XVII. Workers' Compensation

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A. Introduction

The survey period was marked by several important decisions in workers' compensation law. The Indiana Supreme Court twice reversed expansive decisions rendered by the Indiana Court of Appeals,[1] but in two other cases, the supreme court liberalized previous holdings.[2] In other cases involving aggravated pre-existing medical conditions, the court of appeals upheld the Industrial Board's denial of total permanent disability awards where partial impairment compensation had already been awarded.[3] The court of appeals also clarified the meaning of "special employer" and "borrowed servant" for workers' compensation purposes,[4] and it applied new gloss to the dual concept of "injury arising out of and in the course of employment."[5] The court of appeals also reiterated that an employer can only be held liable for medical expenses of which it has notice.[6]

During the survey period, the court of appeals explored the difference between lienholder and subrogee status in the context of a third party action,[7] and in another third party case, the right to sue a fellow employee under "the same employ" rule was clarified.[8] The Industrial Board's power to determine "the fact" and "the acknowledgment of" paternity for the award of workers' compensation was also upheld by the court of appeals.[9]

During its 1983 session, the Indiana General Assembly raised several benefit ceilings under the Indiana Workmen's Compensation and Occupa-

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[1] *See infra* notes 12-47 and accompanying text ("dust disease" last exposure statute of limitation ruled constitutional), and notes 54-91 and accompanying text (college varsity athlete on athletic scholarship ruled not employee of university).

[2] *See infra* notes 103-21 and accompanying text (employer liable for nursing care after injury reaches permanent and quiescent state), and notes 154-66 and accompanying text (expert medical testimony need not be couched in terms of "reasonable medical certainty" for workers' compensation purposes).

[3] *See infra* notes 127-39 and accompanying text (permanent disability award after award for partial impairment requires showing of shattered wage earning capacity), and notes 140-53 and accompanying text (fact finder can reject expert testimony of disability when in conflict with other expert evidence although not from same type of medical specialist).

[4] *See infra* notes 92-102 and accompanying text.

[5] *See infra* notes 167-95 and accompanying text.

[6] *See infra* notes 196-210 and accompanying text.

[7] *See infra* notes 242-56 and accompanying text.

[8] *See infra* notes 257-66 and accompanying text.

[9] *See infra* notes 267-76 and accompanying text.

tional Diseases Acts,[10] and on the federal level, the Seventh Circuit Court of Appeals, in companion cases, denied "Black Lung" benefits to two claimants by approving evidence offered by the defendants to rebut the claimants' statutory pneumoconiosis presumptions.[11]

B. Occupational Disease: "Last Exposure" Rules

In *Bunker v. National Gypsum Co.*,[12] the Indiana Supreme Court finally ended Richard Bunker's vigorous challenge to the Indiana statute of limitations which governs "dust disease"[13] claims arising under the Indiana Occupational Diseases Act.[14] The Act provides that "[n]o compensation shall be payable . . . in cases of occupational diseases caused by the inhalation of silica dust, coal dust, or asbestos dust . . . three (3) years after the last day of the last exposure to the hazards of such disease."[15]

The claimant had been exposed to asbestos for a twenty-two month period in 1949-1950 while employed by National Gypsum.[16] He was transferred by the company to an asbestos-free environment in 1950, where he worked until he left National Gypsum in 1966.[17] In 1976, after undergoing exploratory surgery, Bunker was diagnosed as having asbestosis.[18] Although he was later able to return full-time to his job,[19] he filed a claim for disability under the "Indiana Workmen's Occupational Diseases Act."[20]

Bunker's claim for workers' compensation was denied by the Industrial Board on the ground that it was filed more than three years from the

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[10] *See infra* notes 277-81 and accompanying text.

[11] *See infra* notes 211-41 and accompanying text.

[12] 441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 103 S. Ct. 1761 (1983).

[13] Pneumoconiosis, silicosis, and asbestosis are frequently called the dust diseases because they are caused respectively by coal dust, silica dust, and asbestos dust. Victims of the dust diseases have three years to bring a claim whereas claimants suffering from other workplace toxins have only two. IND. CODE § 22-3-7-9(f) (1982).

[14] IND. CODE §§ 22-3-7-1 to -38 (1982 & Supp. 1983).

[15] *Id.* § 22-3-7-9(f) (1982). The supreme court quoted from the earlier version, IND. CODE ANN. § 22-3-7-9(e) (Burns 1974). 441 N.E.2d at 10. The language differences between the two versions are not significant.

[16] 441 N.E.2d at 9-10.

[17] *Id.* at 10.

[18] *Id.*

[19] *Id.* at 16 (Hunter, J., dissenting).

[20] *Id.* at 9 (referring to IND. CODE §§ 22-3-7-1 to -38 (1982 & Supp. 1983)). Bunker also brought an action for common law negligence against National Gypsum. *See* Bunker v. National Gypsum Co., 406 N.E.2d 1239 (Ind. Ct. App. 1980). *See also* Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 453, 466-69 (1982). He argued he had such a claim because his exposure to asbestos antedated a 1963 amendment to the Indiana Workmen's Occupational Diseases Act which made it the exclusive remedy for employees seeking relief from their employers for health impairments caused by toxic agents found in the workplace. The court ruled that Bunker would have to seek his remedy under the Act. 406 N.E.2d at 1241.

date of his last exposure while an employee of National Gypsum.[21] Bunker responded that his exposure to asbestos fibers was a continuous one, because the asbestos dust remained in his lungs and gastro-intestinal system and was never excreted. Therefore, "the last day of the last exposure" had not yet arrived.[22] The Industrial Board rejected Bunker's interpretation of the statute by finding that "the legislature cannot be said to have intended the term 'last exposure' to mean other than 'last exposure' during and 'in the course of employment.' "[23] For Bunker, that "last exposure" would have been in 1950.

In so ruling, the Board rejected Bunker's argument that workers' compensation statutes must always be construed consistent with the humane objectives of the legislation.[24] Instead, the Industrial Board followed a purposive approach, stating that the legislature had intended a scheme which would provide relief for workplace accidents and health impairments which could be " '*currently funded* out of reduced profits and/or increased price to the consumer of the product of [the] business. Without a specific reasonable time limitation, the rate making process locks [sic] the vital component of predictable losses until some other statistical pattern can be established.' "[25]

On appeal, Bunker argued that if the court were to hold that his claim was barred by the "last exposure" provision of the Act, that provision should be held to be unconstitutional on due process grounds.[26] The

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[21]441 N.E.2d at 9. The Indiana Workmen's Occupational Diseases Act grants the Industrial Board jurisdiction to administer the compensation provisions of the Act. IND. CODE § 22-3-1-3 (1982).

[22]*See* Brief for Appellant at 7, Bunker v. National Gypsum Co., 426 N.E.2d 422 (Ind. Ct. App. 1981) [hereinafter cited as Appellant's Brief].

[23]*Id.* at 3 (quoting Award from Industrial Board of Indiana, Dec. 26, 1979).

[24]*See* F. MARSHALL, A. KING & V. BRIGGS, SR., LABOR ECONOMICS (4th ed. 1980). "The objective of these statutes was to assure benefits to workers and their families in the event of work-related injuries or death while, at the same time, limiting the actual liability of employers to the size of the worker compensation payment." *Id.* at 467.

References to the need for liberal construction of workers' compensation laws so as to effectuate their humane objectives are found in the following Indiana cases (other than *Bunker*) which were decided during the survey period: Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1172 (Ind. 1983); Talas v. Correct Piping Co., 435 N.E.2d 22, 28 (Ind. 1982); Indiana Bell Tel. Co. v. Ernst, 444 N.E.2d 1258, 1260 (Ind. Ct. App. 1983); Suburban Ready Mix Concrete v. Zion, 443 N.E.2d 1241, 1242 (Ind. Ct. App. 1983); Rensing v. Indiana State Univ. Bd. of Trustees, 437 N.E.2d 78, 84 (Ind. Ct. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983); Goins v. Lott, 435 N.E.2d 1002, 1006 (Ind. Ct. App. 1982).

[25]Appellant's Brief, *supra* note 22, at 3 (quoting Award from Industrial Board of Indiana, Dec. 26, 1979).

