk which . . . a reasonably prudent person might comprehend as incidental to the work."[15] Vanderweele argued that goodwill brought about by his charitable act would inure to the benefit of his employer and thus would be incidental to his employment. Although the hearing judge and the Board were persuaded by this argument, the court rejected it stating that "such an amorphous and speculative benefit can[not] by itself supply the required nexus between the accident and the employment so as to confer coverage under the Act."[16] The court called upon its analysis used in *KCL Corp. v. Pierce*,[17] reasoning that the employee must "owe a duty that is reasonably considered to be required by the employment or incidental thereto."[18]

The *Vanderweele* case provides a comprehensive analysis of the two-pronged "in the course of" and "arising out of" test of compensability, however, the court of appeals addressed one or both of the prongs as key issues in several other cases during 1995. For example, in *Lawhead v. Brown*,[19] the court found Brown's injury of March 29, 1994, occurring in his employer's parking lot after work hours, to be in the course of employment.[20] The court also found Brown's injury to arise out of employment because injuries occurring during the time an employee

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13. *Id.*

14. *Id.*

15. *Id.* (quoting Thiellen v. Graves, 530 N.E.2d 765, 767 (Ind. Ct. App. 1988)).

16. *Id.*

17. 226 N.E.2d 548 (Ind. App. 1967) (a case factually similar to the *Vanderweele* case involving an employee injured while pushing a car out of snow after work).

18. *Vanderweele,* 660 N.E.2d at 1051.

19. 653 N.E.2d 527 (Ind. Ct. App. 1995).

20. *Id.* at 529. The court cited Blaw-Knox Foundry & Mill Mach., Inc. v. Dacus, 505 N.E.2d 101, 102 (Ind. Ct. App. 1987), and determined that "the course of employment includes the time that employees are on the employer's premises and are going to and leaving the work place."

is leaving work are incidental to or related to employment.[21] In other words, there is a causal relationship between the employment and the injury under such circumstances.

B. Tippmann v. Hensler

Again, in *Tippmann v. Hensler,*[22] the court of appeals considered the two-pronged test for compensability under the Act. Importantly, as *Tippmann* illustrates, activities that may not appear to be causally related to employment may nevertheless arise out of employment if the employer acquiesces to such activities when the activities are common occurrences of which the employer has knowledge.[23]

In the *Tippmann* case, Hensler received an eye injury on October 19, 1990, when Tippmann and Hensler were firing paint guns in a paint booth while on a work break. Tippmann, as a prank, intentionally fired a paint gun at Hensler causing his eye injury.[24] Even though Hensler was on a work break, the court found that his injury was in the course of employment holding that "[a]ccidents occurring in the performance of acts that are reasonably necessary to the life and comfort of a workman, although personal, are incidental to employment and compensable under the Act."[25] Although the court found Hensler to be in the course of employment despite being on a work break at the time of the injury, the circumstances of the injury gave rise to a question of causal connection between the activity causing the injury and Hensler's employment.[26] The facts before the court were insufficient to enable the court to determine whether a causal nexus existed to support a finding that Hensler's injury arose out of his employment. However, the court cited its decision in *Weldy v. Kline,*[27] as an indication of its final ruling in this case depending upon the factual findings of the trial court as to whether Hensler was engaged in horseplay.

The court acknowledged that "[i]n instances where horseplay is a common occurrence and the employer, with knowledge of the facts, permits the practice to

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21. *Lawhead,* 653 N.E.2d at 529.

22. 654 N.E.2d 821 (Ind. Ct. App. 1995).

23. *Id.* at 826.

24. The court briefly reviewed a "long standing rule in Indiana" that even if an injury is intentional it is still considered "by accident" pursuant to IND. CODE § 22-3-2-6 (1993). *Tippmann,* 654 N.E.2d at 825; *see also* Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282 (Ind. 1994); Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271 (Ind. 1994).

25. *Tippmann,* 654 N.E.2d at 825 (citing Evans v. Yankeetown Dock Corp., 491 N.E.2d 969, 976 (Ind. 1986)).

26. Although the facts before the court were insufficient to make a final determination, the court cited Nelson v. Denkins, 598 N.E.2d 558, 562 (Ind. Ct. App. 1992), and explained as follows: "Moreover, this court has determined that work related disputes and disagreements are consequences that arise out of and in the course of the employment relationship." *Tippmann,* 654 N.E.2d at 825.

27. 616 N.E.2d 398 (Ind. Ct. App. 1993).

continue, he has acquiesced in the horseplay, and it becomes a condition of employment."[28] The court explained that such a situation "satisfies the causal nexus between the injury and the performance of some service of the employment by demonstrating that the accident arose out of a risk which a reasonable person might have comprehended as incidental to the employment at the time of entering into it."[29] On the other hand, the court noted that if Hensler was an active participant in horseplay, his injury would not have been considered as arising out of employment because the horseplay would be an intervening cause between activities otherwise incidental to his employment and the injury.[30]

C. Rogers v. Bethlehem Steel

The court addressed the "arising out of" prong as the sole issue in *Rogers v. Bethlehem Steel*[31] and in so doing provided an analytical approach to examining whether a "causal nexus exist[ed] between the injury sustained and the duties or services performed by the injured employee."[32] The determination of a causal nexus does not always lend itself to a clear and cogent thought process, particularly when counsel must advise the client as to whether an injury arose out of employment. However, categorizing the "risk" leading to the injury may, in some circumstances, provide the analytical tool necessary to aid counsel in the role of advisor.

In *Rogers*, Joseph Rogers was murdered by a co-employee of Bethlehem Steel Corporation in September of 1992. Gary Moore, the co-employee, may have borrowed money from Rogers who "was known to carry a large sum of money and . . . loaned money to various persons in the past . . . ."[33] Witnesses testified that Moore had engaged in arguments with Rogers of a personal nature prior to Rogers's murder. The court observed that Rogers's penchant for carrying and lending large sums of money was not a condition or requirement of his job but rather a "risk personal to himself . . . ."[34] As a result, the court held that Rogers's widow's worker's compensation death benefit claim was not compensable because the injury causing his death "did not arise out of his employment with Bethlehem

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28. *Tippmann,* 654 N.E.2d at 826.

29. *Id.*

30. *Id.* Although the court recites a long standing factor in determining whether an injury resulting from horseplay is compensable (i.e., whether the employer had notice of the horseplay and acquiesced), there is some question whether this factor is applied in making such a determination. Rather, the key factor appears to be whether the injured employee was an innocent victim or active participant in the horseplay. The employer's knowledge and acquiescence appears to be presumed in cases involving an innocent victim. *See* Chicago, I. & L. RY. Co. v. Clendennin, 143 N.E. 303 (Ind. App. 1924). Also, the employer's knowledge is irrelevant in cases involving active participants. *See* Weldy v. Kline, 652 N.E.2d 107 (Ind. Ct. App. 1995).

31. 655 N.E.2d 73 (Ind. Ct. App. 1995).

32. *Id.* at 75.

33. *Id.* at 74.

34. *Id.* at 76.

Steel."[35]

The categories of risk the court used to determine whether the injury was one arising out of employment were as follows:

(1) Risks distinctly associated with the employment;

(2) Risks personal to the claimant; and

(3) Neutral risks which have no particular employment or personal character.[36]

The court, following its analysis in *Peavler v. Mitchell & Scott Machine Co.*,[37] indicated that categories one and three were risks covered by the Worker's Compensation Act, but category two risks were not compensable.[38]

Although in some factual situation it may be difficult to determine if the injury was caused by a risk personal to the claimant, Rogers and Moore were observed by others as involved in a personal dispute over a personal loan, which clearly fell into category two and was not compensable. Suffice it to say, the rule and exceptions defining the "in the course of employment" prong are less troublesome to counsel than the more amorphous determination as to whether an injury meets the causal nexus criteria of the "arising out of employment" prong.

II. AGRICULTURAL EXEMPTION: VIABILITY OF EXEMPTION

The Indiana Supreme Court in *Collins v. Day*[39] addressed the constitutionality of the provision within Indiana's Worker's Compensation Act exempting agricultural employers and their employees from coverage under the Act.[40] The Privileges and Immunities Clause of the Indiana Constitution prohibits the granting of privileges or immunities to any citizen if they are not also granted equally to all citizens.[41] In many respects, this provision is analogous to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Indiana courts have regularly applied the same analytical methodology used by federal courts and applied the "rational basis" standard to determine if a provision

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35. *Id.*

36. *Id.* at 75 (citing K-Mart Corp. v. Novak, 521 N.E.2d 1346, 1349 n.1 (Ind. Ct. App. 1988); 1 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW §§ 6.50, 11.30 (desk ed. 1995); Peavler v. Mitchell & Scott Mach. Co., 638 N.E.2d 879, 881 (Ind. Ct. App. 1994)).

37. 638 N.E.2d 879 (Ind. Ct. App. 1994).

38. *Rogers*, 655 N.E.2d at 75-76.

39. 664 N.E.2d 72 (Ind. 1994).

40. IND. CODE § 22-3-2-9 (1993). This section not only exempts agricultural employers and employees from worker's compensation coverage, it also exempts casual labor and domestic servants but allows the employers of these employees to waive the exemption and accept coverage by giving notice in writing to the employee.

41. IND. CONST. art. I, § 23.

of Indiana law violates Indiana's Constitution.[42] However, the *Collins* court concluded that there was no "settled body of Indiana law" requiring the court to use the same analytical method that courts used in determining federal constitutional questions under the Fourteenth Amendment. Thus, the court applied an "independent interpretation and application" to develop a separate standard applicable to questions arising under Indiana's Privileges and Immunities Clause.[43]

The separate standard had been distilled by the court in past cases when it did not apply a Fourteenth Amendment analytical approach. The standard consists of "two general factors."[44] The first factor requires the existence of a separate identifiable class and that the class distinction be inherent and related to the "'subject-matter of the legislation which require[s] . . . exclusive legislation with respect to the members of the class.'"[45] The second factor requires "equal availability of the preferential treatment for all persons similarly situated."[46]

In applying the two general factors, the *Collins* court observed that agricultural employers and employment, at least historically, consisted of small, often family-owned, businesses with little in the way of employee benefits, worker training or formality in the employment relationship. Moreover, farmers were not easily able to pass on the high cost of worker's compensation insurance to their customers.[47] Thus, the court concluded that there was a distinct identity to the agricultural employer class that was inherent to the subject matter of the worker's compensation exemption for agricultural employers. The court also found the exemption to be available to all agricultural employers, thereby satisfying the second factor of the court's constitutional analysis under Indiana's Privileges and Immunities Clause.

