

## XVIII. Workmen's Compensation

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### A. Arising out of and in the Course of Employment

The Indiana Workmen's Compensation Act<sup>1</sup> imposes two statutory prerequisites to coverage of employment-related accidents.<sup>2</sup> First, the injured worker must prove the existence of an employer-employee relationship.<sup>3</sup> Independent contractors are not employees under the workmen's compensation scheme.<sup>4</sup> Second, the accident must "arise out of" and "in the course of" that employment relationship.<sup>5</sup> When this direct causal link between injury and employment is proven,<sup>6</sup> the employee becomes entitled to workmen's compensation, the exclusive remedy against the employer.<sup>7</sup> Several

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<sup>1</sup>IND. CODE §§ 22-3-2-1 to -6-3 (1976 & Supp. 1979).

<sup>2</sup>*Id.* § 22-3-2-2 (1976) provides in 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 the employment, and shall be bound thereby." See generally Larson, *The Legal Aspects of Causation in Workmen's Compensation*, 8 RUTGERS L. REV. 423 (1954); Malone, *The Limits of Coverage in Workmen's Compensation—The Dual Requirement Reappraised*, 51 N.C.L. REV. 705 (1973).

<sup>3</sup>See 1B A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 43.00-.54 (1979); B. SMALL, *WORKMEN'S COMPENSATION LAW OF INDIANA* § 4.1 (1950); Note, *The Test for the Employment Relationship Under Workmen's Compensation*, 1 U.C.L.A.—ALAS. L. REV. 40 (1971). As a general rule, the test for determining whether an employment relationship exists is the employer's "right to control" the worker's conduct, as distinguished from the right merely to require certain results in conformity with a contract. Compare *Edelston v. Buiders & Remodelers, Inc.*, 304 Minn. 550, 550-51, 229 N.W.2d 24, 25 (1975), wherein the court considered the following factors in determining the existence of an employment relationship: (1) The right to control the means and manner of performance, (2) the mode of payment, (3) the furnishing of materials or tools, (4) the control of the work site, and (5) the right to discharge, with RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958), which enumerates several factors relevant to a determination of the employment status.

<sup>4</sup>*Meek v. Julian*, 219 Ind. 83, 36 N.E.2d 854 (1941); B. SMALL, *supra* note 2, § 4.2 (1950 & Supp. 1976).

<sup>5</sup>1 A. LARSON, *supra* note 3, §§ 6.00-19.63 (1978 & Supp. 1979); Comment, "Arising Out of and in the Course of Employment" in *Workmen's Compensation*, 28 TENN. L. REV. 367 (1961). See Malone, *supra* note 2.

<sup>6</sup>The burden of proving that the accident arose out of and in the course of employment is upon the injured claimant. *Gill v. James A. Gill & Sons*, 130 Ind. App. 1, 159 N.E.2d 734 (1959); B. SMALL, *supra* note 3, § 12.6, at 384-87.

<sup>7</sup>IND. CODE § 22-3-2-6 (1976) provides:

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,

cases decided during this survey period have focused on this causal prerequisite to coverage under the Workmen's Compensation Act.

1. *The Pre-Existing Injury Doctrine.*—In *Parks v. Sheller-Globe Corp.*,<sup>8</sup> the Indiana Court of Appeals reiterated the rule that a pre-existing disease or infirmity will not bar a claim for the full extent of a disability which is caused by a compensable industrial accident.<sup>9</sup> In *Parks*, the employee sustained a compression fracture of a vertebra, which was compensable under the Workmen's Compensation Act. The industrial board found that the injury activated a pre-existing dormant form of plasma cell leukemia. The board awarded only temporary total disability despite evidence that Parks was permanently disabled and unable to return to work.<sup>10</sup> The board concluded that in the absence of Parks' latent condition, the injury might have healed, enabling Parks to return to regular employment within six months. The board further determined that a "normal individual" probably would not have sustained a compression fracture as a result of the accident.

