Recent Developments in Worker's Compensation

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I. Recent Attempts to Avoid the Exclusivity of Indiana's Worker's Compensation Act Remedy

The benefits provided by the Worker's Compensation Act are intended to be the exclusive remedy of an employee against his employer or those in the same employ. The Act clearly states:

> The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 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, except for remedies available under IC 16-7-3.6.[1]

This provision is the foundation upon which the Worker's Compensation Act is built. Predictably, the limited financial remedy available under the Act has led to the bringing of claims intended to circumvent the Act and the exclusive remedy provided under this section. Attempts to chip away the exclusive remedy foundation, however, have met with only limited success in 1989.

Cases challenging the exclusive remedy of worker's compensation in Indiana can be divided into three general categories:[2] (1) cases in which the employer is alleged to have acted intentionally[3] or fraudulently;[4] (2) cases where a co-employee is alleged to have acted outside the scope of his employment;[5] (3) cases where the employee is alleged to be outside the scope of his employment.[6] Cases involving all three categories were

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1. Ind. Code § 22-3-2-6 (1988).

2. A fourth category which has not been successful in Indiana relates to the argument that the employer acts in a dual capacity. *See* Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977) and Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 359 N.E.2d 544 (1977).

3. Blade v. Anaconda Aluminum Co., 452 N.E.2d 1036 (Ind. Ct. App. 1983).

4. Baker v. American States Ins. Co., 428 N.E.2d 1342 (Ind. Ct. App. 1981); Wolfe v. Commercial Union Ins., 792 F.2d 87 (7th Cir. 1986); McCutchen v. Liberty Mut. Ins. Co., 699 F. Supp. 701 (N.D. Ind. 1988).

5. Martin v. Powell, 477 N.E.2d 943 (Ind. Ct. App. 1985).

6. Consolidated Products, Inc. v. Lawrence, 521 N.E.2d 1327 (Ind. Ct. App. 1988).

decided by the Indiana Court of Appeals during the survey period.

Shelby v. Truck & Bus Group, Division of General Motors Corp.[7] contains both category 1 and 2 challenges to compensation as the exclusive remedy. Shelby sued Truck and Bus Group and his supervisor for injuries sustained by Shelby when his supervisor stuck a hot metal rod into Shelby's groin.[8] The trial court granted Truck and Bus Group's motion for summary judgment. The court of appeals affirmed the summary judgment, holding that Truck and Bus Group was not liable for the act of a fellow employee which was not within the scope of the fellow employee's employment.[9]

The court rejected Shelby's claim that an employer could be held liable for the intentional tort of an employee by virtue of the doctrine of *respondeat superior*. The court reasoned that in order to hold an employer vicariously liable for the actions of its employee, the employee's actions must have been committed while he was acting within the scope of his employment.[10] Acts done on the employee's own initiative, not in the service of the employer, are not within the doctrine of *respondeat superior* and are, therefore, not the responsibility of the employer unless the act occurred pursuant to the employer's direct order or by an employee acting as the alter ego of the employer.[11] In *Shelby*, it was not alleged that the employer directed the supervisor's act or that the act was part of the supervisor's job. Thus, the employer was not responsible outside the Worker's Compensation Act for the supervisor's actions.[12]

Interestingly, Shelby tried to avoid summary judgment by arguing that the question of whether the supervisor's act was intentional or negligent was sufficient to preclude summary judgment.[13] The court properly noted that if the supervisor's act was intentional, it was not within the scope of his employment, thereby precluding a claim against Truck and Bus Group.[14] Further, if the supervisor's act was negligent, Shelby's exclusive remedy would be under the Worker's Compensation Act.[15] In either event, therefore, summary judgment was proper as to Truck and Bus Group.

Although Shelby's action against Truck and Bus Group could not be maintained, Shelby could maintain an action against his supervisor,

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7. 533 N.E.2d 1296 (Ind. Ct. App. 1989).
8. *Id.*
9. *Id.* at 1298.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1298-99.
14. *Id.*
15. *Id.*

based upon the allegation that the supervisor acted outside the scope of his employment. It remains to be seen whether Shelby will obtain a recovery in that action.