[26]Appellant's Brief, *supra* note 22, at 16-21. Bunker also raised two equal protection arguments. *Id.* at 21-28. With respect to the first, the court stated: "Nor could it be rationally urged that the legislature intended to divide exposed workers for purposes of coverage into those continually exposed for the necessary 20 to 30 year gestation period and those not." 426 N.E.2d at 425 n.7. The court did not address the second of the Act's classifications identified by Bunker as invidious—the distinction between radiation victims and dust disease victims. Under the Act, the former are given the benefit of a "discovery rule,"

Indiana Court of Appals held that the three year statute of limitations denied Bunker due process of law by effectively denying him a right to recovery.[27] The court cited medical studies which demonstrated that the symptoms of asbestosis were often first manifested many years after the victim's initial threshold exposure to asbestos.[28] The court concluded that "[i]n view of the discovery of this factual information about the disease since the legislature imposed the . . . limitation in 1937, it appears to us that the statute can no longer stand."[29]

As predicted in last year's Survey Article,[30] the Indiana Supreme Court reversed.[31] The court found two errors in the decision below. One was the court of appeals' use of "medical evidence found outside the record of this case to justify their opinion."[32] The second was the lower court's holding that the last exposure provision was unconstitutional.[33]

With respect to the court of appeals' independent search for medical evidence, the supreme court stated that appellate review of lower courts' factual findings " 'is limited to those matters contained in the record which were presented to and considered by the fact-finder.' "[34] With respect to the lower court's finding that the statute was violative of due process, the supreme court gave great weight to the presumption of constitutionality that must be accorded an act of the legislature, especially in the case of statutes of limitations where a judgment as to the reasonableness of the limitation period must be made.[35] The supreme court stated that "[t]he legislature has the sole duty and responsibility to determine what constitutes a reasonable time for the bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice."[36] In upholding the statute, the supreme court explained that to do otherwise would frustrate the legislature's purpose of creating a limitations period for occupational disease claims and would be a "blatant abuse of judicial power."[37]

An interesting question is raised by the supreme court's analysis. The court reviewed the medical evidence cited by the court of appeals and

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while the latter frequently find themselves barred by the three year statute of limitations before they can possibly discover their illnesses. IND. CODE § 22-3-7-9(f) (1982).

[27]426 N.E.2d at 425.

[28]*Id.* at 424-25 & n.6.

[29]*Id.* at 425.

[30]*See* Coriden, *Workers' Compensation, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 433, 434 (1983).

[31]441 N.E.2d at 14.

[32]*Id.* at 11.

[33]*Id.*

[34]*Id.* at 14 (quoting Hales & Hunter Co. v. Norfolk & W. Ry., 428 N.E.2d 1225, 1227 (Ind. 1981)).

[35]441 N.E.2d at 12.

[36]*Id.* The court of appeals apparently found the three year limitations period to be "manifestly insufficient."

[37]*Id.* at 13-14.

noted that the incidence of asbestosis appeared to be a function of exposure: the greater the exposure, the greater the chance of disease.[38] Because the respondent had been exposed for a period of only twenty-two months, the supreme court reasoned that "a legislator *standing in the past* may have reasonably concluded that Respondent would probably never be afflicted by asbestosis and therefore would probably never be in need of protection or relief."[39] If, however, as the court of appeals found, later medical discoveries proved that the 1937 legislators had miscalculated the true probabilities of disease,[40] would the once constitutional statute become violative of due process in light of the new facts? The supreme court gave its answer: "It is within the duties and responsibilities of the legislature to keep itself advised of the general progress of medical learning and to make the determination as to whether or not new or revised legislation is needed."[41]

The court failed to recognize the doctrine of judicial self-restraint in this case, according to Justice Hunter in dissent.[42] He argued that reaching the constitutional question was inappropriate in this case because "the record . . . [was] void of the development . . . vital to our resolution of constitutional issues."[43] He would have preferred either a trial *de novo* on the constitutional issues,[44] or a holding that Bunker did not meet the statutory requirement of a "disablement" and therefore had no claim for compensation.[45] Although it was true that Bunker did return to full-time employment following exploratory surgery in 1976, he was totally disabled for a four week period at the time.[46] Given that Bunker had pressed the claim that he was disabled, to rule that his four week temporary total inability to earn wages was not a disablement under the Act could lead to serious injustice in other cases.[47]

The effect of the Indiana Supreme Court's ruling in *Bunker* was quickly felt. In *Woodworth v. Lilly Industrial Coatings, Inc.*,[48] the claimant had contracted leukemia which he alleged was caused by his exposure to carcinogenic agents while employed at Lilly. The date of claimant's last exposure was March 1, 1977, but he was not actually disabled until

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[38]*Id.* at 14.

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

[40]*See supra* note 29 and accompanying text.

[41]441 N.E.2d at 14.

[42]*Id.* at 14-15 (Hunter, J., dissenting).

[43]*Id.* at 17.

[44]*Id.* at 19.

[45]*Id.* at 15-18.

[46]Record of the Proceedings at 5, Bunker v. Nat'l Gypsum Co., 426 N.E.2d 422 (Ind. Ct. App. 1980) (Industrial Board of Indiana, Form 9, claim for compensation "for total disability during exploratory surgery and post-operative recovery"), *rev'd*, 441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 103 S. Ct. 1761 (1983).

[47]The United States Supreme Court dismissed Bunker's appeal for the lack of a federal question. Bunker v. Nat'l Gypsum Co., 103 S. Ct. 1761 (1983).

[48]446 N.E.2d 646 (Ind. Ct. App. 1983).

about March, 1980.[49] In this case the limitation provision attacked by the claimant was the general two-year "last exposure" rule,[50] rather than the three-year period accorded "dust diseases."[51] Relying on the court of appeals' decision in *Bunker*, the claimant argued that the two-year limitation period was violative of due process.[52] Following the supreme court's reversal in *Bunker*, the court of appeals affirmed the Industrial Board's dismissal of the claim.[53]

C. *The Employer-Employee Relationship*

1. Athletic Scholarship.—In order for there to be a compensable event, an employer-employee relationship between the claimant and the entity from which he or she is seeking workers' compensation must be found to exist.[54] Consistent with the policy that workers' compensation laws are to be liberally construed to effectuate the humane objectives of the legislation,[55] a measure of liberality is required in defining the term employee.[56] That there are limits to this process was demonstrated in the case of *Rensing v. Indiana State University Board of Trustees*.[57]

Claimant Rensing was a varsity football player at Indiana State University.[58] He incurred a spine injury during practice which left him a quadriplegic.[59] Rensing, prior to his matriculation at Indiana State, had entered into a scholarship agreement with the university trustees which he argued was equivalent to a "contract of employment."[60] In exchange for playing football, he was to receive a package consisting of financial assistance and other benefits.[61] The agreement provided that, if he were

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[49]*Id.* at 647.

[50]IND. CODE § 22-3-7-9(f) (1982) provides in pertinent part: "No compensation shall be payable for or on account of any occupational diseases unless disablement . . . occurs within two (2) years after the last day of the last exposure to the hazards of the disease. . . ."

[51]*See supra* note 15 and accompanying text.

[52]446 N.E.2d at 647.

[53]*Id.* at 648. For a full discussion of *Bunker* see Leibman & Dworkin, *A Failure of Workers' Compensation and Tort*: Bunker v. National Gypsum Co., 18 Val. U.L. Rev. (1984).

[54]IND. CODE § 22-3-2-2 (1982). *See* Mid-Continent Petroleum Corp. v. Vicars, 221 Ind. 387, 47 N.E.2d 972 (1943); Meek v. Julian, 219 Ind. 83, 36 N.E.2d 854 (1941); Taylor v. Brainard, 111 Ind. App. 265, 37 N.E.2d 714 (1941).

[55]*See supra* note 24.

[56]Daniels v. Terminal Transp. Co., 125 Ind. App. 28, 32, 119 N.E.2d 554, 556 (1954). The Indiana Workmen's Compensation Act states: "The term 'employee' means every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer." IND. CODE § 22-3-6-1(b) (1982).

[57]444 N.E.2d 1170 (Ind. 1983).

[58]*Id.* at 1170. For a summary of the details of the case, see *id.* at 1170-72.

[59]*Id.* at 1170.

[60]*Id.* at 1172.

