XVIII. Workers' Compensation

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During this survey period, the Indiana Court of Appeals and the Indiana Supreme Court admonished the Industrial Board to provide more specific findings of fact to support its awards in cases dealing with medical evidence bearing on the questions of impairment and disability.[1] The exclusivity of the remedy provided by the Indiana Workmen's Compensation Act was generally upheld.[2] An injury which was not initially disabling but which later progressed to a disability was held to date from the moment of disability and not from the date of occurrence.[3] The failure to provide prompt notice to the employer of a progressive injury was held not to be fatal to an injured employee's claim, absent a showing by the employer of prejudice resulting from the lack of notice.[4] A recurrent injury after the worker left employment will trigger additional benefits from the original employer when the recurrence prevents the otherwise willing worker from accepting other employment.[5] Work-related emotional trauma was held legally sufficient to produce a compensable heart attack,[6] and the Act's ceiling on non-medical benefits was held to take priority over a subsidiary provision containing a formula which provided for an award in excess of the ceiling.[7] Additionally, the Indiana General Assembly amended the Act in 1981 to provide that certain injured vocational student workers would have their benefits for permanent impairment calculated as if they were full time workers.[8]

A. Permanent Total Disability

1. Medical Evidence.—In *Perez v. United States Steel Corp.*,[9] claimant Benedicto Perez sustained a work-related injury which the

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[1] *See* notes 9-49 *infra* and accompanying text.

[2] *See* notes 50-132 *infra* and accompanying text.

[3] *See* notes 147-51 *infra* and accompanying text.

[4] *See* notes 133-46 *infra* and accompanying text.

[5] *See* notes 152-59 *infra* and accompanying text.

[6] *See* notes 160-73 *infra* and accompanying text.

[7] *See* notes 174-80 *infra* and accompanying text.

[8] *See* notes 181-88 *infra* and accompanying text.

[9] 416 N.E.2d 864 (Ind. Ct. App. 1981).

Board determined to be a twenty percent permanent partial impairment.[10] Perez had claimed that he was "permanently totally *disabled*," however, the Board made no express finding with respect to disability.[11] Perez appealed this original finding in 1977 to the Indiana Court of Appeals, which distinguished impairment from disability and held that a finding of partial impairment did not preclude a finding of total disability.[12] The court reversed and remanded the case on this issue directing the Board to permit additional evidence on the question of permanent total disability.[13] After receiving additional evidence, the Board reaffirmed its prior award and Perez appealed once more, in this instance challenging the sufficiency of the findings and urging that the evidence compelled the opposite result.[14]

The court of appeals, in affirming the Board's second decision, discussed the sufficiency of an administrative board's findings for purposes of appellate review. Findings, the court said, are used to "illuminate the reasons for decision . . . . [A] finding which states merely that 'witness A testified that such-and-such occurred' is inadequate as a factual finding that the event indeed did occur. Such a conclusion—that the fact finder believed the witness—is too conjectural."[15] The court held that the Board's findings, which simply stated " '[t]hat Plaintiff is not permanently totally disabled within the definition set forth in the opinion of the Court of Appeals,' " would be inadequate for review.[16] This inadequacy was cured in the second hearing, however, by a recitation of medical testimony under the heading "Summary of Evidence" which concluded with a statement by the Board that the evidence indicated that "Plaintiff is capable of pursuing many normal kinds of occupations. He has permanent partial impairment, but not a permanent total disability."[17] The court ruled that the placement of this "finding" under "Statement of Evidence" was only a defect in form, for which reversal would be inappropriate.[18]

Judge Staton dissented.[19] He argued that the Board's findings were insufficiently specific and therefore substantively defective

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[10]*Id.* at 865.

[11]*Id.* (emphasis in original).

[12]Perez v. United States Steel Corp., 172 Ind. App. 242, 248, 359 N.E.2d 925, 929 (1977).

[13]*Id.* at 249, 359 N.E.2d at 929.

[14]416 N.E.2d at 865.

[15]*Id.* (citations omitted).

[16]*Id.* (quoting the findings of the Industrial Board in its second *Perez* hearing).

[17]416 N.E.2d at 865-66.

[18]*Id.* at 866 (citing IND. R. APP. P. 15(E)).

[19]416 N.E.2d at 866-67 (Staton, J., dissenting).

because the Board had merely provided the court "with a smorgasbord of medical testimony from which it could select a possible factual foundation for the Board's conclusion that Perez was 'capable of pursuing many normal kinds of occupations.' "[20]

Even if the findings of the Board were sufficient for purposes of appellate review, the dissent continued, the negative award in *Perez* was contrary to law because the Board failed to exclude "*every* possibility of recovery."[21] To maintain a claim for total permanent disability " '[i]t is sufficient if the workman can show that he has been so incapacitated by his injuries that *he cannot carry on reasonable types of employments*. The reasonableness of the workman's opportunities will be measured by his physical and mental fitness for them and by their availability.' "[22] The dissent noted that the "measure of the claimant's disability is not limited to a medical evaluation of the claimant's physical impairment or anatomical dysfunction . . . . Other nonmedical factors, such as the claimant's age, education, training, skills, and job opportunities, must be weighed by the Board when the claimant presents evidence on such factors."[23] The Board could not properly have denied Perez's disability claim because it "failed to make specific findings of fact on the nonmedical evidence presented" by manual laborer Perez regarding his seventh grade education, lack of vocational skills, and the refusal of his former employer to re-employ.[24] "[O]nce the claimant presents evidence which may provide a factual foundation for a total disability claim, the Board must execute its statutory duty to weigh that evidence and make findings of fact consistent with its ultimate disposition of the claim."[25]

In concluding his persuasive dissent, Judge Staton admonished the Board for their uncritical adoption of the employer's "Proposed Findings of Fact,"[26] and noted that findings of fact "are the polestar for our judicial review. Without them, this Court wanders aimlessly through the record in search of a factual foundation for the awards . . . . [T]he Board should seize upon every opportunity to make specific findings of fact so that it ensures limited judicial review."[27]

2. Continuation of Medical Care and Payments.—In *Talas v. Correct Piping Co.*,[28] a work related injury reduced Woodrow Talas

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[20]*Id.* at 867.

[21]*Id.* (emphasis in original).

[22]*Id.* at 868 (quoting B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 9.4, at 244 (1950) (emphasis in original)).

[23]416 N.E.2d at 868.

[24]*Id.*

[25]*Id.* at 870.

