> arguably belong to the partnership upon request of the deceased partner's executor, and if the surviving partner is serving in the capacity of executor or administrator of his deceased partner's estate, he must make an equally complete disclosure upon request of any interested beneficiary of the deceased partner.[57]

The court remanded the cause to the trial court with directions to have a complete audit conducted of the assets of both partnerships.[58]

## XIX. Workmen's Compensation

*Gregory J. Utken**

Several noteworthy decisions were rendered in the area of workmen's compensation during the survey period, including cases of first impression.

### *A. Dual Capacity*

Workmen's compensation is an exclusive remedy for injuries arising out of and in the course of employment; civil actions against an employer for injuries at work are prohibited.[1] However, the Indiana Workmen's Compensation Act does permit initiation of civil actions against "some other person than the employer and not in the same employ."[2] Recently, attempts have been made to avoid the exclusivity provision of the statute by suing a defendant-employer in

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[57]352 N.E.2d at 773-74.

[58]The court did not specifically address the widow's questions of whether the survivor's notice to himself as executor was the kind of notice contemplated by the partnership agreement and whether the notice made applicable the provisions of the Indiana Partnership Act, IND. CODE §§ 23-4-1-1 to -43 (1976), and the Indiana Accounting by Surviving Partners Act, IND. CODE §§ 23-4-3-1 to -8 (1976), regarding dissolution, posting of bonds, and appointment of receivers.

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[1]IND. CODE § 22-3-2-6 (1976) states:

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

The courts have also consistently so held. Crowe v. Ben Dee, Inc., 149 Ind. App. 280, 271 N.E.2d 509 (1971). Burkhart v. Wells Elec. Corp., 139 Ind. App. 658, 215 N.E.2d 879 (1966). *See also* Peski v. Todd & Brown, Inc., 158 F.2d 59 (7th Cir. 1946); Stainbrook v. Johnson County Farm Bureau, 125 Ind. App. 487, 122 N.E.2d 884 (1954).

[2]IND. CODE § 22-3-2-13 (1976) states in pertinent part:

> Whenever an injury or death, for which compensation is payable under [this

some capacity other than that of employer. This is known as a dual capacity theory. Two decisions during the survey period discussed the concept of dual capacity in work-related accidents and reached the same result.

In *Needham v. Fred's Frozen Foods, Inc.*,[3] the claimant was injured cleaning a pressure cooker unit while in the employ of Frozen Foods. Frozen Foods had also designed, manufactured, and installed the pressure cooker. Needham brought an action against the company, not as his employer but as a manufacturer of a defective product. He asserted that claims of negligence, strict liability, and breach of warranty could be brought against Frozen Foods as a manufacturer on a dual capacity theory. The company argued that Needham's injuries arose out of and in the course of employment; therefore, workmen's compensation was his exclusive remedy. In a case of first impression for an Indiana court, the Second District Court of Appeals refused to accept the dual capacity theory. It noted that there was no dispute that the injury arose out of and in the course of Needham's employment; thus, it was precisely the type of injury workmen's compensation was intended to cover.

In reaching the foregoing result, the *Needham* court relied upon the reasoning espoused in *Kottis v. United States Steel Corp.*,[4] a similar case recently decided by the Seventh Circuit. In *Kottis*, the Seventh Circuit refused to adopt a dual capacity theory under Indiana law. The action was brought for the wrongful death of plaintiff's husband, who was killed while operating a crane for his employer on the employer's premises. The plaintiff based the action upon a dual capacity theory of employer-landowner, contending that she should be able to sue the company as a landowner, since under the same circumstances she could sue a landowner who was not her husband's employer.[5]

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Act] shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or his dependents, in case of death, may commence legal proceedings against such other person to recover damages notwithstanding such employer's or such employer's compensation insurance carrier's payment of or liability to pay compensation under [this Act] . . . .

[3]359 N.E.2d 544 (Ind. Ct. App. 1977).

[4]543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977).

[5]In rejecting plaintiff's argument, the court observed that such a contention would do "considerable violence to the statutory language." *Id.* at 24. The court then cited Peski v. Todd & Brown, Inc., 158 F.2d 59 (7th Cir. 1946), which held that the Indiana statute's exclusive remedy provision barred a common law action against the employer, who ran a bus service, when an employee was killed on the way to work, even though a third party under contract to the employer would have been liable under the same circumstances.

