quirements.[102] Any other holding by the court would have created a situation in which the defendant often could not lay an adequate foundation for discovery of prior statements by a witness until after the state had rested, and the defense could recall the witness during the presentation of the defense case. Any documents obtained at that point would no longer be of use in cross-examination, as the defense would have already had its opportunity to cross-examine prosecution witnesses.

XI. Labor Law

*Edward P. Archer**

A. Public Law 254—Public Employees

The only Indiana Supreme Court labor law case during the survey period had a significant impact on Indiana labor relations. In *Indiana Education Employment Relations Board v. Benton Community School Corp.*,[1] the court held Public Law 254,[2] which provided for collective bargaining between most public employees[3] and their governmental employer, to be in violation of article 1, section 12 of the Indiana Constitution[4] because the statute prohibited judicial review of Indiana Education Employment Relations Board (EERB) pre-election decisions. Section 8(g) of the law authorized judicial review for any "person aggrieved" by any "final order" of the EERB.[5] Sections 8(d)[6] and 8(i)[7] of the statute, however, specifical-

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[102] *Id.*

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[1] 365 N.E.2d 752 (Ind. 1977).

[2] IND. CODE §§ 22-6-4-1 to 13 (1976).

[3] Public Law 254 applied to all public employees except policemen, firemen, professional engineers, faculty members of any university, certified employees of school corporations, confidential employees, or municipal or county health care institution employees. IND. CODE § 22-6-4-1(c) (1976). Public school teachers may organize under Public Law 217. IND. CODE §§ 20-7.5-1-1 to 14 (1976).

[4] IND. CONST. art. I, § 12.

[5] IND. CODE § 22-6-4-8(g) (1976).

[6] *Id.* § 22-6-4-8(d) provides in pertinent part, in an action by the Board for enforcement of its award: "[T]he determination by the board that an employee organization has been chosen by a majority of the employees in an appropriate unit may not be subject to review by the court."

[7] *Id.* § 22-6-4-8(i) provides:

> In any proceeding for enforcement or review, of a board order held pursuant to section 8 (d) or (g) of this chapter, evidence introduced during the

ly excluded from court consideration or review the EERB's determination of employee organization majority in an appropriate unit.

The court rejected the EERB's argument that such representation questions were reviewable, as are other administrative agency actions, under the Administrative Adjudication Act.[8] The court observed that Public Law 254 was derived in large part from the National Labor Relations Act (NLRA).[9] Under the NLRA, the National Labor Relations Board (NLRB) makes preliminary representation question determinations and, if it finds that a question of representation exists, orders an election.[10] The court stated:

> If an election is held under the NLRA or Public Law 254, the Board then certifies the results. If the union loses the election, the unit determination made previously by the Board becomes a moot issue. If the union wins the election, upon certification by the Board, the employer is under an obligation to bargain with the certified exclusive representative, which obligation is enforceable through the unfair labor practice complaint procedure.[11]

The court observed that, under the NLRA, an employer could contest the NLRB unit determination by the unfair labor practice procedure, but sections 8(d) and 8(i) of the Indiana law prohibit judicial review of EERB unit determinations.[12]

The court noted that one of the purposes of the NLRA procedure was to eliminate delaying tactics by an employer during the election procedure and concluded that, because the NLRA was a model for the Indiana statute: "[T]he Legislature believed that if it prohibited review of representation proceedings as a part of the unfair labor practice procedure, no judicial review of § 7 proceedings would be available under any circumstances."[13] The court stated that use of Administrative Adjudication Act procedures to provide review of representation questions would create the precise situation sought to be avoided by the NLRA and argued additionally that such representation questions were not "final" administrative orders as would be ripe for review under the Administrative Adjudication Act.[14] In support of its argument that representation decisions and

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representation proceeding pursuant to section 7 of this chapter shall not be included in the transcript of the record required to be filed under subsection 8 (d) and (g); nor shall the court consider the record of such proceeding.

[8]365 N.E.2d at 756 (discussing IND. CODE §§ 4-22-1-1 to 14 (1976)).

[9]365 N.E.2d at 756 (discussing 29 U.S.C. §§ 151-169 (1976)).

