Hansen v. Von Duprin: Have the Floodgates Opened to Workmen's Compensation Claims?

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I. Introduction

A year after its landmark decision in *Evans v. Yankeetown Dock Corporation*[1] the Indiana Supreme Court has rendered another momentous workmen's compensation decision, *Hansen v. Von Duprin*.[2] It is momentous on several counts. First, it found compensable a mental "injury" without an accompanying physical injury.[3] Second, it rejected any requirement that the mental injury be the result of some unusual stress in the employment situation.[4] While the first aspect is significant, if not surprising, the second aspect may represent the most far-reaching impact of *Hansen*—and in cases having nothing to do with mental injuries.

In its move away from the unusualness requirement for physical as well as mental injuries, the Court has abandoned a long-standing line of workmen's compensation cases which provided an "unusualness" rule as a framework for determining the causation requirement of the Indiana Workmen's Compensation Act.[5] *Hansen* also has left in doubt the non-compensability of injuries due to the ordinary wear-and-tear of life under the Act.[6] In the process, it has added to the confusion between two

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[1]491 N.E.2d 969 (Ind. 1986).

[2]507 N.E.2d 573 (Ind. 1987).

[3]By so holding, Indiana joined the majority position on workmen's compensation cases involving mental stimulus causing nervous injury. 1B A. Larson, The Law of Workmen's Compensation (MB) § 42.23 (1987). The holding is particularly interesting since Indiana still adheres, albeit tenuously, to the "impact rule" in civil negligence cases. *See, e.g.*, Little v. Williamson, 441 N.E.2d 974, 975 (Ind. Ct. App. 1982), *transfer denied* (1983). Although this different treatment of mental injury workmen's compensation claims can be rationalized on the basis of the no-fault, humanitarian character of the statutory scheme, one could speculate that the *Hansen* decision could be a harbinger of a departure from the "impact rule" in Indiana tort law.

[4]The court's refusal to utilize the unusualness test puts it in harmony with the modern trend in workmen's compensation law. *See* 1B A. Larson, *supra* note 3, at § 42.23(b)(7-661) and (c)(7-670).

[5]*See, e.g.*, United States Steel Corporation v. Dykes, 238 Ind. 599, 154 N.E.2d 111 (1958).

[6]*Cf.* Calhoun v. Hillenbrand Indus., Inc., 269 Ind. 507, 381 N.E.2d 1242 (1978); Lovely v. Cooper Indus. Products, Inc., 429 N.E.2d 274, 281 (Ind. Ct. App. 1982) (Ratliff, J., concurring in result).

requirements that should be very separate—that the injury be accidental and that it arise out of the employment.[7]

Has the supreme court opened the floodgates for workmen's compensation claims? Unless it proceeds to establish some more specific parameters for compensability, the floodgates may indeed be opened. The purpose of this article is to analyze the second aspect of the *Hansen* decision and the path leading to it, to suggest a specific and comprehensive framework to limit compensability consistent with the liberal position now adopted by the supreme court, and to examine briefly some ramifications of the court's current approach.

II. The Hansen and Evans Decisions

The crucial language in *Hansen* is: "Whether the injury is mental or physical, the determinative standard should be the same. The issue is *not* whether the injury resulted from the *ordinary* events of employment. Rather, it is simply whether the injury arose out of and in the course of employment."[8]

The court did concede certain vague limits to compensability:

> This is not to say that compensability is determined by the time of onset of an injury. The mere fact that an injury occurs at work does not, *ipso facto*, render it compensable. The nature of the injury, including an aggravation or triggering of a pre-existing injury, must be such that injury or aggravation is shown to 'arise out of and in the course of employment,' that is, to be causally connected with the employment.[9]

However, the supreme court failed to give any guidance for determining when an injury may be said to "arise out of" the employment.

The unusual event/exertion/stress rule,[10] developed as an evidentiary threshold to assure the causal link between an injury and the employ-

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[7]1B A. Larson, *supra* note 3, at §§ 38.82-38.83.

[8]*Hansen*, 507 N.E.2d at 576.

