XV. Workmen's Compensation

*John F. Vargo**

In *Motor Dispatch, Inc. v. Snodgrass*,[1] the Indiana Court of Appeals affirmed the decision of the full Industrial Board which awarded compensation to plaintiff on the basis of the "dual employer doctrine."[2] An employee of Austin was killed while operating Austin's truck, which was leased to Motor Dispatch, Inc. The trip-lease agreement provided that the truck was in the exclusive control, possession and management of Motor Dispatch. Motor Dispatch also had the power to stop the truck and remove the driver. The court stated that the decisive test of the employee-employer relationship is the right to control the means, manner or method of performance and recognized that this control could be exercised in a mixed manner by two employers and that neither employer need have complete control over the employee. Although the court found that both Austin and Motor Dispatch were employers, it remanded on the question of the extent of each employer's liability.[3]

In *Motor Dispatch*, the court premised the dual employer rule on the common law interpretation of respondeat superior as applied to the general employer-special employer relationship. The general employer-special employer relationship, sometimes called the loaned servant doctrine,[4] arises when a general employer loans his em-

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*Member of the Indiana Bar. J.D., Indiana University Indianapolis Law School, 1974.

[1]301 N.E.2d 251 (Ind. Ct. App. 1973).

[2]Although the court refers to the relationship of Austin and Motor Dispatch as dual employers or co-employers, this may be somewhat inaccurate. Dual employment occurs when an employee is under contract with two employers, under the separate control of each and under a duty to perform unrelated services for each. The facts indicate that the employee was performing related services for both Austin and Motor Dispatch. In a situation such as this, joint employment would be considered the more accurate definition of the relationship of the two employers. "Joint employment occurs when an employee, under contract with two employers, under simultaneous control of both, simultaneously performs" like or the same services for both employers. 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 48.40, at 8-253 (1973) [hereinafter cited as LARSON]. Joint employment results in both employers being liable to the employee for workmen's compensation, while dual employment may result in separate or joint liability depending on severability. *See id.* § 48.40.

[3]The court remanded in order to determine the liability of each employer pursuant to IND. CODE § 22-3-3-31 (Burns 1974), which provides that, unless the employers agree upon a different distribution, "such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employees."

[4]*See* B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 4.13, at 84 (1950) [hereinafter cited as SMALL].

ployee to a special employer. The sole issue in cases such as *Motor Dispatch* is the factual question of which employer owes compensation to an injured loaned servant. Therefore, the *Motor Dispatch* court's utilization of the respondeat superior doctrine to determine compensation liability seems inappropriate. Respondeat superior focuses on the tort liability between an employer and third parties,[5] whereas workmen's compensation focuses on the liability between the employer and employee.[6]

Furthermore the court's application of the dual employer doctrine to trip-lease agreements creates inescapable conflicts. For example, the Workmen's Compensation Act requires a "contract for hire" between the employer and employee;[7] however, trip-lease agreements appear to be made only between general and special employers. Judicial attempts to imply an employment contract between an employee and special employer serve to deprive the employee of his common law right to sue the special employer for negligence.[8] Moreover, the implication of an employment relationship does not resolve the problem of distributing the liability between the two employers. For example, Indiana Code section 22-3-3-31 provides that, absent any arrangement, dual employers are liable for an amount proportional to the wages which they pay to the employee.[9] However, when an employment relationship is implied, it is probable that the special employer has not made direct wage payments to the employee. Sole liability, therefore, would be placed upon the general employer despite the finding of dual employment. If the dual employment test is to be effective, the courts must examine the rationale underlying the Workmen's Compensation Act. One possible solution would be for the courts to determine initially the "contract for hire" requirement before they apply the "right of control" test.