An example of a case involving an allegation that the employee was acting outside the scope of employment, a category 2 case, is *Thiellen v. Graves.*[16] In *Thiellen*, Thiellen and Graves were driving in their employer's parking lot when an accident between the two occurred.[17] The trial court granted summary judgment in favor of the defendant. Thiellen appealed, arguing first that his injury did not arise in the course of his employment, and that Graves, though also employed by Thiellen's employer, was not a co-worker at the time of the accident.[18]

The Court of Appeals for the Second District held that the scope of employment necessarily includes a reasonable period of time before and after work, particularly to enter and leave the actual work area.[19] This holding is supported by Indiana precedents which have held that accidents in employer controlled parking areas are employment related risks.[20]

Thiellen made a novel argument regarding the fellow employee aspects of the case which caused the court to review its prior holding in *O'Dell v. State Farm Mutual Automobile Insurance Co.*[21] In *O'Dell*, the decedent was killed in an accident with a fellow employee on an employer-maintained road.[22] After recovering for the death under the Worker's Compensation Act, the deceased's executrix brought suit against the co-employee. The trial court granted summary judgment in favor of the defendant, holding that the Worker's Compensation Act provided the exclusive remedy for the plaintiff.[23] In dicta, the court stated: "[T]he test must be that the statutory bar applies only when both employees were in the course of their employment, as determined by whether the denominated defendant could obtain compensation benefits if he were the claimant in the same or similar circumstances."[24] Thiellen alleged that Graves' driving was "reckless and wilful and wanton" and that

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16. 530 N.E.2d 765 (Ind. Ct. App. 1988).
17. *Id.* at 766.
18. *Id.*
19. *Id.* at 767. In Wayne Adams Buick, Inc. v. Ference, the court held that trips to the employer's mailbox, located across the street from the place of business, was also part of employment related risk. 421 N.E.2d 733 (Ind. Ct. App. 1981).
20. *Id. See, e.g.*, Ward v. Tillman, 179 Ind. App. 626, 386 N.E.2d 1003 (1979). *See also* Goldstone v. Kozma, 149 Ind. App. 626, 274 N.E.2d 304 (1971).
21. 173 Ind. App. 106, 362 N.E.2d 862 (1977).
22. *Id.* at 864.
23. *Id.* at 866.
24. *Id.*

her "reckless driving was contrary to law."[25] He then argued that had Graves been injured, she would have been barred from receiving compensation benefits by virtue of one or more of the affirmative defenses to compensation enumerated in the Act.[26] Thiellen therefore contended that Graves was not his co-employee pursuant to the *O'Dell* test because she would not have been entitled to receive worker's compensation benefits.[27]

The Court of Appeals criticized the *O'Dell* test as overly broad.[28] The proper inquiry, according to the *Thiellen* court, is not whether the defendant co-employee would be entitled to compensation benefits, but rather, whether the defendant co-employee was engaged in an activity arising out of the course of employment at the time the accident occurred.[29] Since Thiellen and Graves had the same employer and Graves' action arose out of the course of her employment, she was a co-employee of Thiellen, notwithstanding that she may be subject to forfeit her worker's compensation benefits due to an affirmative defense available to the employer as to her. The court finally concluded that Thiellen's recovery was limited to that provided by the Act.[30]

In *Sanchez v. Hamara*,[31] the Court of Appeals for the Third District was called upon to decide a case quite similar on its facts to *Thiellen*. The Sanchezes sued Hamara for injuries which Mrs. Sanchez sustained when Hamara inadvertently closed the passenger door of her van on Sanchez' hand.[32] The event in question took place in the company parking lot. The trial court granted summary judgment to Hamara, which the third district affirmed. The third district reached the same result as did the second district in *Thiellen*. However, the third district reached this result by applying the *O'Dell* test. It is important to note that the *Sanchez* court was not faced with the argument that Hamara would not have been entitled to benefits had she been injured in the same accident. Thus, the holdings in *Sanchez* and *Thiellen* can be reconciled.[33] It is