[9]*Id.*

[10]*See, e.g.*, United States Steel Corp. v. Dykes, 238 Ind. 599, 154 N.E.2d 111 (1958). *Dykes* was the cornerstone of the cases adhering to the "unusualness rule." *See* City of Anderson v. Borton, 132 Ind. App. 684, 178 N.E.2d 904 (1961); Rivera v. Simmons, Co., 164 Ind. App. 381, 386-87, 329 N.E.2d 39, 42 (1975); Houchins v. Pierponts, 469 N.E.2d 786, 788 (Ind. Ct. App. 1984). This position was not without its detractors, particularly those lower courts which espoused the "unexpected result" interpretation of "injury by accident." *See, e.g.*, Ellis v. Hubbell Metals Inc., 174 Ind. App. 86, 366 N.E.2d 207 (1977) (using the "unexpected result" theory to determine compensability). The supreme court, however, remained steadfast until now in adhering to the "unexpected" or "untoward event" theory. *See Calhoun*, 381 N.E.2d 1242. When applied to the causation issue as contrasted with the "by accident" issue, the "unexpected event" rule is another expression of the "unusual exertion" rule. *See* Young v. Smalley's Chicken Villa, Inc., 458 N.E.2d 686 (Ind. Ct. App. 1984).

ment,[11] provided that guideline. While this "unusualness" rule may have operated unfairly with respect to those employees whose daily tasks at work were routinely physically demanding, either in level of exertion or on account of repetition, in cases where those day-after-day demands ultimately caused an injury, a "*usual* exertion or stress" rule, unless refined, can result in unwarranted compensability when the usual demands of a particular job are indistinguishable from the demands of ordinary living outside the work place. It seems as if the supreme court arrived at its present position[12] by confusing, prior to *Evans*, the problematic use of the "unusual event" requirement to define "by accident" with the quite different function of the "unusual event/exertion/stress" concept as a standard for legal causation.[13]

To understand the present blurred state of the requisites for compensability, it is necessary to re-examine *Evans* and the successive stages of *Hansen*. When *Evans v. Yankeetown Dock Corp.*, was decided, it appeared to stand for the proposition that, for jurisdictional purposes, "*an* accident" was not the threshold. Rather, the first requisite to jurisdiction, "by accident," was held to be "unexpected injury or death."[14]

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[11]1B A. LARSON, *supra* note 3, § 38.81, at 7-270, 7-271.

[12]This position can only be *implied* from the court's opinion. It is best described as "anti-unusual" since the court has given it no conceptual framework. One can fairly imply that the "usual" events (whatever they may be) of the employment will be a sufficient producing cause for an injury to be found compensable. One can further imply that because of the court's use of "events"—in the plural—in its holding that it will not require that an injury be identified with any specific, single time or place in the employment. Indeed, Sharon Hansen was unable to identify what it was that her supervisor said to her on the fatal day which precipitated her breakdown. *See infra* text accompanying note 17.

[13]Larson emphasizes that "arising out of" is a causation question which has two parts, legal causation and medical causation. Under the legal test, the law must define what kind of exertion or stress satisfies the test of "arising out of the employment." Then, under the medical test, the medical expert must say whether the exertion or stress, having been held legally sufficient to support compensation, in fact caused the physical condition. 1B A. LARSON, *supra* note 3, at § 38.83(a).

[14]Evans v. Yankeetown Dock Corp., 491 N.E.2d 969 (Ind. 1986). As to the nature of this jurisdictional element, the supreme court and the court of appeals were in accord. They differed on whether the phrase "arising out of and in the course of the employment" represented two additional prongs of the jurisdictional element or mere surplusage. The supreme court held they were the former. *Evans*, 491 N.E.2d at 973.

In deciding whether all three jurisdictional requisites to the application of the exclusive remedy rule were present in the *Evans* case, the court readily found the fatal shooting of Evans to be death by accident. *Id.* at 975. It then addressed the other two prongs. It stated that "[a]n injury arises out of the employment when there is a causal relationship between the injury and the employment." *Id.* (citing Donahue v. Youngstown Sheet & Tube Co., 474 N.E.2d 1013 (Ind. 1985)). It found causation in *Evans* because the allegations against the employer were that of breach of duty stemming from the employer/employee

It was in connection with clarifying the nature of this element that the court brought up the controversy concerning "untoward or unexpected event."[15]

A shooting death such as Evans' is not an ordinary kind of occurrence in the work place. Indeed, it may be the *ultimate* unexpected or untoward event. Therefore the analysis of causation in *Evans* did not deal with the kinds of issues which repeatedly arise in the more run-of-the-mill workmen's compensation claims, most notably back, heart attack and repetitive trauma cases. Nevertheless, in *Evans*, in contrast to *Hansen*, the supreme court clearly understood that "by accident" was a distinct element from "arising out of," the former going to the *character* of the injury, the latter pertaining to its *causation*.[16]

The events in *Hansen v. Von Duprin* were uncommon but the issue presented is common to that presented in the garden-variety workmen's compensation claim.[17] *Hansen* involved a string of incidents which eventually resulted in disability due to a nervous condition. Sharon Hansen was subjected to perverse harassment by her supervisor, Jim Hale. Knowing of Hansen's fear of guns due to a gunshot wound inflicted by her former husband several years earlier, Hale callously played various pranks on Hansen which simulated guns or gunshots. These actions made Hansen, who had suffered numerous emotional and physical problems, increasingly nervous and agitated. On October 23, 1979, an unspecified comment by Hale caused Hansen to become so hysterical that she had to leave work and seek medical attention. Her doctor diagnosed her condition as severe anxiety and depressive syndrome. She has been unable to work since on account of her condition.[18]