The court of appeals reversed the board<sup>11</sup> and held that under the Workmen's Compensation Act an employee is entitled to benefits commensurate with the full extent of disability—including that portion of the injury which resulted from the aggravation or causation of a latent, pre-existing condition.<sup>12</sup> The court stated that "[t]he liability of an employer . . . is not limited to injuries which physically and mentally perfect employees would sustain in similar accidents; rather, he is bound to take employees as he finds them."<sup>13</sup> The court indicated that a pre-existing condition will limit an employer's liability only when that condition is an impairment or disability in and of itself.<sup>14</sup>

2. *Refusal to Submit to Medical Care.*—In *Childers v. Central Teaming & Construction Co.*,<sup>15</sup> the Indiana Court of Appeals determined the extent to which an injured employee would be entitled to compensation for a disability caused, in part, by the employee's refusal to submit to medical treatment.<sup>16</sup> Childers, a forty-six year

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dependents or next of kin, at common law or otherwise, on account of such injury or death.

<sup>8</sup>380 N.E.2d 110 (Ind. Ct. App. 1978).

<sup>9</sup>*Id.* at 112.

<sup>10</sup>For a discussion of the difference between permanent total disability and temporary total disability, see *Covarubias v. Decatur Casting Div. of Hamilton Allied Corp.*, 358 N.E.2d 174 (Ind. Ct. App. 1976).

<sup>11</sup>380 N.E.2d at 112.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 111-12.

<sup>14</sup>*Id.* at 112.

<sup>15</sup>384 N.E.2d 1116 (Ind. Ct. App. 1979).

<sup>16</sup>IND. CODE § 22-3-3-4 (Supp. 1979) provides in part:

[T]he employer may continue to furnish a physician or surgeon and other

old employee of Central Teaming, applied to the industrial board for an adjustment of a prior compensation award. A single hearing member denied the employer's petition that Childers' application be vacated based upon a demand that he submit to proffered medical treatment and awarded Childers eighty percent permanent partial impairment. The full industrial board found that Childers was only entitled to thirty percent permanent partial impairment because part of his disability had been caused by a refusal to undergo an operation which was reasonably calculated to improve his condition. Childers' only reason for refusing to undergo surgery was fear generated by the physician's refusal to make an absolute guarantee that Childers' condition would improve as a result of the operation.

The court of appeals affirmed the industrial board's reduction to thirty percent permanent partial impairment<sup>17</sup> and enunciated a general rule that not every refusal to undergo medical treatment mandates that compensation benefits be reduced or eliminated.<sup>18</sup> Rather, a refusal to submit to treatment will bar compensation only when the refusal is unreasonable in light of the surrounding circumstances,<sup>19</sup> thus causing some part of the disability which is attributable to employee conduct unrelated to a risk incidental to the employment relationship itself.<sup>20</sup> That increment of disability caused by a refusal of medical care does not arise out of and in the course of the employment and, therefore, is not compensable under the workmen's compensation scheme. As noted by the court of appeals:

The foregoing, of course, does not mean that Childers is being forced to undergo a recommended medical procedure. That choice is still his. However, the provisions for workmen's compensation relieve an employer from the

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medical services and supplies and the industrial board may . . . on a proper application of either party, require that treatment by such physician and other medical services and supplies be furnished by and on behalf of the employer as the industrial board may deem necessary to limit or reduce the amount and extent of such impairment. The refusal of the employee to accept such services and supplies, when so provided by or on behalf of the employer, shall bar the employee from all compensation otherwise payable during the period of such refusal and his right to prosecute any proceeding under this article . . . shall be suspended and abated until such refusal ceases; no compensation for permanent total impairment, permanent partial impairment, permanent disfigurement or death shall be paid or payable for that part or portion of such impairment, disfigurement or death which is the result of the failure of such employee to accept such treatment, services and supplies.

<sup>17</sup>384 N.E.2d at 1118.

<sup>18</sup>*Id.* at 1117-18.

<sup>19</sup>*Id.* at 1118.