[26]*Id.*

[27]*Id.*

[28]409 N.E.2d 1223 (Ind. Ct. App. 1980), *vacated*, 416 N.E.2d 845 (Ind. 1981).

to a traumatic quadriplegic. From January 19 to June 16, 1979, he received around-the-clock nursing care at his home. The cost of this care was paid for by the employer's insurance carrier until May 13. After June 16, however, his home nursing care was reduced to maintenance care provided by a nurse's aid for eight hours per day and a bi-weekly visit by a licensed practical nurse. Talas testified that under the around-the-clock care "his physical feelings and motions began to improve," but under the reduced care, "his joints [were] getting stiffer and [he was] not able to function as well as before."[29]

Talas and Correct Piping executed a Form 12 agreement which provided that "compensation was 'based upon 100% permanent impairment of the man as a whole and 100% total permanent disability.' "[30] The agreement further provided that (1) Talas' injury was " 'in a permanent and quiescent state,' " and (2) that continuing treatment " 'including . . . nursing services and supplies, has not been agreed upon' " and would be determined at a hearing of the Board.[31] The Board approved this agreement on April 6, 1979.[32]

A single hearing member on December 21, 1979 ruled on Talas' "emergency petition for a hearing to determine Correct's liability for nursing care needed to sustain his life" and ordered Correct "to pay and continue to pay 'all the medical and nursing care needed by plaintiff . . . in order to reduce his disability or impairment.' "[33] On review, the Board overruled this order and directed Talas to "take nothing by way of the petition."[34]

Talas argued on appeal that for purposes of medical payments, his injury was not permanent and quiescent, and that further, he had never agreed to any provision regarding either the continuation or the reduction of his nursing care.[35] Talas also argued that medical payments for nursing care were appropriate under any one of four payment periods provided for in the Act.[36] Talas concluded his arguments by contending that the Board's findings were insufficient for purposes of appellate review.[37]

The court of appeals affirmed the Board's determination and held there was sufficient evidence in the record to support the Board's decision that Talas' injury "had reached a permanent and

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[29]409 N.E.2d at 1225.

[30]*Id.*

[31]*Id.* at 1225-26 (quoting Form 12 agreement between Talas and Correct Piping).

[32]*Id.* at 1225.

[33]*Id.* at 1226.

[34]*Id.*

[35]*Id.*

[36]*Id. See* note 40 *infra.*

[37]409 N.E.2d at 1226.

quiescent state for the purposes of medical payments."[38] Although Talas had not agreed to a nursing care settlement, the court ruled that the parties had agreed that the question was subject to the Board's determination at a hearing which in fact had been held and which had consummated in the employer's favor.[39] In reviewing the four possible statutory periods during which medical payments could be awarded,[40] the court noted that there was only one possibility applicable to this case, that is, the time " '[a]fter an employee's injury has been adjudicated by agreement or award on the basis of permanent partial impairment . . . as necessary to reduce the amount and extent of such impairment.' "[41] The court concluded, however, that whether any improvement was possible was a question of fact and that the Board must have determined that there was no care available to reduce Talas' 100% impairment.[42] The court agreed that while "[t]he findings of the Board are at best minimally adequate due to the circumstances of the case, the record before this court, and the standard for appellate review, the findings are sufficient to allow us to review the Board's determination."[43]

The Indiana Supreme Court disagreed.[44] It accepted transfer and vacated the opinion of the court of appeals.[45] The supreme court reasoned that because the Board had reversed the order of the single hearing member, it was even more important that the Board "set out written findings of fact in support of [its] decision so that an appellate court may intelligently review the decision without speculating as to the agency's reasoning."[46] This defect was not cured by

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[38]*Id.* at 1227.

[39]*Id.*

[40]The court noted that:

IND. CODE 22-3-3-4 provides payment for medical, surgical, hospital and nursing services at four different times:

(1) After an injury and prior to an adjudication of permanent injury
(2) During the period of temporary total disability resulting from the injury
(3) After an employee's injury has been adjudicated by agreement or award on the basis of permanent partial impairment . . . as necessary to reduce the amount and extent of such impairment, and;
(4) In an emergency or because of the employer's failure to provide attending physician.

409 N.E.2d at 1227 (quoting IND. CODE § 22-3-3-4 (Supp. 1981)).

[41]*Id.*

[42]*Id.* at 1228.

[43]*Id.*

[44]416 N.E.2d 845 (Ind. 1981) *vacating* 409 N.E.2d 1223 (Ind. Ct. App. 1980.

[45]*Id.* at 846.

[46]*Id.*

simply including the hearing officer's order in the Board's order because the officer's order did not include his findings.[47] Further, the Board had reversed the determination of the hearing officer and "therefore it was necessary for the Board to explain its reasons for reversal."[48] The cause was remanded "to the Industrial Board with instructions to make specific findings of fact" which would support an ultimate finding of fact.[49]

B. Exclusiveness of Remedy

1. Employer's Violation of Safety Statutes.—The plaintiff in *Cunningham v. Aluminum Co. of America*,[50] argued that his employer's violations of safety statutes which allegedly resulted in the claimant's severe injuries, should permit him to bring a direct action for compensatory and punitive damages against his employer notwithstanding the exclusive remedy provision of the Indiana Workmen's Compensation Act.[51] Cunningham believed that the exclusive remedy provision only applied when an employee is injured as a result of an industrial accident. When an employer intentionally maintains an unsafe workplace, however, any resultant injuries are not accidents but are intentional torts which fall outside the purview of the Act. Cunningham reasoned that an employer who intentionally maintains an unsafe workplace must expect injuries and that such injuries must therefore be considered to have been intentionally caused.[52]

The court rejected this reasoning, first questioning the appellant's concept of intent by citing Dean Prosser who has stated that " '[t]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent.' "[53] Second, the court characterized Cunningham's injury as an accident clearly within the Act, based on its analysis of two earlier Indiana cases in which the claimants alleged that the employers could have anticipated the

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] 417 N.E.2d 1186 (Ind. Ct. App. 1981).

[51] *Id.* at 1188-89. IND. CODE § 22-3-2-6 (1976) states in part:

> The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of injury or death.

Id.

[52] 417 N.E.2d at 1189.

[53] *Id.* at 1190 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 32 (4th ed. 1971)).

workplace injuries.[54] In those earlier cases, "accident" was defined for the purposes of the Act as " 'an unlooked for mishap, an untoward event which is not expected or designed' "[55] and " 'any mishap or untoward event not expected and which was not designed *by the one who suffered the injury or death.*' "[56] These definitions, however, rest upon the expectations of the employee and not the employer.

The court finally held, again based on precedent, that an employer's violation of a safety statute did not remove Cunningham's injury from the class covered by the Act's exclusive remedy provision.[57] The court cited one case which held that the mere violation of the Federal Employer's Liabililty Act "did not take the cause out of the classification of workmens' compensation cases,"[58] and another case in which the intentional attack by a supervisor on another employee was governed by the Act when the attack arose " 'out of and in the course of employment.' "[59] In yet another case cited by the court, a diversity opinion decided under Indiana law, it was held "that the employee's remedy under the Act was 'exclusive regardless of the [employee's] allegation that the cause of his injury was willful and reckless violation of the statutes . . . . ' "[60]

Cunningham had also mounted an equal protection attack upon that provision of the Act which denies an employee compensation when the employee's injury or death is due to any one of a series of intentional or willful acts of misconduct by the employee,[61] but fails to deny the "benefits" of the Act to an employer who engages in intentional conduct of perhaps equal intensity.[62] Cunningham argued that this disparate treatment of "employers and employees under the Act bears no reasonable relation to a legitimate state objective . . . ."[63]

The court rejected this argument, noting that the historical bargain which gave rise to workers' compensation laws, whereby cer-

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[54]417 N.E.2d at 1190.

