XVIII. Workmen's Compensation

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A. Assignment of Errors

Counsel continue to disregard the requirement that a certified copy of an assignment of errors be included in the transcript on appeal.[1] The assignment need only state that "the award of the full board is contrary to law. . . ."[2] The court may then review both the sufficiency of the findings of fact utilized to sustain the award and the sufficiency of the evidence to sustain the findings of fact.[3] During the survey period, the court of appeals has summarily disposed of two cases not containing this prerequisite by dismissing the appeals by memorandum "not for publication" opinions,[4] citing *Slinkard v. Extruded Alloys*.[5] Although the statutory mandate has been firmly established[6] and consistently enforced by the court with little hope of exception,[7] the court's practice of specifically referring to the inclusion of the assignment[8] has alerted few appellants in the survey period.

B. Permanent Total Disability

The court of appeals established the definition of permanent total disability in *Perez v. United States Steel Corp.*[9] To establish permanent total disability, an injured workman must show "that *he cannot carry on reasonable types of employments*."[10] Necessarily, however, the ability to assume reasonable types of employment requires physical fitness, mental fitness, and availability of employment opportunities.[11] Superimposed on these factors is the per-

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[1]IND. CODE § 22-3-4-8 (1976); IND. R. APP. P. 7.2(A)(1).

[2]IND. CODE § 22-3-4-8 (1976); *see generally* Penn-Dixie Steel Corp. v. Savage, 390 N.E.2d 203, 205 (Ind. Ct. App. 1979).

[3]Penn-Dixie Steel Corp. v. Savage, 390 N.E.2d 203, 205 (Ind. Ct. App. 1979).

[4]*See* IND. R. APP. P. 15(A)(3). The author has personal knowledge of these cases since he has served as a single hearing judge for the Industrial Board since 1977.

[5]150 Ind. App. 479, 277 N.E.2d 176 (1971).

[6]*See* IND. CODE § 22-3-4-8 (1976); *see generally* B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA, § 12.14 (1950 & Supp. 1976).

[7]Means v. Seif Material Handling Co., 157 Ind. App. 492, 300 N.E.2d 895 (1973).

[8]*See, e.g.*, Seagram & Sons v. Willis, 401 N.E.2d 87 (Ind. Ct. App. 1980); White v. Woolery Stone Co., 396 N.E.2d 137 (Ind. Ct. App. 1979).

[9]359 N.E.2d 925, 927-28 (Ind. Ct. App. 1977).

[10]*Id.* at 927 (quoting B. SMALL, *supra* note 6, § 9.4) (emphasis in original).

[11]359 N.E.2d at 928 (quoting B. SMALL, *supra* note 6, § 9.4).

manency of the injury. Therefore, applicaiton of the definition remains unsettled[12] as each party presents medical evidence to demonstrate the claimant's condition.

In *White v. Wollery Stone Co.*,[13] White underwent surgery to remove cartilage from his knee. He suffered a lengthy recuperation as a result of complications and sought a declaration by the Industrial Board that his injury resulted in permanent total disability. The Board disagreed, and found that the injuries resulted in a fifty percent permanent partial impairment of his left lower extremity.[14] The court of appeals affirmed, deferring to medical testimony which had established the extent of the claimant's injuries, the likelihood that the claimant could return to his old job, and the parameters which the claimant should follow in seeking employment.[15]

In *Penn—Dixie Steel Corp. v. Savage*,[16] Savage suffered burns and a hernia in a work-related accident. After receiving temporary total disability benefits for approximately fifty-one weeks, he returned to work. Subsequently, he was unable to continue working because he experienced mental problems allegedly precipitated by the previous injury.