<sup>20</sup>1 A. LARSON, *supra* note 3, § 13.22 (1978); B. SMALL, *supra* note 3, § 11.4 (1950 & Supp. 1976).

burden of paying compensation for that portion of his impairment which exists because he has unreasonably refused the proffered treatment.<sup>21</sup>

The court of appeals found the following factors sufficient to support the board's determination that Childers' refusal to undergo the surgery was unreasonable:<sup>22</sup> (1) For the existing injury, reasonable treatment was the operation; (2) the estimated chances of success were good; (3) if unsuccessful, Childers' condition would not be worsened; (4) the surgery involved no unusual risk or extraordinary pain; (5) the operation recommended was the "textbook" treatment of Childers' condition; (6) the long term benefits and cure likely to accrue were good; (7) Childers was otherwise healthy and likely to respond favorably to the surgery; and (8) the physician was qualified and had prior experience in performing this type of operation.<sup>23</sup> These factors, when weighed against Childers' unfounded fear of the operation,<sup>24</sup> led the court to affirm the industrial board's ruling that Central Teaming was not liable for that portion of the total disability which was caused by Childers' rejection of the surgery.<sup>25</sup>

3. *Horseplay.*—During the survey period, the Indiana Supreme Court, in a three-two decision, denied transfer in *Pepka Spring Co. v. Jones*.<sup>26</sup> In that case, Jones had initiated "spring throwing" at a fellow employee. After throwing the spring, Jones left the immediate area to get a drink of water. He returned approximately three to four minutes later and resumed normal work-related duties. Shortly thereafter, he was struck in the eye with a spring thrown by the same fellow employee.

The issue presented on appeal was whether Jones' claim for compensation was barred by his own horseplay activity. The general rule is that injury resulting from horseplay activity is not causally linked to a risk incidental to the employment relationship but arises from a personal frolic or abandonment of that relationship by the

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<sup>21</sup>384 N.E.2d at 1118.

<sup>22</sup>Professor Larson enumerates several factors which bear upon the issue of reasonableness: (1) the claimant's age, (2) the claimant's physical condition, (3) the claimant's previous surgical experience, (4) the ratio of deaths from the operation, and (5) the percentage of cures. 1 A. LARSON, *supra* note 3, §§ 13.22, at 3-419 to -429 (1978). Larson further states that "[t]he question whether refusal of treatment should be a bar to compensation turns on a determination whether the refusal is reasonable. Reasonableness in turn resolves itself into a weighing of the probability of the treatment's successfully reducing the disability by a significant amount, against the risk of the treatment to the claimant." *Id.* at 3-398.

<sup>23</sup>384 N.E.2d at 1117.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 1118.

<sup>26</sup>378 N.E.2d 857 (Ind. 1978).

worker.<sup>27</sup> Two exceptions exist to this rule: (1) When injury befalls an innocent victim of horseplay,<sup>28</sup> and (2) when the employer has knowledge and acquiesces in the horseplay.<sup>29</sup>

The industrial board ruled that Jones had withdrawn from horseplay activity at the time of injury and therefore was entitled to compensation. A majority of the Indiana Court of Appeals<sup>30</sup> and the Indiana Supreme Court<sup>31</sup> agreed with that ruling. The majority focused on whether Jones had in fact abandoned the horseplay activity and returned to his employer's work. The focus was not on the time element between horseplay and the return to work, but rather whether the employee intended to and effectuated a return to that work.<sup>32</sup> Because it could be inferred reasonably from the facts that Jones had returned to a work-related activity, the board's grant of compensation was affirmed.<sup>33</sup>

Two justices of the Indiana Supreme Court dissented to the denial of transfer, arguing that "[t]he question on review is thus not one of fact, as it was seen to be by the Court of Appeals in this case, but one of law."<sup>34</sup> The dissent indicated that Jones' attempt to abandon the frolic and return to work did not constitute an intervening factor which would break the chain of cause and effect initiated by Jones' original action of throwing the spring.<sup>35</sup> The retaliation was, in the dissent's view, a foreseeable response and part of the ongoing horseplay and therefore not terminated by Jones' return to work.<sup>36</sup>

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<sup>27</sup>*Block v. Fruehauf Trailer Div.*, 146 Ind. App. 70, 252 N.E.2d 612 (1969), wherein the court stated: "Once the connection between the employment and the 'horseplay' conduct becomes so tenuous that there is no apparent causal factor, to permit compensation would be to disregard even the most liberal boundaries of the limitation, 'arising out of and in the course of the employment.'" *Id.* at 74, 252 N.E.2d at 615. *See also* *Lincoln v. Whirlpool Corp.*, 151 Ind. App. 190, 279 N.E.2d 596 (1972).