[55]*Id.* (quoting Pearson v. Rogers Galvaniz. Co., 115 Ind. App. 426, 428, 59 N.E.2d 364, 365 (1945)).

[56]*Id.* at 1190 (emphasis in original)(quoting Furst Ferber Cut Stone Co. v. Mayo, 82 Ind. App. 363, 365, 144 N.E. 857, 857 (1925)).

[57]417 N.E.2d at 1190.

[58]*Id.* (citing Harshman v. Union City Body Co., 105 Ind. App. 36, 13 N.E.2d 353 (1938)).

[59]*Id.* at 1191 (quoting Burkhart v. Wells Elecs. Corp., 139 Ind. App. 658, 662, 215 N.E.2d 879, 881 (1966)).

[60]*Id.* at 1191 (quoting North v. United States Steel Corp., 495 F.2d 810, 811-12 (7th Cir. 1974)).

[61]IND. CODE § 22-3-2-8 (1976) (current version at *Id.* § 22-3-2-8 (Supp. 1981)).

[62]417 N.E.2d at 1191-92.

[63]*Id.* at 1192.

tainty, speed, and freedom from devastating defenses were given to the employee in exchange for his accepting certain limitations on his remedies not provided for in tort law,[64] did indeed meet the legitimate state objective test of an equal protection analysis by improving what was formerly "a highly unsatisfactory remedy" under the common law.[65] In any event, however, to state a cognizable equal protection claim, the plaintiff must show that he was not treated alike by the law with respect to "all persons similarly circumstanced."[66] For purposes of equal protection comparison, employers and employees are clearly not similarly circumstanced, and "Cunningham has nowhere alleged that the Act in its operation treats him any differently than any other employee."[67]

Perhaps it should also be emphasized that the great historical tradeoff of workers' compensation was designed to produce a rough equivalency—the injured worker received a certain but limited benefit, and the employer paid for all accidental injuries arising out of and in the course of employment, without an inquiry into either the employer's or the employee's negligence. While this equation was once recognized by both labor and business as representing an equitable bargain into which the denial of a worker's claim for intentional misconduct could reasonably be factored without seriously tipping the scales in favor of employers, the recent failure of the Indiana legislature to keep pace with economic realities by adequately adjusting benefit schedules may have damaged that perception of equivalency in Indiana.[68]

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[64]Contributory negligence, assumption of risk, and the fellow servant rule. *Id.*

[65]*Id.*

[66]*Id.*

[67]*Id.*

[68]The amount of the award under the Indiana Workmen's Compensastion Act codified at IND. CODE §§ 22-3-1-1 to -10-3 (1976 & Supp. 1981) is a function of several variables such as the classification of the impairment (whether total or partial, temporary or permanent), the nature of the loss (medical expenses, lost wages, or a physical impairment which is linked by statutory formula to lost wages), and the worker's former earning level. The variables are then subject to a system of statutory ceilings. With respect to an injury occurring after July 1, 1979, an injured employee can receive compensation for medical expenses during the period of temporary total disability. *Id.* § 22-3-3-4 (Supp. 1981). During the period of temporary total disability he can receive up to 500 weeks of compensation for lost earnings at 66⅔% of his average weekly wage, *id.* § 22-3-3-8, not to exceed $140 per week of such compensation, *id.* § 22-3-3-22. If he has been permanently impaired he can receive an additional award of weekly compensation at 60% of his weekly compensation according to the statutory schedule. *Id.* § 22-3-310(a)(1). Impairment awards are reduced, however, by temporary total disability payments in excess of fifty-two weeks. *Id.* Total compensation exclusive of medical benefits under any provision or combination of provisions of the law is limited to $70,000. *Id.* § 22-3-3-22(g).

The Interagency Task Force on Products Liability stated:

In states that have not raised Worker Compensation benefits to the National

2. Dual Capacity Doctrine.—Although injured workers must generally remain content with the exclusive remedy provided by workers' compensation, they or their subrogees are free to pursue tort actions against third parties whose tortious acts may have been the sole or concurrent proximate causes of their injuries. Indeed, nearly half of the national payout for product liability claims is extracted from manufacturers of workplace products to compensate injured workers.[69]

Frequently, employers of the injured workers or subsidiaries of the employer are also the manufacturers of the product causing the injury. In these cases, workers argue that they should be permitted to maintain direct actions against their employers who have caused injury in their capacity of product manufacturers.[70] Why, the workers argue, should a suit against a third party manufacturer be permitted to go forward but be barred when the identical tort is committed by their employer? The response to the workers' argument is that the employer is a legal entity which has bargained away tort defenses in exchange for the immunization from direct suit which it enjoys under the exclusivity of the workers' compensation remedy. Permitting tort actions against the employer would destroy the balance for which the employer bargained.

While Indiana[71] and most other states[72] which have considered

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> Commission's [Commission on State Workmen's Compensation Laws] recommendation of 66⅔ [per cent of] previous income up to 100 per cent of the state's weekly wage, it might be fair and reasonable to cut off a worker's right to sue manufacturers of products in exchange for a higher Worker Compensation payment benefit.

U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT VII-104 (1978). Indiana's average weekly wage for accidents occurring after July 1, 1980 is $210. *See* IND. CODE § 22-3-2-22(a) (Supp. 1981). Under the National Commission's formulation, an injured workman earning more than $314.84 would thus receive $210 per week, as opposed to the Indiana formulation which cuts off the maximum award at $140 per week ($210 x 66⅔%).

[69]INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 62 (1977).

[70]*See generally* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 357-61 (1976); Utken, *Workmen's Compensation, 1978 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 340-42 (1978); Note, *Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553 (1979); Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

[71]*See* notes 74-77 *infra* and accompanying text.

[72]*See, e.g.*, Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 93, 432 N.Y.S.2d 879 (1980) (rejecting plaintiff's dual capacity argument, but permitting recovery because corporate employer had absorbed maker of hazardous machine through merger); Longever v. Revere Copper and Brass, Inc., 80 Mass. Adv. Sh. 1767, 408 N.E.2d 857 (1980). For additional case authorities, *see* Utken, *supra* note 70, at 342 n.7.

the question have rejected the dual capacity doctrine, several jurisdictions have begun to recognize this concept.[73] Although this response is in part based upon perceptions that workers' compensation is no longer providing adequate benefits, the increasing recognition of dual capacity can more likely be traced to the growth of corporate conglomerates. When injury is caused by products which are sold by wholly owned subsidiaries of the employer and which are totally unrelated to the products manufactured, or the services provided, by the division or subsidiary in which the injured employee works, the argument for recognizing a true dual capacity of the employer is clearly enhanced. The giant holding companies of the late twentieth century were not comtemplated by the architects of the workers' compensation system when the bargain between employer and employee was struck in the early part of that century.