The court of appeals affirmed the Board determination that Savage was 100% disabled.[17] In support of this finding, the Board relied on the testimony of Savage's wife and daughter concerning Savage's mental state.[18] Moreover, the Board considered the psychiatrist's testimony that Savage's injury was "a significant emotional factor in his mental demise."[19] The psychiatrist also testified that Savage was totally disabled.[20]

The standard of review is clear. The reviewing court will not weight evidence and will only consider evidence tending to support the Board's decision.[21] Thus, the Board's determination of permanent total disability, if based on sufficient evidence, will not be disturbed on appeal.[22] Moreover, although a finding of permanent partial im-

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[12]Although findings by the Social Security Administration have been rejected by the Industrial Board as irrevelant, many of the same factors leading to a favorable determination there seem applicable to the present inquiry. *See generally* H. McCormick, Social Security Claims and Procedures (2d ed. 1978).

[13]396 N.E.2d 137 (Ind. Ct. App. 1979).

[14]*Id.* at 139.

[15]*Id.* at 139-40.

[16]390 N.E.2d 203 (Ind. Ct. App. 1979).

[17]*Id.* at 204-05, 208.

[18]*Id.* at 207.

[19]*Id.*

[20]*Id.*

[21]White v. Woolery Stone Co., 396 N.E.2d at 140.

[22]*Id. See* Dennison v. Martin, Inc., 395 N.E.2d 826, 828 (Ind. Ct. App. 1979); Penn-Dixie Steel Corp. v. Savage, 390 N.E.2d at 208.

pairment does not exclude a finding of permanent total disability,[23] when there is evidence of both, the Board's finding of only some degree of permanent partial impairment is sustainable.[24]

C. *Liability for Contractor's Employees*

A little known provision of the Workmen's Compensation Act was discussed by the court of appeals in *Indiana Bell Telphone Co. v. Owens*.[25] In that case, Indiana Bell hired an independent contractor to complete utility construction for the telephone company. One of the contractor's employees, Owens, suffered a compensable injury while working on the project. The Industrial Board, relying on Indiana Code section 22-3-2-14,[26] found Indiana Bell secondarily liable for the statutory benefits available to the employee. However, the court of appeals reversed and remanded the case to the Industrial Board because the Board's findings of fact were insufficient to show that Indiana Bell had actually contracted with Owens' employer.

The statutory section upon which the Industrial Board relied[27] imposes upon those persons delineated therein, including a homeowner, the duty to verify that those with whom they contract carry compensation insurance on their employees.[28] Similar provisions without dollar limitation apply for contractors who sublet any work.[29] Failure to exact a cetificate from the Industrial Board makes one liable to the same extent as the contractor.[30] A right of subrogation exists against the contractor but this is seen as more illusory than real because exhaustion of the immediate employer's liability is required[31] and the contractor not carrying insurance is often judgment-proof. More than one homeowner has been surprised to discover this provision. Furthermore, because homeowners' policies contain a standard exclusion for losses covered by workmen's compensation, the homeowner often incurs personal liability. Additionally, the certificate from the Board provides protection for only ten days.[32] Therefore, in addition to requesting a certificate from the

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[23]Perez v. United States Steel Corp., 359 N.E.2d at 929.

[24]396 N.E.2d at 140.

[25]399 N.E.2d 443 (Ind. Ct. App. 1980).

[26]IND. CODE § 22-3-2-14 (1976).

[27]*Id.*

[28]*Id.* The contract must exceed $500.

[29]*Id.*

[30]*Id.* The Industrial Board's procedural rules require that each request for a certificate be accompanied by a pre-addressed, stamped envelope. 630 IND. AD. CODE § 1-1-37 (1979).

[31]*See* IND. CODE § 22-3-2-14 (1976). Exhaustion of the immediate employer's liability is generally regarded as the return on execution unsatisfied.

[32]*Id.* § 22-3-5-5.

Board, anyone contracting for services should also request from the contractor a certificate of insurance, which provides for notification in the event of cancellation. Moreover, a homeowner should purchase a workmen's compensation contingency endorsement for his homeowner's policy.