Although an amicus brief submitted by the Legal Services Organization of Indiana provided a "forceful, thorough, and well-documented" argument indicating that the exemption no longer applied to current social or economic conditions of the agricultural business in Indiana, the court stated that the "plaintiff ha[d] failed to carry the burden placed upon the challenger to negative every reasonable basis for the classification."[48] Consequently, the court did not find that the agricultural exemption violated Indiana's Privileges and Immunities Clause.

An additional question raised by the plaintiff in *Collins* was whether allowing the employer the right to waive the exemption improperly provided a privilege to the employer that was not granted to the agricultural employee.[49] The court concluded that the waiver provision did not violate the Privileges and Immunities

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42. *Collins*, 664 N.E.2d at 74.
43. *Id.* at 75.
44. *Id.* at 78.
45. *Id.* (quoting Heckler v. Conter, 381 N.E. 878, 879 (Ind. 1933)).
46. *Id.* at 79.
47. *Id.* at 81.
48. *Id.*
49. *See* IND. CODE § 22-3-2-9(b) (1993).

Clause of Indiana's Constitution because there was a rational basis for providing the privilege to the agricultural employer and not the employee. The court implied that the basis for the exemption was related to the business of farming in the Indiana business environment. In that regard, employers were responsible for the "management decisions" governing the operation of the agricultural business.[50] To allow each employee to elect coverage or not would result in inconsistency in a business in which employees tended to be transient.

For the time being, the agricultural exemption remains viable. The court's emphasis on the Legal Services Organization's amicus brief suggests that a future case arguing this issue may have the opposite result due to substantial change in Indiana's agricultural industry.

III. Discovery: The Board's Discretionary Power

In *Drew v. Quantum Systems, Inc.*,[51] the Indiana Court of Appeals was presented with two issues regarding the Board's authority and the proper exercise of discretion in its use of such authority. In *Drew*, the Board dismissed a claim for benefits as a sanction for Drew's failure to comply with the Board's order compelling Drew to submit a timely response to Quantum Systems' interrogatories. Although Drew initially argued that the Board was without authority to dismiss his claim as a sanction for his delinquent response, he conceded the Board's authority pursuant to Indiana Trial Rule 37, which is incorporated into the Board's administrative rules under Indiana Administrative Code, Title 631, Rule 1-1-3.[52]

Drew's argument focused on what he characterized as the Board's abuse of its discretion in imposing such a harsh sanction. Drew's contention was that, because he eventually answered Quantum Systems' interrogatories and did not have a long history of evading discovery, the Board abused its authority by dismissing his claim. The court disagreed with Drew and identified guidelines previously stated in *Burns v. St. Mary Medical Center*,[53] indicating that a "[d]ismissal [was] not unjust where (1) the party was given additional time within which to respond and was expressly warned that failure to respond would result in dismissal and (2) no response or motion for additional time was timely made and no reason excusing a timely response [was] demonstrated."[54]

Drew failed to respond to Quantum Systems' interrogatories for nearly four months from the October 25, 1993 date upon which he was originally requested

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50. *Collins*, 664 N.E.2d at 82.

51. 661 N.E.2d 594 (Ind. Ct. App. 1996).

52. *Id.* at 595. The issue of the Board's authority was not an issue of lengthy debate. The court merely confirmed the parties' acknowledgment of the Board's authority stating as follows: "It is well established that the Board has the authority to order parties to comply with discovery requests. Available sanctions for failure to comply with discovery orders under T.R. 37 include dismissing the action." *Id.*

53. 504 N.E.2d 1038, 1039 (Ind. Ct. App. 1987).

54. *Drew*, 661 N.E.2d at 595.

to respond. Drew did not respond to the motion to compel that was filed by Quantum Systems on February 22, 1994, and he did not request an extension of time. Thus, the Board ordered him to respond, but two months later he had not done so. On May 31, 1994, the Board ordered the case dismissed, but allowed Drew twenty days to show cause as to why the dismissal should be set aside.[55] Drew filed his response to the Board's "show cause" order two days late and indicated he would respond to the interrogatories within two weeks. Nevertheless, Drew did not answer the interrogatories for another two months.

Drew's repeated failure to respond or even comply with his own representation of when he would respond provided ample justification for the Board's proper use of its discretionary authority to dismiss Drew's claim. The *Drew* case highlights the importance of discovery in worker's compensation cases. The Board clearly has the discretionary authority to dismiss a claim or otherwise take appropriate action under law.[56]

IV. PERMANENT TOTAL DISABILITY: CASE PROCEDURE AND SUBSTANCE

During 1995, the Indiana courts decided two cases involving claims of permanent total disability, *K-Mart Corp. v. Morrison*[57] and *Hill v. Woodmark Corp.*[58] In so doing, the courts provided counsel and the Board guidance in both substantive law and matters of procedure.

A. K-Mart Corp. v. Morrison

In *K-Mart Corp. v. Morrison,* the Indiana Court of Appeals interpreted the scope of the provision within Indiana's Worker's Compensation Act that entitles an employer to terminate or otherwise deny compensation when an employee, without justification, refuses employment suitable to the physical limitations caused by his work injury.[59] In *K-Mart Corp.,* Morrison's reflex sympathetic dystrophy ("RSD") caused substantial physical limitations, including arm, leg and shoulder pain that resulted in her falling down and dropping things at times.[60] K-Mart offered her a position behind the jewelry counter rather than in the apparel department, which K-Mart believed to be more suitable to her physical limitations. K-Mart believed her refusal to take the job justified a reduction in its worker's

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55. *Id.*

56. In Weldy v. Kline, 652 N.E.2d 107 (Ind. Ct. App. 1995), the Board deemed unanswered admissions as being admitted as true and accurate statements. However, because the admissions led to contradictory conclusions, the Board reviewed deposition testimony to reach its conclusion. *Id.* at 109.

57. 645 N.E.2d 18 (Ind. Ct. App. 1995).

58. 651 N.E.2d 785 (Ind. 1995).

59. IND. CODE § 22-3-3-11(a) (1993) states that "[i]f an injured employee, only partially disabled, refuses employment suitable to his capacity procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the worker's compensation board such refusal was justified."

60. *K-Mart*, 645 N.E.2d at 20 n.3.

compensation obligation. Because the court determined that Morrison was totally disabled, it did not consider errors in applying Indiana Code section 22-3-3-11, other than to cite its previous decision in *Jones & Laughlin Steel Corp. v. Kilburn,*[61] stating that the referenced statute only applies to partial disabilities and not total disabilities.

More instructive, however, was the court's discussion of the meaning of its remand and K-Mart's failure to challenge the Board's findings of fact. Specifically, the court in its prior decision in *K-Mart Corp. v. Morrison,*[62] remanded the case back to the Board to use "facts as presented in the record, of Morrison's disability status."[63] The court had found that the Board's findings of fact regarding Morrison's permanent total disability were based on evidence that was not in the record.[64] K-Mart contended that the court's remand required the Board to hold a hearing and gather additional evidence. However, the court concluded that the language of its remand could "in no way be found to *require* the Board to conduct an evidentiary hearing."[65] Rather, the court simply stated that the evidence the Board previously used to support its specific findings of fact was not evidence in the record and that the Board must use evidence in the record to support its specific findings of fact. K-Mart failed to challenge the evidence ultimately used to support the Board's finding of permanent total disability. Without this challenge, the court of appeals' standard of review required it to find that the evidence in the record led to an "inescapable . . . contrary result" before it could overturn the Board's decision.[66] No such contrary result was found by the court.

K-Mart next argued that the court's prior finding—that the evidence of record did not support Morrison's disability as being either permanent or quiescent—conclusively indicated that the same evidentiary record could not support a finding of total disability. After citing the evidence in the record used by the Board to support its finding of permanent total disability, the court indicated that its prior reversal of the Board regarding whether the disability was permanent or quiescent was not inconsistent with its current finding of permanent total disability. To support this conclusion, the court referenced the distinction between temporary total disability and permanent total disability made in *Covarubias v. Decatur Casting, Etc.*[67] The *Covarubias* court recognized that temporary total disability benefits focus on whether an injury prevents the claimant from returning to the type of work he performed prior to the injury. On the other hand, permanent total disability focuses on the question of whether the claimant can return to any gainful employment.

An additional issue in *K-Mart*, which demonstrates the importance of

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61. 477 N.E.2d 345 (Ind. Ct. App. 1985).
62. 609 N.E.2d 17 (Ind. Ct. App. 1993).
63. *Id.* at 30.
64. *Id.*
65. *K-Mart Corp. v. Morrison*, 645 N.E.2d 18, 20 (Ind. Ct. App. 1995).
66. *Id.*
67. 358 N.E.2d 174 (Ind. App. 1976).

challenging questionable findings, involved the Board's decision to award total disability benefits through March 8, 1994 when the evidence in the record was closed in April of 1991. K-Mart contended that the award lacked evidentiary support. However, the court concluded that K-Mart's failure to challenge the finding that "Morrison's condition had 'grown progressively worse for lack of proper treatment'"[68] and its failure to tender any treatment specific to Morrison's condition indicated that the Board's award of total disability beyond the date when the record of medical evidence was closed was supported by the record.[69]

B. Hill v. Woodmark Corp.

While *K-Mart* is instructive to counsel on the importance of properly analyzing and challenging findings of fact, particularly in a case involving a permanent total disability claim, *Hill v. Woodmark Corp.*[70] reminds the Board of the importance of specific findings of fact supported by evidence in the record. "In an unpublished memorandum decision, the Indiana Court of Appeals did not reach the merits of the plaintiff's claim but remanded to the Board with instructions to make specific findings of fact regarding Hill's ability to obtain reasonable types of employment in light of his back injury."[71] Once the Board had issued specific findings of fact, the Indiana Court of Appeals reversed the Board's finding that Hill was not permanently totally disabled. The Indiana Court of Appeals held that the evidence in the record did not support the finding that Hill could find reasonable employment.[72]

The Indiana Supreme Court, however, stated that the Indiana Court of Appeals' decision "misperceive[d] the nature and character of the Board's role in deciding this case."[73] The Indiana Supreme Court indicated that, when the Board is in a position to determine whether the claimant has met the burden of proving a permanent total disability, there is no requirement that there be evidence in the record to make an affirmative finding that reasonable work is available. Rather, the Board need only determine that he failed to prove that he was disabled.[74] Moreover, upon remand from the Indiana Court of Appeals, the Board used evidence in the record to support its finding that Hill had not met his burden, including evidence from two doctors chronicling specific physical activities that Hill could perform. This evidence included the ability to lift specified amounts of weight, the capacity to squat, bend and stoop for periods of time, grasping ability; and full maneuverability of the neck and head.[75]

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68. *K-Mart,* 645 N.E.2d at 21 (quoting the findings of the Board).