The Indiana position on the dual capacity doctrine was discussed during the survey period in *Jackson v. Gibson.*[74] The court noted that the doctrine had initially been rejected by the Seventh Circuit Court of Appeals in *Kottis v. United States Steel Corp.*,[75] a diversity case decided under Indiana law. The reasoning of that case, in which it was held that the doctrine "was not consistent with the statute 'which abrogates' all other rights and remedies . . . at common law or otherwise on account of such injury or death except those against 'some other person than the employer not in the same employ,' "[76] was later held dispositive in *Needham v. Fred's Frozen Foods, Inc.*[77]

In *Jackson*, however, the plaintiff sought to bring his direct action against Gibson, the president of his employer, Sun Realty, not in any dual capacity as his employer but against Gibson as a separate "entity."[78] Gibson was also the owner of the real property upon which the plaintiff was injured, prompting the plaintiff to bring his action against Gibson as landowner.[79]

The court rejected the plaintiff's theory after employing the following two step analysis derived from *Witherspoon v. Salm.*[80]

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[73]*See, e.g.*, Moreno v. Leslie's Pool Mart, 110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (1980); Knous v. Ridge Machine Co., 64 Ohio App. 2d 251, 413 N.E.2d 1218 (1979); *cf.* Kohi v. Raybestos-Manhattan Inc., 505 F. Supp. 159 (E.D. Pa. 1981) (predicting that Pennyslvania state courts would follow a dual capacity doctrine).

[74]409 N.E.2d 1236 (Ind. Ct. App. 1980), *transfer denied*, Feb. 2, 1981.

[75]543 F.2d 22 (7th Cir. 1976).

[76]409 N.E.2d at 1237-38 (quoting 543 F.2d at 24).

[77]179 Ind. App. 671, 359 N.E.2d 544 (1977), *discussed in* Utken, *supra* note 70, at 340-42.

[78]409 N.E.2d at 1238.

[79]*Id.*

[80]251 Ind. 575, 243 N.E.2d 876 (1969).

Under *Witherspoon*, a court must first determine whether the plaintiff's injury arose out of or in the course of his employment.[81] If as in *Jackson* it did,[82] the next step is to determine whether the defendant was within the class of persons made immune to direct suit by Indiana Code section 22-3-2-5 of the Act which states that the "employer . . . or those conducting his business . . . shall be liable only to the extent and in the manner herein specified."[83] The court in *Jackson* held that defendant Gibson, "president of Sun Realty, Inc. was supervising or directing the work of Jackson, an employee of the corporation . . . . [A] president-manager-director is within the group of persons conducting the business of the employer, the corporation."[84]

It would appear that under the court's analysis, a person cannot simultaneously be more than one legal entity for *purposes of the Act*.[85] If the injury arises in the course of employment, a natural person will either be held to be within the immune class of employers and persons doing his business, or he will be held to be outside that class. The court noted, however, that "[h]ad the landowner been someone other than Gibson and a stranger to the employment, there is no question that these provisions [IND. CODE §§ 22-3-2-5, -13] would not foreclose the bringing of a suit."[86] It should be emphasized that under the court's analysis, Gibson would be immune from direct suit even though the injury-causing instrumentality were shown to be some hazardous condition of premises not owned, operated, or controlled by Sun Realty, the employer. Employers probably should not be overly sanguine that their immunity to direct suits in these situations will be permitted to continue indefinitely in Indiana without limitation.

3. Retaliatory Discharge.—In 1973, in *Frampton v. Central Indiana Gas Co.*,[87] the Indiana Supreme Court ruled that an employee who alleged that he was discharged for filing a workers' compensation

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[81]*Id.* at 576, 243 N.E.2d at 877. "At the time of the collision appellant was within the scope of her employment and her injuries arose out of and during the course of her employment . . . ." *Id.*

[82]409 N.E.2d at 1236-37. "Duane Jackson was employed by Sun Realty Company, Inc. as a custodian. He was injured while performing his duties as custodian at a building owned by Earl Gibson." *Id.*

[83]IND. CODE § 22-3-2-5 (1976).

[84]409 N.E.2d at 1238.

[85]Alternatively, if the existence of more than one legal entity is recognized as residing in a single person, and if one of those entities has been established as the employer of the claimant, all other entities become immune to direct suit by the claimant when injury is incurred out of and in the course of employment.

[86]409 N.E.2d at 1239 n.1.

[87]260 Ind. 249, 297 N.E.2d 425 (1973).

claim, had stated a cognizable claim upon which relief could be granted.[88] In *Scott v. Union Tank Car Co.*,[89] the Indiana Court of Appeals was asked to determine whether such a claim sounded in contract or tort for purposes of establishing which statute of limitations applied to the action.

Scott, an employee at will who had brought his action more than two years after he was discharged, argued his claim arose out of a contractual relation and was therefore governed by the six year statute of limitations which applies to contracts not in writing.[90] The court of appeals ruled, however, that retaliatory discharge is an act of an employer " 'intended to cause an invasion of an interest legally protected from intentional invasion' "[91] and therefore sounds in tort. "The fact that the right invaded is one which the law has created 'in consequence of a relation which a contract has established between the parties' in no way undermines, but in fact supports that conclusion."[92] Scott's claim was thus barred by the two year limitation provided by section 34-1-2-2.[93]

Judge Staton dissented, arguing that a retaliatory discharge can be more properly characterized as a breach of the employment contract.[94] He acknowledged that employment at will in Indiana provides no express promise to retain an employee beyond a period determined by the will of either party, but also quoted the *Frampton* court which held that " 'in exercising a statutorily conferred right an exception to the general rule must be recognized.' "[95] The dissent further noted that when workers' compensation was voluntary in Indiana,[96] it was firmly established that the rights and obligations of the act were " 'contractual in nature.' "[97] Even though that coverage is now compulsory, the dissent argued that the relationship still bears contractual characteristics.[98]

In support of this reasoning, the dissent first pointed to the extra-jurisdictional reach of the state's power to regulate performance of workers' compensation duties which is similar to the power

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[88]*Id.* at 253, 297 N.E.2d at 428.

[89]402 N.E.2d 992 (Ind. Ct. App. 1980).

[90]IND. CODE § 34-1-2-1 (1976).

[91]402 N.E.2d at 993 (quoting RESTATEMENT (SECOND) OF TORTS § 6, Comment a (1965)).

[92]402 N.E.2d at 993. *See* Peru Heating Co. v. Lenhart, 48 Ind. App. 319, 326, 95 N.E. 680, 683 (1911).

[93]IND. CODE § 34-1-2-2 (1976).

[94]402 N.E.2d at 993 (Staton, J., dissenting).

[95]*Id.* at 995 (quoting 260 Ind. at 253, 297 N.E.2d at 428).

[96]Act of Mar. 14, 1929, ch. 172, § 2, 1929 Ind. Acts 536 (current version at IND. CODE § 22-3-2-2 (1976)).

[97]402 N.E.2d at 995.