D. Tolling of Modification Period for Fraud

In *Gayheart v. Newnam Foundry Co.*,[33] an employee filed a civil action for fraud against an employer and his insurer after the Industrial Board had dismissed the employee's claim for benefits under the Workmen's Compensation Act because the statute of limitations had expired. Based on his failure to exhaust administrative remedies and the *res judicata* effect of the original Industrial Board proceedings,[34] the trial court granted summary judgment against the employee in the fraud action. The court of appeals held that the doctrine of *res judicata* could not operate to prevent the trial court from addressing the issue of fraud since the Industrial Board had no jurisdiction to consider fraud as a ground for tolling the statute of limitations.[35] In vacating the court of appeals' decision, the supreme court held that the Board always has jurisdiction to determine whether a party was fraudulently induced into foregoing the filing of an application for modification under Indiana Code section 22-3-3-27.[36] Furthermore, the court held that if fraud were found, the modification time limitation would be tolled at the moment the fraud was perpetrated.[37] Clearly, an employee would be protected by this expansion of the Board's jurisdiction. The opinion however, deals only with the limitation period for a modification of an award. Thus, the employer would also be protected because his compensation personnel, who would have knowledge of the occurrence of an accident and surrounding circumstances, would be in charge of the file.

Because the opinion is limited to modifications under Indiana Code section 22-3-3-27, absent some pronouncement, the general limitation period for the initial filing of claims found in Indiana Code section 22-3-3-3[38] would be applicable as a nonclaim statute.[39] Thus, where no weekly indemnity payments are made, claims should still

[33]393 N.E.2d 163 (Ind. 1979).

[34]*Id.* at 165.

[35]*Id.*

[36]*Id.* at 166.

[37]Id.

[38]IND. CODE § 22-3-3-3 (1976).

[39]*See* Wawrinchak v. United States Steel Corp., 148 Ind. App. 444, 267 N.E.2d 395 (1971). "A nonclaim statute creates a right of action and has inherent in it the denial of a right of action. It imposes a condition precedent—the time element which is a part of

be filed within two years from the date of accident. However, in a modification action, the claimant should fully exercise the right to raise the fraud issue lest it be waived. Nevertheless, he may preserve an action at law for damages if the fraud caused him to forbear filing his claim in an original action.

E. Retaliatory Discharge—Limitations

The landmark case of *Frampton v. Central Indiana Gas Co.*[40] was revisited by the court of appeals in *Scott v. Union Tank Car Co.*[41] The supreme court in *Frampton* held that an employee who alleges that he was discharged in retaliation for filing a compensation claim stated a claim upon which relief could be granted.[42]

In *Scott*, an employee filed a suit against Union more than two years after his dismissal alleging that he had been discharged in retaliation for filing a workmen's compensation claim. The trial court dismissed the suit on the ground that it was barred by the two-year statute of limitations.[43] A divided third district court of appeals also affirmed the dismissal. The court held that a claim alleging retaliatory discharge is tortious in nature, and is therefore subject to the two-year limitations.[44]

Judge Staton's lengthy dissent[45] characterized the employee's action as one of contract, and thus subject to the longer statute of limitations.[46] He noted, however, that after the effective date of Indiana Code section 34-1-2-1.5, a two-year limitations period would be applicable.[47] Thus, currently under both views, filing should occur within two years.

F. Medical Malpractice

In *Stevens v. Kimmel*[48] and in *McLaughlin v. American Oil Co.*,[49]

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the action itself." *Id.* at 451-52, 267 N.E.2d at 399. Furthermore, nonclaim statutes may not be extended "by the disability, fraud or misconduct of the parties," nor are they subject to waiver. *Id.* at 452, 267 N.E.2d at 400 (quoting Donnella v. Crady, 135 Ind. App. 60, 63, 185 N.E.2d 623, 625 (1962)).

[40]260 Ind. 249, 297 N.E.2d 425 (1973). *See generally* B. SMALL, *supra* note 6, § 11.16 (Supp. 1976).

[41]402 N.E.2d 992 (Ind. Ct. App. 1980).

[42]260 Ind. at 253, 297 N.E.2d at 428.

[43]402 N.E.2d at 992. *See* IND. CODE § 22-3-3-3 (1976).

[44]402 N.E.2d at 993.

[45]*Id.* at 993-97 (Staton, J., dissenting).

[46]IND. CODE § 34-1-2-1 (1976).