69. *Id.*

70. 651 N.E.2d 785 (Ind. 1995).

71. *Id.* at 786.

72. Hill v. Woodmark Corp., 632 N.E.2d 1173, 1178 (Ind. Ct. App. 1994), *rev'd*, 651 N.E.2d 785 (Ind. 1995).

73. *Hill,* 651 N.E.2d at 786.

74. *Id.*

75. *Id.* at 787.

The dissent in *Hill* indicated that the majority of the Board's findings were "unsupported by the record and the remaining findings [did] not adequately show the basis of the decision against appellant."[76] It also indicated that the findings were not even minimally amenable to "appellate review."[77] The dissent stated that "[f]indings of basic facts must reveal the Board's analysis of the evidence and its determination therefrom regarding the very specific issues of fact which bear on the particular claim . . . ."[78] Notwithstanding the dissent's disagreement with the majority in *Hill*, one thing remains certain. Findings of fact must be supported by evidence in the record, and the courts are not reluctant to remind both counsel and the Board of the importance of this matter of procedure, particularly when the claim involves permanent total disability.

V. APPORTIONMENT

The issue addressed in *U.S. Steel Corp. v. Spencer*[79] involved the proper interpretation and application of the apportionment statute within Indiana's Worker's Compensation Act, which reads in pertinent part, as follows:

> If an employee has sustained a permanent injury either in another employment, or from other cause or causes than the employment in which he received a subsequent permanent injury by accident, . . . he shall be entitled to compensation for the subsequent permanent injury in the same amount as if the previous injury had not occurred: Provided, however, that *if the permanent injury for which compensation is claimed, results only in the aggravation or increase of a previously sustained permanent injury or physical condition . . . the board . . . shall award compensation only for that part of such injury, or physical condition resulting from the subsequent permanent injury.*[80]

In addressing the question of apportionment, the court provided guidance to counsel as to when the following legal maxim applies:

> [T]he employer takes his employees as he finds them, if he takes them at all, and if they sustain injuries by accident arising out of and in the course of employment they are entitled to compensation for their own injuries, not for the injuries physically and mentally perfect employees would have sustained in like accidents.[81]

Notwithstanding the court's guidance, the efficacy of the apportionment statute's role in claims wherein a subsequent injury results in permanent total disability must also be seriously questioned as a result of *U.S. Steel Corp.*

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76. *Id.* at 790 (DeBruler, J., dissenting).
77. *Id.*
78. *Id.* (quoting Perez v. U.S. Steel Corp., 426 N.E.2d 29 (Ind. 1981)).
79. 645 N.E.2d 1106 (Ind. Ct. App. 1995).
80. IND. CODE § 22-3-3-12 (1993) (emphasis added).
81. Goodman v. Olin Matheison Chem. Corp., 367 N.E.2d 1140, 1146 (Ind. App. 1977).

The *U.S. Steel Corp.* court indicated that the apportionment statute does not apply to reduce an employer's liability for benefits when the employee is only predisposed or somehow more susceptible to a particular injury.[82] However, if there is a pre-existing impairment that "combines with an impairment resulting from a subsequent compensable accidental injury to render [the claimant] either permanently totally disabled or permanently partially impaired in a greater degree than would have resulted from the subsequent injury had there been no pre-existing impairment,"[83] then the apportionment statute applies to reduce the employer's liability to the amount of impairment or disability caused by the injury that occurred during employment. Thus, whether the apportionment statute applies depends upon whether a preexisting condition of the body is an impairment or a disability, or simply a predisposition or susceptibility to an injury that the current work injury exacerbated or aggravated.

A compelling question prompted by *U.S. Steel Corp.* is whether, in light of the case law definition of "disability," a permanent total disability is subject to apportionment based on either a preexisting disability or permanent impairment. In *U.S. Steel Corp.*, Spencer had a preexisting back injury resulting from an accident while playing baseball in 1973. In 1974, Spencer underwent surgery to fuse his spine. Unfortunately, the spinal fusion deteriorated causing Spencer to take a leave of absence from work for a year.[84] Upon returning to work at U.S. Steel, Spencer was restricted from heavy lifting, bending and standing. He continued back treatments from 1975 to the date of his second injury on June 15, 1983. According to medical testimony, his injury resulted in a fifty-five percent permanent partial impairment rating, twenty percent of which was considered causally connected to the second injury.[85]

Although the facts of this case appear to properly invoke application of the apportionment statute, they call into question an interesting conundrum brought about by a distinction between the term "impairment" and the term "disability" under Indiana's Worker's Compensation Act. As the court succinctly explains, "the issue of physical impairment concerns medical evidence related to the loss of bodily function, whereas a disability determination rests on vocational factors relating to the ability of an individual to engage in reasonable forms of work activity."[86] Although the Board relied upon the medical findings of Spencer's doctor to determine that only twenty-percent of Spencer's impairment was caused by his 1983 work injury, it also appeared to rely on the testimony of a clinical psychologist concerning Spencer's permanent total disability. In that regard, the clinical psychologist observed that Spencer was capable of working, although in a diminished capacity, from the date of his 1973 baseball injury up to the date of

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82. *U.S. Steel Corp.*, 645 N.E.2d at 1108 (citing Bethlehem Steel Corp. v. Cummings, 310 N.E.2d 565 (Ind. App. 1974)).

83. *Id.* at 1108 (citing *Goodman*, 367 N.E.2d at 1140).

84. *Id.* at 1107.

85. *Id.* at 1108.

86. *Id.* at 1109 (citing Rockwell Int'l v. Byrd, 498 N.E.2d 1033 (Ind. Ct. App. 1986)).

his 1983 work injury,[87] at which point he was no longer able to engage in gainful employment. Because the Board appeared to have relied on the "conflicting opinions of the experts,"[88] the court remanded the case to the Board to determine if Spencer was "suffering from a condition which impaired or disabled him prior to the 1983 injury."[89] If so, the court directed the Board to apply the apportionment statute.

The problem in this case is that Spencer, *medically*, would appear to have suffered a preexisting permanent impairment entitling U.S. Steel to apportionment for the impairment caused by the 1983 injury. Moreover, Spencer's work activities from 1973 to 1983 were limited or diminished based on his medical restrictions suggesting some type of disability. However, upon remand, the Board did not apportion the award for the permanent total disability that resulted from the subsequent 1983 work injury. This evokes the important question of whether the Board must find a preexisting *permanent partial* disability in order to apply the apportionment statute to Spencer's resulting permanent total disability. If so, the *U.S. Steel Corp.* case was over at the moment both parties agreed that permanent total disability resulted from the 1983 work injury because Indiana's Worker's Compensation Act, unlike other worker's compensation acts, does not recognize *permanent partial* disability, at least as a separately compensable type of injury.[90] Indeed, under Indiana law, a permanent disability only exists if it is one-hundred percent disabling despite references to the contrary in prior and subsequent cases.[91]

To further explain, in *K-Mart Corp. v. Morrison*[92] the court distinguished "temporary total disability from permanent total disability."[93] The distinction referenced indicates that the term "disability," in the context of temporary total

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87. Spencer returned to work after his 1973 injury "with a heavy lifting, bending and standing work restriction imposed on him by his physician." *Id.* at 1107.

88. *Id.* at 1109.

89. *Id.*

90. *See* Jenkins v. Pullman Standard Car Mfg. Co., 139 N.E.2d 566 (Ind. Ct. App. 1957). Under Indiana's Occupational Diseases Act found at IND. CODE §§ 22-3-7-1 to -38 (1993 & Supp. 1996), the loss or loss of use of any eye or appendage (i.e., schedule injuries) is referred to as a disablement whereas, the same loss or loss of use of an eye or appendage under Indiana's Worker's Compensation Act is not referred to as a disablement. Thus, it could be argued that a scheduled injury is tantamount to a *permanent partial* disability despite the terminology. If so, a preexisting scheduled injury coupled with a subsequent injury causing permanent total disability could allow for the apportionment of the permanent total disability.

91. In Goodman v. Olin Matheison Chem. Corp., 367 N.E.2d 1140, 1144 (Ind. App. 1977), the court explained that someone can be permanently disabled to a "greater degree" if they have a preexisting injury. Again, in a subsequent decision of *U.S. Steel Corp.*, the concept of a "naturally progress[ing]" disability was suggested to imply that Spencer may have been disabled but not such that the disability would have naturally progressed to total disability. U.S. Steel Corp. v. Spencer, 655 N.E.2d 1243, 1247 (Ind. Ct. App. 1995). Consequently, both cases strongly suggest a type of permanent disability that is less than total.

92. 645 N.E.2d 18 (Ind. Ct. App. 1995).

93. *Id.* at 20 (citing Covarubias v. Decatur Casting, Etc., 258 N.E.2d 174 (Ind. App. 1976)).

disability, means the employee is unable to return to the type of work he was performing immediately prior to the injury. The term "disability" within the context of permanent total disability means the employee is unable to return to any gainful employment. Based on the facts in *U.S. Steel Corp.*, it would appear that Spencer was able to return to gainful employment but unable to return to the type of work he was performing prior to the 1973 baseball injury. In that regard, it could be said that, between 1973 and 1983, Spencer was "disabled" in accordance with the definition of temporary disability. Undeniably, the facts indicate that he was not permanently disabled as a result of his 1973 baseball injury because he remained gainfully employed by U.S. Steel and was able to work.

In the subsequent decision in *U.S. Steel Corp.*,[94] the court affirmed the finding of the Board that there was no basis upon which to apportion Spencer's disability. On remand, the Board did not focus on impairment but rather issued findings regarding disability. In fact, the Board rejected the medical testimony upon which it, in part, preliminarily relied and instead focused on the expert opinion of the clinical psychologist. It would seem the Board was quite aware that it could not apportion a "disability" as defined under the permanent total disability definition of *Covarubias*. Specifically, a person with a "disability," as defined under the permanent total disability definition in *Covarubias*, would never find himself back in the work place to be subjected to a subsequent injury, which the apportionment statute was enacted to address.