[10]29 U.S.C. § 159(c) (1976).

[11]365 N.E.2d at 756-57.

[12]*Id.* at 757.

[13]*Id.* at 758.

[14]*Id.* at 758-59.

certifications of the EERB are only interim orders, the court again asserted that "the unit determination becomes a moot issue if the union loses the election."[15] The court concluded that only an order to bargain is a final order and that such orders would be reviewable under section 8(g). Finally, the court noted that in similar legislation, providing for bargaining between school boards and certified school employees,[16] the legislature specified that appeals could be taken under the Administrative Adjudication Act, and that no such provision was contained in Public Law 254. The court thus concluded that the constitutional requirement for judicial review of agency action set forth in *Warren v. Indiana Telephone Co.*[17] was not met.[18]

The court rejected the EERB's argument that the objectionable portions of section 8 were severable from the rest of the statute. It stated: "[T]he ultimate test is whether or not the Legislature would have passed the statute had it been presented without the invalid features"[19] and concluded: "[B]ecause the objectional prohibitions on judicial review . . . are so unique and shape the fundamental character of Indiana's public employee bargaining statute, they are not severable from the remainder of the Act, and the entire statute must be voided."[20]

The impact of this decision on collective bargaining for Indiana public employees is, of course, devastating. Only public school teachers continue to have the right to bargain collectively in Indiana.[21] The only channel available for reconstruction of public employee bargaining rights is the legislature. In that regard, it is important that the lessons of *Benton Community School* be learned in order to avoid a similar pitfall in future legislation.

The court clearly required that, to meet Indiana constitutional requirements, judicial review must be provided for administrative determinations regarding election issues. The court also implied that this requirement would be met if review were provided through an unfair labor practice procedure as under the NLRA.

This implication, however, may be frought with hazards. The court stated that if the union loses the election the earlier resolution of representation questions becomes moot. This statement may be true from the employer's perspective, but it clearly is not true from

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[15]*Id.* at 759.

[16]IND. CODE § 20-7.5-1-6 (1976).

[17]217 Ind. 93, 26 N.E.2d 399 (1940).

[18]365 N.E.2d at 760. In *Warren*, the supreme court held that the due process clause requires that the actions and orders of an administrative body be subject to judicial review. 217 Ind. at 104-05, 26 N.E.2d at 404.

[19]365 N.E.2d at 760.

[20]*Id.* at 761.

[21]*See* IND. CODE §§ 20-7.5-1-1 to 14 (1976).

the union's perspective. For example, if the EERB were to reject a union's petition for a smaller unit, the union's loss of an election in the larger unit would not moot its original contention that the smaller unit would have been appropriate. Under the NLRA, no judicial review is available to unions under these circumstances.[22] If the NLRA system of review is adopted in its entirety, the contention could again be made that the Indiana constitutional requirement that judicial review be available for all agency determinations is not fulfilled.

Regarding the merits of the court's decision, the dissenting opinion is much more persuasive. The dissent concluded that the objectionable portions of the statute were severable from the remainder of the law and, thus, did not render the entire statute invalid.[23] To find the pertinent provisions of section 8(d) and 8(i) inoperative and to sustain the remainder of Public Law 254 would preserve its primary purpose—to provide for collective bargaining between public employers and employees. The statute established rights of employers and employees, set forth unfair labor practice limitations on conduct of both employers and employee organizations, set forth procedures for determining the representation status of employee organizations, and established an entire system to administer those provisions. Clearly, the limitation on judicial review of pre-election determinations is not the heart of the law. The court's conclusion that the legislature would not have passed the statute if it had been presented without the limitations on judicial review of the EERB's election determinations is totally unconvincing.

B. Public Law 217—Public School Teachers

Several court of appeals decisions relating to various facets of labor law were issued during the survey period. After the supreme court found Public Law 254 to be unconstitutional and void in *Benton Community School*, the only statutory protection remaining for public employee bargaining in Indiana was Public Law 217[24] which applies to public school teachers.

That statute was very strictly construed in *Indiana Education Employment Relations Board v. Board of School Trustees*.[25] The court of appeals held that, under the facts of that case, the president of the bargaining representative for the teachers was not engaged in protected activity in representing a teacher whose contract

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[22]*See, e.g.*, NLRB v. Falk Corp., 308 U.S. 453 (1940); AFL v. NLRB, 308 U.S. 401 (1940).