In *Pirtle v. National Tea Co.*,[10] the court found the written notice requirement of Indiana Code sections 22-3-3-1 and 22-3-3-2[11] satisfied by mere employer knowledge of an employee injury. The claimant-appellant, Pirtle, injured his back on Friday, but did not report the injury to his foreman until the following Monday or Tuesday. Although the foreman refused to fill out an accident report form, the employer's file contained some information concern-

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[5]*See* Gibbs v. Miller, 283 N.E.2d 592 (Ind. Ct. App. 1972); W. PROSSER, THE LAW OF TORTS § 69, at 458-60 (4th ed. 1971).

[6]*See* SMALL § 1.1, at 1-3.

[7]IND. CODE § 22-3-6-1(b) (Burns 1974).

[8]Once the employment relationship is established, *id.* § 22-3-2-6 would deprive the employee of his right to sue in negligence.

[9]See note 3 *supra*.

[10]308 N.E.2d 720 (Ind. Ct. App. 1974).

[11]IND. CODE §§ 22-3-3-1, -2 (Burns 1974).

ing Pirtle's accident. After consideration of the above facts, the Industrial Board denied compensation because of the lack of proper written notice to the employer.[12]

The *Pirtle* court stated that the written notice requirement would be satisfied if the employer has actual or imputed knowledge of the injury. Further, the absence of knowledge by the employer does not bar the employee's claim unless the employer can show resulting prejudice.[13] Assuming the requisite prejudice is shown by the employer, the claimant's rights to compensation will be impaired only to the extent of such prejudice.

The court of appeals, in *Wolf v. Plibrico Sales & Service Co.*,[14] reversed the Industrial Board's decision denying compensation for claimant's back injury. Wolf claimed that he injured his back while working in a bent position as he repaired industrial furnaces. On July 9, 1971, Wolf experienced a sharp pain in his back and reported the incident to his foreman. Wolf and his fellow employees had previously experienced aches and pains in their backs while working in awkward positions. After consulting his family physician, Wolf returned to his employment and worked intermittently until he was hospitalized for a severe lumbosacral sprain. The Industrial Board denied compensation because Wolf had failed to prove an "untoward event" sufficient to satisfy the "accident" requirement of the compensation act.[15]

The opinion of the *Wolf* court is significant from the standpoint that it completely avoids any definitive approach to the determination of what constitutes an accident. The court defined the term accident as an "untoward event not expected or designed."[16] This definition is juxtaposed between a requirement of "sudden traumatic violence" and a mere requirement that the claimant allege that he was working for his employer when the disability arose.[17] Attempting to pinpoint the definition, the court stated that an accident requires an "event," but an event can consist of internal exer-

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[12]The Industrial Board found two grounds for denying compensation: the lack of notice and the fact that the injury did not arise out of or in the course of employment. The court of appeals resolved the latter issue by finding no evidence to support such a conclusion. 308 N.E.2d at 724.

[13]Most decisions do not attempt to define prejudice. However, prejudice usually consists of either the lack of opportunity to investigate the accident or the lack of opportunity to afford proper medical treatment to the employee. *See* Garton v. Kleinknight, 74 Ind. App. 267, 128 N.E. 770 (1920); Tillotson v. New York Tel. Co., 33 App. Div. 2d 612, 304 N.Y.S.2d 579 (1969).

[14]301 N.E.2d 756 (Ind. Ct. App. 1973).

[15]The requirement of "accident" in the Workmen's Compensation Act is found in IND. CODE § 22-3-2-2 (Burns Supp. 1974).

[16]301 N.E.2d at 764.