The Board, arguably, could have found Spencer's *impairment* apportionable relying on the purely medical testimony of the medical expert. However, the Act does not contemplate a deduction in benefits when an apportionable impairment exists if the claimant is permanently and totally disabled. In other words, an apportionment of Spencer's "impairment" would not have reduced U.S. Steel's benefit payment obligation to Spencer because there was no separate additional permanent partial impairment benefit award "stacked" on top of the permanent total disability award. Moreover, because impairment addresses a purely physical measurement of some loss of bodily function, whereas disability measures the effect the loss of function has on the claimant's ability to work, it is difficult to reason how a preexisting impairment would diminish an employer's obligation for an employee's subsequent disability.

To further analyze this problem, a preexisting impairment and a subsequent impairment are capable of being added together under the apportionment statute to create a permanent total disability. There is no doubt that two injuries to the same part of the body can be added to produce a greater impairment than each injury standing alone would cause. There is equally no doubt that the apportionment statute allows the Board to identify the impairment rating of each of the two injuries and only charge the employer with the responsibility of paying the permanent partial impairment benefits attributable to the degree of impairment caused by the injury that occurred in its employment. As long as the issue is confined to permanent partial impairment, the apportionment statute seems to work fine. However, when the two injuries combine to produce an impairment,

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94. U.S. Steel Corp. v. Spencer, 655 N.E.2d 1243 (Ind. Ct. App. 1995).

which, together with vocational factors, results in permanent total disability, the employer's permanent partial impairment benefit liability changes to an obligation to pay permanent total disability benefits. Any credit the employer would have received in terms of a reduction for the preexisting impairment is lost unless the Board and courts recognize that a disability can exist without being a total disability.

In *U.S. Steel Corp.*, the Board and the court attempted to "square" the unequal sides of the dilemma brought to light by the apportionment statute by implying that a permanent total disability can be apportioned if the prior injury "would naturally progress into permanent total disability on its own."[95] Although such a standard would place an employer in the difficult position of obtaining vocational evidence to establish that a preexisting injury was capable of deteriorating to a point at which a claimant would no longer be able to work, it also suggests that due to a preexisting injury a partial disability can coexist with a permanent partial impairment and a subsequent injury can accelerate the partial disability into a permanent total disability. Consequently, the apportionment statute may still be able to fully serve its benign purpose by allowing for the apportionment of permanent total disability if the Board and courts recognize that partial disability is the type of preexisting disability contemplated by the apportionment statute.[96] This however would require a permanent partial impairment to coexist with a *temporary* partial disability.[97]

In the context of the necessarily retrospective application of the apportionment statute, it is not inconsistent for the Board or courts to find that a claimant with an injury causing some permanent partial impairment can remain gainfully employed although partially disabled by the impairment. The evidence of partial disability, demonstrated by the facts in *U.S. Steel Corp.*, would be the diminished physical capacity of the employee that required a medical restriction as to the work he or she was able to perform.[98] This concept is consistent with the partial disability referenced in Indiana Code section 22-3-3-11.[99]

Importantly, however, recognizing the possibility of partial disability in the context of the apportionment statute would not require the Board or courts to interpret such partial disability as separately compensable. The Board and the courts would also not be required to interpret the temporary partial disability benefits statute as requiring the employer to pay benefits under the statute as an additional benefit after a permanent partial impairment is established.[100] In *U.S.*

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95. *Id.* at 1247.

96. The concept of partial disability is embodied in IND. CODE § 22-3-3-11 (1993).

97. A temporary disability, either partial or total, is temporary because it has not reached quiescence and is not yet capable of being rated as a permanent impairment.

98. Due to the requirement of reasonable accommodation under the Americans With Disabilities Act, it is likely that workers, who in the past may have been unable to work, will now remain gainfully employed although not in the same job capacity.

99. Although the statute does not include the word "temporary" with its text, it has been interpreted as one of the statutes addressing temporary partial disability.

100. IND. CODE § 22-3-3-9 (1993). Under this statute, the Board has interpreted the benefits

Steel Corp., the Board could have used Spencer's permanent impairment apportionment ratio to apportion Spencer's permanent total disability by finding that Spencer had a temporary partial disability that clearly restricted his ability to perform certain types of work. Unfortunately, the Board may have been saddled with the "all or nothing" definition of permanent total disability that leads inextricably to virtually never finding a preexisting disability.

VI. Second Injury Fund

Linville v. Hoosier Trim Products[101] required the court to interpret the provision within Indiana's Worker's Compensation Act defining the purpose of the second injury fund. Specifically, Indiana Code section 22-3-3-13(a) provides as follows:

> If an employee who from any cause, had lost, or lost the use of, one (1) hand, one (1) arm, one (1) foot, one (1) leg, or one (1) eye, and in a subsequent industrial accident becomes permanently and totally impaired by reasons of the loss, or loss of use of, another such member or eye, the employer shall be liable only for the compensation payable for such second injury. However, in addition to such compensation and after the completion of the payment therefore, the employee shall be paid the remainder of the compensation that will be due for such permanent impairment out of a special fund known as the second injury fund . . . .

In this case, Linville received an injury in 1982 that resulted in an eleven percent permanent partial impairment of her right hand and then received an injury in 1988 resulting in a thirty-seven percent permanent partial impairment of her left hand. The combined result of these two injuries left her permanently totally disabled. The court was asked to interpret two phrases within the statute. First, the court was required to interpret whether the phrase "lost" or "lost the use of" required a finding that the body part must be a one-hundred percent loss or must be one-hundred percent unable to function. Then, the court was required to interpret the meaning of the phrase "permanently and totally impaired."[102]

In explaining its approach the court cited *Associated Insurance Companies, Inc. v. Burns,*[103] stating that a "liberal construction is necessary to accomplish the Act's beneficent purposes."[104] Although the Board denied Linville's claim against the second injury fund because she had not lost one-hundred percent use of either hand, the court held that "'loss of use' should be interpreted to refer to either total

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to be due only during the time prior to the claimant reaching maximum medical improvement. *See* Kohman v. Indiana University, No. 93A029512-EX00750 (Ind. Ct. App. Dec. 20, 1995) (unpublished decision).

101. 659 N.E.2d 250 (Ind. Ct. App. 1995).

102. *Id.* at 252.

103. 562 N.E.2d 430 (Ind. Ct. App. 1990).

104. *Linville*, 659 N.E.2d at 252.

or partial loss."[105] The court also explained that the Board's interpretation of "permanent and totally impaired" had a very narrow application.[106] Because a narrow application would have been inconsistent with a liberal construction of the law, the court concluded that permanent and total impairment was synonymous with permanent total disability. Consequently, the court found that Linville's diminished use of both hands resulted in permanent total disability entitling her to benefits from the second injury fund.

The dissent in this case believed that the language of the statute was unambiguous particularly in light of "Ind. Code § 22-3-3-10(c) which distinguishes between accidents causing 'loss by separation,' 'loss of use,' and 'partial loss of use.'"[107] Thus, the dissent believed that "loss of use" could only mean one-hundred percent loss of use, which did not occur to either of Linville's hands. The dissent, therefore, agreed with the Board's decision.

In the rehearing of *Linville v. Hoosier Trim Products*,[108] the court adopted the logic of the dissent in the initial *Linville* decision. The court overturned its original decision finding that the terms "lost" and "lost the use of" were not ambiguous simply because they were not defined in the Worker's Compensation Act. The court defined "loss" as a "total deprivation of a body part, or the total deprivation of the use of a body part."[109] Moreover, the court noted that because Indiana Code section 22-3-3-10(c) references "partial loss," the term "loss" must be modified by the term "partial" to be construed as a partial loss.[110]

The court of appeals appears to be divided regarding the viability of claims against the second injury fund. Thus, counsel may be well advised to review the merits of any case involving preexisting and subsequent scheduled injuries before making a claim against the fund.

VII. MEDICAL EXPENSES

In *Montgomery Aviation, Inc. v. Hampton,*[111] the court was asked to "adopt a definition of 'necessary'" medical expenses. The term "necessary" medical expenses is not defined in Indiana's Worker's Compensation Act. Indiana Code section 22-3-3-4 simply states that the employer must pay for "'such surgical, hospital and nursing services and supplies as the attending physician or the worker's compensation board may deem necessary.'"[112]

In *Montgomery Aviation*, Hampton had three knee surgeries, the first in July of 1990, the second in January of 1991, and the third in February of 1992. Montgomery Aviation argued that the third surgery was not a medically necessary

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105. *Id.*
106. *Id.*
107. *Id.* at 253 (Darden, J., dissenting).
108. 664 N.E.2d 1178 (Ind. Ct. App. 1996).
109. *Id.* at 1179 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1976)).
110. *Id.*
111. 650 N.E.2d 77, 80 (Ind. Ct. App. 1995).
112. *Id.* at 79 (citing IND. CODE § 22-3-3-4(a) (1993)).

expense because the evidence of record suggested that the doctors did not believe it would cure or relieve Hampton's problem.[113] Montgomery Aviation's definition of "necessary" would have required the doctor to "'reasonably believe the treatment [would] have a curative or relieving effect' upon the injury."[114] The court refused to adopt such a definition.

The court cited *Talas v. Correct Piping Co.*[115] as demonstrating that "noncurative, prospective palliative measures, such as nursing services and physical therapy"[116] are within the ambit of medical expenses for which an employer is liable under Indiana's Worker's Compensation Act. However, the court explained that *Talas* did not provide much guidance with respect to retrospective medical expenses for a surgical procedure that was noncurative in nature.

In providing counsel guidance as to the type of medical expenses for which an employer may be liable, the court looked to evidence indicating that Hampton's surgery was, at minimum, believed to uncover the nature of his knee pain. Moreover, there was also evidence that the surgeon believed the surgery would improve Hampton's knee condition.[117] *Montgomery Aviation* appears to define medical expenses for which the employer is liable to include exploratory procedures that are expected to help in diagnosing medical conditions.[118]

VIII. ATTORNEY'S FEES

Unfortunately, *Connecticut Indemnity Co. v. Bowman*[119] does not provide counsel much guidance in the area of what action constitutes bad faith entitling plaintiff's counsel to an award of attorney's fees. However, from a procedural perspective, it is instructive with respect to stipulated cases. In *Connecticut Indemnity*, Bowman filed an action against Connecticut Indemnity Co. ("CIC"), the insurance carrier of Standard Locknut and Lockwasher, Inc. ("Standard Locknut"), based on gross negligence, constructive fraud and intentional infliction of emotional distress.[120] CIC argued that Bowman was collaterally estopped from his lawsuit because the Board did not find in favor of Bowman upon his request for attorney's fees based on the allegation that "the employer had acted in bad faith

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113. *Id.* at 78.