[23]365 N.E.2d at 762.

[24]IND. CODE §§ 20-7.5-1-1 to 14 (1976).

[25]368 N.E.2d 1163 (Ind. Ct. App. 1977).

renewal was in jeopardy.[26] The court, accordingly, concluded that the EERB had erred in finding that the school board's dismissal of the president, a non-tenured teacher, for his representation of this teacher was an unfair labor practice.[27] The court concluded that section 6 of the law[28] "allows school employees to engage in only those activities which attempt to advance the rights of the teachers in the bargaining unit as a group, and confers no right upon a school employee to discuss a personal grievance with his school employer."[29]

The court recognized that section 2(o)[30] provides a means of recourse for a teacher who has an individual grievance. That section specifically provides: "Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of his grievances either individually or through the exclusive representative . . . ."[31] The court concluded,

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[26]368 N.E.2d at 1167.

[27]*Id.*

[28]IND. CODE § 20-7.5-1-6 (1976) provides:

> (a) School employees shall have the right to form, join or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits and other matters as defined in sections 4 and 5.

Section 4 provides:

> A school employer shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage related fringe benfits. A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances, but such binding arbitration shall have no power to amend, add to, subtract from or supplement provisions of the contract.

Id. § 20-7.5-1-4. Section 5 provides:

> (a) A school employer shall discuss with the exclusive representative of certificated employees, and may but shall not be required to bargain collectively, negotiate or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters: working conditions, other than those provided in Section 4; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations: Provided, however, that any items included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable.
>
> (b) Nothing shall prevent a superintendent or his designee from making recommendations to the school employer.

Id. § 20-7.5-1-5.

[29]368 N.E.2d at 1168.

[30]IND. CODE § 20-7.5-1-2(o) (1976).

[31]*Id.*

however, that this section was not applicable because the teacher whose contract was in jeopardy did not petition his school employer, governing body, or superintendent for redress of his personal grievances.[32] The court stated in dictum that discharge of an employee representative for assisting a school employee in furtherance of his rights under section 2(o) would be an unfair labor practice.[33]

In addition, the court addressed the question of the fact-finding authority of the EERB. The trial court had held that the school board's determination not to renew a teacher's contract was "final and conclusive" and not reversible by the EERB "unless no evidence exists to support the reasons given by the School Board for non-renewal, or unless the reasons given were a sham and the School Board is found to have acted in bad faith, corruptly, fraudulently, or to have grossly abused its discretion."[34] The trial court had analogized the EERB review of the school board decision to court review of an administrative decision under the Administrative Adjudication Act.[35] The court rejected this holding of the trial court, stating that the function of the EERB is to conduct de novo proceedings to resolve unfair labor practice complaints and that the trial court's function is one of review within the meaning of the Administrative Adjudication Act.[36]

The court's holding on the issue of the discharge of the bargaining representative president is very narrow. Had the teacher, whose contract renewal was in jeopardy, petitioned the school employer for redress within the meaning of section 2(o), the bargaining representative president would have been protected in assisting him in furtherance of his petition. This holding clearly exalts form over substance. The bargaining representative president had been asked by the teacher to help him retain his position. The teacher had been asked to resign. The bargaining representative president had contacted the parents of some of the teacher's students and asked them to call the school board, and he had accompained the teacher to a conference with the high school principal who had sought the teacher's resignation. While apparently no formal petition had been filed for redress of the teacher's concern about his non-renewal, clearly the teacher had evidenced his concern to the school principal. Discussions with the principal, both with and without the presence of the representative president, were aimed at seeking redress of the teacher's grievance or concern about non-renewal. The court's

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[32]368 N.E.2d at 1168.
[33]*Id.*
[34]*Id.* at 1170.
[35]IND. CODE § 4-22-1-18 (1976).
[36]368 N.E.2d at 1168.

holding that such efforts to resolve individual grievances prior to the filing of a formal petition are not protected activities will surely formalize and, therefore, rigidify procedures in school labor relations.