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25. *Thiellen*, 530 N.E.2d at 768.
26. *Id. See* IND. CODE § 22-3-2-8 (1988).
27. *Id.*
28. *Id.*
29. *Id. See* Ward v. Tillman, 179 Ind. App. 626, 386 N.E.2d 1003 (1979).
30. 530 N.E.2d at 768.
31. 534 N.E.2d 756 (Ind. Ct. App. 1989).
32. *Id.* at 757.
33. One aspect of the *Sanchez* case which is disturbing relates to Mr. Sanchez's claim for loss of consortium. The claim failed because Mr. Sanchez took the position that he should be entitled to a common law claim for loss of consortium inasmuch as his wife had a common law claim for damages. The court dismissed the wife's claim and was, therefore, compelled to dismiss the husband's claim, but stated: "As the Sanchezes do not raise the issue whether Louis has a claim for loss of consortium against Barbara

the opinion of the author that while the rationale of the second district in *Thiellen* is appropriate, the *O'Dell* test is sufficient to determine whether or not the parties are in the same employ.

Riverview Health Care v. Wright[34] is an example of an attempt to avoid the exclusive remedy provisions of the Worker's Compensation Act by alleging that the employee was outside the scope of his employment at the time of the injury; a category 3 case. In *Riverview*, Wright was scheduled to report to work in the afternoon, but went to the employer's premises in the morning to pick up her paycheck.[35] Although the parking lot to the center was icy, she entered the premises without incident.[36] While inside, Wright completed enrollment forms for an employee benefit program.[37] Upon leaving the premises, she fell in the parking lot and was injured.[38]

Wright filed a civil action against Riverview, alleging negligence. Riverview moved to dismiss the action, arguing that the Worker's Compensation Act afforded to Wright her exclusive remedy.[39] The trial court denied Riverview's motion, but Riverview again raised the exclusive remedy defense on two occasions during the trial. On both occasions, the trial court determined that it had jurisdiction to adjudicate the dispute and ultimately allowed the case to go to the jury.[40] The jury found that Riverview was not negligent.

Following the entry of judgment against her, Wright filed a claim with the Worker's Compensation Board.[41] Although the claim was dismissed by the single hearing judge, it was reinstated by the full Worker's Compensation Board.[42] On appeal, the court of appeals held that the doctrine of *res judicata* barred the employee from relitigating the issue of jurisdiction before the Worker's Compensation Board.[43] Although both the trial court and the Board possessed the authority to determine

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where Maria's exclusive remedy is provided by the Act, we leave that question for another day." *Sanchez*, 534 N.E.2d at 758.

It should be noted that the spouse of an employee has no common law action against the employer by virtue of a compensable injury to the employee. *See* England v. Dana Corp., 428 F.2d 385 (7th Cir. 1970); Rosander v. Copco Steel & Eng'g. Co., 429 N.E.2d 990 (Ind. Ct. App. 1982).

34. 524 N.E.2d 321 (Ind. Ct. App. 1988).

35. *Id.*

36. *Id.* at 322.

37. *Id.*

38. *Id.*

39. *Id.*

40. Although it is not particularly clear, the trial court impliedly determined that Ms. Wright's injury was not in the course of her employment. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 323-24.

the jurisdictional issue, "once one tribunal exercised authority over Wright's claim and reached a final judgment on the merits, the other tribunal was precluded from re-evaluating the issues and facts of the claim."[44]

Though apparently not raised by Riverview, the court of appeals also found that Wright was estopped from claiming that the Worker's Compensation Board had jurisdiction of her claim because she had argued to the trial judge that the Worker's Compensation Board was without jurisdiction. According to the court of appeals, "[a] party cannot assume inconsistent or mutually contradictory positions in the same or successive litigation."[45] This suggests that Wright's problem could not have been solved by presenting her claim to the Worker's Compensation Board and the court concurrently. Assuming that Riverview would not have challenged the Board's jurisdiction, it is reasonable to assume that the parties would have either voluntarily agreed to compensation or the Board would have awarded compensation. It would thereafter have been inappropriate for Wright to proceed with a civil action and argue that the Board was without jurisdiction. This presents a problem for the practitioner who is faced with a claim where the applicability of the Worker's Compensation Act is unclear. The best approach might be to promptly submit the facts to the Worker's Compensation Board for its determination as to the Board's jurisdiction. This approach is suggested because the Board is likely to be more expert with regard to the issues surrounding the "arising out of" employment test than a trial court which may be faced with that issue only infrequently. Further, the Board's procedures can be expedited so that a determination of the issue may be had in sufficient time to invoke the jurisdiction of a civil court in the event that the Board finds itself to be without jurisdiction.