114. *Id.* (quoting Brief of Appellant).

115. 435 N.E.2d 22 (Ind. 1992).

116. *Hampton*, 650 N.E.2d at 79.

117. *Id.*

118. The court pointed out that, even though the surgery was unsuccessful in curing Hampton's problem, "in such surgery, no one can give a guarantee; there is never an assurance of cure." *Id.* The court also took exception to Montgomery Aviation's suggestion that the only reason the third surgery was performed was because Hampton wanted it to be performed. Such a suggestion implies that "surgeons are willing to perform invasive procedures without good cause." *Id.*

119. 652 N.E.2d 880 (Ind. Ct. App. 1995).

120. *Id.* at 882.

in adjusting and settling" Bowman's claim.[121] CIC also argued that, because Bowman's claim for attorney's fees based on bad faith was not among the issues to which the parties stipulated, Bowman's request for attorney's fees was not timely made.[122] The court found that, because the Board did not issue specific findings regarding the basis for its denial of Bowman's claim for attorney's fees and because the Board could have denied Bowman's claim for attorney's fees on more than one basis,[123] Bowman was not collaterally estopped from filing his lawsuit against CIC.

Although Bowman also argued that the Board had a statutory duty to determine whether bad faith claims handling existed, the court did not address this issue. Nevertheless, this case suggests the possibility that the Board will deny claims for attorney's fees based on bad faith in stipulated cases if the issue is not preserved within the scope of the parties' stipulation.

IX. STATUTE OF LIMITATIONS

The decision in *East Asiatic/Plumrose, Inc. v. Ritchie*[124] may cause counsel substantial concern in terms of advising clients whether a claim has been closed based on the statute of limitations. *Plumrose* interpreted Indiana Code section 22-3-3-27, often referred to as the modification statute, which allows for a claim to be reopened by the Board when a change in circumstance indicates the need.[125] The statute of limitations, at least prior to the *Plumrose* case, enabled counsel to provide guidance to their clients as to the point in time when the average claim finally closed, meaning that it was no longer subject to modification under the modification statute. As used herein, the term "average claim" refers to a claim involving an employee who is injured such that she is unable to return to the work she was doing when she was injured and therefore receives temporary total disability ("TTD") benefits until such time as she is fully recuperated and back at her job. In the past, counsel could advise their clients that such an average claim could be considered closed two years after the date the last TTD benefits were paid. The decision in *Plumrose*, however, no longer allows such advice to be given. As a result of expected uncertainty in closing claims, absurd and unintended action may prevail and cause a greater burden on Indiana's worker's compensation system.

In *Plumrose*, claimant Ritchie was injured on July 6, 1988 when "a pipe penetrated the roof of his mouth and the frontal lobe of his brain."[126] Ritchie was paid in accordance with the "agreement to compensation" form, which was signed

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121. *Id.* at 882, 883 (quoting IND. CODE § 22-3-4-12 (1993)).

122. *Id.*

123. "[T]he Board could have denied the request because it was outside the scope of the issues, or it could have denied the request because it found neither Standard Locknut nor CIC acted in bad faith." *Id.* at 883.

124. 655 N.E.2d 87 (Ind. Ct. App. 1995).

125. IND. CODE § 22-3-3-27(a) (1993).

126. *Plumrose*, 655 N.E.2d at 88.

by him and approved by the Worker's Compensation Board.[127] The agreement to compensation was signed on July 25, 1988, indicating TTD benefit payments were to begin on July 14, 1988. Shortly thereafter, the agreement was approved by the Board.[128] As is typical in such cases, TTD benefits continued until Ritchie was released to return to work, which occurred on April 16, 1990. However, on April 24, 1990, Ritchie left work and was admitted to a hospital. Although Ritchie was discharged from the hospital three weeks later, he never returned to work.[129] As a result of his doctor determining that Ritchie had reached maximum medical improvement, Plumrose and Ritchie entered into a settlement on October 11, 1990 in which 100 weeks of permanent partial impairment ("PPI") benefits were paid. The PPI benefits technically were paid from July 6, 1988 to June 21, 1990.[130]

On May 4, 1992, Ritchie filed an application with the Board to modify the permanent partial impairment settlement. In response, Plumrose sought to dismiss Ritchie's claim based on lack of jurisdiction alleging that the statute of limitations within Indiana Code section 22-3-3-27(c) barred modification of Ritchie's settlement. The statute reads as follows:

> The [Board] shall not make any such modification upon its own motion nor shall any application therefore be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the *original award* made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid.[131]

The court rejected Plumrose's argument that the statute of limitations should bar Ritchie's application for modification. The court held that the phrase "original award" does not refer to the award of TTD benefits. Rather, "[i]t is the permanent partial impairment award that usually adjudicates the injured employee's right to compensation up to that point in time."[132] Moreover, the court seized upon the final clause of Indiana Code section 22-3-3-27(c) which states, "applications for increased *permanent partial impairment* are barred unless filed within one (1) year from the last day for which compensation was paid."[133] The court reasoned that the last clause of the above-referenced statute "suggests that the 'original award' includes the award of PPI; a claimant cannot seek to increase PPI unless an award of PPI had previously been made."[134] Thus, the court's decision in *Plumrose* holds that a claim that only involved the award of TTD benefits does not contain an "original award." Without an original award, the statute of limitations period set

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* (emphasis added) (citing IND. CODE § 22-3-3-27(c) (1993)).
132. *Id.* at 90.
133. *Id.* (emphasis added) (quoting IND. CODE § 22-3-3-27(c) (1993)).
134. *Id.*

forth in the modification statute will not begin. Consequently, claims for which only TTD benefit payments are made remain subject to modification to an uncertain date in the future.

The "fallout" of the *Plumrose* decision may cause insurance carriers to maintain financial reserves for a longer period of time on claims involving only TTD benefits, even when the claimant has returned to work without any indication of a future manifestation of the injury. If this is the result, employers may pay higher insurance premiums based on the cumulative effect of long outstanding claim reserves on claims that heretofore would have been closed. Employers that are not subject to reserving practices and procedures of insurance carriers or third party administrators may have an even greater competitive advantage in the market place as a result.

In addition, counsel may be forced to become involved in claims in which they would otherwise not be involved. It can be expected that employers will not wish to have claims remain open in virtual perpetuity. In an effort to close these "TTD only" claims, employers may seek permanent partial impairment ratings from their doctors. Claims that would otherwise go unrated simply because the claimant has fully recuperated may now need to be rated. Employers may not be able to afford the open liability associated with claims that do not have some type of PPI rating. The claimant may respond to the PPI rating by retaining her own counsel to dispute the rating. The end result may be more litigation and, hence, more burden on a system originally designed to minimize litigation. It remains to be seen whether claims that only involve TTD benefits will precipitate a great burden upon Indiana's worker's compensation system.

X. Exclusive Remedy

> The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 on account of personal injury or death by accident *shall exclude all other rights and remedies of such employee*, the employee's personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death . . . .[135]

In 1995, the courts considered a number of cases involving the exclusive remedy provision of the Indiana Worker's Compensation Act. Typical to this line of cases, defendants in tort suits often attempted to avoid the trial court's jurisdiction by invoking Indiana Code section 22-3-2-6, also known as the exclusive remedy provision of the Act, arguing that the plaintiffs' sole remedy was with the jurisdiction of the Board. In 1995, the courts' analysis of the exclusive remedy provision of the Worker's Compensation Act included four cases in which individuals who are often described as "loaned or borrowed servants" or "leased employees" sought to invoke the exclusive remedy statute as a fellow servant or coemployee of the injured party.[136] The courts also reviewed three cases in which

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135. IND. CODE § 22-3-2-6 (Supp. 1996) (emphasis added).

136. Williams v. R.H. Marlin, Inc., 656 N.E.2d 1145 (Ind. Ct. App. 1995); U.S. Metalsource

a plaintiff injured by a coemployee attempted to avoid the exclusive remedy statute by raising the horseplay or intentional acts exception to the statute.[137] Finally, the courts reviewed two cases in 1995 in which exclusive jurisdiction of the Board was avoided, once based upon the type of injuries claimed by the plaintiff,[138] and once based upon the nature of the claimant.[139]

A. Exclusive Remedy Statute Invoked Under the Coemployee/Fellow Servant Doctrine—Summary Judgment v. Motion to Dismiss

1. Riffle v. Knecht Excavating, Inc.—In *Riffle,*[140] the court reviewed the classic set of circumstances in which the exclusive remedy provision is invoked by a defendant who is commonly described as a loaned or borrowed servant or leased employee and thereby claims tort immunity as a coemployee of the plaintiff. Riffle's employer, a contractor, rented a backhoe and an operator to excavate a large hole as part of a construction project.[141] Riffle was injured when struck by a portion of the earthen wall that had dislodged while he worked at the bottom of the hole. Riffle thereafter sued the backhoe operator, the excavating company from which the backhoe and the operator were rented, and the property owner.

The backhoe operator's motion for summary judgment was granted by the trial court, apparently on grounds that the backhoe operator was a borrowed servant of Riffle's employer and thus a fellow employee of Riffle, removing the negligence claim from the jurisdiction of the trial court and placing Riffle's remedy exclusively with the Board.[142] In considering Riffle's argument that the trial court erred in finding the backhoe operator to be a borrowed servant, the court first reiterated the well established standard of review, indicating that in reviewing the entry of summary judgment it could not weigh the evidence but could only "consider the facts in the light most favorable to the nonmoving party."[143] The court went on to acknowledge that the appropriate test to determine whether Riffle and the backhoe operator were coemployees was whether the backhoe operator could also have received worker's compensation benefits from Riffle's employer had the backhoe operator been injured under similar circumstances.[144] In granting summary judgment, the court applied the test by considering those facts most favorable to Riffle as the nonmoving party.

Corp. v. Simpson, 649 N.E.2d 682 (Ind. Ct. App. 1995); Tapia v. Heavner, 648 N.E.2d 1202 (Ind. Ct. App. 1995); Riffle v. Knecht Excavating, Inc., 647 N.E.2d 334 (Ind. Ct. App. 1995).

137. Tippmann v. Hensler, 654 N.E.2d 821 (Ind. Ct. App. 1995); Weldy v. Kline, 652 N.E.2d 107 (Ind. Ct. App. 1995); *Tapia,* 648 N.E.2d at 1202.

138. Terrell v. Rowsey, 647 N.E.2d 662 (Ind. Ct. App. 1995).

139. Ransburg Indus. v. Brown, 659 N.E.2d 1081 (Ind. Ct. App. 1995).

140. *Riffle,* 647 N.E.2d at 334.