The district court had granted summary judgment for the company based on its position that workmen's compensation provided the exclusive remedy. On appeal, the Seventh Circuit, after reviewing Indiana law but finding no Indiana cases addressing the question, affirmed. It noted that Indiana courts had repeatedly held workmen's compensation to be an exclusive remedy and had consistently refused to permit actions based upon other statutory or common law duties arising in the course of the employee-employer relationship.[6] The court stated that there was no basis for allowing an additional remedy when an employment relationship predominates. In this particular instance, the court of appeals noted that one of the purposes of workmen's compensation is to replace actions brought against employers for accidents caused by failure to provide a safe work place.

While the concept of dual capacity has found acceptance in other jurisdictions and in the minds of some commentators,[7] these two cases make it clear that it cannot be utilized in Indiana. Since workmen's compensation statutes place a limit on recovery, the doctrine of dual capacity favors injured employees who seek to recover amounts in excess of the statutory limits by permitting them to proceed on another theory. While recognizing the policy advantages of adopting such a theory, the court of appeals declared in *Needham* that any change in the law should be made by the legislature and not the courts.[8]

### *B. Arising Out of and in the Course of Employment*

Under workmen's compensation, in order for an injury to be compensable it must arise out of and in the course of employment.[9] In *Golden v. Inland Steel Co.*,[10] the Second District Court of Appeals

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[6]*See* note 1 *supra*. *See also* Hickman v. Western Heating & Air Conditioning, Co., 207 F. Supp. 832 (N.D. Ind. 1962).

[7]*See, e.g.*, Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952); Marcus v. Green, 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973); *cf.* Costanzo v. Mackler, 34 Misc. 2d 188, 277 N.Y.S.2d 750 (Sup. Ct.), *aff'd*, 17 App. Div. 2d 948, 233 N.Y.S.2d 1016 (1962) (defendant not considered employer); Mazurek v. Skaar, 60 Wis. 2d 420, 210 N.W.2d 691 (1973) (national guardman's recovery from state not restricted to workmen's compensation limits). *See also* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 72.80 (1976); Vargo, *Workmen's Compensation, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 289, 289 (1974); Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

[8]359 N.E.2d at 545.

[9]IND. CODE § 22-3-2-2 (1976) states in pertinent part: "[E]very employer and every employee, except as herein stated, shall be required to comply with the provisions of this law, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of employment, and shall be bound thereby."

[10]359 N.E.2d 252 (Ind. Ct. App. 1976).

illustrated this principle in a brief opinion. The claimant was travelling to work on a public highway and was involved in a near collision with another car. He proceeded into his employer's parking lot, and the driver of the other car pulled in next to him. An argument and altercation ensued in which the claimant lost six permanent teeth. The Industrial Board found that the claimant's condition did not arise out of or in the course of his employment, and the Board denied workmen's compensation. While injuries sustained in an employer's parking lot generally are held to be compensable under workmen's compensation,[11] the court of appeals affirmed, finding inescapable the conclusion that it was the traffic incident, which had occurred on the way to work on a public highway, that brought about the injury. Thus, claimant did not sustain an injury by being "specially and peculiarly exposed by the character and nature of his employment to the risk of the danger which befell him."[12]

This issue was also discussed in *O'Dell v. State Farm Mutual Automobile Insurance Co.*,[13] which held that an employee killed in an employer's parking lot was covered by workmen's compensation. Plaintiff's husband was driving home after work on a thoroughfare maintained by his employer between the plant gate and the employee parking lot. A co-employee on his way to work entered the gate as plaintiff's husband was exiting, and a head-on collision resulted, killing the plaintiff's husband. Plaintiff brought an action for the wrongful death of her husband, seeking to collect on his uninsured motorist coverage. The insurance company defended on the basis that workmen's compensation was the exclusive remedy. However, plaintiff contended that her husband was not in an employee status at the time.

The Third District Court of Appeals upheld the insurance company's position and affirmed dismissal of the action. The court observed that public policy favored liberal construction of the Indiana Workmen's Compensation Act in accidents involving the egress and ingress of employees to their work premises.[14] Thus, whether an injury occurred on the operating premises of the employer was an important determinant of an employment nexus. The court reasoned that employee parking lots and private drives are considered to be within an employer's supervision, relying on its decision in *United States Steel Corp. v. Brown*,[15] which held that

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[11]*See*, B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 7.7, at 171 (1950).

[12]359 N.E.2d at 253 (quoting Polar Ice & Fuel Co. v. Mulray, 67 Ind. App. 270, 273, 119 N.E. 149, 150 (1918)).

[13]362 N.E.2d 862 (Ind. Ct. App. 1977).

[14]*Id.* at 865 (citing Reed v. Brown, 129 Ind. App. 75, 152 N.E.2d 257 (1958) and Jeffries v. Pitman-Moore Co., 83 Ind. App. 159, 147 N.E. 919 (1925)).