When she applied to the Industrial Board for workmen's compensation, the full board ruled against her, overturning an award in her

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relationship, relying on 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 11.30 (1983) for the proposition that neutral assaults are considered to be within the scope of workmen's compensation. *Evans*, 491 N.E.2d at 975. It also found, without difficulty, that Evans' death arose in the course of his employment since he had arrived at work at his usual time and was merely pausing for a cup of coffee with fellow employees prior to going to work when he was shot. *Id.* at 976.

[15]*Id.* at 973. *See also* Hansen v. Von Duprin, Inc., 507 N.E.2d 573, 575-76 (Ind. 1987).

[16]*Evans*, 491 N.E.2d 969.

[17]*See, e.g.*, Kerchner v. Kingsley Furniture Co., Inc., 478 N.E.2d 74 (Ind. Ct. App. 1985) (back injury from heavy lifting); Lovely v. Cooper Indus. Products, Inc., 429 N.E.2d 274 (Ind. Ct. App. 1981) (series of blows while operating machinery over period of years as cause of back pain); American Maize Products Co. v. Nichiporchik, 108 Ind. App. 502, 29 N.E.2d 801 (1940) (pre-existing condition aggravated over period of years by concussion from air hammer).

[18]507 N.E.2d at 573-74.

favor by the single member who conducted the hearing. The findings of the single member and the full board were identical except for the full board's additional finding: "It is further found that there is no probative evidence of *an accident* as defined under the Indiana Workmen's Compensation Act."[19] On appeal, the court of appeals followed *Evans* and found that Hansen's anxiety neurosis resulting from Hale's actions "was an unexpected injury and, therefore, fits within the definition of injury by accident."[20]

The second issue of the court of appeals' decision put that court into uncharted waters—whether the Workmen's Compensation Act covers purely mental injuries. This was a novel issue in Indiana.[21] The court of appeals had no difficulty deciding that there was no valid reason to require a physical injury to justify an award for a work-related nervous disorder.[22] What the court of appeals *did* view as difficult and important, was establishing a standard for causal connection between the employment and a claimed mental injury. It stated:

> As one commentator noted:
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> Rarely does a mental illness result from a single cause. More often than not it results from many causes, including basic defects in the employee's personality, and hence, it is arguable that mental illness is an ailment common to all mankind irrespective of the employer-employee relationship.[23]

The court perceived an analogy in the difficulty presented by workmen's compensation cases involving heart attacks. There, it observed,

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[19]*Id.* at 575 (emphasis added). The Industrial Board's decision was handed down prior to the supreme court's decision in *Evans*. *Id.*

[20]Hansen v. Von Duprin, Inc., 496 N.E.2d 1349 (Ind. Ct. App. 1986), *vacated*, 507 N.E.2d 573 (Ind. 1987).

[21]*See Hansen*, 507 N.E.2d at 575.

[22]Ironically, in view of the traditionally conservative stance of the Indiana courts, the court of appeals' (and, subsequently, the supreme court's) decision put Indiana at the forefront of the trend on this issue of the compensability of mental injury without physical injury. *See* 1B A. LARSON, *supra* note 3, at § 42.23. Many states allow compensation in only two types of cases involving mental illness: (1) physical trauma which produces a mental disorder, and (2) mental stimulus which produces a physical disability. *See* Hansen v. Von Duprin, 496 N.E.2d at 1350, n.1. The appellate court observed that the Indiana Workmen's Compensation Act of 1929, IND. CODE §§ 22-3 (1982 & Supp. 1987) contained no language excluding mental illness and that Indiana courts long permitted compensation awards for neurosis accompanying physical injuries. *Hansen*, 496 N.E.2d at 1350.