Moreover, this undesirable end result seems totally unnecessary. The statute does not define either "petition" or "petitioning." A more reasonable construction of section 2(o) would be to treat preliminary settlement efforts before the filing of a written grievance as being equivalent to "petitioning the school emloyer . . ." for a redress.[37]

Nor is there any convincing support for the court's conclusion that section 6 confers no right upon a school employee to discuss a personal grievance with his school employer. Section 6 specifically states that school employees have the right "to engage in other activities, individually *or in concert* for the purpose of establishing, *maintaining*, or improving salaries, wages, hours, salary and wage related fringe benefits . . . ."[38] Surely the actions of the teacher and the bargaining representative president in this case were actions in concert for the purpose of maintaining the teacher's employment contract which covered all of the items specifically listed in section 6.

Section 6 is far more specific with respect to protecting the employee's right to discuss personal grievances, individually or in concert, than is the language of section 7 of the NLRA[39] after which it was patterned. The Indiana Supreme Court in *Benton Community School* recognized the influence of the NLRA as the pattern for Public Law 254.[40] The NLRA likewise set the pattern for teacher bargaining rights granted in Public Law 217. Section 7 of the NLRA provides that "employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[41] Under this far more general language, it has long been accepted that union representatives are protected when representing employees in pre-grievance procedures. In *NLRB v. Weingarten, Inc.*,[42] the Supreme Court upheld the NLRB's interpretation of this language as affording an employee the right to have a union representative at any confrontation with his employer when the employee reasonably believes the investigation will result

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[37]IND. CODE § 20-7.5-1-2(o) (1976). By construing this section to require the filing of a formal written document despite the fact that the school board has been given actual notice, the court is placing form over substance.

[38]*Id.* § 20-7.5-1-6 (emphasis added).

[39]29 U.S.C. § 157 (1976).

[40]*See* note 9 *supra* and accompanying text.

[41]29 U.S.C. § 157 (1976).

[42]420 U.S. 251 (1975).

in disciplinary action.[43] In the companion case, *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*,[44] the Supreme Court upheld the NLRB's reinstatement with back pay of a union representative who was discharged for insisting upon her right to represent an employee at an investigatory interview.[45]

The language of section 6 of Public Law 217 is more specific in protecting the employees' right to be represented than section 7 of the NLRA. Also, the additional language of section 2(o) of Public Law 217, for which there is no direct counterpart in the NLRA, clearly establishes the right of school employees to redress grievances either individually or through their exclusive representatives.[46] Moreover, such a right is essential to good labor relations. As the Supreme Court noted in *Weingarten:*

> The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer presentation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.[47]

Despite its unreasonable construction of section 6 and section 2(o), the court performed a service in clarifying the trial court's

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[43] *Id.* at 267.
[44] 420 U.S. 276 (1975).
[45] *Id.* at 277.
[46] *See* text accompanying note 31 *supra.*
[47] 420 U.S. at 262-64 (citations omitted).

misunderstanding of the fact-finding role of the EERB. Clearly, the EERB was intended to have authority to hear unfair labor practice issues de novo. The trial court's version of the EERB's role would place the respondent school corporation in the position of being both the trier of fact and the respondent. Certainly the legislature could not have intended that the respondent have authority to decide its own case subject only to a very limited review.

C. Public Employees under Civil Service Acts

The court of appeals decision in *Grenchik v. State ex rel. Pavlo*[48] will put substantial pressure on cities to comply with legislative requirements to establish civil service systems.

Effective January 21, 1972, Indiana Code section 19-1-37.5-1[49] mandated the City of Whiting to create a civil service system for firemen. Under the statute the civil service system was to be administered by a three person commission. Upon adoption, full-time firemen were to become permanent members of the civil service system. Permanent members were to be subject to demotion for violation of written rules of the commission, and any demotions were to be subject to a review procedure before the commission.[50] Despite this statutory requirement, four years later, when the firemen in this case were demoted, the City had not adopted a civil service system for firemen. The court upheld the trial court order that two firemen, who were demoted for political reasons, be reinstated to their former positions with back pay.[51]

The court rejected the City's argument that this statute was a nullity until the City established a civil service commission for firemen. Citing authority from Indiana[52] and from other jurisdictions,[53] the court held that the firemen were demoted in violation of the statute and were entitled to reinstatement.[54] The court noted that the statute was intended to protect firemen from arbitrary political actions and that, when the City failed to create the mandated civil service commission, no governmental body existed with the power to demote the firemen in accordance with the statute.[55]

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[48]373 N.E.2d 189 (Ind. Ct. App. 1978).