141. *Id.* at 336.

142. *Id.*

143. *Id.* (citing Collins v. Covenant Mut. Ins. Co., 604 N.E.2d 1190, 1194 (Ind. Ct. App. 1992)).

144. *Id.* at 337 (citing Weldy v. Kline, 616 N.E.2d 398, 401-02 (Ind. Ct. App. 1993)).

The facts included that the backhoe operator was employed by Riffle's employer in the usual course of its business, performed the same type of work as the other regular employees working for Riffle's employer, reported daily to the worksite supervisor for instruction, was provided with specific instruction as to the work that he was to perform, and was provided with no discretion in the performance of the work.[145] Under these facts, the court ruled that the backhoe operator was also an employee of Riffle's employer and that the employment was not casual. Thus, the backhoe operator was deemed a coemployee of Riffle and thereby immune from Riffle's negligence action pursuant to Indiana Code section 22-3-2-6.[146] The court rejected Riffle's argument that the backhoe operator's dual employment created a question of fact precluding summary judgment by relying on the similar facts of *Sharp v. Bailey*.[147] Interestingly, in a footnote, the court acknowledged that the seven factor test set forth in *Hale v. Kemp* for determining whether an employer/employee relationship existed was appropriate, but "the cases employing these factors were largely irreconcilable."[148]

Following *Riffle*, the court considered three additional "dual employment" or "loaned or borrowed" servant cases on jurisdictional grounds by way of review of the trial courts' summary judgment rulings.[149] These cases are significant in light of the courts' analysis of the pretrial procedure involving the use of a Trial Rule 56 motion for summary judgment to address the jurisdictional questions raised by the exclusive remedy provision of the Worker's Compensation Act.

2. Tapia v. Heavner.—In *Tapia*, the Fifth District was required to review the employment status of Tapia, who was injured by Heavner, an employee of Ohlson & Associates (collectively "Ohlson"), the employer to which Tapia's services were "loaned" by her general employer, Standard Life Insurance Company of Indiana ("Standard Life").[150] Tapia filed a negligence action against Ohlson, and Ohlson asserted lack of subject matter jurisdiction as a defense. Ohlson later filed a motion for summary judgment alleging that, because it was Tapia's employer, her exclusive remedy was with the Board pursuant to Indiana Code section 22-3-2-6. The trial court agreed and granted Ohlson's motion.[151]

Unlike the *Riffle* court, the *Tapia* court did not apply the typical summary judgment standard of review.[152] Instead, the court analyzed the jurisdictional basis

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145. *Id.*

146. *Id.*

147. *Id.* (citing Sharp v. Bailey, 521 N.E.2d 368 (Ind. Ct. App. 1988)).

148. *Id.* at 337 n.1 (citing Hale v. Kemp, 579 N.E.2d 63, 67 (Ind. 1991)).

149. Williams v. R.H. Marlin, Inc., 656 N.E.2d 1145 (Ind. Ct. App. 1995); U.S. Metalsource Corp. v. Simpson, 649 N.E.2d 682 (Ind. Ct. App. 1995); Tapia v. Heavner, 648 N.E.2d 1202 (Ind. Ct. App. 1995).

150. *Tapia,* 648 N.E.2d at 1204-05.

151. *Id.* at 1205.

152. "When reviewing an entry of summary judgment, we stand in the shoes of the trial court. We do not weigh the evidence but will consider the facts in the light most favorable to the nonmoving party." *Riffle,* 647 N.E.2d at 336 (citing Collins v. Covenant Mut. Ins. Co., 604 N.E.2d 1190, 1194 (Ind. Ct. App. 1992)).

of Ohlson's summary judgment motion and noted that "[t]he defense that a claim is barred by the exclusivity provision of the Act is an attack upon the court's subject matter jurisdiction which cannot form the basis of a motion for summary judgment."[153] The court went on to instruct that the proper procedural means of raising a jurisdictional defense such as the exclusive remedy statute is through an affirmative defense or a motion to dismiss under Indiana Rules of Procedure, Trial Rule 12(B)(1). Moreover, the court correctly pointed out that, if a court lacking subject matter jurisdiction takes action on the merits, such as by ruling on a motion for summary judgment, its action is void.[154]

The distinction between Ohlson's use of a summary judgment motion as opposed to a motion to dismiss is significant in light of the factual nature of the dispute involving the determination of Tapia's employment status. In considering Tapia's argument that she was not employed by Ohlson at the time of her injury but instead by her general employer, Standard Life, the court recited the well established Indiana law that a person can have more than one employer as exemplified in *Fox v. Contract Beverage Packers, Inc.*[155] Tapia agreed that the seven factor test set forth in *Fox*[156] was the proper vehicle for determining whether she was under the dual employment of Ohlson and Standard Life at the time of her injury, but, because a number of the applicable material facts were in dispute, Tapia argued that the court's granting of Ohlson's motion for summary judgment was improper.[157]

The court agreed that the trial court was presented with a factual dispute and even acknowledged that, if it had resolved the matter under a standard of review for summary judgment motions, it would have been compelled to reverse.[158] However, because the court determined that Ohlson's action should have been treated by the trial court as a motion to dismiss under Trial Rule 12(B)(1), a weighing of the evidence was proper. "Unlike ruling on a motion for summary judgment, the trial court *may weigh evidence and resolve factual disputes* when ruling on a motion to dismiss for lack of subject matter jurisdiction."[159] Thus, it is proper for the trial court to consider and resolve any factual disputes, and the

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153. *Tapia,* 648 N.E.2d at 1205 (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282 (Ind. 1994)).

154. *Id.* (citing *Perry,* 637 N.E.2d at 1282).

155. *Id.* at 1206 (citing Fox v. Contract Beverage Packers, Inc., 398 N.E.2d 709 (Ind. Ct. App. 1980)).

156. Test for determining the existence of an employee/employer relationship as set forth in *Fox* requires consideration of the following facts: "(1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties and the existence of an employer/employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries." *Id.* (citing *Fox,* 398 N.E.2d at 711-12).

157. *Id.*

158. *Id.* at 1205.

159. *Id.* (emphasis added) (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1286 (Ind. 1994)).

court of appeals should affirm the trial court on any theory that is supported by evidence contained in the record.[160]

The impact of the *Tapia* court's procedural analysis cannot be diminished. Had it applied the summary judgment standard of review employed by the *Riffle* court, it would have been compelled to reverse and remand for the trier of fact to resolve the issue of whether Tapia was employed by both Ohlson and Standard Life. Instead, the court engaged in a review of the facts relating to the *Fox* seven factor test and found that at least five of the seven factors supporting Tapia's employment by Ohlson were present.[161] The court thus concluded that Tapia was employed by Ohlson at the time of her injury, and her only recourse was with the exclusive remedy afforded her by the Worker's Compensation Act. This, however, did not end the court's analysis. Because Tapia's injury allegedly occurred as a result of horseplay or an intentional act, the court was required to determine whether she was provided with an exception to the exclusive remedy statute, which will be discussed in greater detail in Part X.B.[162]

Lest there be any doubt that all future challenges to a trial court's jurisdiction based upon the exclusive remedy provision of the Act should be raised in terms of a Trial Rule 12(B)(1) motion to dismiss, two subsequent decisions in 1995 followed the *Tapia* pretrial procedure analysis.[163]

3. U.S. Metalsource v. Simpson.—In *U.S. Metalsource,* Simpson was a truck driver employed by Whiteford National Lease ("Whiteford"). Simpson, on behalf of Whiteford, hauled steel exclusively for U.S. Metalsource for nearly two years until he was injured while trying to move a load of steel on his truck. U.S. Metalsource defended Simpson's negligence claim on the jurisdictional grounds of the exclusive remedy statute, claiming that it was a coemployer of Simpson at the time of his injury. The trial court, however, denied U.S. Metalsource's motion for summary judgment.[164] As in *Tapia*, the *U.S. Metalsource* court also considered the trial court's decision under the standard of review for a motion to dismiss for lack of subject matter jurisdiction under Trial Rule 12(B)(1) rather than as a motion for summary judgment. Upon application of the *Fox* seven factor test,[165] the court found that U.S. Metalsource was Simpson's employer at the time of his injury and remanded to the trial court with instructions to dismiss the action for want of jurisdiction.[166]

4. Williams v. R.H. Marlin, Inc.—Finally, in October, 1995, the court reviewed a construction accident case involving borrowed servant and coemployment issues similar to the facts of *Riffle.* In *Williams v. R.H. Marlin,*

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160. *Id.*

161. *Id.*

162. *Id.*

163. Tippmann v. Hensler, 654 N.E.2d 821 (Ind. Ct. App. 1995); U.S. Metalsource Corp. v. Simpson, 649 N.E.2d 682 (Ind. Ct. App. 1995).

164. *U.S. Metalsource,* 649 N.E.2d at 684.

165. *Id.* at 685 (citing Fox v. Contract Beverage Packers, Inc., 398 N.E.2d 709, 711-12 (Ind. Ct. App. 1980)).

166. *Id.* at 685, 686.