[23]*Hansen*, 496 N.E.2d at 1350 (quoting Render, *Mental Illness as an Industrial Accident*, 31 TENN. L. REV. 288, 297 (1964)). For a very thoughtful and thorough discussion of this dilemma, see Townsend v. Maine Bureau of Public Safety, 404 A.2d 1014 (Me. 1979).

the rule has been that the claimant must demonstrate that the heart attack was precipitated by some unusual stress related to the employment.[24] For evaluating causation of work-related mental injuries, the appellate court proceeded to espouse what it believed was a sensible standard in an approach adopted by other jurisdictions under which the claimant must establish that the disorder resulted from a situation of greater dimensions than the day-to-day mental stresses and tensions which all employees must experience.[25] Applying this standard, it ruled against Sharon Hansen. While it recognized that Hale's behavior toward Hansen was "ill-considered" and "inappropriate," it did not find the "dimension of his antics," which it characterized as horseplay, to be so great or persuasive as to cause "abnormal anxiety in an employee."[26] It distinguished friction between employee and supervisor from friction which escalates to the point of full-fledged harassment[27] and ultimately found: "Although Hale's conduct did not help Hansen's emotional state, we cannot hold that his actions caused her present anxiety disorder."[28]

The supreme court disagreed, not just with the application of the court of appeals' rule to the facts, but with the rule itself. In explaining its granting transfer, the court stated, "In proposing a rule limiting the compensability of mental injuries to those resulting from stresses '*other* than the day-to-day mental stresses which all employees experience,' the court of appeals would be, in actuality, regressing to the 'untoward event' standard unanimously rejected by this Court in *Evans* . . . ."[29]

What the supreme court here failed to recognize is that the court of appeals was *not* regressing to the "untoward event" problem with which *Evans* dealt. The "untoward event" notion there pertained to defining "by accident," a separate prong of the compensability requirements. In *Hansen* the court of appeals was attempting to find an appropriate legal test for the *causation* element[30] of the Workmen's

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[24]*Id.* at 1351.

[25]Hansen v. Von Duprin, Inc., 496 N.E.2d at 1351. *See also* School Dist. #1 v. Department of Indus. Labor & Human Relations, 62 Wis. 2d 370, 215 N.W.2d 373 (1974).

[26]*Hansen*, 496 N.E.2d at 1351. Arguably, rather than to make those findings itself, the court of appeals should have remanded the case to the Industrial Board for the Board to make the necessary findings of fact under the newly announced principles of law. *See* Lovely v. Cooper Indus. Products, Inc., 429 N.E.2d 274, 278 (Ind. Ct. App. 1981). The only reason the full board found against Hansen was that it determined that there had not been an accident. From the supreme court's rendition of the facts, one might question the correctness of the court of appeals' application of its own rule to the facts.

[27]*Hansen*, 496 N.E.2d at 1351.

[28]*Id.*

[29]Hansen v. Von Duprin Inc., 507 N.E.2d 573, 575 (Ind. 1987).

[30]Larson explains the difference between legal causation and medical causation and the importance of separating them. IB A. LARSON, *supra* note 3, at § 38.83(a), (b) and (h).

Compensation Act expressed by the "arising out of . . . the employment" language. Nothing in *Evans* compelled the conclusion that an "unusual exertion/stress" rule had been rejected as a standard for legal causation as well as for "accidentalness." Only after the supreme court's decision in *Hansen* is it apparent that its rejection of "unusualness" was across the board.

III. The "Causation" Problem

Having rejected any unusualness test, the supreme court failed to articulate any test at all for causation. The most it stated was that the issue was "not whether the injury resulted from the ordinary events of employment."[31] The Court declined to articulate even a "usual exertion rule."[32] As a result, it has left Indiana workmen's compensation law in a vacuum.

Determining what constitutes an injury "arising out of . . . the employment" requires making some kind of distinctions, if, as the court has held, compensability is not to be determined merely by the time of onset. If the supreme court believes it necessary to move away from the "unusual stress or exertion" rule, it should do so by providing some other framework by which to differentiate those injuries which "arise out of and in the course of the employment" from those which do not. The supreme court's decision in *Hansen* is about as helpful in identifying that causation standard as was the famous remark of Justice Stewart in defining what constitutes pornography, "I know it when I see it. . . ."[33]

The supreme court apparently failed to recognize the need for setting a standard for causation. The causation issues were relatively easy in both *Evans* and *Hansen*. The court of appeals in *Hansen* instinctively recognized but, unfortunately,[34] did not elaborate on the reason courts have found it necessary to look for a distinctive feature in the employment demands, environment, or relationships to serve as a standard in deciding the causation issue in certain kinds of workmen's compensation claims. An appropriate distinctive feature operates as a device, or standard of proof, to ensure that injuries which are compensated have an identifiable link with the employment.[35]

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[31]*Hansen*, 507 N.E.2d at 576. This statement has the ring of the "negative pregnant" complained of in Judge White's dissent in Chestnut v. Coca Cola Bottling Co., 145 Ind. App. 504, 512, 251 N.E.2d 575, 579 (1969) (White, J., dissenting).

[32]1B A. Larson, The Law of Workmen's Compensation § 38.31 (1987).

[33]Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[34]It is unfortunate because had the court of appeals elaborated on this problem, the supreme court might have been forced to deal with the issue of a standard for causation.