[98]*Id.* at 996.

given to the state to regulate performance of contracts outside the state which were formed within the state.[99] However, a state does not have the power to control the "legal consequences of a tortious act committed outside the state . . . . "[100] Therefore, "if the rights and obligations imposed on employment agreements by the . . . Act are applicable to injuries sustained by an employee in another jurisdiction then those rights and obligations must be contractual in nature."[101] The dissent further argued that the remedies under the Act are not based on fault, a tort concept, but are triggered by an inquiry regarding whether an injury was incidental to the contractual employment relationship. Thus, the employer's duty to compensate under the Act is a contractual one incidental to the employment relationship.[102]

While the dissent also pointed to the various reciprocal duties of employer and employee under the Act to illustrate the presence of contractual characteristics such as consideration and mutuality,[103] the most persuasive argument mounted by the dissent, however, invoked the policy followed "with apparent unanimity" in other jurisdictions.[104] This policy holds "that when a question arises with respect to which of two applicable statutes of limitations should govern a particular cause of action, the doubt should be resolved in favor of the theory containing the longer period of limitation."[105]

In support of the majority position, it can be argued that six years is really too long a period in which to permit a suit for wrongful discharge on any ground. The dissent observed, however, that the legislature in 1977 had enacted a two year statute of limitations to govern oral employment agreements—a statute which would now govern disputes similiar to *Scott*.[106] To permit Scott to maintain his action, which accrued before enactment of the 1977 statute under a contract theory, would set no far-reaching precedent for other employment cases.

In another area of Indiana law, however, precedent does appear to give the choice to plaintiff if his claim contains the essential elements of either theory. In Indiana, a claim for breach of implied warranty can be brought sounding in contract if the various Uniform Commercial Code requirements are met, or can sound in tort if

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 997.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* (citing IND. CODE § 34-1-2-1.5 (Supp. 1981)).

personal injury or property damage is alleged.[107] If the essential elements are present, the applicable statute of limitations will thus be determined by the plaintiff's choice of theory. There seems little compelling reason for absolutely characterizing all retaliatory discharge actions as either sounding in contract or tort. The claim would seem to allow for an election of theories and remedies, or the theories might be pleaded alternatively in separate counts.

4. Date of Accrual; Time of Exposure vs. Time of Disability.— Occupational diseases frequently take years to develop before the worker becomes disabled. In *Bunker v. National Gypsum Co.*,[108] the plaintiff was exposed to asbestos during 1949-1950 but did not become disabled by asbestosis until some time after 1963. Bunker sought to maintain a common law action for negligence against his employer, arguing that the Act was not his exclusive remedy because his cause of action accrued in 1949-1950 when he was exposed to asbestos and not when he was disabled. In 1950 neither he nor his employer was covered by the Indiana Occupational Disease Act which then required affirmative acceptance by the employer before its employees would be covered.[109] The Act was amended in 1963, however, to provide that coverage was automatic unless an employee voluntarily exempted himself from the Act.[110] The question presented to the court was which version of the Act controlled: the Act at the date of exposure or the Act as it existed at the time of disablement.[111]

The court first noted the general rule that "[t]he act has at all times granted compensation on account of *disablement or death*. . . .

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[107]*See* Amermac, Inc. v. Gordon, 394 N.E.2d 946, 948 n.4 (Ind. Ct. App. 1979); Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21, 27 (Ind. Ct. App. 1977) ("In Indiana, an action for breach of warranty may be either in contract or tort, depending on the allegations of the complaint."); *cf.* Reid v. Volkswagen of America, Inc., 512 F.2d 1294, 1296 (6th Cir. 1975) (includes Indiana among states which apply Uniform Commerical Code limitation where privity of contract has been alleged, but apply the tort limitation where it has not); *see also* Vargo & Leibman, *Products Liability, 1979 Survey of Recent Developents in Indiana Law*, 12 IND. L. REV. 227, 240-41 (1979).

[108]406 N.E.2d 1239 (Ind. Ct. App. 1980).

[109]As originally enacted in 1937 the relevant provision stated: "(a) Where an employee in this state dies or sustains injury to health, by reason of disease contracted . . . in the course of employment . . . , unless such employer shall have elected to provide and pay compensation as provided in section 4 of this act, a right of action shall accrue to the employee . . . ." Act of Mar. 6, 1937, ch. 69, § 3, 1937 Ind. Acts 334 (1937) (current version at IND. CODE § 22-3-7-3 (1976)).

[110]Act of Mar. 15, 1963, ch. 338, § 1, 1963 Ind. Acts 1044, 1045 (1963). The 1963 act originally created a presumption that employers and employees were covered by the act and were bound "respectively, to pay and accept compensation" unless the employee gave notice to the contrary prior to any disablement or death. *Id.* In 1974, this presumption was abolished and mandatory compliance with stated exceptions was substituted therein. Act of Feb. 21, 1974, Pub. L. No. 109, § 1, 1974 Ind. Acts 414 (1974) (codified at IND. CODE § 22-3-7-2 (1976)).

[111]406 N.E.2d at 1240.

No employee has a remedy under the act unless or until the occupational disease causes death or disablement."[112] Because the Occupational Disease Act provided that coverage would be automatic unless the employee voluntarily exempted himself, the court held that the plaintiff's action accrued after 1963, and was therefore governed by the exclusive remedy of the Act.[113] The effect of this ruling was to bar the plaintiff altogether because the Indiana Occupational Disease Act's statute of limitations regarding asbestosis provides that disability must occur within three years of the employee's last exposure to asbestos.[114]

Bunker had also challenged this provision on equal protection grounds, but the court declined to reach the constitutional question, ruling that it was not properly before the court in plaintiff's appeal from the trial court's dismissal which had only found "that Bunker's exclusive remedy was provided by the act."[115] The plaintiff's constitutional challenge was grounded on the theory that other plaintiffs' who expressly come under this statute, and impliedly under other statutes of limitation, would have the benefit of a limitation period which would run from the date those plaintiffs *discovered or might have ascertained* that they had suffered an injury and damages, rather than from the date of their exposure to a toxin.[116]

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[112]*Id.* at 1241 (emphasis in original).

[113]*Id.*

[114]IND. CODE § 22-3-7-9(f) (Supp. 1981).

[115]406 N.E.2d at 1240 n.1. Following the close of the Survey period, the court of appeals held in a companion case, after reviewing medical research regarding the nature of asbestosis which was unavailable unitl several years after the law was passed in 1937, that the three-year statute of limitations was unconstitutional. Bunker v. National Gypsum Co., 426 N.E.2d 422 (Ind. Ct. App. 1981) (2-1 decision) (Hoffman, J., dissenting).

[116]Brief for Appellant at 20-23. *See, e.g.*, IND. CODE § 22-3-7-9(f) (Supp. 1981) which, while providing for a three year limitation from date of last exposure to the hazards of diseases caused by inhalation of silica dust, coal dust, or asbestos, also provides:

> However, in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement . . . , occurs within two (2) years from the date on which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment.

A distinct line of cases has held that under Indiana law, a tort cause of action accrues upon the concurrence of injury and "damages . . . '*susceptible of ascertainment.*' " Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 880 (S.D. Ind. 1970) (emphasis in original) (quoting Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836, 840 (7th Cir. 1957); *see also* Montgomery v. Crum, 199 Ind. 660, 679, 161 N.E. 251, 259 (Ind. 1928); Scates v. State, 383 N.E.2d 491, 493 (Ind. Ct. App. 1978). However, the validity of this rule was placed in question by a recent Indiana Supreme Court decision.

In Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981), a legal malpractice action arising out of a negligently drawn will, the court examined when a cause of action accrued for

An interesting question is presented within the context of the *Bunker* case if in fact the statute of limitations governing a common law action for negligence occurring in 1949-1950 was interpreted as beginning to run only when plaintiff would or should have as-certained or discovered his damages. Would Bunker's common law action have accrued at the moment of discovery, or would it have accrued at the time the undiscovered injury commenced, but be tolled until the moment Bunker discovered his illness as would be the rule in the case of fraudulent concealment?[117] If the latter view were adopted, Bunker's common law action for negligence would have accrued in 1949-1950 when presumably his progressive injury began, but would have been tolled until Bunker discovered, or should have discovered, that he had contracted asbestosis. His common law action would then have survived the 1963 amendment to the Occupational Disease Act. It can be persuasively argued, however, that tolling should only occur when the defendant's scienter can be proved. Bunker does not appear to have alleged any fraudulent concealment on the part of his employer, and while it might be inferred that Bunker's claim of negligence against National Gypsum implies that National Gypsum is alleged to have had actual or imputed knowledge of the harmful propensities of asbestos, there is no confidential or fiduciary relationship between Bunker and National Gypsum

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legal malpractice. The court ruled that the statute had begun to run, and the cause of action had accrued upon, the death of the testator, rather than at the time the probate court ruled adversely to the plaintiff. *Id.* at 290. This holding was broadly based on the policy that approves the repose characteristics of statutes of limitation. *Id.* at 291. The rule set down in *Shideler* would therefore be expected to govern all such statutes where the legislature has not provided for some variant. The *Shideler* rule also denies the concept of discovery, that is, the statute begins to run at the onset of damages even if damages are not *yet ascertainable*. *Id.* Damages were held to have occurred in *Shideler* even before the probate court had ruled that a legal injury had in fact occurred. *See generally* MacGill, *Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions*, 14 IND. L. REV. 927 (1981) for a detailed appraisal of *Shideler*.

Applied to the *Bunker* case, the *Shideler* rule would result in the plaintiff's common law action accruing at the time his undiscovered disease began. The *Shideler* court quoted a New York case, Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936), in which the plaintiff's cause of action accrued when he inhaled the dust and not when this dust resulted in disease. 270 N.Y. at 300-01, 200 N.E. at 827, *quoted in* 417 N.E.2d at 289-90. But even under *Shideler*, accrual would probably not be established that early. If a disease failed to develop, no cause of action would ever accrue. *Shideler* does not hold that the accrual of a plaintiff's action should relate back to the moment of defendant's act upon the later ripening of that act into injury. If Bunker's asbestosis had commenced prior to the 1963 amendment, his common law action against National Gypsum would have accrued at that time, and under *Shideler*, would have run out two years later absent fraudulent concealment.

[117] *See, e.g.*, French v. Hickman Moving & Storage, 400 N.E.2d 1384, 1398 (Ind. Ct. App. 1980) (alleged fraudulent concealment of conversion); Cordial v. Grimm, 169 Ind. App. 58, 68, 346 N.E.2d 266, 272 (1976) (alleged legal malpractice).

as would give rise to a duty requiring National Gypsum under a fraud theory to disclose those propensities.[118]

5. The Effect of Other Compensation Statutes.—State workers' compensation statutes may not govern compensation for some workplace accidents. In *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*,[119] the claimant, Max Cuellar, sought compensation under the Longshoremen's and Harbor Worker's Compensation Act.[120] The Administrative Law Judge and the Benefits Review Board both found that Cuellar was an employee within the Act and was therefore entitled to temporary total disability.[121] On appeal, the employer, Garvey Grain, raised, *inter alia*, two issues: (1) "whether Cuellar was an employee within the meaning of the Act" and (2) whether the accident occurred "on navigable water of the United States" as to meet the situs jurisdictional requirement of the Act.[122]

Cuellar was a millwright who was injured while "repairing or reconditioning screw conveyors in a portion of the [Garvey] mill where grain products were made into pellets to be stored . . . until the owner of the product determined to whom the pellets would be shipped."[123] The Administrative Law Judge determined that Cuellar, whose duties also included repairing equipment on the barges and ships which docked beside the plant, was engaged in "maritime employment" although at other times, such as at the time of injury, his duties might reasonably fall outside that classification.[124]

The Seventh Circuit Court of Appeals affirmed this finding, pointing out that "[t]he 'moment of injury' test is no longer the test to determine the status of an employee under the Act."[125] The court cited *Northeast Marine Terminal Co. v. Caputo*,[126] a United States Supreme Court case which held that "a workman is covered [under the Act] if he spends at least *some of his time* in indisputably longshoring operations."[127] The court concluded that it would not set aside the Benefit Review Board's finding if the award "is supported by substantial evidence on the record, considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusion."[128] The court also noted that "[in] deciding this appeal, the Act

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[118]*See* 400 N.E.2d at 1389.
[119]639 F.2d 366 (7th Cir. 1981).
[120]33 U.S.C. § 901-50 (1976 & Supp. III 1979).
[121]639 F.2d at 368-69.
[122]*Id.*
[123]*Id.*
[124]*Id.* at 370.
[125]*Id.* at 371.
[126]432 U.S. 249 (1977).
[127]639 F.2d at 371 (emphasis added).
[128]*Id.* at 369.

is to be liberally construed in favor of injured workers . . . ."[129] The court's conclusion was that "Cuellar was engaged in 'maritime employment' by virtue of the work he did in performing his overall duties for his employer . . . ."[130] The court also upheld the Administrative Law Judge's finding that Cuellar's injury met the situs requirement of the statute.[131] Although Cuellar was working well within the pellet making plant, "[n]avigable waters include an adjoining area customarily used by the employer in loading, unloading, repairing or building a vessel."[132]

This case suggests that an employee whose duties include some functions common to other workers who are covered by a compensation statute more liberal than the applicable state compensation law, may be able to secure the protection of the more liberal statute even though that employee was performing other functions at the time of injury, and in a place somewhat removed from the situs normally associated with the coverage of the more liberal statute. Employers and their compensation insurance carriers would be well advised to review the status and job-sites of workers potentially subject to such alternate coverage.

C. Progressive and Recurrent Injuries

1. Notice to Employer and Effective Date.—Bogdon v. Ramada Inn Inc.,[133] presented a fact pattern which frequently results in workers' compensation litigation. Frank Bogdon suffered a back injury in January, 1977, but continued to work with some discomfort until March 31, when severe pain forced him to obtain surgery for a herniated disc. Bogdon had orally advised his manager of the original injury in January but failed to notify his employer on March 31, when his actual disability began. He also failed to obtain prior authorization from the employer for medical treatment. The claimant retained his own medical help and the ultimate result of his laminectomy was a fifteen percent partial permanent impairment. Bogdon filed a Form 9 application alleging that his injury had occurred on March 31, 1977. In the subsequent hearing, the employer's motion for a finding in its favor was granted by the single hearing member who found that "on the 31st day of May, [sic] 1977, plaintiff . . . did not sustain an accidental injury."[134] The full Industrial Board later adopted this decision without any additional reasons or find-

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[129] *Id.*

[130] *Id.* at 370.

[131] *Id.* at 371.