[61]*Id.* at 1171.

injured, his financial assistance would continue, but he would still be obligated to provide services to the athletic department of the university.[62] The Industrial Board rejected his claim for workers' compensation, finding that he had failed to prove the existence of an employer-employee relationship between himself and the university trustees.[63]

The Indiana Court of Appeals reviewed the Industrial Board's award and in a 2-1 decision found sufficient evidence of an employment relationship between the parties within the meaning of the statute.[64] First, the court noted that it was conceded by the university trustees that some type of contractual relationship existed between them and Rensing.[65] After finding that Rensing was not covered by the classes of employees expressly exempted from coverage under the Indiana Worker's Compensation Act, the court addressed the question of whether there was an employment contract between the parties.[66] The court observed that the financial aid agreement called upon Rensing to play football in exchange for financial aid, or if injured, to provide alternative services.[67] Rensing's benefits were to continue as long as he "was 'otherwise eligible to compete.' "[68]

The court also observed that "scholarships or similar benefits may be viewed as pay pursuant to a 'contract of hire' in the analogous context of unemployment benefits."[69] The Unemployment Compensation Act provides for liability for contributions on behalf of individuals attending college " 'who, in lieu of remuneration . . . receive either meals, lodging, books, tuition or other education facilities.' "[70] In addition, the court found that the financial aid agreement impliedly gave the university trustees the power to withdraw benefits if it was later found that Rensing had misrepresented his intention to play football.[71]

The court, finding no Indiana cases on point, cited a California case in which the next of kin of a deceased scholarship athlete were awarded death benefits under the California workers' compensation law.[72] That athlete, however, also had a part-time job with the college.[73] In a Colorado case, a student-athlete was required to play football in exchange for a job as manager of the university's tennis courts.[74] When he was

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[62] *Id.*

[63] *Id.* at 1172.

[64] 437 N.E.2d 84, 87 (Ind. Ct. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

[65] *Id.* at 83.

[66] *Id.* at 84.

[67] *Id.* at 85.

[68] *Id.*

[69] *Id.*

[70] *Id.* (quoting IND. CODE § 22-4-6-2 (1982)).

[71] 437 N.E.2d at 85.

[72] *Id.* at 86 (citing Van Horn v. Industrial Accident Comm'n, 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963)).

[73] 437 N.E.2d at 86.

[74] *Id.* at 87 (citing University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953)).

injured during football practice, the Colorado Supreme Court upheld his workers' compensation award. The court held that the injury was an incident of his employment.[75] In another Colorado case, however, the next of kin of a student-athlete who was on an athletic scholarship were denied compensation because the evidence failed to disclose an obligation on the athlete's part to play football.[76] The Indiana Court of Appeals concluded that in the two foreign cases in which compensation was awarded, as well as in the instant case, benefits received were conditioned upon "athletic ability and team participation."[77] Therefore, the court found a contract of hire existed and Rensing was an employee within the meaning of the Indiana statute.[78]

A final issue addressed by the court was whether Rensing's contract for hire should be classified as " 'casual and not in the usual course of the trade, business, occupation or profession of the employer.' "[79] Such a finding would remove Rensing from the statute's coverage. The court found Rensing's activities non-casual because of their periodical regularity and the importance of the athletic program to the university.[80] Finally, the court found football to be a part of the university's occupation.[81]

The Indiana Supreme Court granted transfer and reversed in a unanimous decision.[82] The court stated that for there to be an employment relationship, there must be "an intent that a contract of employment, either express or implied, . . . exist."[83] The court examined the documents which formed the agreement and found no such intent.

The primary document relied on by the court was the National Collegiate Athletic Association (NCAA) constitution and bylaws which the agreement incorporated by reference. The NCAA constitution expressly distinguishes intercollegiate sports from professional sports, viewing the former "as part of the educational system."[84] A student may not accept any pay, nor can an institution "condition financial aid on a student's ability as an athlete."[85] The benefits Rensing received under the grant were not considered pay under NCAA rules, nor did they affect his eligibility. The Internal Revenue Service has ruled that such benefits are not taxable and are to be treated in the same manner as an award under an academic scholarship.[86]

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[75]437 N.E.2d at 87.

[76]*Id.* (citing State Compensation Ins. Fund v. Industrial Comm'n, 135 Colo. 570, 314 P.2d 288 (1957)).

[77]437 N.E.2d at 87.

[78]*Id.* (referring to IND. CODE § 22-3-6-1(b) (1982)).

[79]437 N.E.2d at 87 (quoting IND. CODE § 22-3-6-1(b) (1982)).

[80]437 N.E.2d at 88-89.

[81]*Id.*

[82]444 N.E.2d at 1175.

[83]*Id.* at 1173.

[84]*Id.*

[85]*Id.*

[86]*Id.*

The court noted that the Indiana General Assembly has granted the boards of trustees of state educational institutions only the power to award scholarships that are "reasonably related to the educational purposes and objectives of the institution and in the best interests of the institution and the state."[87] No such requirement is placed on the hiring of part-time employees. Furthermore, unemployment benefit contributions are assessed not on scholarship grants, but only on in-kind benefits conferred on regular job holders in lieu of pay.[88]

The court also stated that the university's receipt of benefits from its athletic program did not mean that Rensing was in the service of the school.[89] Moreover, other jurisdictions have held that student leaders, student athletes, student resident-hall assistants and the like were not employees unless they were also employed in a university job.[90]

The court found three essential elements of an employment relationship lacking in the agreement between the university trustees and Rensing—the lack of intent to enter a contract for hire, the lack of pay for performance, and the lack of the employer's right to discharge on the basis of performance.[91] The decision of the Industrial Board was, therefore, reinstated.

2. Borrowed Servant.—In *Beach v. Owens-Corning Fiberglas Corp.*,[92] the plaintiff was a general employee of U.S. Piping but was working on the premises of Owens-Corning for a period of several months pursuant to a contract between the companies.[93] When Beach was injured on the job, he brought suit (presumably alleging negligence) against Owens-Corning. The defendant's motion for summary judgment was granted on the theory that the plaintiff was a borrowed servant, and any claim for relief against Owens-Corning had to be brought under the Indiana Workmen's Compensation Act.[94] The federal district court ruled that the question "whether plaintiff [was] an employee or independent contractor" was a matter of law and that summary judgment was appropriate.[95]

In applying a test of employer-employee relationship from *Fox v. Contract Beverage Packers, Inc.*,[96] the court found that

> while Owens-Corning, (1) did not have the right to discharge Jackie Beach; (2) did not pay him his wages directly; (3) did not supply his tools; and (4) had no formal contract of employment

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[87] *Id.*
[88] *Id.* at 1173-74.
[89] *Id.* at 1174.
[90] *Id.*
[91] *Id.*
[92] 542 F. Supp. 1328 (N.D. Ind. 1982).
[93] *Id.* at 1329-30.
[94] *Id.* at 1331.
[95] *Id.* at 1329 (citing Downham v. Wagner, 408 N.E.2d 606 (Ind. Ct. App. 1980)).
[96] 398 N.E.2d 709 (Ind. Ct. App. 1980).

> with plaintiff; it (1) did control the place and the manner in which plaintiff was performing his work; (2) did exercise direct supervision over him at the time of the accident; (3) did contract with U.S. Piping for his services . . . ; and (4) had the right to and did control the boundaries of his work.[97]

One additional factor from *Fox* was whether the parties believed that an employer-employee relationship existed.[98] Beach claimed that he held no belief that Owens-Corning was his employer.[99] The court found, however, the plaintiff's acquiescence in the direct supervision by Owens-Corning for a period of several months was sufficient to demonstrate an implied service contract between the parties.[100] The court stated that the decisive Indiana "test for the existence of a master-servant relationship is 'the right to command the act and to direct and control the means, manner or method of performance.' "[101] Thus, Owens-Corning, as a matter of law, was held to be a special employer of the plaintiff.[102]

D. Permanent and Quiescent State

1. Permanent Impairment—Nursing Care.—Workers' compensation includes two components: the first is compensation to victims for economic loss as a result of injuries arising out of and in the course of their employment; the second is compensation to injured employees to cover expenses they incur for medical services and supplies. Both of these compensation components are limited. Economic loss, whether as a result of disability (the inability to work and earn wages) or impairment (the loss of physical function),[103] is limited under the Indiana statute to a total of 500 weeks of compensation at a percentage of the average weekly wage.[104] Medical expense compensation is also limited, in theory at least, by the concept that the employer is not liable for medical costs once it is no longer possible "to limit or reduce the amount and extent of [the victim's] impairment."[105] That point may not be reached, however, even after the

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[97]542 F. Supp. at 1330.

[98]*Id.*

[99]*Id.*

[100]*Id.*

[101]*Id.* (quoting Wabash Smelting, Inc. v. Murphy, 134 Ind. App. 198, 209, 186 N.E.2d 586, 592 (1963)).

[102]542 F. Supp. at 1331.

[103]*See* Talas v. Correct Piping Co., 435 N.E.2d 22, 26 (Ind. 1982).

[104]IND. CODE § 22-3-3-8 (1982) provides for a maximum non-medical benefit amount set by a percent of an average weekly wage multiplied by 500. The maximum average weekly wage and maximum non-medical benefit limits are established by the Indiana Workmen's Compensation Act. *Id.* § 22-3-3-22 (1982 & Supp. 1983). These amounts for 1983 and beyond have recently been raised. *See infra* notes 277-80 and accompanying text.