[35]It should be noted that not all courts have been delighted at the prospect of making such distinctions. The court in Lock-Joint Tube Co., Inc. v. Brown, 135 Ind. App. 386, 393, 191 N.E.2d 110, 114 (1963) stated the "unusual exertion" rule burdened the courts with "the arbitrary, illogical and absurd duty of drawing gossamer lines of distinction."

The search for such a distinctive feature has taken several paths in Indiana workmen's compensation law. In *Haskell & Barker Car Co. v. Brown*,[36] the talisman was whether an aneurysm suffered by a worker resulted from "*a risk reasonably incident to the employment.*" The condition in question in *Townsend & Freeman Co. v. Taggart*[37] was sunstroke. There the court looked for *a hazard beyond that of the general public* to determine if the ensuing disability arose out of the employment.

Perhaps the Indiana case which put the need for such a device into the most compelling perspective is *United States Steel Corporation v. Dykes*.[38] In *Dykes*, the employee was afflicted with a diseased heart and coronary system which had deteriorated to a point where it could not withstand the load put on it by his regular work as a grinder, resulting in a fatal heart attack one day at work. The supreme court rejected the arguments that the legislature intended that a heart attack such as the one suffered by Dykes should be considered a "death by accident arising out of and in the course of the employment,"[39] or that it was "what the courts had in mind when they said that if an accident aggravates a pre-existing condition the resulting harm is compensable."[40] It cited a medical journal article which articulated the dilemma in determining causation in heart cases:

> Frequently it is difficult or impossible to evaluate the significance of the particular episode of stress or injury that the disabled person stipulates (claims) as the precipitating cause of his disability. If the event stipulated is clearly unusual and if it was followed immediately by heart (cardiac) failure, the relationship may be reasonably clear. Often the event stipulated is not sufficiently unusual to distinguish it from other nonoccupational stresses that may have occurred about the same time. Thus, it may be alleged that coronary insufficiency or heart failure was precipitated by lifting a 40 lb. box from an overhead shelf. Such an exertion may have been no greater than that of sneezing or straining at stool, either or both events may have had the same relationship to the onset of heart (cardiac) disability as did the stress of lifting the box. In circumstances of this type no one can assert with propriety that any one of these episodes of stress

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[36]17 Ind. App. 178, 117 N.E. 555, 557 (1917) (quoting Bryant v. Fissell, 84 N.J. 76, 77, 86 A. 458, 460 (1913)).

[37]81 Ind. App. 610, 144 N.E. 556 (1924).

[38]238 Ind. 599, 154 N.E.2d 111 (1958).

[39]*Id.* at 611, 154 N.E.2d at 118.

[40]*Id.* at 612, 154 N.E.2d at 118.

> was more likely than any other to have provided the excess work load that caused the diseased heart to fail.[41]

Accordingly, the court went on to hold that the mere showing that the employee "was performing his usual routine everyday task when he suffered a heart attack does not establish a right to workmen's compensation because there was no event or happening beyond the mere employment itself."[42] In other words, this is the unusual exertion rule.

The *Dykes* court and others dealing with this problem[43] have attempted to find a way to make the causal relationship between the employment and the disability-injury or death reasonably clear, to distinguish those situations where the work in which the employee was engaged "simply amounted to the ordinary wear and tear of life impinging on the infirmity with which he had been previously afflicted."[44] Furthermore, there is an additional problem with claims involving mental or emotional illness—that the employee may be either feigning or malingering. The court in *Hansen* recognized no such concerns. Moreover, it implicitly has overruled *Dykes*.

If the floodgates are not to be opened, the Indiana Supreme Court needs to address a critical issue—distinguishing between the employment environment and day-to-day living for purposes of legal causation. It purports to recognize that the mere fact that an injury occurs on the job (or that the employee first becomes aware of symptoms of an injury on the job) is not sufficient *ipso facto* to make that injury compensable.[45] To the extent that the supreme court has recognized that there *are* limits to compensability, it is in accord with other jurisdictions which recognize that the purpose of the workmen's compensation schemes is to "protect workers from those injuries which 'in a just sense' relate to employment,"[46] rather than to make the employer a general health and accident insurer.[47] If this employment/day-to-day living distinction is to have any

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[41]*Id.* at 612 n.3 154 N.E.2d 118 n.3 (quoting Moritz, *Coronary Thrombosis*, J.A.M.A. Vol. 156, No. 14, 1306-09 (Dec. 4, 1954).

[42]*Id.* at 613, 154 N.E.2d at 119.