[49]IND. CODE § 19-1-37.5-1 (1976).

[50]*Id.* §§ 19-1-37.5-6, -7.

[51]373 N.E.2d at 192.

[52]Hauser v. Town of Highland, 237 Ind. 516, 147 N.E.2d 221 (1958); City of Frankfort v. Easterly, 221 Ind. 268, 46 N.E.2d 817 (1943).

[53]Simpson v. City of Grand Island, 166 Neb. 393, 89 N.W.2d 117 (1958); Myers v. Board of Directors Tualatin Rural Fire Dist., 5 Or. App. 142, 483 P.2d 95 (1971); Logan v. City of Two Rivers, 222 Wis. 89, 267 N.W. 36 (1936).

[54]373 N.E.2d at 192.

[55]*Id.*

The court also noted that the statute provided that reinstatement entitled a party to compensation from the time of demotion.[56]

The court also rejected the City's argument that the fire department's failure to elect a commissioner under the statute constituted either a waiver or a basis for estoppel to bar the firemen from reinstatement and back pay. The court noted that the City had failed to show that the demoted firemen had intended to forfeit their rights under the statute and concluded: "The Act placed no duty on individual firemen to take the City of Whiting to court to mandate creation of a commission. Instead the Act mandated the City to implement the Act."[57]

This decision is well reasoned and based upon substantial precedent.[58] It clearly gives considerable impetus to cities to follow legislative mandates to create civil service commissions. When cities attempt to circumvent such a mandate by failing to create a commission, they will be unable to take any action against employees if their action would be subject to administration by such a commission.[59]

D. Labor Employment Security Act

Two significant cases involving the administration of the Employment Security Act[60] were decided by the court of appeals.

In *Hoosier Wire Die, Inc. v. Review Board of Indiana Employment Security Division*,[61] the court reversed the Division Review Board's determination that an NLRB back pay award could be deductible income only in the week it was received by the claimant.

The NLRB had ordered that an employee be reinstated and made whole for any loss of pay. As is its practice, the NLRB computed the back pay on a quarterly basis for the period between the employee's termination of employment and his reinstatement.[62] For almost all of that period, the employee had collected unemployment compensation benefits. After making payment to the employee under the NLRB order, the company requested that its experience account be relieved of charges for the benefit overpayment for the period covered by the payment. The referee ruled that under the

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[56]*Id.*

[57]*Id.* at 193.

[58]*See* authorities cited in notes 52 & 53 *supra.*

[59]Under the statute in question no firemen could be removed, suspended, demoted, or discharged. IND. CODE § 19-1-37.5-7 (1976).

[60]IND. CODE § 22-4-1-1 (1976).

[61]370 N.E.2d 1343 (Ind. Ct. App. 1978).

[62]*See* ISIS Plumbing & Heating Co., 138 N.L.R.B. 716 (1962); F.W. Woolworth Co., 90 N.L.R.B. 289 (1950).

Employment Security Act the employee received deductible income only within the calendar week during which she actually received payment.

The Employment Security Act provides that an employee must repay benefits to which he is not entitled because of subsequent receipt of income deductible from benefits which is allocable to the week or weeks for which such benefits were paid.[63] It also provides: "[W]here it is finally determined . . . that an individual has received benefits to which he is not entitled under this article, the board . . . shall relieve the affected employer's experience account of any benefit charges directly resulting from such overpayment."[64] The statute lists an NLRB award of back pay as a deductible income item:

> Provided, however, That if such payments made pursuant to the provisions of the National Labor Relations Act . . . are not, by the terms of the order or agreement under which said payments are made, allocated to any designated week or weeks, then, and in such cases, such payments shall be considered as deductible income in and with respect to the week in which the same is actually paid.[65]

The Division Review Board contended: (1) Because the NLRB computed its award on a quarterly basis, no allocation to designated weeks had been provided, and (2) a designated amount must be assigned to a designated week before an award becomes deductible.