[105]IND. CODE § 22-3-3-4 (1982). This section provides four time periods during which a claimant may be awarded expenses of medical and nursing services. Talas v. Correct Piping Co., 435 N.E.2d 22, 26 (Ind. 1982). The third period is "after an adjudication or award

victim's injury is said to be in a permanent and quiescent state. In *Talas v. Correct Piping Co.*,[106] the Indiana Supreme Court defined the scope of this statutory liability for medical expense compensation.

Woodrow Talas' industrial injury reduced him to a traumatic quadriplegic.[107] After hospitalization and a period of institutional rehabilitation, he was returned home where he received around-the-clock nursing care. The employer paid for the care for several months. The parties executed a Form 12 agreement which provided that after December 6, 1978, Talas "had sustained both '100% permanent impairment of the man as a whole and 100% total permanent disability.' "[108] This stipulation meant that Talas could receive the maximum compensation for his economic losses for the maximum period under the statute.[109]

With respect to medical expenses, the Form 12 agreement stipulated " 'that the injury is in a permanent and quiescent state.' "[110] However, it was also agreed " 'that the question of continuing treatment for the employee's injuries including . . . nursing services and supplies' " was to be " 'left to the determination of the Industrial Board upon proper hearing . . . .' "[111] Talas filed an emergency petition for an award for nursing care "as necessary to sustain and maintain his life."[112]

A single hearing officer ordered the employer to pay Talas for medical and nursing care necessary to reduce his impairment or disability.[113] Upon

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of permanent impairment, as the industrial board may deem necessary to limit or reduce the amount and extent of impairment." This period was the only one held to be relevant to Talas' injuries. *Id.* at 27.

[106]435 N.E.2d 22 (Ind. 1982).

[107]For a review of facts of the *Talas* case, see *id.* at 23-26.

[108]*Id.* at 26 (quoting the parties' agreement). The court distinguished a finding of "100% permanent impairment of the man as a whole" from "permanent *total* impairment," the latter being a phrase which the court stated "would necessarily describe death." *Id.* at 27. The court, therefore, reasoned that the wording of the agreement must be read as "permanent partial impairment" which falls within the statutory period found applicable in this case. *Id. See infra* note 109.

[109]Compensation for permanent partial *impairment* is calculated by taking a percentage of an average weekly wage times a specified number of weeks. IND. CODE § 22-3-3-10 (1982). But a worker can also recover a total permanent disability award. *Id.* § 22-3-3-22 (1982 & Supp. 1983). It has been argued that under Perez v. United States Steel Corp., 172 Ind. App. 242, 247, 359 N.E.2d 925, 929 (1977), *vacated*, 426 N.E.2d 29 (Ind. 1981) (not addressing this issue), an injured employee could be entitled to both types of awards. Coriden, *Compensation, Disability, Impairment*, INDIANA WORKMEN'S COMPENSATION 1983 § 11, at 8 (Indiana Continuing Legal Education Forum 1983). *But cf.* Duncan v. George Moser Leather Co., 408 N.E.2d 1332, 1336 & n.5 (Ind. Ct. App. 1980) (citing *Perez* to support proposition that duplication of awards isn't permissible, but that IND. CODE § 22-3-3-27 (1982) permits the Industrial Board to modify or change a permanent partial impairment award to a permanent total disability award).

[110]435 N.E.2d at 24 (quoting the parties' agreement).

[111]435 N.E.2d at 24 (quoting the parties' agreement).

[112]435 N.E.2d at 24.

[113]*Id.*

appeal, the full Industrial Board overruled and directed that Talas receive none of the aid he had requested.[114] The Board's findings revealed conclusively that no additional medical or nursing care would improve Talas' condition.[115] However, evidence in the record was equally clear that around-the-clock care was essential to prevent his condition from seriously deteriorating.[116] The employer's position, which was adopted by the Industrial Board, was that " 'there was no medical treatment which was necessary to limit or reduce the amount and extent of Talas' impairment or disability and that the amount and extent of Talas' impairment would never be reduced.' "[117]

The supreme court adopted a broader view.[118] Although the supreme court agreed that nothing could be done to "limit or reduce the amount and extent" of Talas' quadriplegia, it found that he was unable to care for himself. The court found further that absent special care and assistance, Talas would be more susceptible to life threatening medical disorders.

> In view of the remedial nature of the Workmen's Compensation Act and the liberal construction to be accorded it, we conclude that the impairment of Talas's physical functions would be limited, if not reduced, by nursing care, as these terms are utilized in the Act. That conclusion follows even though the care will not cure Talas's quadriplegia, *for in the circumstances present here*, any other construction would be inimical to the humanitarian purposes of the Act.[119]

The court stated its reasoning was limited to *"the circumstances present here,"*[120] yet it seems clear that its ruling will make Indiana employers generally liable for maintenance care necessary to keep an incurable injury at its permanent and quiescent state once that stage has been reached. The court also ruled that *professional* nursing care was not necessarily required if lay help would do, but a family member could not be required to give up gainful employment in order to provide that help.[121] One result of the *Talas* case is to bring Indiana more in line with other

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[114] *Id.*

[115] *Id.* at 27.

[116] *Id.* at 27-28.

[117] *Id.* at 25 (quoting Industrial Board's findings).

[118] Talas appealed, partly on the ground that the Industrial Board had failed to make adequate findings of fact. The Supreme Court of Indiana agreed, and twice remanded the case to the Industrial Board for further factual findings. *Id.* at 23. *See* Talas v. Correct Piping Co., 426 N.E.2d 26 (Ind. 1981); Talas v. Correct Piping Co., 416 N.E.2d 845 (Ind. 1981); *see also* Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 453, 455-58 (1982).

[119] 435 N.E.2d at 28-29 (emphasis in original). The court cites fifteen cases from other jurisdictions supporting its reasoning. *Id.* at 29 n.1.

[120] *Id.* at 29 (emphasis in original).

[121] *Id.* at 30.

jurisdictions which have substantially extended the limitations on workers' compensation awards for medical expenses.

2. *Partial Impairment—Total Disability.*—Until a workplace injury reaches a permanent and quiescent state, the Indiana Workmen's Compensation Act[122] provides for an award of temporary total disability compensation.[123] After the injury is adjudged to be permanent and quiescent, a determination of the extent of impairment is made and the claimant receives a statutory award to compensate for the loss of physical function represented by the impairment.[124] The statute provides for awards for a specified number of weeks of compensation for loss of parts of the body as well as similar awards for partial loss of bodily function which can be expressed as a percentage impairment.[125] A final determination is then made as to whether the claimant suffers permanent total disablement as a result of the impairment; that is, whether the claimant is capable of reasonable employment. When the claimant has been adjudged to be 100% permanently impaired, a finding of total disability generally follows as a matter of course, as was the case in *Talas*.[126] But where the claimant suffers partial impairment, the far more common case, the issue of permanent total disability is more difficult to resolve.

In *Hale v. Mossberg/Hubbard*,[127] the claimant, Hale, a female janitor, suffered a back injury for which she received temporary total disability compensation. On January 12, 1979, Hale's doctor expressed the opinion that the claimant's injuries had become permanent and quiescent.[128] Upon receiving additional medical testimony, the single hearing judge found that the claimant suffered a " 'permanent partial impairment of 22% of the body as a whole, apportioned 7% as pre-existing and 15% as a result of the industrial accident . . . .' "[129] In conclusion, the Industrial Board found " 'insufficient evidence of permanent total disability . . . . The spinal fusion is an accepted medical treatment for the condition suffered and limits employment, but does not totally prevent similar factory work, where such is available . . . .' "[130]

Upon review, the Indiana Court of Appeals affirmed.[131] To justify a finding of permanent total disability, the court stated that the claimant had the burden of demonstrating her inability to engage in employment

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[122]IND. CODE §§ 22-3-1-1 to -10-3 (1982 & Supp. 1983).

[123]*Id.* § 22-3-3-8 (1982).

[124]*Id.* § 22-3-3-10.

[125]*Id.* § 22-3-2-10(b)(6). This subsection provides: "In all other cases of permanent partial impairment, compensation proportionate to the degree of such permanent partial impairment, in the discretion of the Industrial Board, not exceeding five hundred (500) weeks."

[126]*See supra* note 109.

[127]432 N.E.2d 409 (Ind. Ct. App. 1981).

[128]*Id.* at 410.

[129]*Id.* at 411 (quoting Industrial Board's findings).

[130]432 N.E.2d at 411 (quoting Industrial Board's findings).