[43]Wolf v. Plibrico Sales & Service Co., 158 Ind. App. 111, 301 N.E.2d 756 (1973), 158 Ind. App., 304 N.E.2d 355, *transfer denied* (1973) (providing a review of the repetitive trauma and back injury cases). *Compare* Holloway v. Madison-Grant United School Corp., 448 N.E.2d 27 (Ind. Ct. App. 1983) *with* Harris v. Rainsoft of Allen County, Inc., 416 N.E.2d 1320, (Ind. Ct. App. 1981).

[44]238 Ind. 599, 612, 154 N.E.2d 111, 118 (1958) (quoting Detenbeck v. General Motors Corp., 309 N.Y. 558, 561, 132 N.E.2d 840, 842 (1956)).

[45]*See supra* text accompanying note 9.

[46]Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1019 (Me. 1979).

[47]*Townsend*, 404 A.2d 1014. *See also* School Dist. #1 v. Department of Indus., Labor and Human Relations, 62 Wis. 2d 370, 215 N.W.2d at 373.

meaning in Indiana, then the supreme court needs to state where the line is to be drawn.

The Indiana Occupational Disease Act makes such a distinction. It defines occupational disease—disease arising out of the employment—as:

> [a] . . . disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident of an occupational disease as defined in this section.
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> [b] A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all of the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.[48]

While the legislative drafters may have been verbose in their formulation, they made clear the distinction between diseases which were a risk of employment, and hence compensable, and those which were not.[49]

The supreme court has not yet articulated a standard for legal causation of "injury by accident" to replace that standard swept away explicitly or implicitly by *Hansen*. It is not too late for the court to adopt a comprehensive standard which would be consistent with *Evans* and *Hansen* but which would also explicitly recognize that there are injuries, or infirmities, which, although they may have their onset during the employment, are not to be allocated to the employment relationship

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[48]IND. CODE § 22-3-7-10 (Supp. 1987).

[49]One may observe that the difference between a gradual "injury" such as a heart condition and a "disease" becomes very indistinguishable as the courts move further from either the unusual exertion rule or the "unexpected event or mishap" approach. There is no apparent reason why the legal standard for causation should not be the same for both.

for compensation purposes. What makes certain injuries noncompensable must be the nature of the source of the injury, a nature which is so ordinary that it cannot be attributed, fairly, as a risk of the employment. These are injuries or infirmities which have been characterized as due to the ordinary wear-and-tear of life or due to a trivial incident.[50] Where an injury or infirmity is the result of the ordinary wear-and-tear of life or of a trivial incident, there is no justification for imposing the cost of such an injury on the consumer of the product or service which is the object of the employment.[51]

A standard which the Indiana Supreme Court could adopt as the legal standard for causation might be articulated as follows:

> A workman's claim would be compensable if:
> (1) an injury occurs at a fixed time and place, is clearly traceable to the employment, and is not caused by a trivial incident, or
> (2) the work consists of a type of activity, or a level of exertion, stress or repetitive activity not common to ordinary everyday living which either has a cumulative detrimental effect or aggravates a pre-existing weakness, resulting in disability; or
> (3) the worker sustains a compensable occupational disease.

Such a standard would avoid the unexpected event/unexpected result morass which has plagued the courts.[52] It would avoid making distinctions between exertions unusual and usual to a particular employment. It would recognize a clearly work-related event or accident, even a gradual injury, but would distinguish them from ordinary wear and tear and trivial incidents.[53]

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[50]The courts before *Evans* were not hesitant to recognize a trivial incident. *See, e.g.*, Young v. Smalley's Chicken Villa, Inc., 458 N.E.2d 686 (Ind. Ct. App. 1984); Bowling v. Fountain County Highway Dep't, 428 N.E.2d 80 (Ind. Ct. App. 1981); City of Anderson v. Borton, 132 Ind. App. 684, 178 N.E.2d 904 (1961).

[51]*Cf.* Young v. Smalley's Chicken Villa, Inc., 458 N.E.2d 686, 688 (Ind. Ct. App. 1984) (Neal, P.J., concurring); Lovely v. Cooper Indus. Prod., Inc., 429 N.E.2d 274, 280 (Ind. Ct. App. 1982) (Ratliff, J., concurring in result).

[52]*See, e.g.*, Evans v. Yankeetown Dock Corp., 491 N.E.2d 969, 973 n.1 (Ind. 1986).