[132] *Id.* at 369.

[133] 415 N.E.2d 767 (Ind. Ct. App. 1981).

[134] *Id.* at 769. *See also* note 140 *infra.*

ings of its own,[135] but after review and an order by the court of appeals,[136] the Board added an additional negative finding which stated that the claimant had failed to establish " 'by extrinsic evidence the existence of a fact to logically determine the date of alleged incident being January, 1977 or March 31, 1977, if one occurred.' "[137] The claimant sought review once more, claiming that the award of the Board was contrary to law.[138]

The court concluded that the hearing officer believed that the claimant may have been injured in January, 1977 but not on March 31, 1977.[139] The issues to be resolved were therefore whether adequate notice to the employer had been given and whether the claimant's Form 9 application was proper when it gave the date of injury as March 31, 1977.[140]

The court accepted the employer's assertion that Indiana Code section 22-3-3-1[141] requires either actual knowledge of the injury by the employer or written notice by the employee to the employer within thirty days of the injury.[142] The court continued by noting, however, that compensation is only barred if the employer was prejudiced by the lack of knowledge, and only then to the extent the employer was prejudiced.[143] The burden of proving prejudice is on the employer.[144] In this case the court found that there was no evidence in the record of prejudice to the employer.[145] Indeed, there was evidence in the record showing that the employer may have had actual or constructive knowledge of the injury.[146]

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[135]415 N.E.2d at 769.

[136]In an unpublished opinion, the court of appeals initially directed the Board to file amended findings of fact and conclusions of law. 415 N.E.2d at 768.

[137]*Id.* at 769.

[138]*Id.*

[139]*Id.*

[140]*Id.* A third issue dealt with the effective date of a corrected award entered *sua sponte* by the single hearing member "in which he changed . . . the word *May* to *March* to reflect the proper date of the incident." *Id.* (emphasis in original). The court held that the correction should be treated like one made by a court. "A court's correction of an error *nunc pro tunc* relates back to the time of the original entry." *Id.* at 771. Because Bogdon had already filed an application for review of the original entry, no Form 16 application was required to preserve the corrected award as an issue for appeal and to give the court jurisdiction over the claim. *Id.* The resolution of this issue in *Bogdon* was analyzed in Rich v. Review Bd. of Ind. Employment Security Div., 419 N.E.2d 187, 189 (Ind. Ct. App. 1981).

[141]IND. CODE § 22-3-3-1 (1976).

[142]*Id.* at 769-70.

[143]*Id.*

[144]*Id.* at 770.

[145]*Id.*

[146]*Id.* at 769. "However, Ramada's housekeeper and other employees and staff knew of his injuries. . . . Ramada also paid him his sick pay and vacation pay." *Id.*

The employer also argued that the claimant's Form 9 application filed November 16, 1977 was defective because it set the effective date of injury as March 31, 1977 (rather than January, 1977) and refiling at this time would therefore be barred by the two year statute of limitations provided by Indiana Code section 22-3-3-3.[147] The employer was relying on the claimant's own evidence which set the original date of injury as January, 1977.[148] The court, citing *Hornbook-Price Co. v. Stewart*,[149] a factually similiar sixty-two year old case, held that "such a progressive injury is to be treated as one, the effective date being the point of disability."[150] Thus, the claimant's original Form 9 application dated March 31, 1977 was proper and filed well within the two year statute of limitations.[151]

2. Recurrent Injury After Leaving Employment.—In *E.F.P. Corp. v. Pendill*,[152] the claimant suffered a neck injury in the course of employment and received an award for temporary total disability. Two weeks after returning to work he was discharged for reasons unrelated to the injury. Eleven days later he received the first of several disability slips from a neurologist and his original doctor. Six weeks after the first slip was issued, the claimant filed for review of the original award "due to recurrence of injury." The Industrial Board awarded claimant new benefits from his original employer[153] and the award was affirmed by the court of appeals.[154]

The court ruled that while a new injury suffered by the claimant after leaving the original employer would not trigger liability under the Act,[155] the later recurrence of an old injury which had been received in the course of the original employment would support the award of additional benefits chargeable to the original employer.[156] The defendant had argued that a workers' compensation award constitutes a wage substitute that the worker would have been entitled to as an employee of the defendant company but for the injury. However, because an employee is no longer entitled to wages from the company after he leaves its employ, he should not be entitled to wage substitutes.[157] The court agreed that there was authority for

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[147]*Id.* at 770-71 (citing IND. CODE § 22-3-3-3 (1976)).

[148]415 N.E.2d at 770.

[149]66 Ind. App. 400, 118 N.E. 315 (1918).

[150]415 N.E.2d at 771.

[151]*Id.*

[152]413 N.E.2d 279 (Ind. Ct. App. 1980), *transfer denied*, Apr. 20, 1981.

[153]*Id.* at 280.

[154]*Id.* at 281.

[155]*Id.* at 280 (quoting Walfcale v. Grush, 115 Ind. App. 155, 158, 57 N.E.2d 438, 439 (1944)).

[156]413 N.E.2d at 280.

[157]*Id.* at 280-81 (quoting Brief for Appellant at 7-8).

such a result, but only when the recurring injury is not the cause of the claimant's subsequent unemployment.[158] But where the old injury prevents a worker who wishes to work from earning wages from a new employer, wage substitutes chargeable to the original employer are in order.[159]

D. Arising Out Of and In The Course Of Employment

A heart attack suffered while at work will not entitle an employee to workers' compensation in the absence of a causal link between the attack and some "event or happening beyond the mere employment itself."[160] In *Harris v. Rainsoft of Allen County, Inc.*,[161] the court of appeals held that a heart attack suffered by a person with a pre-existing heart condition, is compensable when this causal link is the result of either physical *or* psychological stimulus.[162]

The claimant's decedent was the president and principal owner of Rainsoft, his employer. Earlier on the day of his fatal attack, he had witnessed and assisted at a fire in the building which also housed Rainsoft. Later that evening, he was roused from an after-dinner nap and told that Rainsoft itself was on fire. He rushed to the scene and found the building aflame. Moments later he collapsed and was immediately taken to the hospital where he died later that night.

The Industrial Board found that decedent's death "did not arise out of his employment."[163] The Board relied on *United States Steel Corp. v. Dykes*,[164] which was analyzed in *Douglas v. Warner Gear Division of Borg Warner Corp.*,[165] as requiring a showing that "the employment, or the conditions of the employment, must have been in some proximate way, accountable for, conducive to, or in aggravation of the hastening of the failing activity of the heart."[166] The Board further required that this causal link must be manifested in some sort of "*physical* exertion, over and above that generally required of the employee, or some *physical* impact or trauma which precipitates the heart attack in order to be compensable."[167]

The court found no Indiana cases which expressly required a

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[158]413 N.E.2d at 281.

[159]*Id.*

[160]United States Steel Corp. v. Dykes, 238 Ind. 599, 613, 154 N.E.2d 111, 119 (1958).

[161]416 N.E.2d 1320 (Ind. Ct. App. 1981).

[162]*Id.* at 1324.

[163]*Id.* at 1322.