[131]432 N.E.2d at 410, 414.

of reasonable types.[132] An award for permanent total disability requires a showing of disability " 'which so destroys or shatters a workman's wage earning capacities as to leave him unable to resume reasonable types of employment for the remainder of his life . . . . [T]otal permanent disability must be taken to require a greater incapacity than that produced by any of the other scheduled harms.' "[133] The Industrial Board had found that the employer was unable or unwilling to tender work within the current physical limitations of the claimant.[134] Hale pointed to that fact, to the evidence of her difficulty in obtaining employment elsewhere (once she admitted to prospective employers that she had had a spinal fusion), and to her lack of training, expertise, work experience and education to justify a finding of a permanent total disability.[135] The court found the evidence insufficient to prove "that the spinal fusion was considered so disabling that she could not obtain any reasonable employment."[136] The essence of this holding is that compensation for the permanent harm caused by the accident, once the condition becomes permanent and quiescent, will generally come in the form of an impairment award.

The court of appeals found sufficient evidence in the record to support the Industrial Board's finding of a 7% pre-existing impairment.[137] The effect of that ruling was to reduce her impairment award from 22% to 15%.[138] How and why this apportionment is made is discussed in the next section.[139]

E. Aggravation of Pre-existing Condition

1. "Apportionment" Statute.—In *Rork v. Szabo Foods*,[140] the claimant alleged that as a result of a fall she experienced in April, 1977, she suffered a sprained ankle, injured vertebrae, and complications.[141] Rork also alleged that her attempts to return to work had failed because continuing pain prevented her from fulfilling her work duties.[142] The Industrial Board found that following the accident, the claimant suffered " 'a 20% permanent partial impairment of the body as a whole of which 10% is causally connected to the stipulated industrial accident.' "[143] The Board

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[132] *Id.* at 413.

[133] *Id.* at 412 (quoting White v. Woolery Stone Co., 181 Ind. App. 532, 534, 396 N.E.2d 137, 139 (1979) (quoting B. SMALL, WORKMAN'S COMPENSATION LAW OF INDIANA § 9.4, at 244 (1950))).

[134] 432 N.E.2d at 411.

[135] *Id.* at 412.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 413.

[139] *See infra* notes 140-65 and accompanying text.

[140] 439 N.E.2d 1338 (Ind. 1982).

[141] *Id.* at 1339.

[142] *Id.*

[143] *Id.* at 1341 (quoting Industrial Board's Additional Findings of Fact)

further found that the claimant had failed to establish her permanent total disability. The claimant appealed, arguing that her accident had caused greater than a 10% impairment, and that she had become permanently totally disabled.[144]

In addressing the degree of impairment argument, the court cited section 12 of the Indiana Workmen's Compensation Act, the "apportionment" statute.[145] That section provides that where a permanent injury increases or aggravates a pre-existing permanent injury, the Industrial Board must determine the extent of pre-accident impairment and the amount of additional permanent impairment caused by the accident, "and shall award compensation only for that part of such injury, or physical condition resulting from the subsequent permanent injury."[146] Although conflicting medical testimony appeared in the record, the court stated that it was not its prerogative to reweigh the evidence.[147] The Industrial Board's finding of a 10% impairment as a result of the aggravation to Rork's pre-existing condition was greater than one expert's estimate, but less than another's.[148] On these facts the court refused to disturb the Industrial Board's finding of a 10% impairment.[149]

In reviewing Rork's claim for total permanent disability, the court noted that the claimant has the burden of establishing such a finding by proving an inability to perform employment of reasonable types.[150] Reasonableness is to be assessed by the availability of opportunities and the claimant's physical and mental fitness.[151] Rork's claim was premised on the testimony of a neurologist. That doctor, on the basis of his estimate of the pain suffered by the claimant, found "that she suffers a '100% impairment and total disability which is likely to be a permanent total disability with respect to pursuing gainful employment.' "[152] The court rejected Rork's argument that her total permanent disability was conclusively established because this evidence was unrebutted by another neurologist. It stated that the fact finder may reject expert opinion testimony and noted that there was other contradictory expert medical testimony. Based on these facts and the lack of evidence demonstrating the unavailability of work opportunities for which Rork was suited, the court upheld the Industrial Board's finding that Rork did not suffer permanent total disability.[153]

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[144]*Id.*

[145]*Id.* at 1342 (citing IND. CODE § 22-3-3-12 (1982)).

[146]IND. CODE § 22-3-3-12 (1982).

[147]439 N.E.2d at 1342.

[148]*Id.*

[149]*Id.* at 1342-43.

[150]*Id.* at 1343 (quoting Perez v. United States Steel Corp., 426 N.E.2d 29, 31 (Ind. 1981) (quoting Perez v. United States Steel Corp., 172 Ind. App. 242, 245-46, 359 N.E.2d 925, 927-28 (1977))).

[151]439 N.E.2d at 1343.

[152]*Id.* (quoting testimony of Dr. Smith).

[153]*Id.*

2. To a Reasonable Medical Certainty.—In *Noblesville Casting Division of TRW, Inc. v. Prince*,[154] the claimant alleged that an industrial accident had aggravated an existing back condition. The Industrial Board affirmed the hearing officer's award of medical expenses, temporary total disability, and permanent partial impairment.[155] On review, the Indiana Court of Appeals reversed the award because the expert testimony failed to establish to a reasonable medical certainty that the claimant's injuries were caused by the accident.[156]

In an exhaustive analysis, the supreme court reversed,[157] stating: "We here reject the notion that the admissibility and probative value of medical testimony is dependent upon the expert witness's ability to state conclusions in terms of 'reasonable medical certainty . . . .' "[158] The court's ruling that expert medical testimony couched in terms of "possibility" could be probative is discussed elsewhere in this survey issue.[159] The practical result of the holding should be an easing of a claimant's burden of establishing impairment and disability, especially in complex medical cases where estimates have to be made of the additional amount of injury that has been added to a pre-existing injury. The problem is analogous to that in the adoption of comparative fault provisions where the fact finder must apportion fault between parties. Expert evidence couched in terms of probabilities or possibilities in both of these situations is likely to aid the fact finder.[160]

Because the court of appeals had held for the employer under the "reasonable medical certainty" analysis, it did not reach several additional issues raised in *Noblesville Casting*.[161] The supreme court, in light of its rejection of the reasonable medical certainty standard, addressed these additional issues.

First, the court held it was unnecessary for the Industrial Board to distinguish an "acceleration" of an existing degenerative condition from an "aggravation" of an existing quiescent one.[162] The court stated that where an industrial accident increases an existing impairment, the statute only requires the Industrial Board to determine " 'the extent of the aggravation or increase resulting from the subsequent permanent injury.' "[163]

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[154]438 N.E.2d 722 (Ind. 1982).

[155]*Id.* at 725.

[156]424 N.E.2d 1055 (Ind. Ct. App. 1981), *rev'd and vacated*, 438 N.E.2d 722 (Ind. 1982).

[157]438 N.E.2d at 737. This was a 2-2 decision with two justices concurring in the result only. *Id.* (Pivarnik, J., concurring). Justice Pivarnik, in his concurring opinion, stated that expert opinions based solely on "possibilities" were of no probative value. *Id.* Justice DeBruler did not participate. *Id.*

[158]*Id.* at 726.

[159]For a further discussion of this ruling, see Tanford, *Evidence, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 197, 211 (1984).

[160]438 N.E.2d at 731-32.

[161]*Id.* at 732.

[162]*Id.* at 734.

[163]*Id.* (quoting IND. CODE § 22-3-3-12 (1982)).

The court also rejected Noblesville Casting's argument that the Industrial Board was required to specify the " 'nature' of the pre-existing back condition."[164]

Second, Noblesville Casting attacked the sufficiency of evidence to support several of the Industrial Board's findings of fact. The court reviewed these findings and the supporting evidence and concluded that none of the findings were based on evidence that was "devoid of probative value or that lacked a requisite quantum of legitimacy."[165] Other evidential issues dealing with hearsay and hypothetical questions were likewise resolved in favor of the claimant.[166]

F. Arising Out of and In the Course of Employment

Claimants for workers' compensation must prove not only an employer-employee relationship but also that their injuries arose out of *and* in the course of their employment.[167] Traditionally, these tests were considered separate and distinct.[168]

> Generally stated, the rule seems to be that an accident arises out of the employment when there is a causal connection between it and the performance of some service of the employment. A causal connection is established when the accident is shown to have arisen out of a risk which a reasonable person might comprehend as incidental to the employment, or where the evidence shows an incidental connection between conditions under which the employee worked and his resulting injury or death. The phrase, in the course of, requires, on the other hand, some investigation into the work itself and the breadth of its grasp. The principal emphasis is upon the time and place elements, so that "in the course of" the employment might be taken to mean "during" the employment.[169]

Yet, as the three cases in this section will demonstrate, there is a close relationship between the two tests, and a finding of one element tends to create an inference that the other is present as well.