It is interesting to speculate whether the Worker's Compensation Board would have found itself to have jurisdiction had the issue first been presented in that forum. It is possible that Wright's activity would have been found to be incidental to her employment, especially in light of the fact that she completed an employee benefit enrollment form. The case certainly highlights the risk of giving up the rather liberal, though financially limited, coverage of the Worker's Compensation Act in favor of proceeding in a civil forum where liability must be established by a preponderance of the evidence.

II. Statutes of Limitation in Worker's Compensation Cases

Two cases decided during the survey period dealt with statutes of limitations issues. As to the initial filing of claims, the Act states:

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44. *Id.* at 323.
45. *Id.* at 325.

> 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 worker's compensation board. However, in all cases wherein an accident or death results from the exposure to radiation, a claim for compensation shall be filed with the 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.[46]

Before 1947, the language of this section required that the statute of limitations be computed from the date of "the injury," which had been interpreted to mean the point at which the injury became manifest.[47] That language allowed for a much more subjective analysis as to when the limitations period began to run and therefore lacked certainty in defining when a claim was barred. In 1947, the section was changed to incorporate its present language which has been consistently held by the Worker's Compensation Board and the Courts of Appeals to require that a claim be filed within two years of the date of the "accident."[48]

The only possible deviation from such consistency occurred in *Bogdon v. Ramada Inn, Inc.*.[49] In *Bogdon*, the issue was whether the employee had notified the employer of the injury within thirty days of the injury as required by the Act.[50] The *Bogdon* court held that for the purpose

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46. IND. CODE § 22-3-3-3 (1988).

47. *See, e.g.*, Standard Brands, Inc. v. Moore, 114 Ind. App. 500, 51 N.E.2d 865 (1943); American Maize Products Co. v. Nichiporchik, 108 Ind. App. 502, 29 N.E.2d 801 (1940).

48. *See, e.g.*, Lewis v. Marhoefer Packing Co., 145 Ind. App. 225, 250 N.E.2d 375 (1969).

49. 415 N.E.2d 767 (Ind. Ct. App. 1981).

50. IND. CODE § 22-3-3-1 provides:

> 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.
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> Unless such notice is given or knowledge acquired within thirty (30) days from the date of the injury or death, no compensation shall be paid until and from the date such notice is given or knowledge obtained. No lack of knowledge by the employer or his representative, and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer shall show that he is prejudiced by such lack of knowledge or by such want, failure, defect or inaccuracy of the notice, and then only to the extent of such prejudices.

IND. CODE § 22-3-3-1 (1988).

of the notice requirement of section 22-3-3-1, the time limit does not begin to run until the time at which a progressive injury becomes manifest.[51]

The language of the *Bogdon* opinion was not as clear as it might have been and has sometimes been said to justify the filing of a *claim* for compensation more than two years after the occurrence of an accident. An example of such a claim is found in *Ingram v. Land-Air Transportation Company*.[52] The accident at issue in *Ingram* occurred in January of 1985, but no claim was filed with the Worker's Compensation Board until January of 1988.[53] Ingram had pain immediately after the accident, with gradually progressed and increased until December of 1987 when he sought additional medical care.[54] Ingram claimed that he did not know that he had been injured until December of 1987 when his pain became disabling.[55] The Worker's Compensation Board dismissed Ingram's claim, which dismissal was affirmed by the court of appeals.[56]

The decision of the *Ingram* court properly limited the *Bogdon* decision to its facts and reaffirmed the general rule that a claim must be filed within two years of the date of the accident. While the *Bogdon* court held that for the purpose of notification to the employer of an injury the time of the injury is when it becomes manifest, the *Ingram* court limited *Bogdon* to the construction of Indiana Code section 22-3-3-1, which contains language much different than that contained within Indiana Code section 22-3-3-3.[57]

The applicable statute of limitations for the re-opening of a claim for additional medical expenses was considered in *Berry v. Anaconda Corp.*[58] The *Berry* decision makes it clear that claims for additional medical expenses must be filed within one year from the last day for which compensation benefits were paid.