<sup>28</sup>146 Ind. App. at 73, 252 N.E.2d at 615.

<sup>29</sup>*Id.*

<sup>30</sup>371 N.E.2d 389 (Ind. Ct. App. 1978), *discussed in* Price, *Workmen's Compensation, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 334 (1979).

<sup>31</sup>378 N.E.2d at 858.

<sup>32</sup>371 N.E.2d at 391, wherein the court stated:

The Board's finding which recited that Jones had "returned to work" after having earlier thrown a spring at Mr. Host, is clearly indicative of a conclusion that even if Jones had been an aggressor or participant in horseplay, he had withdrawn from that aggression or participation. Thus, the Board was entitled to conclude as they must have, that Jones, like the claimant in *Woodland Cemetery Ass'n v. Graham* [149 Ind. App. 431, 435, 273 N.E.2d 546, 549 (1971)] had become "an innocent victim."

<sup>33</sup>371 N.E.2d at 391.

<sup>34</sup>378 N.E.2d at 858 (Pivarnik J., dissenting).

<sup>35</sup>*Id.*

<sup>36</sup>The dissent stated that willing participants in horseplay activity are not acting within the course of employment as defined by the Workmen's Compensation Act. It determined that the conduct leading up to the worker's injury could be "characterized

This approach seems analogous to those tort cases which hold a defendant liable for the reasonably foreseeable class of injuries which are likely to result and which flow from the defendant's original conduct.<sup>37</sup> The dissent failed, however, to enunciate the degree of abandonment or the criteria which the industrial board should use in determining whether an employee has in fact abandoned horseplay activity.

### B. *Workmen's Compensation—An Exclusive Remedy*

1. *Parking Lot Accidents.*—In *Ward v. Tillman*,<sup>38</sup> Ward was injured in an automobile accident involving a fellow employee on the parking lot of his employer. Ward had "clocked out" and was leaving the plant as Tillman was entering. Ward and his wife brought an action against Tillman for injuries sustained by Ward. The trial court granted Tillman's motion for summary judgment. It determined that the accident arose out of and in the course of employment and that the Wards' exclusive remedy was under the Workmen's Compensation Act.

In affirming the trial court's determination, the court of appeals stated that "an employer may be liable for those injuries which occur off the immediate job site if the property is maintained for an employment-connected use."<sup>39</sup> If the parking lot is within the employer's supervision, it is an extension of his operating premises and, therefore, accidents which result from a reasonable ingress or egress to the plant generally are held to be employment-related risks.<sup>40</sup> Furthermore, since the accident occurred at a location where the employee by reason of his employment was reasonably expected to be, it was compensable.<sup>41</sup>

The court also determined that Ward and Tillman were co-employees, stating that employees are "in the same employ" if each

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as a 'playful diversion,' 'a prank,' and a 'recognized human frailty.'" *Id.* The dissent concluded that the majority holding that the worker had "withdrawn from that aggression or participation" was a "judicial gloss on 'horseplay' [which is] an act of social policy beyond the intent of our legislature." *Id.*

<sup>37</sup>See, e.g., *Seaton v. United States Rubber Co.*, 223 Ind. 404, 61 N.E.2d 177 (1945).

<sup>38</sup>386 N.E.2d 1003 (Ind. Ct. App. 1979).

<sup>39</sup>*Id.* at 1005. The court noted that public policy requires a liberal construction of arising out of and in the course of employment when determining whether an accident, involving the ingress and egress of an employee to his work premises, is compensable under the Workmen's Compensation Act (citing *O'Dell v. State Farm Mut. Auto. Ins. Co.*, 362 N.E.2d 862 (Ind. Ct. App. 1977)).

<sup>40</sup>386 N.E.2d at 1005.