[17]*Id.*

tion or strain as well as external trauma.[18] Judge Sharp concluded that the facts of *Wolf* fell within the facts, reasoning, and result of *Rankin v. Industrial Contractors, Inc.*[19] *Rankin* contained several propositions which could be relevant to the determination in *Wolf*, including the following: (1) the claimant need not negate other causes of his disability, (2) aggravations of pre-existing conditions are compensable, (3) the claimant need not point to any particular time or place of the accident, and (4) the claimant must show that his work increased the risk of his injury. The inadequacy of *Wolf* lies not in its failure to define "accident," which is an impossible task, but rather in its failure to remand to the Industrial Board for further findings, which findings would possibly avoid the replacement of an agency conclusion with a judicial conclusion.[20]

One of the more important cases decided during the survey period was *North v. United States Steel Corp.*[21] In *North*, an employee brought an action against his employer, United States Steel, for punitive damages, alleging *inter alia* that United States Steel wilfully and recklessly violated Indiana Code sections 22-1-1-10 and 22-1-1-11,[22] which prescribe the employer's duty to provide a safe place for the employee to work. United States Steel argued that North's tort action was prevented by Indiana Code section 22-3-2-6, which provides that the remedies under the Workmen's Compensation Act are exclusive. North asserted that section 6 was not applicable to situations involving violations of the employer's duty to provide a safe place of employment and, alternatively, that section 6 did not apply to actions brought for wilful and reckless violations of the Employer's Liability Act.[23]

The Court of Appeals for the Seventh Circuit rejected both of North's arguments and held that section 6 was the exclusive remedy for an employee injured during the course of his employment. Relying on prior case law and statutory construction, the court stated that the Workmen's Compensation Act specifically abolishes common law actions against an employer and dismissed the action.[24]

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[18] *Id.*

[19] 144 Ind. App. 394, 246 N.E.2d 410 (1969).

[20] The court's description of the Industrial Board's findings can only be described as a conclusion. Thus, any decision by the court could have been avoided by remanding to the Board for more specific findings. *See* Transport Motor Express, Inc. v. Smith, 311 N.E.2d 424 (Ind. 1974).

[21] 495 F.2d 810 (7th Cir. 1974).

[22] IND. CODE §§ 22-1-1-10, -11 (Burns 1974).

[23] *Id.* §§ 22-3-9-1 *et seq.*

[24] In support of its holding that the Act abolished all common law actions, the court cited Selby v. Sykes, 189 F.2d 770 (7th Cir. 1951); Stainbrook v. Johnson County Farm Bureau, 125 Ind. App. 487, 122 N.E.2d 884 (1954); Harshman v. Union City Body Co., 105 Ind. App. 36, 13 N.E.2d

This simplistic and narrow approach by the court of appeals ignores both the underlying rationale of the compensation laws and the complexities involved in employer-employee relationships. The development of workmen's compensation laws was a result of the inability of the working man to recover against his employer for industrially related injuries.[25] This intolerable situation was the primary reason for the abolishment of common law actions against the employer and the substitution of a "no fault" system of recovery.[26] Thus, compensation acts were promulgated to include, as a cost of production, the consequences of industrial accidents.[27]

In *North*, the plaintiff did not allege that an accident occurred, but argued that the employer acted in a wilful manner. Thus, North's action could be considered entirely outside the framework of the Workmen's Compensation Act since the plaintiff's injuries did not fall within the definition of "accident."[28] Moreover, the ability to initiate an independent action for wilful employer misconduct is easily justified since the wilful misconduct of an employee is grounds for the denial of compensation benefits.[29] Furthermore, it is contrary to the policy underlying the Workmen's Compensation Act to permit employers to insure against intentional wrongs, and thereby escape civil liability, while employees are relegated to partial relief through compensation benefits.[30]

Pragmatically, the "dual capacity doctrine" establishes a solid justification for permitting North's tort action.[31] This doctrine is

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353 (1938); *In re* Bowers, 65 Ind. App. 128, 116 N.E. 842 (1917); IND. CODE §§ 22-3-2-6, -6-2 (Burns 1974). The court also foreclosed punitive damage actions on the authority of Burkhart v. Wells Electronics Corp., 139 Ind. App. 658, 215 N.E.2d 879 (1966).

[25] 1 LARSON § 4.30 (1972); SMALL § 1.2.

[26] 1 LARSON § 5.20 (1972); SMALL § 1.1.