1. Out of the Employment.—In *Suburban Ready Mix Concrete v. Zion*,[170] the parties stipulated that the harm to Robert Zion occurred *within* the course of his employment as a cement truck driver for Suburban.[171]

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[164]438 N.E.2d at 735.

[165]*Id.* at 736.

[166]*Id.* at 737.

[167]*See* IND. CODE § 22-3-2-2 (1982).

[168]"The phrases 'out of' the employment and 'in the course of' the employment have separate meanings and both requirements must be fulfilled before compensation is awarded." Olinger Constr. Co. v. Mosbey, 427 N.E.2d 910, 912 (Ind. Ct. App. 1981).

[169]B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 6.1 (1950).

[170]443 N.E.2d 1241 (Ind. Ct. App. 1983).

[171]*Id.* at 1242.

The court of appeals addressed the issue of whether the injury arose *out of* his employment. Zion was accidentally, but fatally injured when a ricocheting bullet struck him in the head. The shot was fired by a minor who was shooting at street lights from his parents' apartment.[172] The court stated that "the crucial issue for determination [was] whether a causal connection exist[ed] between the accident and the employment. Absent such a connection, the injury is not deemed to have arisen out of the employment."[173]

The Industrial Board found for Zion, and the Indiana Court of Appeals affirmed. The court stated that the arising out of employment requirement is relaxed when a claimant's employment involves traveling.[174] The court cited a 1981 case in which a traveling employee was killed in a robbery at a motel near the construction site where he worked.[175] Even though the robbery in that case took place after working hours, the death was found to arise out of his employment because his job placed him at the point where the shooting occurred. In *Zion*, the court found that the claimant's employment required him to be at the site of the accident and held that such a finding supported the Industrial Board's conclusion that the accident arose out of Zion's employment.[176]

Indiana courts have ruled that employees who incur injury, even during working hours, by crossing highways and exposing themselves to danger no greater than would be experienced by the general public, cannot recover under the statute.[177] But when the employer condones the conduct, or makes it necessary, compensation is awarded.[178] Generally, parking lot accidents are compensable,[179] as are noon time injuries on the employer's premises.[180] Injuries to employees who leave the premises for lunch on their own time may result in denied compensation,[181] but traveling employees are generally protected throughout the day while away from home on the employer's business.[182] Innocent victims of horseplay and

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[172]*Id.*

[173]*Id.* (citing Prater v. Indiana Briquetting Corp., 253 Ind. 83, 86, 251 N.E.2d 810, 812 (1969)).

[174]443 N.E.2d at 1242.

[175]*Id.* (citing Olinger Constr. Co. v. Mosbey, 427 N.E.2d 910 (Ind. Ct. App. 1981)).

[176]443 N.E.2d at 1243.

[177]*See* Pope, *Compensable and Non-Compensable Injuries Under the Indiana Workmen's Compensation Act*, INDIANA WORKMEN'S COMPENSATION 1983 § 1, at 31-32 (Indiana Continuing Legal Education Forum 1983) (citing De Canales v. Dyer Constr. Co., 147 Ind. App. 537, 262 N.E.2d 543 (1970)).

[178]Pope, *supra* note 177, at 32 (citing Prater v. Indiana Briquetting Corp., 253 Ind. 83, 251 N.E.2d 810 (1969)).

[179]Pope, *supra* note 177, at 27-28.

[180]*Id.* at 30-31.

[181]*Id.* at 30.

[182]*Id.* at 43-44.

assault during working hours also receive compensation.[183] In general, injuries that occur solidly *within* the course of employment are found to have an incidental causative nexus to the employment sufficient to support the additional finding that they arose *out of* the employment.

2. In the Course of Employment.—The injury in *Indiana Bell Telephone Co. v. Ernst*,[184] clearly arose *out of* the claimant's employment. Ernst was returning a company truck to the company garage when he was struck by another vehicle.[185] He was returning after completing a task assigned him by the company. Indiana Bell claimed that because the task was completed, and the accident occurred, after authorized working hours, the injury was not incurred *within* the course of the claimant's employment.[186]

The evidence as to authorization was in conflict, but the court ruled that "from the evidence there existed a reasonable inference that Ernst's assignment that day was to complete the two calls and return the truck to the garage."[187] The court suggested that the claimant may have worked overtime without authorization and may have taken too long to complete a job assignment, but held that when the accident occurred, he was within the course of his employment.[188]

When the risk that leads to the accident is created by the employment, i.e., it arises out of the employment, the accident is generally considered compensable, even in the face of the employee's alleged misconduct. Where there is no misconduct, the basis for compensability is even clearer, as when a cashier is mugged after working hours because the robbers believed—erroneously—that she carried the day's cash receipts.[189]

One final issue in *Ernst* is of interest. Although classifying the accident as a " 'non-job' incident," Bell paid Ernst $343.50 per week for fourteen weeks and $171.75 per week for thirty-nine weeks, and then terminated his employment.[190] The employer asked that this amount be credited against the workers' compensation award as a substitute system of insurance.[191] Because the company could not establish "whether Bell's sickness benefit plan complied with IC 22-3-5-4, whether it was intended to do so, or

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[183] *Id.* at 34-35 (citing Woodlawn Cemetery Ass'n v. Graham, 149 Ind. App. 431, 273 N.E.2d 546 (1971)).

[184] 444 N.E.2d 1258 (Ind. Ct. App. 1983).

[185] *Id.* at 1259.

[186] *Id.* at 1260. Indiana Bell also claimed, on the same basis, that the injury did not arise out of Ernst's employment. *Id.* The court found that the injury did arise out of the claimant's employment "since such collisions are a reasonably foreseeable consequence of driving a company truck over the public highways." *Id.*

[187] *Id.*

[188] *Id.*

[189] *See* Strother v. Morrison Cafeteria, 383 So. 2d 623 (Fla. 1980).

[190] 444 N.E.2d at 1259.

[191] *Id.* at 1260-61.

whether it was ever submitted to or approved by the industrial board,"[192] no credit was permitted. While the Indiana Workmen's Compensation Act provides for self-insurance[193] and substitute insurance,[194] these plans must not only provide equivalent compensation, they must be approved as well.[195]

3. Secondary to a Job Related Injury—Failure to Notify Employer of Personal Doctor.—In *Richmond State Hospital v. Waldren*,[196] the ankle injury to the claimant arose both out of and in the course of her employment.[197] Later, when she was diagnosed as having phlebitis, Richmond Hospital contended that the phlebitis was not secondary to the ankle injury.[198] If it was, then the injury from phlebitis would also be found to have arisen both in the course of and out of her employment. The medical evidence was conflicting, but the Industrial Board affirmed the hearing judge's finding that the phlebitis was secondary to the ankle injury.[199] The Indiana Court of Appeals affirmed this finding.[200]

The claimant in this case sought medical assistance following the original accident from a doctor recommended by her attorney rather than the one recommended by her employer, Richmond Hospital.[201] Waldren failed to notify the hospital of the change. The phlebitis occurred several months later, after she had returned to work. She revisited the doctor her attorney had recommended, again without notifying her employer, and the doctor hospitalized her.[202] Two weeks after Waldren was hospitalized, the attorney sent notice of that fact to Richmond Hospital.[203]

The Industrial Board found that the employer had failed to tender medical care for the phlebitis, and due to that failure, claimant had good cause to seek medical treatment from another doctor. The Industrial Board awarded the claimant compensation for her medical expenses.[204]

The court of appeals severed and remanded the claim for medical expenses.[205] It stated that "the statute allows the employee to select medical treatment under three circumstances: (1) in an emergency; (2) if the

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[192] *Id.* at 1261.

[193] *See* IND. CODE §§ 22-3-5-1, -3 (1982); *see also id.* § 22-3-7-34(b) (Indiana Occupational Diseases Act).

[194] *See* IND. CODE § 22-3-5-4 (1982); *see also id.* § 22-3-7-34(e) (Indiana Occupational Diseases Act).

[195] "No such substitute system shall be approved unless it confers benefits upon injured employees . . . at least equivalent to the benefits provided by this act . . . ." 444 N.E.2d at 1261 (quoting IND. CODE § 22-3-5-4 (1982)).

[196] 446 N.E.2d 1333 (Ind. Ct. App. 1983).

[197] *Id.* at 1334.

[198] *Id.* at 1335.