The court rejected that argument and held that the employee received payment for the weeks covered by the NLRB award in the form of back pay ordered by the NLRB.[66] It held that the computations provided by the NLRB were deemed to be a part of its order and that the requirement that the award be allocated to a designated week or weeks is satisfied when the order provides sufficient information to reveal to the Division Review Board that the claimant has received his wages for the period during which he also received unemployment benefits.[67]

The court's construction of the statute seems quite reasonable. In light of the NLRB's long followed practice of computing back pay on a quarterly basis, to adopt the Review Board's position would defeat the legislature's intent that NLRB back pay awards be treated as a deductible item requiring repayment by the claimant and credit to the employer's experience account.

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[63]IND. CODE § 22-4-13-1(b) (1976).
[64]*Id.* § 22-4-13-1(d).
[65]*Id.* § 22-4-5-2.
[66]370 N.E.2d at 1348.
[67]*Id.* at 1349.

The court was not asked to address the situation which can result from attempting to allocate an NLRB back pay award to designated weeks within the period covered by the award when an employee has no job for the first portion of a quarter, but obtains a job paying much more than his former job for the last portion of the quarter. To illustrate, if the employee would have earned $1,000 per month in his job with the employer and he is unemployed for the first two and one-half months of a quarter, but employed elsewhere at $3,000 per month for the last one-half month of the quarter, the NLRB award for the quarter would be the $3,000 he would have earned with the employer less the $1,500 he earned in his new job or $1,500. Since the greatly increased income in the latter portion of the quarter offsets a portion of the back pay which would have been due for the first two and one-half months of the quarter, it is not clear how the $1,500 payment should be allocated within that two and one-half month period. It could be argued that under the controlling statute[68] this $1,500 payment should be considered as deductible income for the week in which it is actually paid. Such an approach, however, would clearly defeat the legislative intent to treat NLRB awards as deductible income because such awards are almost always paid after the employee is reinstated, and, thus, at a time when the employee is no longer claiming unemployment benefits. The statute provides that to avoid allocating the payment to the week in which it was actually paid the payment must be "allocated to any designated week or *weeks.*"[69] Under the above example, the $1,500 payment for the quarter clearly is allocable to the weeks within the first two and one-half months of the quarter and should be considered as deductible income in those weeks. Because the statute includes, as an alternative allocation to a designated week, the allocation to "designated weeks," the fact that the payment cannot be allocated to specific weeks should not defeat its treatment as deductible income throughout the two and one-half month period.

The court's decision in *Hoosier Wire* is consistent with this illustration. The court stated: "[T]he requirement that an award be allocated to a *designated* week or weeks is satisfied when the Order provides sufficient information to reveal to the Division that the claimant has received his wages for *the period* during which he also received unemployment compensation benefits."[70]

The second significant case interpreting the Employment Security Act decided by the court of appeals was *Wilson v. Review Board of*

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[68]IND. CODE § 22-4-5-2 (1976).

[69]*Id.* (emphasis added).

[70]370 N.E.2d at 1349 (emphasis added).

the Indiana Employment Security Division.[71] In that case, the claimant's unemployment compensation benefits had been terminated by the Division after a determination by the deputy based upon the former employer's report that she had refused an offer of suitable work. The claimant brought this action in the trial court contending that the Division's termination of her benefits without notice and without affording her a hearing was in violation of her right to due process[72] and due course of law.[73] The court, relying heavily on *Mathews v. Eldridge*,[74] held that unemployment benefits constitute a property interest protected by the requirements of due process.[75] The court concluded, therefore, that the Division's suspension and termination process denied insured workers due process by suspending or terminating benefits without providing the insured worker adequate notice and an opportunity for a hearing at which he could offer evidence or confront adverse witnesses.[76]

The Indiana Employment Security Act was amended in 1972 to provide: "In the event a hearing is requested by an employer or the division after it has been administratively determined that benefits should be allowed to a claimant, entitled benefits shall continue to be paid to said claimant unless said administrative determination has been reversed by a due process hearing."[77] The court held that this language of the Act complied with due process and due course of law requirements, but that the Division had improperly construed the Act in cutting off the claimant's benefits without a due process hearing.[78]

The result of this decision will be to require the Division, when a hearing is requested by a claimant, who was previously found to be eligible for benefits, to continue benefit payments to the claimant until the prior determination of eligibility is reversed at a due process hearing. This result appears consistent with the dictates of prior precedent[79] and the 1972 amendment to the Act.