[27] *See* 1A LARSON § 37.10; SMALL § 5.2; Note, *Right of Employee to Sue Employer for an Intentional Tort*, 26 IND. L.J. 280 (1951).

[28] *See* SMALL § 5.1 (Supp. 1968).

[29] IND. CODE § 22-3-2-8 (Burns 1974) describes several types of employee misconduct, including wilful failure to perform statutory duties, which can prevent recovery of compensation benefits. *Id.* § 22-3-2-7 states: "Nothing in this act [*Id.* §§ 22-3-2-1 to -6-3] shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty." Thus, an employee may be deprived of compensation benefits for his failure to perform statutory duties while, according to the *North* holding, the same type of conduct by the employer is not penalized. This type of judicial construction is inconsistent with the general principle of uniformity in statutory interpretation.

[30] *See* Note, *Right of Employee to Sue Employer for an Intentional Tort*, 26 IND. L.J. 280, 282 (1951).

[31] For an explanation of the doctrine of dual capacity and a survey of the case law concerning this subject, see Kelly, *Workmen's Compensation and*

steeped in the complex interpositions of contemporary employer-employee relationships. Professor Larson has definitively stated:

> Under this doctrine, an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his employer if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.[32]

In *North*, one of the plaintiff's allegations was that a defect existed in the shop's design. If a third party, rather than the employer, had designed the shop, North could have maintained his action against the third party tortfeasor. However, the *North* court prevented a similar action against the employer-designer due to the exclusivity clause of the Workmen's Compensation Act. By mandate of the "dual capacity doctrine," United States Steel's obligation as the shop designer could be considered so unrelated to its obligations as an employer that it would be subject to tort liability.

Finally, the *North* court completely disregarded the consequences of disallowing punitive damages in an action against an employer who wilfully or intentionally violates safety regulations. In the absence of any effective safety enforcement,[33] an employer can ignore the minimal cost of compensation benefits and continue with impunity to engage in unsafe practices.[34] Thus, the holding

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Employer Liability: The Dual Capacity Doctrine, 5 ST. MARY'S L.J. 818 (1974).

[32]2 LARSON § 72.80, at 226.20 (1974).

[33]Although there are several federal and state agencies which attempt to control unsafe industrial conditions, their effect may be minimal. For example, the Occupational Safety and Health Act, 28 U.S.C. §§ 651 *et seq.* (1970) (OSHA), and the Indiana Occupational Safety and Health Act, IND. CODE §§ 22-8-1.1-1 *et seq.* (Burns 1974) (IOSHA), have penalties for unsafe industrial practices. However, the enforcing agencies lack the manpower to properly inspect the large number of businesses in Indiana. OSHA has a staff of ten and IOSHA a staff of fourteen who attempt to inspect approximately 80,000 businesses. In fiscal year 1974, OSHA made 1,115 inspections and it is estimated that less than two percent of Indiana businesses will be inspected annually. *See* Nussbaum, *Hoosier Firms Must Pay Millions to Correct Deficiencies in Safety*, The Indianapolis Star, July 7, 1974, at 1, col. 4.

[34]It is very unlikely that an employer, faced with enormous expense, would voluntarily alter his business in order to provide a safe place for an employee to work. For example, assume the following facts. An employer owns an unsafe machine costing several million dollars. In order to sustain his business, he must continue to operate the machine. Its unsafe condition does not interfere with its efficiency; however, its condition is dangerous to the employees. While it would cost several hundred thousand dollars to repair the unsafe condition of the machine, the maximum cost of compensation for injury or death to an employee is only thirty thousand dollars. In such a situation, although the thought processes of the employer may not amount

in *North* could foster industrial disconcern for minimal safety standards, thereby increasing the likelihood that industrial accidents will be more frequent occurrences. Hopefully, a different conclusion would result if the same issue should confront the Indiana Supreme Court.

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to a cold calculation of mere costs when considering the safety of his employees, cost must be a factor that would at least subconsciously influence his choice.

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