[199] *Id.* at 1334-35.

[200] *Id.* at 1336.

[201] *Id.* at 1334.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 1334-35.

[205] *Id.* at 1336.

employer fails to provide needed medical care; or (3) for other good reason."[206] The court found neither evidence of an emergency, nor evidence of good cause beyond the failure to provide medical care.[207] With respect to the employer's failure to tender care, the court found "no evidence in the record that the Hospital had any knowledge of Waldren's condition until June 27, 1980, fourteen days after she entered the Randolph County Hospital."[208] The court held that an employer who "has no knowledge of the need for medical services and no opportunity to tender the medical services . . . cannot be held liable for them."[209] On remand, Waldren was to be awarded only those medical expenses "incurred within a reasonable time after Richmond Hospital was notified of the need for such services."[210]

G. Federal Workers' Compensation: Pneumoconiosis Presumption

1. Rebuttal Evidence Standards.—In 1977, Congress amended Title IV of the Federal Coal Mine Health and Safety Act of 1969 (FCMHSA), to liberalize claim awards and expand the Act's coverage.[211] The Department of Labor, which is responsible for processing claims after 1973, has issued regulations defining pneumoconiosis, creating a presumption of the disease, and establishing standards for rebutting the presumption.[212] Those regulations were at issue in *Underhill v. Peabody Coal Co.*[213]

In *Underhill*, the claimant worked as a coal miner for thirty-four years.[214] Only the first nine years were in underground mines, but he claimed that throughout his career he was exposed to varying amounts of coal dust.[215] Underhill complained of "coughing, gagging, and dizziness, and . . . sleeping difficulties."[216] He introduced as evidence two ventilatory studies of his respiratory function. His respiratory function was found, by each administering doctor, to register below the regulations' minimum levels.[217] An administrative law judge (ALJ) found that Underhill had satisfied the regulatory criteria and "was therefore presumed to be totally disabled due to pneumoconiosis."[218] The ALJ also rejected the evidence offered by Peabody to rebut the presumption.[219]

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[206] *Id.* (citing IND. CODE § 22-3-3-4 (1982)).
[207] 446 N.E.2d at 1336.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *See* Underhill v. Peabody Coal Co., 687 F.2d 217, 219-20 (7th Cir. 1982).
[212] *Id.* at 219-20.
[213] 687 F.2d 217 (7th Cir. 1982).
[214] *Id.* at 220.
[215] *Id.* at 221.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.* at 221-22.

The Benefits Review Board reversed,[220] and the Seventh Circuit Court of Appeals affirmed the decision of the Board, stating that "Peabody met its burden by offering in rebuttal uncontroverted medical evidence."[221] The court ruled that while the x-rays indicating that the claimant did not suffer from pneumoconiosis cannot, standing alone, rebut the presumption, they are of some probative value when combined with other evidence.[222] In this case, three physicians corroborated the x-ray evidence by testifying that Underhill's impaired respiratory function was not the result of pneumoconiosis. The court, relying on the uncontradicted medical opinion of only one of the physicians, found the ALJ's ruling unsupportable and irrational, and affirmed the Board's reversal.[223]

One of the physicians, not relied on by the court, found that Underhill's condition was *aggravated* by many years of underground coal mine employment.[224] Although the Benefits Review Board expressly disapproved the "aggravation theory," which is incorporated into Department of Labor regulations,[225] the court declined to rule on the concept. The court reasoned that because its disposition of the case was based on evidence which precluded "any finding that Underhill's lung impairment was aggravated by exposure to coal dust," it would be inappropriate for the court to reach the "important constitutional problem" of the aggravation theory.[226]

The court also held that, inasmuch as the pneumoconiosis presumption could be established by a physician's reasoned medical judgment, the standard for rebuttal should be no higher.[227] It was, therefore, improper for the ALJ to require a reasonable degree of medical certainty standard from the defendants.[228]

2. Disablement Presumption After Death of Miner.—In *Freeman v. Director of Workers' Compensation*,[229] the claimant widow sought benefits under a statutory presumption of entitlement. Under federal law, survivors of miners, who had been employed for twenty-five years or more in coal mines before June 30, 1971 and who died on or before March 1, 1978, are entitled to benefits unless it is established that at the time of death the miner was not partially or totally disabled by pneumoconiosis.[230]

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[220] *Id.* at 222.

[221] *Id.*

[222] *Id.* at 223.

[223] *Id.* at 223 & n.9.

[224] *Id.* at 222.

[225] 20 C.F.R. § 727.202 (1982) states in pertinent part: "For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, *or aggravated by*, dust exposure in coal mine employment." (emphasis added).

[226] 687 F.2d at 224.

[227] *Id.* at 223.

[228] *Id.*

[229] 687 F.2d 214 (7th Cir. 1982).

[230] *Id.* at 215. *See* 30 U.S.C. § 921(C) (1976 & Supp. V 1981).

The claimant's late husband, Freeman, was employed as a miner for thirty years and as a mine examiner for the eight years prior to his death.[231] An ALJ ruled that Freeman's employer had failed to establish that Freeman was not " 'disabled by pneumoconiosis from engaging in work which was comparable to the most arduous employment in which he engaged with some regularity and over a substantial period of time during his career as a coal miner.' "[232] In reversing, the Benefits Review Board found that a total or partial disability depends upon a miner's decreased ability to carry out his last, not his most difficult, coal mine job.[233] The Board also ruled that evidence of more than one of the criteria promulgated in the regulation for rebuttal[234] was sufficient to rebut the pneumoconiosis presumption.[235]

On appeal the claimant challenged the Board's interpretation of the meaning of the rebuttal regulation.[236] That regulation lists four criteria and states that "alone" they are not sufficient to rebut the presumption.[237] The claimant urged the court of appeals to read the regulation as requiring evidence other than those four types.[238] The court looked to the language of a related permanent regulation in interpreting the rebuttal regulation.[239] The court found that while the rebuttal regulation was intended to keep claimants from being easily defeated by one piece of evidence, each criterion had probative force.[240] In finding at least three of the criteria present in the employer's rebuttal evidence, the court of appeals affirmed the Board's decision that the pneumoconiosis presumption had been rebutted.[241]

H. Third-Party Actions

1. Product Liability Interface—Lienholder v. Subrogee.—In *Norris v. United States Fidelity & Guaranty Co.*,[242] Norris was injured on the job by a rock crushing machine. He recovered a workers' compensation award, paid by his employer's insurance carrier (Fidelity).[243] He then sued

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[231] 687 F.2d at 215.

[232] *Id.* at 215-16 (quoting ALJ's findings).

[233] 687 F.2d at 216.

[234] 20 C.F.R. § 727.204(d) (1983).

[235] 687 F.2d at 216.

[236] *Id.*

[237] *Id.* at 215. 20 C.F.R. § 727.204(d) (1983) reads as follows:

The following evidence alone shall not be sufficient to rebut the presumption: (1) Evidence that a deceased miner was employed in a coal mine at the time of death; (2) Evidence pertaining to a deceased miner's level of earnings prior to death; (3) A chest X-ray interpreted as negative for the existence of pneumoconiosis; (4) A death certificate which makes no mention of pneumoconiosis.

[238] 687 F.2d at 216.

[239] *Id.* at 217 (citing 20 C.F.R. § 718.306(d) (1983)).

[240] 687 F.2d at 217.

[241] *Id.*

[242] 436 N.E.2d 1191 (Ind. Ct. App. 1982).

[243] *Id.* at 1192.

the manufacturer of the machine in a third-party products liability action, and settled before trial for an amount less than his original claim.[244] Finally, Norris brought a declaratory judgment action to determine the extent of his liability to Fidelity. The declaratory judgment action was dismissed by the trial court, and the dismissal was affirmed by the Indiana Court of Appeals.[245]

Norris argued that the carrier's claim against him amounted to "equitable subrogation," and therefore Fidelity should not be allowed to recover because Norris did not recover the full value of his claim. Alternatively, Norris claimed that the carrier's recovery from the settlement should be reduced in the same proportion that his settlement had been reduced when compared with the amount of the original claim.[246] The court of appeals ruled that when an employee brings an action against a third-party tortfeasor, any recovery the employee receives by judgment or settlement establishes a lien in favor of the employer's compensation carrier under the Indiana Workmen's Compensation Act.[247] If, on the other hand, the employee's action is dismissed, or the employee fails altogether to bring the third-party claim, the carrier can bring an action in its own name or in the name of the claimant. The court found that in the latter two instances there is a subrogation which does not exist when the carrier is foreclosed from bringing suit by the employee's successful independent action.[248] Thus, Fidelity was a lienholder, not a subrogee. The court also rejected Norris's claim for a proportionate reduction in Fidelity's recovery, finding that he received what he bargained for and that to hold otherwise could allow injured employees to prevent recovery by compensation carriers.[249]

The plaintiff also argued that "as equitable subrogation should be applied, the doctrines of equitable discretion should also apply to bar repayment where the employer has 'unclean hands' because of its own negligence."[250] The court rejected this argument because subrogation didn't apply in this case. The court, in support of its conclusion, quoted from an Article coauthored by this writer.[251] That Article examined a provision of the Indiana Product Liability Act[252] which bars recovery of compensation payments made by employers and their carriers when the employer is adjudged to be a concurrent misuser of the defective product.[253]

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[244]*Id.* at 1194.