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[71]373 N.E.2d 331 (Ind. Ct. App. 1978). For another discussion of *Wilson*, see Price, *Administrative Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 30, 41-42 (1978).

[72]U.S. CONST. amend XIV.

[73]IND. CONST. art. 1, § 12.

[74]424 U.S. 319 (1976).

[75]373 N.E.2d at 340-41.

[76]*Id.* at 341.

[77]Act of Feb. 17, 1972, Pub. L. No. 174, 1972 Ind. Acts 844 (codified at IND. CODE § 22-4-17-2(e) (1976)).

[78]373 N.E.2d at 344. According to the court, a "due process hearing" before the Division requires adequate notice of the hearing and an opportunity to offer evidence and confront adverse witnesses. *Id.* at 341.

[79]*See* Mathews v. Eldridge, 424 U.S. 319 (1976).

E. Workmen's Compensation and Occupational Diseases Act

In *Martinez v. Taylor Forge & Pipe Works*,[80] the Indiana Court of Appeals upheld an Industrial Board decision that a gradually incurred hearing loss due to a high level of noise at the employees' workplace was neither the result of an accident covered by the Workmen's Compensation Act[81] or an occupational disease covered by the Workmen's Occupational Diseases Act.[82] The court noted that, to prevail on appeal from a negative decision from the Industrial Board, the claimants must establish "that the decision was contrary to law by showing the evidence was without conflict, that it would lead to but one conclusion, and that the Industrial Board reached the opposite conclusion."[83]

The parties stipulated: The plaintiffs' loss of hearing could not be traced to one particular incident, that it occurred gradually over a long period of time, that the noise the plaintiffs were exposed to during their working hours was much greater than the noise they were exposed to after their working hours, and that the noise-induced hearing loss of the plaintiffs would not have been unexpected or unforeseen by reasonable men under similar circumstances.

The court concluded that an accident arising out of or in the course of employment had not occurred and that the claimants had not put forth a convincing argument that their hearing loss should be compensable as an occupational disease.[84] In addition, the court stated that even if an inference were to be made that the hearing loss was an occupational disease, the opposite inference was equally supported by the evidence. The court stated that, in reviewing the Industrial Board decision, it would only consider the evidence "which supports the decision and reasonable inferences therefrom" and concluded that it could not state "that the Board erred as a matter of law in finding that [the claimants] did not sustain hearing loss by reason of contracting an 'occupational disease' within the purview of the Act."[85] Finally, the court held that the claimants failed to establish a disablement as would justify recovery under the Act because, following the closing of the defendant's plant, they secured employment comparable in both levels of noise and wages to what they had experienced in their prior employment.[86]

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[80]368 N.E.2d 1176 (Ind. Ct. App. 1977).
[81]*See* IND. CODE § 22-3-2-2 (1976).
[82]*Id.* § 22-3-7-2.
[83]368 N.E.2d at 1177-78.
[84]*Id.* at 1179.
[85]*Id.*
[86]*Id.* at 1180.

The court's reasoning in this case is confusing. From the court's reference to the limited standard of review of administrative agency decisions, it appears that the court considered this issue as a matter of administrative fact finding or, at least, as a matter within the range of broad administrative discretion. The question at issue between the parties was not, however, grounded in a factual dispute. The parties stipulated the facts. The issue presented was a question of law: Did the legislature intend a gradually-incurred industrial hearing loss to be compensable under either the Workman's Compensation Act or the Occupational Disease Act?