[47]402 N.E.2d at 994 n.3. IND. CODE § 34-1-2-1.5 (Supp. 1980) became effective Aug. 29, 1977.

[48]394 N.E.2d 232 (Ind. Ct App. 1979).

[49]391 N.E.2d 864 (Ind. Ct. App. 1979).

the court adopted the reasoning found in *Ross v. Schubert*[50] as applicable to malpractice actions against company physicians. In *Stevens*, the plantiff suffered a work related injury and was treated by the company physician. Later, he filed a medical malpractice suit against Dr. Kimmel. Dr. Kimmel claimed that as company physician, he was a co-employee and, therefore, immune from suit. The *Stevens* court reiterated that the company physician is essentially an independent contractor in relation to his patients; therefore, he cannot claim the "in the same employ" immunity found in Indiana Code section 22-3-2-13.[51]

In *McLaughlin*, the court also found that a company physician is not clothed with immunity from a medical malpractice suit.[52] However, the court held that McLaughlin's intentional tort action against his employer was improper.[53] The court refused to accept McLaughlin's argument that because the act which caused his injury was intentional, not accidental, it was not within the purview of the Act.[54] Instead, the court held that the question was not whether the injury was accidental or intentional, but whether it was one arising out of and in the course of employment.[55] Finding that McLaughlin's injury was one arising out of and in the course of employment, the court limited him to the remedies provided by the Act.[56] It is axiomatic that the harmful effects of the treatment of a compensable injury are themselves compensable.[57]

G. Recovery Limitations

Temporary employees from Manpower, Inc. were found to be employees of the firm utilizing Manpower's services in *Fox v. Contract Beverage Packers, Inc.*[58] Fox, a Manpower employee, received workmen's compensation benefits from Manpower's insurance carrier for injuries he sustained while on assignment at Contract Beverages. Fox then brought a suit against Contract, alleging negligence. Fox claimed that his civil suit was appropriate, because Contract was not his employer. The trial court entered summary judgment against Fox, and the court of appeals affirmed.[59] The court

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[50]388 N.E.2d 623 (Ind. Ct. App. 1979).

[51]394 N.E.2d at 233.

[52]391 N.E.2d at 865.

[53]Id. at 866.

[54]*Id.*

[55]*Id.*

[56]*Id.*

[57]*See generally* Seagram & Sons, Inc. v. Willis, 401 N.E.2d 87 (Ind. Ct. App. 1980); B. SMALL, *supra* note 6, §§ 6.19, 8.48.

[58]398 N.E.2d 709 (Ind. Ct. App. 1980).

[59]*Id.* at 710.

reasoned that Contract and Manpower were joint employers of Fox, so that Fox was limited to recovery of workmen's compensation benefits.[60] Manpower's payment of the workmen's compensation benefits did not preclude this result, since joint employers are allowed to contract between themselves as to who carries workmen's compensation insurance.[61] As Fox's employer, Contract could also use the exclusivity provisions of the Act.[62]

H. Statutory Changes

The 1980 Legislative Session produced an amendment[63] to the Township Poor Relief provisions, that a recipient performing work as a satisfaction of conditions of relief was covered by "IC 22-3," presumably referring to the Workmen's Compensation Act[64] and Occupational Disease Act[65] rather than the older and substantially superseded Employer Liability Act.[66]

Two statutory changes made in 1979 became effective during the survey period. The first change to the Workmen's Compensation Act was the increase in the average weekly wages considered in determining compensation benefits.[67] As of July 1, 1979, the average weekly wages were $195, producing a compensation benefit of $130; as of July 1, 1980, average weekly wages were $210, producing a compensation benefit of $140.[68] The statutory maximums were also increased to reflect the higher benefits.[69] Similar changes were made in the Occupational Disease Act.[70]

The other change to the Workmen's Compensation Act involved the extension of the so-called "healing period" from 26 to 52 weeks for accidents occurring on or after July 1, 1979.[71] Nevertheless, benefits for permanent partial impairment remain at seventy-five

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[60]*Id.* at 712.