Inc.,[167] Williams was employed by a subcontractor on a construction project. Similar to *Riffle,* the general contractor leased a crane and crane operator from R.H. Marlin, Inc. ("Marlin") to provide lifting services for all contractors and subcontractors on the project. Williams brought a negligence action against Marlin, its crane operator and others after being injured when a crane basket in which he was riding was dropped.[168] Again as in *Riffle*, summary judgment motions were filed alleging exclusive jurisdiction of the Board because the crane operator was the borrowed servant of Williams's employer and thereby a coemployee of Williams. The trial court agreed and ruled that it was without jurisdiction in light of the exclusive remedies of the Worker's Compensation Act.[169]

The *Williams* decision is significant in that, unlike *Riffle*, the *Williams* court applied the Trial Rule 12(B)(1) motion to dismiss standard of review rather than a summary judgment standard of review.[170] Moreover, the *Williams* court also employed the seven factor *Fox* test utilized by *Tapia* and *U.S. Metalsource.*[171] Unlike the result in *Tapia* and *U.S. Metalsource*, however, the *Williams* court reversed the trial court's ruling that it lacked subject matter jurisdiction, finding that Williams's employer was not the special employer of the crane operator, and, because Williams and the crane operator were not coemployees, Williams' negligence action was not barred by the exclusivity provision of the Act.[172] With the freedom to weigh the evidence under a Trial Rule 12(B)(1) motion to dismiss standard of review, the *Williams* court undertook an exceedingly thorough fact-sensitive analysis in applying the *Fox* seven factor test as set forth in *Hale v. Kemp.*[173] In this case, however, the fact-sensitive analysis yielded no immunity from suit for the crane operator because he was not deemed a coemployee of Williams, and Williams therefore established jurisdiction with the trial court.[174]

Given these recent decisions, it is clear that any challenges to a trial court's jurisdiction based upon the exclusive remedy provision of the Worker's Compensation Act must be treated by the trial court as a motion to dismiss under Trial Rule 12(B)(1), even if raised as a motion for summary judgment. Obviously, this provides the trial court great flexibility in considering and weighing what may otherwise be disputed facts. Importantly, although a defendant seeking to avoid the trial court's jurisdiction as a coemployer or coemployee under the exclusive remedy statute usually carries the burden of proof, that burden shifts to the plaintiff when the action is properly before the court as a motion to dismiss for lack of subject matter jurisdiction.[175]

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167. 656 N.E.2d 1145 (Ind. Ct. App. 1995).
168. *Id.* at 1148-49.
169. *Id.* at 1149.
170. *Id.*
171. *Id.* at 1151 (citing Hale v. Kemp, 579 N.E.2d 63, 67 n.2 (Ind. 1991)).
172. *Id.* at 1150.
173. *Id.* at 1151-53.
174. *Id.* at 1153.
175. *Id.* at 1149 (citing Foshee v. Shoney's, Inc., 637 N.E.2d 1277, 1281 (Ind. 1994)); Tapia

B. Horseplay/Intentional Acts Exception to the Exclusive Remedy

1. Tapia v. Heavner.—It does not automatically follow that a tortfeasor may escape trial court jurisdiction through the exclusive remedy statute simply by establishing employer/employee or coemployee status.[176] In *Tapia*, as discussed above, the defendant Ohlson was able to establish an employer/employee relationship with Tapia, which would thereby typically invoke the exclusive remedy provision. However, Tapia's injury was caused when an individual, deemed by the court to be a coemployee, pulled a lever causing Tapia's chair to fall to the floor.[177] Accordingly, the court engaged in further analysis to determine whether the coemployee's actions amounted to horseplay that would remove him from the protection of the exclusive remedy provision of the Act. The court acknowledged that "[a] number of recent decisions have carved out an exception holding that where a co-employee engages in horseplay or various non-job related activities, he forfeits the immunity provided by the statute."[178] Under this line of cases, the intentional activity, or horseplay, of pulling a lever and causing Tapia's chair to drop would have been considered not in the course of employment and the individual perpetrating the activity would therefore not have been "in the same employ" as Tapia for purposes of the exclusive remedy provision of the Worker's Compensation Act.[179]

The *Tapia* court declined to follow this line of cases, however, and instead adopted the test for determining whether individuals are "in the same employ" as set forth in *Weldy v. Kline.*[180] Pursuant to *Weldy*, the test is simply whether the defendant-tortfeasor would be entitled to worker's compensation benefits "under the same or similar circumstances."[181] Thus, the *Tapia* court concluded that, because its analysis had deemed Tapia to be a coemployee of Heavner, the individual that caused her chair to drop, they were both in the same employ and otherwise identically situated. Therefore, the court concluded that, in a reverse situation, Heavner would likewise have been entitled to worker's compensation benefits as was Tapia.[182] Without further consideration of the horseplay

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v. Heavner, 648 N.E.2d 1202, 1205-06 (Ind. Ct. App. 1995) (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1287 (Ind. 1994)).

176. *Tapia,* 648 N.E.2d at 1207 (citing Burke v. Wilfong, 638 N.E.2d 865 (Ind. Ct. App. 1994)).

177. *Id.* at 1205.

178. *Id.* at 1207 (citing Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631 (Ind. Ct. App. 1989); Seiler v. Grow, 507 N.E.2d 628 (Ind. Ct. App. 1987); Martin v. Powell, 477 N.E.2d 943 (Ind. Ct. App. 1985)); *see also supra* note 30.

179. *Tapia*, 648 N.E.2d at 1207-08 (citing *Fields,* 540 N.E.2d at 637).

180. *Id.* at 1208 (citing Weldy v. Kline, 616 N.E.2d 398 (Ind. Ct. App. 1993)).

181. *Id.*

182. *Id.* Following her injury, Tapia filed a claim for worker's compensation against her general employer, Standard Life, and received worker's compensation benefits from Standard Life's insurance carrier. *Id.* at 1205.

allegations, the court deemed Heavner to be in the same employ as Tapia and thereby entitled to immunity from Tapia's negligence action by way of the exclusive remedy statute. The court remanded with direction to dismiss Tapia's claim for lack of subject matter jurisdiction.[183]

2. Tippmann v. Hensler.—As already discussed above in Part I.B., the court again considered the horseplay/intentional act exception to a coemployee's immunity from suit in *Tippmann v. Hensler.*[184] In *Tippmann,* there was no apparent dispute that the defendant, Tippmann, and Hensler were coemployees. Both worked for the same company, and while on a work break Tippmann, Hensler and other employees gathered in a paint booth where paint guns were typically test fired. The employees fired paint guns at the ceiling, but Tippmann fired a paint gun that struck Hensler's eye, causing his injury.[185]

Hensler filed a worker's compensation claim and received benefits as a result of the injury to his eye. Hensler thereafter filed a complaint against Tippmann alleging negligence or intentional conduct, apparently attempting to avoid the exclusive remedy provision of the Worker's Compensation Act that would otherwise afford Tippmann immunity from Hensler's action.[186] Tippmann filed a summary judgment motion on the basis of the exclusive remedy provision, but the trial court denied Tippmann's motion in light of what it deemed to be genuine issues of material fact, including whether the parties were engaged in horseplay, whether the parties were in the same employ, and whether Tippmann's actions were intentional.[187] As in *Williams*, *U.S. Metalsource*, and *Tapia*, the *Tippmann* court acknowledged that the proper procedural vehicle for challenging the trial court's subject matter jurisdiction was through a motion to dismiss rather than a motion for summary judgment and analyzed the case accordingly.[188]

In analyzing the trial court's ruling, the court referenced the exclusivity provision contained in Indiana Code section 22-3-2-6, followed by what may be described as the exception to the Worker's Compensation Act's exclusive remedy provision.[189] Essentially, to the extent that an employee's injury is caused by an

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183. *Id.*

184. 654 N.E.2d 821 (Ind. Ct. App. 1995).

185. *Id.*

186. *Id.* at 823-24.

187. *Id.* at 823.

188. *Id.* at 824.

189. IND. CODE § 22-3-2-13 (1993) contains what has been described as an exception to the exclusive remedy statute in the following provision:

> [W]henever an injury or death, for which compensation is payable under Chapters 2 through 6 of this article shall have been sustained under circumstances creating in *some other person than the employer and not in the same employ* a legal liability to pay damages in respect thereto, the injured employee or his dependents, in case of death, may commence legal proceedings against the other person to recover the damages notwithstanding the employer's or the employer's compensation insurance carrier's payment of or liability to pay compensation under Chapters 2 through 6 of this article.

Id. (emphasis added).

individual that is "not in the same employ" as the injured employee, the Worker's Compensation Act allows a negligence action to be brought against such individuals.[190] As in *Tapia,* the *Tippmann* court also relied upon the *Weldy* test for determining whether individuals are in the same employ.[191] Applying this test, the court concluded that Tippmann and Hensler were in the same employ because they were both participating in a regularly-scheduled work break when the accident occurred. This "support[ed] the conclusion that had Tippmann been injured under the same circumstances, he would have been able to obtain worker's compensation benefits to the same extent as Hensler."[192] The court went on, however, to analyze the horseplay-related incident in terms of the "arising out of" and "in the course of" employment concepts, as discussed above in Part I.B.

The court acknowledged that a work-related injury resulting from horseplay may be deemed compensable when the employer acquiesces to such activity and it thereby becomes a condition of employment, but, when the injured employee actively participates in the horseplay, worker's compensation benefits will be denied because active participation is considered an intervening cause.[193] Thus, the court remanded the case to the trial court with instructions to make a finding of fact as to whether Hensler actively participated in the horseplay or was simply an innocent victim.[194]

The court reasoned that, if Hensler were deemed to be an innocent victim of the horseplay, he would be subject to the exclusive jurisdiction provision of the Worker's Compensation Act and the trial court would have no jurisdiction to hear his case. On the other hand, if the trial court found that Hensler was an active participant in the horseplay, the injury would not be deemed "in the course of his employment and the provisions of the Act [would] not apply."[195] Presumably, then, if Hensler was an innocent victim, his only remedy would be the worker's compensation benefits that he had already received as the trial court would be denied jurisdiction to hear his negligence claim under the exclusive remedy statute. If, however, Hensler was found to have been an active participant, the exclusive remedy provision of the Act would not apply, and Hensler would be allowed to proceed with his negligence claim against Tippmann, although his award of worker's compensation benefits totaling $19,983.60 would have been improper.[196]

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190. *Tippmann*, 654 N.E.2d at 824 (citing Northcutt v. Smith, 642 N.E.2d 254, 256 (Ind. Ct. App. 1994); IND. CODE § 22-3-2-13 (1993)).

191. The *Weldy* test is simply whether the defendant-tortfeasor would also be entitled to worker's compensation benefits if hers and the injured employee's circumstances were reversed. *Id.* at 825 (citing Tapia v. Heavner, 648 N.E.2d 1202, 1208 (Ind. Ct. App. 1995); Northcutt v. Smith, 642 N.E.2d 254, 256 (Ind. Ct. App. 1994); Weldy v. Kline, 616 N.E.2d 398, 403 (Ind. Ct. App. 1993)).

192. *Id.*

193. *Id.* at 826 (citing *Weldy*, 616 N.E.2d at 405).

194. *Id.*

195. *Id.*; *see also supra* note 30.

196. *Tippmann*, 654 N.E.2d at 823. "Active participation is effectively an intervening cause

The dissent raised an interesting point in this regard. Essentially, the dissent noted that, because Hensler had already successfully prosecuted his claim for worker's compensation benefits, his claim against Tippmann should have been dismissed by the trial court for lack of jurisdiction.[197] Stated another way, it would seem that a remand for a factual finding as to Hensler's active participation, or lack thereof, was unnecessary in light of the fact that he had been awarded benefits under the Worker's Compensation Act. It is implicit, pursuant to *Weldy*, that, had Hensler actively participated, he would not have been awarded benefits.[198] This approach seems to be implied by the decision of the *Tapia* court in that Tapia, like Hensler, was awarded worker's compensation benefits, and, upon finding that Tapia and the tortfeasor were in the same employ pursuant to *Weldy*, the court simply remanded with direction to dismiss for lack of subject matter jurisdiction, not to determine whether Tapia actively participated in the horseplay.[199] The Indiana Supreme Court granted Hensler's petition for transfer on January 17, 1996, although its opinion has not been rendered as of this writing.[200] It remains to be seen whether the issues raised in Judge Garrard's dissent will be resolved on transfer.