This question of law is extremely important and has been the subject of judicial resolution and legislative efforts in several other states over the past few years. Some courts have found gradual loss of hearing to be an accidental injury compensable under Workmen's Compensation Acts.[87] In *Hinkle v. H.J. Heinz Co.*,[88] the Supreme Court of Pennsylvania found such a loss of hearing to be the result of an "accident," viewing each outburst of noise as a "miniature accident" and concluding that prolonged exposure to noise was compensable under the Pennsylvania Act.[89] Other jurisdictions have come to the opposite conclusion.[90] Professor Larson in his treatise *The Law of Workman's Compensation* notes: "The greatest flurry in the occupational disease field since the recognition of silicosis as a compensable disease in the early 1930's was caused by the partial loss of hearing problem beginning in 1948."[91]

The court's conclusion that the claimants in this case had not established a disablement because they had not lost any wages is not a settled point of law. Larson notes that this legal problem dates back to *Slawinski v. J.H. Williams & Co.*,[92] a New York case which granted a schedule award to a drop forge shop employee for loss of hearing although he had lost no work time and had suffered no loss of earnings. Larson then discusses the subsequent case law develop-

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[87]Shipman v. Employers Mut. Liab. Ins. Co., 105 Ga. App. 487, 125 S.E.2d 72 (1962); Winkelman v. Boeing Airplane Co., 166 Kan. 503, 203 P.2d 171 (1949); Skowronski v. Ajax Forging & Casting Co., 54 Mich. App. 136, 220 N.W.2d 725 (1974); Vaughn & Rush v. Stump, 156 Okla. 125, 9 P.2d 764 (1932); Hinkle v. H.J. Heinz Co., 462 Pa. 111, 337 A.2d 907 (1975). *See also* Lozowski v. Nicholson File Co., 92 R.I. 270, 168 A.2d 143 (1961).

[88]462 Pa. 111, 337 A.2d 907 (1975). *Contra*, Workmen's Compensation Bd. v. Stolsky, 18 Pa. Commw. Ct. 367, 336 A.2d 447 (1975) (lower court decision rendered one month earlier than *Hinkle* and in apparent conflict).

[89]462 Pa. at 117-18, 337 A.2d at 910.

[90]Workmen's Compensation Bd. v. Stolsky, 18 Pa. Commw. Ct. 367, 336 A.2d 447 (1975); Carling v. Industrial Comm'n, 16 Utah 2d 260, 399 P.2d 202 (1965).

[91]1B A. LARSON, THE LAW OF WORKMAN'S COMPENSATION § 41.50 (1978).

[92]298 N.Y. 546, 81 N.E.2d 93 (1948).

ment and legislative efforts in other jurisdictions related to this issue.[93]

A complete analysis and application of the reasoning underlying this problem to Indiana statutes is beyond the scope of this discussion. Larson's consideration of the issue is noted only to illustrate the significance and complexity of the matter presented to the court. By alluding to the limited standard of review of administrative decisions, the court failed to confront the issue. The court did give the impression that if the Industrial Board were to change its interpretation, at least with respect to the Occupational Diseases Act, to find industrially caused gradual hearing losses to be compensable, the court might sustain that interpretation as well. In the meantime, if this decision is to remain unchanged on further appeal, such hearing losses are not compensable under either the Workmen's Compensation Act or the Occupational Disease Act in Indiana.

XII. Products Liability

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During this survey period few products liability cases were decided under Indiana law,[1] but these few may prove to be highly significant because specific doctrines of Indiana products liability law appear to have been modified or redefined. In addition, the Indiana General Assembly enacted a new products liability statute[2] which promises to have a major impact on products liability practice in this state.

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[93]IB A. LARSON, *supra* note 91.

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[1]Two cases decided during the survey period are not discussed because they either did not raise any new issues or did not discuss issues concerning products liability. *See* Cates v. Jolley, 373 N.E.2d 877 (Ind. 1977) (negligence case involving ladder); American Home Prod. Corp. v. Vance, 365 N.E.2d 780 (Ind. Ct. App. 1977) (primarily discussing issue of inconsistent jury verdict).

[2]Act of Mar. 10, 1978, Pub. L. No. 141, § 28, 1978 Ind. Acts 1308 (codified at IND. CODE §§ 33-1-1.5-1 to 8 (Supp. 1978)). The full text of this chapter is reprinted as an appendix following this article.