Berry sustained a serious injury on January 25, 1984. He and Anaconda agreed to the payment of 50 weeks of temporary total disability benefits and 62.5 weeks of permanent partial impairment benefits. Both the temporary disability and permanent impairment benefits began on

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51. *Bogdon*, 415 N.E.2d at 770.
52. 537 N.E.2d 532 (Ind. Ct. App. 1989).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. IND. CODE § 22-3-3-1 has not been revised since 1929 and it seems quite likely that when the legislature amended § 22-3-3-3 in 1947, it inadvertently failed to amend § 22-3-3-1. There is no good reason for the difference in language and § 22-3-3-1 should probably be revised to require that the employee give notice to his employer within thirty days of the date of the *accident*, rather than within thirty days of the date of the *injury*.
58. 534 N.E.2d 250 (Ind. Ct. App. 1989).

January 26, 1984 and ended on September 19, 1985 and March 24, 1985 respectively.[59] Anaconda paid medical expenses for Berry through August 3, 1987. Thereafter, a dispute developed regarding the payment of additional medical bills.[60] Berry filed an application with the Worker's Compensation Board on March 10, 1988 to review the prior award based upon an alleged change of conditions. The Board dismissed his claim as not timely filed.[61]

In affirming the action of the Worker's Compensation Board, the court of appeals held that the provision of medical services is not compensation for the purpose of extending the statute of limitations to re-open a claim for additional compensation benefits or medical payments.[62] The court of appeals noted that there is a distinction in the Act between awards for medical services and awards for compensation benefits.[63] As to the time within which an application for additional medical services must be filed, the court looked to Ind. Code § 22-3-3-27 which establishes two potential periods of limitation,[64] and quoted with approval from *Gregg v. Sun Oil Co.*:[65]

> Applications for the modification of an award of medical expenses must be filed within the latter one year statute of limitations, for that is the period of review incorporated by reference into the provisions of IC 1971, 22-2-3-4. . . . The language which constitutes the incorporation by reference expressly refers to the statutory period applicable to increased permanent partial impairment cases.[66]

It appears that Berry would have had to file his claim for additional medical services on or before September 19, 1986, one year from the last date for which he received any compensation. Having failed in that

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59. *Id.* at 251.

60. The underlying award specifically stated that the issue of Anaconda's responsibility for future expenses remained open for later determination. *Id.*

61. *Id.*

62. *Id.* at 253.

63. *Id.* at 252-53.

64. IND. CODE § 22-3-3-27 provides in pertinent part:

> (c) 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. The board may at any time correct any clerical error in any finding or award.

IND. CODE § 22-3-3-7 (1988).

65. 180 Ind. App. 379, 388 N.E.2d 588 (1979).

66. *Berry*, 534 N.E.2d at 253.

regard, his claim for the payment of additional medical expenses was properly dismissed.

A curious aspect of the *Ingram* and *Berry* decisions relates to the courts' recognition of the hardship imposed upon Ingram and Berry as a result of its decisions.[67] Hardship is the necessary result of any statute of limitations. Once having determined that the legal system is best served by establishing limitations beyond which claims cannot be brought, the hardship sometimes imposed must be accepted by all. It serves no useful purpose to attempt to place blame for the individual disappointment occasioned by the enforcement of the statutes in question.

III. Defining "Offense" for the Purpose of the Affirmative Defense Contained Within the Worker's Compensation Act

One additional case which deserves discussion is *Hass v. Shrader's, Inc.*[68] In that case, Hass, while making a delivery, pulled into the emergency lane of the roadway in order to pass slow moving traffic. As he did, he ran into a truck parked in the emergency lane, sustaining severe personal injuries.[69]

The employer claimed that Hass' injury was a result of his commission of a traffic code offense which precluded recovery under the Act.[70] The single hearing judge found for the employer as did the full Worker's Compensation Board. The full Board also found that Hass knowingly violated a statutory duty in addition to his commission of an offense.[71]

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67. In *Ingram*, the court stated: "We are aware that our decision works a hardship on Ingram, and others similarly situated, a hardship that can only be remedied by the legislature which created it." Ingram v. Land-Air Transp. Co., 537 N.E.2d 532, at 534 (Ind. Ct. App. 1989). The *Berry* court stated:

> For the above reasons, Berry's argument is without merit. If the legislature had intended the result argued by Berry, it would have so stated. It is not our prerogative to rewrite plain statutory language. While the result is harsh, it is for the legislature to correct if it so desires. Consequently, this case is affirmed.