[53]The Delaware Supreme Court has adopted a similar standard. In Chicago Bridge & Iron Co. v. Walker, 372 A.2d 185, 187 (Del. 1977), it held there were four ways to support an award: (1) the injury occurs at a fixed time and place and is clearly traceable to the employment; (2) unusual exertion aggravates a pre-existing weakness; (3) the worker shows he has an occupational disease; and (4) the work had a cumulative detrimental effect on the employee's physical condition. This last test is broken into two sub-tests: (1) the usual duties of the employment contributed to the condition and (2) the contributing employment factors were present on the day of the injury. *Id.* at 188. *Accord*, Mooney

The proposed standard would fill the causation vacuum left by *Hansen* but there remain some problems once the scope of compensability has been defined. These problems stem generally from the supreme court's abandonment of an "event" concept, creating a "time" problem.[54] When does an injury occur if there is no accident? That in turn depends upon what is defined as an injury.[55]

No Indiana case gives a clear definition of "injury." There are useful formulations from other sources. In his treatise on workmen's compensation, Larson found one of the best general definitions of "injury" in an early Massachusetts case: "In common speech the word 'injury,' as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability."[56] Such a definition would be consistent with *Hansen* and *Evans*, as well as prior case law,[57] as long as it was not interpreted to exclude a mental injury.

IV. The "Time" Problem

With the above definition of injury in mind, we turn to some of the "time" problems under the Indiana Workmen's Compensation Act.

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v. Benson Management Co., 466 A.2d 1209, 1212 (Del. 1983).

Formulations which distinguish between the risks of usual employment duties and ordinary wear and tear are common. For instance, the New York rule is that a heart attack is compensable if attributable to an exertion in the employment placing upon the heart a strain greater than the wear and tear of ordinary life. 1B A. Larson, *supra* note 3, at §§ 38.31(c) and 38.64(a). *Cf.* Allen v. Industrial Comm., 729 P.2d 15, 25, n.7 (Utah 1986).

[54]To some extent, the proposed standard perpetuates that problem by including elements which do not have a time and place focus due to the supreme court's rejection of the concept of a singular event as an integral part of the Workmen's Compensation Act. Once such a concept is rejected with respect to causation, it would be inconsistent to bring it back in on other issues.

[55]The statutory definition is a non-definition: " 'injury' and 'personal injury' mean only injury by accident arising out of and in the course of the employment and do not include a disease in any form except as it results from the injury." Ind. Code § 22-3-6-1(e) (Supp. 1986).

[56]1B A. Larson, *supra* note 3, at § 42.11 at 7-577 (quoting *Burns' Case*, 218 Mass. 8, 105 N.E. 601, 603 (1914)). Larson himself articulates personal injury to include "any harmful change in the body" which "need not include physical trauma, but may include such injuries as disease, sunstroke, nervous collapse, traumatic neurosis, hysterical paralysis, and neurasthenia." *Id.* § 42.00 at 7-575. The inclusion of disease in this definition, without limitation, would be incompatible with the statutory definition of injury in Ind. Code § 22-3-6-1(e) (Supp. 1987). *See supra* note 54. The *Burns' Case* formulation is preferable because it gives concrete form to the notion of "harmful" change.

[57]*See, e.g.*, American Maize Products Co. v. Nichiporchik, 108 Ind. App. 502, 29 N.E.2d 801 (1940); E. Rauh & Sons Fertilizer Co. v. Adkins, 126 Ind. App. 251, 129 N.E.2d 358 (1955).

One problem is the notice required of the employee under the notice provision, particularly when the injury results from the cumulative demands of the job and the onset of symptoms is gradual rather than sudden. Indiana Code section 22-3-3-1 provides in pertinent part:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury or death at the time thereof or shall acquire such knowledge afterward, the injured employee or his dependents, as soon as practicable after the injury or death resulting therefrom, shall give written notice to the employer of such injury or death . . . .[58]

Another problem relates to the average weekly wage. The time of occurrence of an injury is the determining factor for the applicable maximum weekly wage.[59] A more difficult problem is posed by the statute of limitations for filing a claim. Indiana Code section 22-3-3-3 provides:

> The right to compensation under IC 22-3-2 through IC 22-3-6 shall be forever barred unless within two (2) years *after the occurrence of the accident*, or if death results therefrom, within two (2) years after such death, a claim for compensation thereunder shall be filed with the industrial board; provided, however, that in all cases wherein an accident or death results from the exposure to radiation, a claim for compensation shall be filed with the industrial board within two (2) years from the date on which the employee had knowledge of his injury or by exercise of reasonable diligence should have known of the existence of such injury and its causal relationship to his employment.[60]

Since the supreme court has abandoned any requisite of a discrete event, in many cases there will be *no* accident. If no accident occurs, what event should start the two-year limitation clock ticking? These time problems were lurking in pre-*Evans* cases but were not addressed.[61]

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[58]IND. CODE § 22-3-3-1 (1982).

[59]IND. CODE § 22-3-3-22 (Supp. 1986).