[61]IND. CODE § 22-3-3-31 (1976).

[62]*Id.* § 22-3-2-6.

[63]Act of 1980, Pub. L. No. 94, 1980 Ind. Acts 1170 (amending IND. CODE § 12-2-1 (1976)). This amendment provides: "[A] recipient performing work under this chapter and the governmental unit for which he works are covered by IC 22-3 with regard to the work performed. In computing benefits under IC 22-3, the wage rate at which the recipient works off the assistance shall be used." 1980 Ind. Acts at 1171.

[64]IND. CODE §§ 22-3-1-1 to -6-3 (1976 & Supp. 1980).

[65]*Id.* §§ 22-3-7-1 to -38.

[66]*Id.* §§ 22-3-9-1 to -11 (1976).

[67]The average weekly wages are determined as of the date of the accident.

[68]IND. CODE §§ 22-3-3-22, -3-8 (Supp. 1980).

[69]*Id.*

[70]*Id.* § 22-3-7-19.

[71]*Id.* § 22-3-3-10. *See also* Occupational Disease Act, IND. CODE § 22-3-7-16 (Supp. 1980).

dollars for accidents after July 1, 1977. Administratively, the Board has determined that an employer is entitled to dollar credit for benefits paid in excess of the healing period as against the permanent partial impairment benefits, and not merely credit for the number of weeks paid at the higher rate for temporary benefits. This practice has not been addressed by the court of appeals and therefore will continue, absent some determination by them.

I. Briefly Noted

In *Davis v. C.P. Lesh Paper Co.*,[72] the claimant was injured in the course of her employment when she was seventeen years old. She filed her claim over two years after the injury, but argued that her "minor" status had tolled the statute of limitations. The court held that under both the current and immediately preceding version of the statute, a minor for all purposes under the Act was a person who had not reached the age of seventeen.[73] Those under seventeen are in some cases entitled to receive double compensation.[74]

Seagram & Sons, Inc., v. Willis[75] provided an interesting factual situation wherein the combined effects of medications prescribed for an industrial injury and alcohol ingested by the injured workman combined to produce his death.[76] The court held that the effects of the industrial accident need not be the sole cause of the death and affirmed the award of compensation.[77] The court also stated that if interest were to be added from the date of death it was a matter for the legislature to include in the statute and not for the court to create.[78]

A finding that an employee was the aggressor in a fight precluded her right to compensation in *Berryman v. Fettig Canning Corp.*[79] The court dismissed the argument that "but for" the employment, the dispute over time cards and riders would not have occurred and held that such a dispute did not arise out of employment.[80] To arise out of the employment it must be a risk reasonably incidental to the employment, either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly con-

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[72]394 N.E.2d 207 (Ind. Ct. App. 1979).
[73]*Id.* at 208-09.
[74]IND. CODE § 22-3-6-1 (Supp. 1980).
[75]401 N.E.2d 87 (Ind. Ct. App. 1980).
[76]*Id.* at 88-89.
[77]*Id.* at 92.
[78]*Id.* at 93.
[79]399 N.E.2d 840 (Ind. Ct. App. 1980).
[80]*Id.* at 843.

nected with the employment owing to the special nature of the employment.[81]

In *Coleman v. Indiana Veneers, Inc.*,[82] the plaintiff appealed the Industrial Board's decision to award her only forty percent of her deceased son's income. The court of appeals approved of the Board's "ascertaining" the percentage of support contributed to a partial dependent.[83] Absent precise figures with which to determine the mathematical formula, the court held that the Board's findings were not clearly erroneous.[84]

The other cases decided during the survey period advance no new legal propositions and appear to be limited to their facts.[85]

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[81]*Id.*

[82]395 N.E.2d 874 (Ind. Ct. App. 1980).

[83]*Id.* at 876.

[84]*Id.*

[85]Birge v. Bryant Air Conditioning, 393 N.E.2d 790 (Ind. Ct. App. 1979); Sheller-Globe Corp. v. Parks, 393 N.E.2d 264 (Ind. Ct. App. 1979).