Berry, 534 N.E.2d at 253.

68. 534 N.E.2d 1119 (Ind. Ct. App. 1989).

69. *Id.*

70. *Id.* at 1120.

71. *Id.* Ind. Code § 22-3-2-8 provides:

> No compensation is allowed for an injury or death due to the employee's knowingly self-inflicted injury, his intoxication, his commission of an offense, his knowing failure to use a safety appliance, his knowing failure to obey a reasonable written or printed rule of the employer which has been posted in a conspicuous position in the place of work, or his knowing failure to perform any statutory duty. The burden of proof is on the defendant.

Ind. Code § 22-3-2-8 (1978).

The court of appeals held that traffic infractions are not an offense within the meaning of Ind. Code § 22-3-2-8.[72] Further, the court of appeals held that the full Worker's Compensation Board could not raise an additional affirmative defense for the benefit of the employer.[73]

The Worker's Compensation Act does not define the word "offense" so the court undertook an examination of other statutes and definitions.[74] Before 1983, most traffic violations were misdemeanors, but after 1983 the traffic code was de-criminalized and many violations which had been misdemeanors were made civil infractions. Also, the criminal code was amended to exclude an infraction as an offense, making only felonies and misdemeanors "offenses."[75] Although the employer argued that by changing the affirmative defense language in the Worker's Compensation Act from felony and misdemeanor to offense in 1978, the legislature must have meant to use the pre-1983 definition of offense which would include traffic violations, the court concluded that the legislature did not intend the word "offense" to include an infraction.[76]

In the author's opinion, the 1983 criminal code and other changes should not affect the application of the affirmative defenses. For years, traffic violations have been deemed sufficient to prevent the payment of worker's compensation benefits. For example, in *DeMichaeli & Associates v. Sanders*,[77] the employee's failure to yield the right-of-way or to stop at a stop sign was found sufficient to bar compensation. At the time of the *DeMichaeli* decision, the traffic violations in question were Class C misdemeanors. After 1983, those violations became Class C infractions. However, the nature of the violation did not change. As William Shakespeare said, "a rose by any other name smells as sweet." The action of the court of appeals completely negates traffic violations as a basis for the affirmative defense without any showing that the legislature intended to materially affect the affirmative defense when the word "offense" was substituted for the words "felony" and "misdemeanor."

In *Hass*, the employer failed to raise the affirmative defense of a knowing violation of a statutory duty and the court of appeals properly held that because the affirmative defense had not been pled or proven by the employer, it was waived.[78] Pursuant to the rules of the Worker's

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72. *Hass*, 534 N.E.2d at 1121.
73. *Id.* at 1121-22.
74. *Id.* at 1120-21.
75. *Id.*
76. *Id.*
77. 167 Ind. App. 669, 340 N.E.2d 796 (1976).
78. *Hass*, 534 N.E.2d at 1122. Of course, Shrader's may have considered the affirmative defense, but was unable to prove that Hass knew that it was a statutory violation to pass other vehicles in the emergency lane.

Compensation Board, affirmative defenses must be pled a minimum of 45 days prior to a hearing.[79]

IV. Conclusion

The Indiana Courts of Appeals have generally been quite steadfast in protecting the exclusive remedy provisions of the Worker's Compensation Act. Likewise, the courts have rendered opinions which support the proposition that claims must be timely filed pursuant to the various statutes of limitations within the Act. Change has occurred as to one of the affirmative defenses where the court's action is at odds with prior similar cases and the collective wisdom of the Worker's Compensation Board.

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79. Ind. Admin. Code tit. 630, r. 1-1-10 (1988) provides: "If the defendant relies upon the special defenses allowed by 22-3-2-8, such special defense must be pleaded by an affirmative answer filed no later than forty-five (45) days before the date set for hearing unless good cause shown for delay."