[15]142 Ind. App. 18, 231 N.E.2d 839 (1967). An additional factor that may have

employees going to and from work who are injured on private roadways owned and operated by the employer were within the workmen's compensation coverage.

### C. Statutory Limitation Period

In *Sissom v. Commodore Corp.*,[16] the First District Court of Appeals, in an apparent case of first impression, discussed the statutory limitation period for filing a Form 14 application[17] under a voluntary compensation agreement that states no date for termination of payments. Sissom received an employment-related injury in April of 1971. In accordance with an agreement entered into by the company and Sissom, which was approved by the Industrial Board, Sissom was to receive fifty-seven dollars per week beginning April 19, 1971; the payments were to continue until terminated in accordance with the provisions of the Indiana Workmen's Compensation Act.[18]

In February 1973, the company ceased payments and filed a Form 14, seeking to terminate or reduce compensation payments to Sissom. A hearing was set on the company's application, but the company moved to dismiss its application; the motion was granted on June 3, 1975. On June 6, 1975, Sissom filed a Form 14 application. It was denied. He appealed to the full Industrial Board, and they held his application untimely. The Industrial Board reasoned that under section 22-3-3-27 of the Indiana Code[19] an application could not be filed by either party after two years from the last day for which compensation was paid under the original award. Since the company ceased payments under the compensation agreement on February 24, 1973, the Board held Sissom's June 3, 1975, application untimely. Sissom appealed.

The court of appeals reversed and explained the proper procedure for modification or termination of compensation in situations when no date for termination of payments is expressed in the compensation agreement. The court also explained the procedure for

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weighed in the court's decision in *O'Dell* was the fact that the plaintiff had already collected full workmen's compensation benefits.

[16]349 N.E.2d 724 (Ind. Ct. App. 1976).

[17]Form 14 is an application for review of an award because of a change in condition, such as increased or diminished disability.

[18]IND. CODE § 22-3-3-27 (1976).

[19]*Id.* The provision states in pertinent part:

> The board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid.

ascertaining when the limitation period for filing a Form 14 begins to run. The court cited an Industrial Board rule which authorized the company to stop compensation payments to Sissom[20] but held it had to be construed and applied consistently with the workmen's compensation statute and its underlying purposes.[21] It therefore read the Board's rule in conjunction with section 22-3-4-5 of the Indiana Code.[22] This statutory provision declares that if, after the parties have entered into a compensation agreement approved by the Board, they disagree as to the continuance of payments, either party

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[20]Rule 32 of the Industrial Board Rules of Procedure states:

> If an injured employee, or his dependents have been awarded compensation by the industrial board, either by approval of an agreement, or by an award upon a hearing, the employer shall continue the payments of compensation under the terms of such award or agreement for the specific period therein fixed, or until such employee returns to work, or the dependency ends, or the employer shall have disagreed with the injured employee or the dependents as to the continuation of such compensation payments.
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> In such cases the employer or such employer's insurance carrier, shall file with the industrial board in duplicate, a memorandum prescribed by the industrial board showing payments made, the date of the employee's return to work, the date of cessation and reason for termination of the dependency and any other fact or facts pertaining to the cessation of said payments of compensation.

IND. ADMIN. RULES & REGS. § (22-3-4-14)-1 (Burns 1976).

[21]In Indiana Dept. of State Revenue v. Colpaert Realty Corp., 321 Ind. 463, 109 N.E.2d 415 (1952), it was held that an administrative agency's rules may not add to or detract from its governing statute as enacted.

[22]IND. CODE § 22-3-4-5 (1976) reads in full:

> If the employer and the injured employee or his dependents disagree in regard to the compensation payable under this act, or, if they have reached such an agreement, which has been signed by them, filed with and approved by the industrial board, and afterward disagree as to the continuance of payments under such agreement, or as to the period for which payments shall be made, or to the amount to be paid, because of a change in conditions since the making of such agreement, either party may then make an application, to the industrial board, for the determination of the matters in dispute.
>
> Upon the filing of such application, the board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the board, of the time and place of hearing. The hearing of all claims for compensation, on account of injuries occurring within the state, shall be held in the county in which the injury occurred, except when the parties consent to a hearing elsewhere. Provided however, That in disputes wherein the employer denies liability, or refuses, fails, or neglects to pay compensation during the period of employee's total temporary disability, such hearing may, upon written request by the injured employee, be set in the county wherein the injury occurred, or any adjoining county thereto wherein cases are to be set for hearing prior to the date of hearing in the county of injury.
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> All disputes arising under this act if not settled by the agreement of the parties interested therein, with the approval of the board, shall be determined by the board.

can make application to the Board for determination of the dispute. The Board is then required to set a hearing on the application. The statute goes on to state that all disputes under the statute not settled by agreement of the parties "shall be determined by the Board." Thus, since the parties had not agreed whether payments were properly terminated in February 1973, the Board, by statute, had to find in a hearing that there had been a change in conditions after the original agreement before it could be said that the company's duty to make further payments ceased on February 14, 1973. As a result, the court ruled that the limitation period did not run from the February 14, 1973, date, and Sissom's application was timely.