[164]238 Ind. 599, 154 N.E.2d 111 (1958).

[165]131 Ind. App. 664, 174 N.E.2d 584 (1961).

[166]416 N.E.2d at 1322 (quoting 131 Ind. App. at 672-73, 174 N.E.2d at 588).

[167]416 N.E.2d at 1323 (emphasis in original).

physical causal link although all Indiana cases permitting recovery had heretofore involved physical stimulus.[168] The court was able to find abundant authority from other jurisdictions, however, "for the proposition that a heart attack is compensable when induced by work-related unusual mental, emotional, or psychological stimulus and suffered by an employee with preexisting heart disease."[169] The court also quoted Professor Larson who has emphasized that "[t]he easiest type of case in which to connect the stimulus and the physical injury is that in which the precipitating event is sudden and the result immediate."[170] The court further noted that Indiana has awarded compensation in tort actions where emotional injuries arise out of physical trauma.[171] The one Indiana case in which compensation was denied when the stimulus leading to the heart attack was non-physical,[172] was distinguished by the *Rainsoft* court on the ground that that decision was simply based on what the earlier court held was its limited scope of judicial review, and not on any ruling by the court with respect to the principle of causative emotional trauma.[173]

E. Statutory Discrepancy in Benefit Schedules

In *Roberts v. Casting Service Corp.*,[174] the court of appeals reconciled an apparent conflict between one provision[175] of the Act which specified a formula for computing compensation benefits that resulted in an amount which exceeded the statutory ceiling mandated by Indiana Code section 22-3-3-22.[176] Chester Roberts was killed in the course of employment on November 3, 1969. His dependents and employer entered into an agreement which provided for a term

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[168]*Id.*

[169]*Id. See, e.g.*, Little v. J. Korber & Co., 71 N.M. 294, 378 P.2d 119 (1973) (emotional upset); Pukaluk v. Insurance Co. of N. America, 7 A.D.2d 676, 179 N.Y.S.2d 173 (1958) (fright). *See generally* Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441 (1967); Note, *Heart Injuries Under Workers' Compensation: Medical and Legal Considerations*, 14 SUFFOLK U.L. REV. 1365 (1980) (costs to employers in heart cases should be mitigated by application of waiver, apportionment, and second injury laws in order to avoid discrimination in the hiring of workers known to have pre-existing heart conditions).

[170]416 N.E.2d at 1323 (quoting 1 B. LARSON, WORKMEN'S COMPENSATION LAW §42.21 (1976) (citations omitted)).

[171]416 N.E.2d at 1324. *See, e.g.*, Olin Corp. v. Calloway, 160 Ind. App. 69, 309 N.E.2d 829 (1974); E.I. Du Pont De Nemours & Co. v. Green, 116 Ind. App. 283, 63 N.E.2d 547 (1945).

[172]*See* Campbell v. Colgate-Palmolive Co., 134 Ind. App. 45, 184 N.E.2d 160 (1962).

[173]416 N.E.2d at 1324.

[174]404 N.E.2d 1199 (Ind. Ct. App. 1980).

[175]IND. CODE § 22-3-3-17 (1976).

[176]*Id.* § 22-3-3-22(b) (Supp. 1981).

of five hundred weeks of compensation at a rate of $57 per week, or $28,500, based on a formula for calculating death benefits set out in section 22-3-3-17.[177] Elsewhere in the Act, however, section 22-3-3-22(b) states that the "maximum compensation exclusive of medical benefits which shall be paid for any injury under any provision of this law or any combination of provisions shall not exceed twenty-five thousand dollars ($25,000) in any case."[178] The Industrial Board ruled that the $25,000 ceiling applied, notwithstanding the existence of a formula which permitted a recovery in excess of that amount.[179]

In affirming this decision the court of appeals was "careful to point out that the appellant did not present the board with any issue of fact, nor did she question whether it was possible to agree to more than the $25,000 ceiling, nor does the record show that she raised any claim that the employer deceived her in any manner."[180] The sole issue was limited to a question of statutory interpretation. This dictum suggests that when an employer has expressly agreed to give claimant's dependents five hundred weeks of benefits at fifty-seven dollars per week, the employer *may* be bound to its promise. Or when the employer has deceived those dependents into believing that they are entitled to five hundred full weeks of benefits, the employer might be liable under a fraud theory for the full $28,000. Although conflict between these two provisions is limited to a narrow two-year (1969-1971) period and is therefore unlikely to have any appreciable future impact unless an injury from this period has not been fully settled, similar anomalies may arise as a result of future modifications to existing legislation. Employers and carriers who notify claimants and dependents regarding potential benefits, will be well advised to state in their notice that any compensation benefits to be dispensed or received are subject to all ceilings, limitations, and other provisions of the Act, or other operation of law.

F. Statutory Development

Under Indiana Code section 22-3-3-10(a), compensation for permanent impairment is based on sixty percent of the employee's "weekly wages, not to exceed one hundred twenty-five dollars ($125) average weekly wages" for the statutory periods assigned to the various

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[177]IND. CODE § 22-3-3-17 (1976).

[178]*Id.* § 22-3-3-22(b) (Supp. 1981). This limitation applies to injury occurring between April 1, 1967 and July 1, 1971. *Id.*

[179]404 N.E.2d at 1200.

[180]*Id.*

scheduled injuries.[181] "Average weekly wages" are defined as "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two (52) weeks immediately preceeding the date of injury, divided by fifty-two (52) . . . ."[182] Part-time workers would therefore be entitled under this formulation to benefits based on an average *partial* weekly wage.

During the 1981 legislative session Indiana Code section 22-3-6-1(c) was amended[183] to include vocational education students enrolled in approved "cooperative programs with employers" as defined in section 20-10.1-6-7.[184] These minor employees will now be considered full-time employees "for the purpose of computing compensation for permanent impairment"[185] and will have their average weekly wage calculated by multiplying "(A) The student employee's hourly wage rate . . . by (B) forty (40) hours," but only for the purpose of calculating permanent impairment awards.[186]

This new formula creates an increased actuarial burden for employers employing vocational education students. It should be noted, however, that Indiana Code section 20-10.1-6-8 appears to exempt such students from additional benefits "otherwise payable as a result of being under seventeen (17) years of age under the definition of a minor in IC 22-3-6-1."[187] The additional benefits referred to are probably the punitive "double compensation" provisions of section 22-3-6-1(c) which directly assesses an additional amount equal to the regular compensation award in the event of injury against the employer (rather than the insurance carrier) who employs a minor under sixteen years of age "in violation of the child labor laws of this state."[188] Without this exemption, some employers under the "cooperative program" might have found themselves more frequently liable.

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[181]IND. CODE § 22-3-3-10(a) (Supp. 1981).
[182]*Id.* § 22-3-6-1(d).
[183]Act of April 27, 1981, P.L. 199, 1981 Ind. Acts 1548 (1981).
[184]IND. CODE § 20-10.1-6-7 (Supp. 1981).
[185]*Id.* § 22-3-3-10.
[186]*Id.* § 22-3-6-1(d)(4).
[187]*Id.* § 20-10.1-6-8.
[188]*Id.* § 22-3-6-1(c)(2).