[245]*Id.* at 1192, 1195.

[246]*Id.* at 1193.

[247]*Id.* at 1194. *See* IND. CODE § 22-3-2-13 (1982).

[248]436 N.E.2d at 1193.

[249]*Id.* at 1194.

[250]*Id.*

[251]*Id.* at 1194-95 (quoting from Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227 (1979)).

[252]IND. CODE §§ 33-1-1.5-1 to -8 (1982 & Supp. 1983).

[253]Vargo & Leibman, *supra* note 251, at 247-48 (discussing IND. CODE § 33-1-1.5-4(b)(2) (1982)).

Although the Article predicted that the provision might not apply in situations where the carrier is a lienholder,[254] the authors were not at all sure that the legislature really intended the statutory bar against recovery back by a misusing employer to be inoperative in this class of cases. Because there seemed to be no policy basis for an exclusion, we thought the effect may have merely been a legislative oversight. It also seems clear that this provision of the Indiana Product Liability Act[255] was designed to more equitably apportion the cost of the employee's injury between a negligent employer and a defective workplace product manufacturer, without affecting the total recovery of the plaintiff/claimant.[256] In this case, Norris bargained for a settlement with the machine manufacturer for the full value of his injury and should not have expected an additional windfall recovery.

2. Tort Action by State Employee Against Another State Employee. —In *State v. Coffman*,[257] claimant Coffman was an employee of the Indiana State Highway Department. He was injured in a collision with Kirk, an Indiana State Police Officer. Coffman received workers' compensation, but also filed a tort action against Kirk and the state.[258] The Indiana Workmen's Compensation Act allows such a suit against a person legally liable for an employee's injuries when that liability rests "in some other person than the employer and not in the same employ."[259] Coffman argued that although he and Kirk had the same employer, the State of Indiana, they were not "in the same employ" under the test articulated in *Ward v. Tillman*.[260] If that were true, Kirk would not be a fellow employee and Coffman would not be precluded from bringing a tort ac-

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[254]Indiana Code section 33-1-1.5-4(b)(2), however, refers only to cases where the employer or the carrier has sought recovery either as subrogee or direct claimant.

[255]IND. CODE § 33-1-1.5-4(b)(2) (1982) (amended 1983).

[256]Assume, for example, that Norris had won a judgment for $1,000,000 from the manufacturer of the defective rock crushing machine, and it also could be shown that his employer had concurrently misused the machine by speeding it up or by failing to maintain it adequately. The *policy* behind section 33-1-1.5-4(b)(2) would dictate that the employer, because of its negligence, should lose its right to recover its compensation payments, but that policy should not go so far as to permit Norris to obtain a double recovery. Logically, the $1,000,000 judgment against the product manufacturer should be reduced by the amount of the previously made worker's compensation payments. But because this section addresses only instances where the employee and carrier are claimants or subrogees, the misusing employer would appear to escape the pinch of the provision when the employer's status is that of lienholder. The policy of section 33-1-1.5-4(b)(2) seems directed at inhibiting the misuse by employers of workplace products, and would appear to be just as applicable to lienholder cases as it is to cases involving direct claims and subrogation. This section was amended in 1983 to apply to claimants and *lienholders*. For a discussion of this amendment, see Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 279 (1984).

[257]446 N.E.2d 611 (Ind. Ct. App. 1983).

[258]*Id.* at 613.

[259]*Id.* (quoting IND. CODE § 22-3-2-13 (1982)).

[260]179 Ind. App. 626, 386 N.E.2d 1003 (1979).

tion against him and the state under the Indiana Tort Claims Act.[261]

Coffman argued that the test from *Tillman* of "in the same employ" is whether the co-employee could recover workers' compensation from the same accident.[262] Kirk, a state police officer, was ineligible for workers' compensation because state troopers have their own disability fund.[263]

The court of appeals reversed the trial court's denial of summary judgment for the state. It noted at the outset that the state was Coffman's employer. Because the Indiana Workmen's Compensation Act precludes a suit against the employer, the court found that "Coffman [was] conclusively prevented from bringing a legal action against the State."[264] The court also found that Coffman was barred from suing Kirk in the police officer's individual capacity. The state, by statute, must pay a judgment " 'against an employee when the act or omission causing the loss is within the scope of his employment.' "[265] The court concluded that because a judgment against the police officer would create legal liability in Coffman's employer, the state, Coffman was also precluded from suing Kirk.[266]

I. Miscellaneous

1. Worker's Compensation Benefits to Illegitimate Children.—In *Goins v. Lott*,[267] the Indiana Court of Appeals affirmed the Industrial Board's decision to award death benefits to an acknowledged illegitimate child of an Indiana workman killed in an industrial accident. The mother of the decedent's legitimate child, who also received benefits, opposed the award absent any court decree of paternity.[268] The sole issue on review was whether the Industrial Board was empowered to make a determination of paternity and acknowledgment in order to establish presumptive dependency.[269]

For the illegitimate child to be eligible for benefits, both an acknowledgment of paternity and a legal duty of the parent to provide support at the time of the parent's death must be shown.[270] The court found that the Industrial Board has the power to determine paternity where necessary "to a determination of dependency for benefit purposes."[271] The court then found that "the *fact* of paternity gives rise under Indiana law to the duty of a father to support his illegitimate child . . . ."[272]

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[261] IND. CODE §§ 34-4-16.5-1 to -19 (1982 & Supp. 1983).
[262] 446 N.E.2d at 614.
[263] *Id.*
[264] *Id.*
[265] *Id.* (quoting IND. CODE § 34-4-16.5-5 (1982)).
[266] 446 N.E.2d at 614.
[267] 435 N.E.2d 1002 (Ind. Ct. App. 1982).
[268] *Id.* at 1003.
[269] *Id.* at 1005.
[270] *Id.* at 1006. *See* IND. CODE § 22-3-3-19 (1982).
[271] 435 N.E.2d at 1007.
[272] *Id.* (emphasis in original).

Therefore, if a factual determination of paternity and acknowledgment is made, the illegitimate child is entitled to benefits under the act.[273]

The mother of the legitimate child also argued that the father did not have a legally enforceable obligation to support the illegitimate child at the time of his death because no paternity action had been brought within two years of the illegitimate child's birth.[274] Such an action is barred by the statute of limitations after two years.[275] Assuming arguendo that the statute of limitations applied in this case, the court found that by providing substantial economic and emotional support to the illegitimate child, the father had created a legally enforceable obligation on his part at the time of his death.[276]

2. Statutory Update.—The average weekly wage provisions under the Indiana Workmen's Compensation Act and the Indiana Occupational Diseases Act were amended during the survey period. Employees injured on or after July 1, 1983, and before July 1, 1984, are considered to have earned an average weekly wage of not more than $234.00, and not less than $75.00.[277] For employees injured on or after July 1, 1984, the average weekly wage is considered to be not more than $249.00, and not less than $75.00.[278] The total non-medical benefits for a worker's injury occurring within the July 1, 1983 through June 30, 1984 period were raised from $70,000 to $78,000,[279] and for the period on or after July 1, 1984, the cap on non-medical benefits was set at $83,000.[280] Similar adjustments were made for occupational diseases.[281]

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[273]*Id.* at 1008.

[274]*Id.* at 1010.

[275]IND. CODE § 31-6-6.1-6 (1982).

[276]435 N.E.2d at 1010.

[277]Act of Apr. 22, 1983, Pub. L. No. 225-1983, § 2, 1983 Ind. Acts 1419, 1421 (codified at IND. CODE § 22-3-3-22 (Supp. 1983)).

[278]*See* IND. CODE § 22-3-3-22 (Supp. 1983).

[279]*Id.*

[280]*Id.*

[281]Act of Ap. 22, 1983, Pub. L. No. 225-1983, § 4, 1983 Ind. Act 1419, 1424-29 (codified at IND. CODE § 22-3-7-19 (Supp. 1983)).