### *D. Necessity of Autopsies*

The Indiana Workmen's Compensation Act contains a provision permitting autopsies.[23] The courts have attached a reasonable and necessary requirement to the granting of an autopsy under the statute.[24] In *Delaware Machinery & Tool Co. v. Yates*,[25] the Second District Court of Appeals discussed the "necessary" requirement at length. This was the first time an Indiana court had discussed this requirement. The court reviewed several cases from other jurisdictions and observed that autopsies were granted only if there was a strong showing by the requesting party that the autopsy would likely establish the disputed fact and that the truth could not be obtained through other evidence.[26] After reviewing the cases, the court applied those principles to this case and held that in order to be entitled to an autopsy the requesting party had to show (1) that the causal relationship between the particular action and death could not be determined from the evidence before the Board, and (2) that an autopsy would be likely to affirm or negate that causal link.[27] An

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[23]*Id.* § 22-3-3-6, which states in pertinent part:

> The employer upon proper application, or the industrial board, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same; if, after a hearing, the industrial board orders an autopsy and such autopsy is refused by the surviving spouse or next of kin, in such event, any claim for compensation on account of such death shall be suspended and abated during such refusal.

[24]Delaware Mach. & Tool Co. v. Yates, 158 Ind. App. 167, 301 N.E.2d 857 (1973); McDermid v. Pearson Co., 107 Ind. App. 96, 21 N.E.2d 80 (1939); General Am. Tank Car Corp. v. Zapala, 104 Ind. App. 418, 10 N.E.2d 762 (1937).

[25]351 N.E.2d 67 (Ind. Ct. App. 1976).

[26]*Id.* at 73-74.

[27]*Id.* at 74. In a brief concurring opinion, Judge Buchanan found the court's "strong showing of necessity-test" to be completely inconsistent with the express statutory language. *Id.* at 77 (Buchanan, J., concurring). *See* Missouri Valley Bridge & Iron Co. v. Alsip, 116 Ind. App. 259, 63 N.E.2d 297 (1945); Town of Newburg v. Jones, 115 Ind. App. 320, 58 N.E.2d 938 (1945), both of which indicated an absolute right to an

autopsy is not essential if there is sufficient external evidence to support a doctor's opinion that there is a causal relationship, even when other doctors draw a contrary inference.

### *E. Artificial Members*

In another case of first impression, *Indiana & Michigan Electric Co. v. Miller*,[28] the Second District Court of Appeals suggested the legislature amend section 22-3-3-4 of the Indiana Code,[29] which requires an employer to furnish artificial members to employees injured on the job who require them. In *Indiana & Michigan Electric*, a press handle struck the claimant in the mouth, breaking two caps off of his teeth. The claimant was treated by a dentist who inserted two porcelain and gold crowns. The Industrial Board ordered the employer to pay for the dental expenses. The court of appeals reversed, holding that the expenses were not occasioned by personal injury. The court observed that no Indiana cases had considered the issue of whether compensation could be given for damage to artificial members. In reviewing the statute, the court noted that it specifically stated that in the case of "loss of *natural* teeth"[30] the employer must furnish an artificial replacement. Permanent attachment to the human body did not make an artificial member natural; thus, compensation was denied. The court regretted its conclusion and recognized its unfairness to workers whose artificial members are damaged in otherwise compensable accidents.[31] However, it held that correction of such an inequity could only be remedied by the legislature, and it rightfully suggested that the legislature address this problem.

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autopsy provided the procedure adopted is reasonable both as to time and occasion of its exercise, and proper notice thereof is given.

[28]363 N.E.2d 1053 (Ind. Ct. App. 1977).

[29]IND. CODE § 22-3-3-4 (1976) provides in pertinent part: "Where a compensable injury results in the amputation of an arm, hand, leg or foot or the enucleation of an eye or the loss of natural teeth, employer shall furnish an artificial member, and where required, proper braces."

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

[31]This inequity was noted several years ago in B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 8.7 (1950).