[60]IND. CODE § 22-3-3-3 (Supp. 1987). The language of this section, specifically the reference to "the accident," calls into question the reasoning of the supreme court in Evans v. Yankeetown Dock Corp., 491 N.E.2d 969, 972-73 (Ind. 1986). The court said, *inter alia*: "Likewise, in construing a statute to determine and give effect to the true intent of the legislature, each individual section of a statute must be construed with due regard for all of the other sections of the act . . . ." (citation omitted). *Id.* at 973. *Evans* fails to reconcile the language of IND. CODE § 22-3-3-3 (Supp. 1987) in arriving at its interpretation of "injury by accident." *See also* IND. CODE § 22-3-3-21 (1982)(concerning burial in all cases of death of an employee from an injury by *an* accident); *Id.* § 22-3-4-3 (*accident* reports).

[61]*E.g.*, Ellis v. Hubbell Metals, Inc., 174 Ind. App. 86, 366 N.E.2d 207 (1977); American Maize Products Co. v. Nichiporchik, 108 Ind. App. 502, 29 N.E.2d 801 (1940).

There are a variety of possible approaches to resolving these time problems. Under the Indiana Workmen's Occupational Diseases Act, the limitation period is triggered by the date of death or disablement.[62] The average weekly wage maximum is related to disability or death.[63] The Indiana Workmen's Compensation Act has a special approach to the limitation period when "an accident or death results from the exposure to radiation. . . ."[64] In such a case, the claim must be filed "within two (2) years from the date on which the employee had knowledge of his injury or by the exercise of reasonable diligence should have known of the existence of such injury and its causal relationship to his employment."[65] In some other jurisdictions the specific date on which an injury occurs is the date on which the *disability* manifests itself.[66] In other cases it has been the time of onset of pain occasioning medical attention, even though the level of pain only makes it more difficult, but not impossible, to work.[67]

To the extent that the onset of pain or other symptomatology and disability do not coincide, that onset of pain or symptoms—that is, the point when the employee becomes aware of the deleterious effect of his job demands—should be the triggering event for notice to the employer.[68] The employer should have the opportunity to take appropriate action, such as to modify the employee's job tasks or to obtain preventive medical care.[69]

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[62]IND. CODE § 22-3-7-32 (Supp. 1986). Disablement must occur within two years after the last day of the last exposure of the hazards of the disease, with certain exceptions. *Id.* § 22-3-7-9(f).

[63]IND. CODE § 22-7-7-19 (Supp. 1986).

[64]*Id.* § 22-3-3-3.

[65]*Id.*

[66]*See* 1B A. LARSON, *supra* note 3, § 39.50, at 7-350.27.

[67]*Id.* at 7-350.28.

[68]This approach to the notice requirement would be consistent with IND. CODE § 22-3-3-4 (1982), which provides in pertinent part:

> After an injury and prior to an adjudication of permanent impairment, the employer shall furnish or cause to be furnished, free of charge to the employee, an attending physician for the treatment of his injuries, and in addition thereto such surgical, hospital and nursing services and supplies as the attending physician or the industrial board may deem necessary.

This might seem to be an unwarranted expansion of the employer's obligation to provide medical services. However, if the supreme court is determined to make compensable injuries which flow from the usual events of the employment, without requiring a discrete event, then this expansion of the employer's obligation is inevitable. To the extent that early medical attention may avoid later disability, there is a concomitant advantage to the employer.

[69]In Sharon Hansen's case, for example, early notice to a person with appropriate supervisory responsibility (other than Hale, obviously) might have averted her ultimate breakdown, at least from employment-related causes.

However, fashioning the appropriate "time" concepts to trigger the statute of limitations period and to apply to the average weekly wage determinations involves different considerations. The date of onset of pain or symptomatology may be too early to use as a benchmark for the average weekly wage determination or for the beginning of the limitation period, particularly with a gradual injury. If indeed there is an identifiable accident or incident, such as a fall or an unusual exertion, then the date of that occurrence should control, as it has in the past. Where there is no such singular event, however, then the trigger date should be the earlier date of the following: the first date on which the employee's condition disables him or the date of his last exposure to the deleterious condition in the employment from which the injury resulted. This approach would provide a nexus between the injury and the employment status when there is no specific event to pinpoint the time of an injury.

IV. Conclusion

The foregoing discussion of problems raised by the supreme court's current approach to workmen's compensation cases only scratches the surface. It is obvious that when the supreme court rejected any interpretation of "injury by accident" which was limited to "an accident," it headed in a direction which would lead inexorably to further problems of statutory interpretation. This article has dealt with only a few. There certainly will be others.

It may be that some of the problems can be resolved only by the Indiana legislature. There are certainly a few statutory provisions which are difficult to reconcile with the court's position which abandons any vestige of an accident requirement. Certainly the courts have ahead of them a sizeable task in delineating the requirements of the Workmen's Compensation Act to implement the *Hansen* decision.