C. Exclusive Remedy Statute of the Worker's Compensation Act: Type of Claim and Class of Claimant Analysis

Two cases were decided in 1995 involving an analysis of the exclusive remedy statute as it relates to specific types of injuries claimed and to a specific class of claimant.

1. Terrell v. Rowsey.—In *Terrell v. Rowsey*,[201] Terrell brought an action against his employer, his supervisor, and his coemployees following his termination after being caught drinking beer in his employer's parking lot in violation of company policy. Terrell alleged that his supervisor "broke and entered his car and trespassed upon his car . . . and that as a result of [his

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and this court has consistently *denied compensation* to an injured employee who so participates." *Id.* at 826 (emphasis added) (citing *Weldy*, 616 N.E.2d at 405).

197. *Id.* (Garrard, J., dissenting).

198. *See Weldy*, 616 N.E.2d at 404.

199. Tapia v. Heavner, 648 N.E.2d 1202, 1208 (Ind. Ct. App. 1995).

200. The appellee's petition to transfer cites the following as the basis for its petition:

> The opinion of the court of appeals in this case is in error in that it conflicts with numerous other opinions of the Indiana Court of Appeals as well as contravening recent strong *dicta* of the Indiana Supreme Court as follows: (a) Martin v. Powell, (1985) Ind. App., 447 N.E.2d 943, *trans. denied* -- in which the court of appeals held that "in the same employ" for purposes of co-worker immunity under the Indiana Worker's Compensation Act (the "Act") requires the defendant co-worker to be acting within the course of his employment at the time the plaintiff suffers a compensable injury . . . .

Tippmann v. Hensler, No. 02503-9603-CV-201 (Ind. Jan. 17, 1996) (appellee's petition to transfer).

201. 647 N.E.2d 662 (Ind. Ct. App. 1995).

supervisor's] tortious misconduct, Terrell suffered embarrassment, defamation and loss of quiet enjoyment of his property."[202] The court affirmed the trial court's judgment in favor of Terrell's employer, supervisor and coemployees, but in so doing noted that the trial court erroneously found that it was without jurisdiction over Terrell's action in light of the exclusive remedy statute. The court stated that, because Terrell's claimed injuries of defamation, embarrassment and loss of quiet enjoyment of property were not physical and did not represent loss of physical function, they were not the type of injuries covered under the Worker's Compensation Act. Thus, the exclusive remedy statute did not apply to remove the case from the jurisdiction of the trial court.[203]

2. Ransburg Industries v. Brown.—Possibly the most interesting case decided in 1995 in the area of exclusive jurisdiction involved a case of first impression in Indiana. In *Ransburg Industries v. Brown*,[204] the court was faced with resolving the issue of whether the exclusive remedy statute bars a claim for prenatal injuries inflicted in the work place.[205] An action was brought against defendant Ransburg Industries ("Ransburg") by Rebecca and Brett Brown (the "Browns") after the Browns' son Brandon died on the day of his birth. The Browns alleged that Brandon's death was caused when Mrs. Brown fell ill after inhaling fumes while painting floors for Ransburg during the first trimester of her pregnancy. The trial court denied Ransburg's motion for summary judgment on grounds that the injuries causing Brandon's death did not invoke the exclusive remedy provision of the Worker's Compensation Act.[206]

The court again noted that the proper procedural vehicle for attacking the trial court's jurisdiction was not through a motion for summary judgment, but rather through a motion to dismiss pursuant to Trial Rule 12(B)(1).[207] The court then proceeded to review the trial court's decision as though it were based upon the denial of a motion to dismiss for lack of subject matter jurisdiction rather than a denial of a motion for summary judgment.[208] Because this was a case of first impression, the court sought guidance from other jurisdictions that considered the issue of prenatal injury in the worker's compensation arena.[209]

Essentially, the issue as to the applicability of the exclusive remedy statute was resolved by determining whether Brandon's claim against Ransburg was independent or derivative of Mrs. Brown's injury. The court first rejected

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202. *Id.* at 664.

203. *Id.* at 665 (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282 (Ind. 1994)).

204. 659 N.E.2d 1081 (Ind. Ct. App. 1995).

205. *Id.* at 1082.

206. *Id.*

207. *Id.* at 1082-83 (citing *Perry*, 637 N.E.2d at 1286; Mannon v. Howmet Transp. Serv., Inc., 645 N.E.2d 1135, 1136 (Ind. Ct. App. 1995)).

208. *Id.* at 1083.

209. *Id.* (citing Thompson v. Pizza Hut of America, Inc., 767 F. Supp. 916 (N.D. Ill. 1991); Namislo v. Akzo Chemicals, Inc., 620 So. 2d 573 (Ala. 1993); Pizza Hut of America, Inc. v. Keefe, 900 P.2d 97 (Colo. 1995); Cushing v. Timesaver Stores, Inc., 552 So. 2d 730 (La. Ct. App. 1989); Bell v. Macy's California, 261 Cal. Rptr. 447 (1989)).

Ransburg's reliance upon a California case in which the court ruled that the child's injury was derivative from the employee's injury when the child's injury resulted from the employer's delay in securing medical attention for the pregnant employee.[210] The *Ransburg* court recognized that no other jurisdiction had followed the California analysis and turned instead to persuasive rationale from other jurisdictions.[211]

The common thread running through the cases from other jurisdictions considered by the *Ransburg* court was the recognition that the claim of the child was independent from any injury or claim of the employee-mother. In *Thompson v. Pizza Hut of America, Inc.*,[212] the employee's child was born with severe birth defects after the pregnant employee was exposed to, among other fumes, carbon monoxide as a result of a three day failure of the employer's ventilation system. Like Ransburg, the employer in *Thompson* also defended on grounds that the exclusive remedy provision of the Illinois worker's compensation laws "applied because the child's injury [was] derived from the injury suffered by the mother in the course of her employment."[213] The Illinois court, however, recognized a distinction between those cases in which the exclusive remedy provision of the Illinois worker's compensation laws worked to bar claims of spouses and children flowing from the employee's injury, such as loss of consortium claims, and those claims brought by the child based upon her independent prenatal injuries.[214]

The *Ransburg* court found the reasoning of *Cushing v. Time Saver Stores, Inc.*,[215] to be most persuasive in analyzing the distinction between a derivative or independent cause of action by a child injured in utero. In *Cushing*, an employee-mother suffered an injury after falling from a stack of boxes. The fall caused her child to be born with severe birth defects.[216] The *Cushing* court brought the distinction between derivative and independent actions out of the theoretical vacuum with the following analysis:

> The Act itself and all jurisprudence construing its various provisions, up to this time, have been focused on injuries to *employees*, and resultant losses by them and certain of their family members, based on the injuries *to the employees*. With regard to the losses of the family members, these might be economic, such as loss of support because the injured employee was no longer coming home with a paycheck, or they might be intangible, such as loss of consortium because the injured employee was no longer there to participate in family life. However, these losses, while rightfully termed "separate and distinct" and "independent" from those injuries sustained by the employee, always hinged upon the injuries of the

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210. *Id.* (citing *Bell*, 261 Cal. Rptr. at 454-55).
211. *Id.*
212. 767 F. Supp. 916 (N.D. Ill. 1991).
213. *Ransburg*, 659 N.E.2d at 1083 (citing *Thompson*, 767 F. Supp. at 918).
214. *Id.*
215. 552 So. 2d 730 (La. Ct. App. 1989).
216. *Ransburg*, 659 N.E.2d at 1084 (citing *Cushing*, 552 So. 2d at 731).

> employee. Because Dad or Mom suffered an injury, the family suffered a loss *based on that injury.* Thus, the claims of the family members were derivative of the employee's injury, even though the language utilized in the cases recognized an individual loss sustained by each family member, albeit one for which no claim could be asserted.
>
> Such is not the case in this instance. . . . Here, the employee's child has alleged injuries which are in no way derivative of the mother's injury. Whether Mom is there to continue bringing home a paycheck or to participate in the child's life has no relevance to this child's alleged brain damage.[217]

With this guidance from other jurisdictions, the *Ransburg* court next analyzed the facts of the case under Indiana law, first noting that the Indiana Supreme Court had previously recognized a cause of action based upon a pre-conception tort.[218] The *Ransburg* court rejected the employer's argument that Brandon's injury and death were derivative from the mother because the child was exposed to the harmful fumes through Mrs. Brown. Relying on *Cushing*, the *Ransburg* court noted that "the inquiry of whether a claim is derivative focuses not on how the injury occurred but rather on whether the claimed damages are based upon the employee's injury."[219]

The court concluded that the Browns' claim was based solely upon the injury incurred by Brandon and was in no way dependent on Mrs. Brown's claim.[220] The court thus reasoned that the wrongful death claim of Brandon, unlike a loss of consortium claim, was not derivative of the mother's claim and was therefore not barred by the exclusive remedy provision of the Worker's Compensation Act.[221] In a footnote, the court acknowledged a rather creative argument by Ransburg that the state tort liability should be preempted by Title VI of the Civil Rights Act because Ransburg would be prevented from implementing a gender-based fetal protection policy, but found that the facts of *Ransburg* did not indicate that Ransburg was prevented from complying with both federal and state law requirements.[222] A petition for transfer was filed on May 3, 1996, but as of this writing the Indiana Supreme Court has yet to take action on the same. Thus, the *Ransburg* decision indicates that if a child injured in utero can demonstrate an independent cause of action, he or she should be allowed to proceed with a negligence claim against the employer of his or her mother.

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217. *Id.* (citing *Cushing*, 552 So. 2d at 731-32).

218. *Id.* (citing Walker v. Rinck, 604 N.E.2d 591 (Ind. 1992)).

219. *Id.* at 1085.

220. *Id. But see* Nelson v. Denkins, 598 N.E.2d 558, 563 (Ind. Ct. App. 1992) ("A cause of action for loss of consortium derives its viability from the validity of the claim of the injured spouse against the wrongdoer.").

221. *Ransburg*, 659 N.E.2d at 1085-86.

222. *Id.* at 1086 n.7.