<sup>41</sup>*Id.* See *United States Steel Corp. v. Cicilian*, 133 Ind. App. 249, 180 N.E.2d 381 (1962).

employee would be entitled to compensation benefits for injuries sustained in the same accident.<sup>42</sup> Because the court concluded that Tillman could have obtained compensation for any injuries which he might have sustained in the accident, it held that he was a co-employee, and not a third-party tortfeasor. The Wards' exclusive remedy was, therefore, under the Workmen's Compensation Act.<sup>43</sup>

2. *Municipal Police Officers.*—In *Elwell v. City of Michigan City*,<sup>44</sup> a police officer and his wife brought an action against Michigan City alleging negligence in the maintenance of a sewer drain. Elwell was injured in the performance of his duties while riding in a police car. The trial court dismissed the action finding that the Workmen's Compensation Act and the Police Pension Fund Act<sup>45</sup> provided the exclusive remedy to policemen injured while on duty.

The Indiana Court of Appeals reversed the trial court and held that the Elwells' action was not barred.<sup>46</sup> It determined that although section 22-3-2-6 of the Indiana Code provides the exclusive remedy for industrial accidents,<sup>47</sup> the statute expressly exempts police officers who are members of the police department of a municipality *and* who are members of a police pension fund (hereinafter referred to as exempt officers).<sup>48</sup> The court further determined that if a municipality elects to procure workmen's compensation insurance, only the medical provisions of the Act apply to exempt officers.<sup>49</sup> Policemen covered by these medical provisions are limited to recovering medical and surgical care, medicines, laboratory costs, curative and palliative agents, x-ray costs, and costs for diagnostic and therapeutic services, to the extent that these services are provided for in the workmen's compensation policy procured by the municipality.<sup>50</sup> The court also held that the Workmen's Compensation Act was silent as to an officer's remedy other than for medical care and, thus, only barred recovery for

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<sup>42</sup>386 N.E.2d at 1005. IND. CODE § 22-3-2-13 (Supp. 1979) provides in part: Whenever an injury or death, for which compensation is payable under chapters 2 through 6 of this article 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 the other person to recover damages.

<sup>43</sup>386 N.E.2d at 1005. See IND. CODE § 22-3-2-6 (1976), *quoted at note 7 supra*.

<sup>44</sup>385 N.E.2d 1203 (Ind. Ct. App. 1979).

<sup>45</sup>IND. CODE § 19-1-24-1 to -6 (1976).

<sup>46</sup>385 N.E.2d at 1205.

<sup>47</sup>See IND. CODE § 22-3-2-6 (1976), *quoted at note 7 supra*.

<sup>48</sup>*Id.* at 1204.

<sup>49</sup>*Id.* See IND. CODE § 22-3-2-2 (1976).

<sup>50</sup>See IND. CODE § 22-3-2-2 (1976).

medical expenses and did not bar the Elwells' civil action for injuries.<sup>51</sup>

3. *Liability of the Company Physician.*—The “in the same employ”<sup>52</sup> language received a limiting construction in one of the most significant departures from Indiana’s traditional rejection of the dual capacity doctrine<sup>53</sup> in *Ross v. Schubert*,<sup>54</sup> which involved an appeal from an adverse judgment in a malpractice suit by an employee and his wife against three company physicians. Ross, partially disabled in a non-industry related accident, was examined by three physicians employed on a part-time basis at International Harvester’s plant clinic. These physicians assigned the appellant to light duty work under a handicap job program. Subsequent to this assignment, Ross was again examined by one of the defendant physicians and ordered to return to regular factory work with some weight-lifting limitations. As a result of this activity, Ross was permanently disabled, and he and his wife then brought an action against the physicians for negligence in reclassifying him and in treating his injury. The trial court instructed the jury that civil actions against co-employees are barred by the workmen’s compensation act and that the verdict must be returned for the physicians should the jury find that they were employees of International Harvester at the time of their alleged negligence. The jury thereupon returned a verdict for the physicians.

The Indiana Court of Appeals reversed the trial court and held that a physician is not protected by the “in the same employ” language.<sup>55</sup> It found no legislative intent<sup>56</sup> to shield company physicians from tort liability for their malpractice<sup>56</sup> and concluded that the physicians under these facts were not immune as co-employees.<sup>57</sup> The court recognized that liability flowed from the patient-physician

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<sup>51</sup>385 N.E.2d at 1204-05.

<sup>52</sup>IND. CODE § 22-3-2-13 (Supp. 1979).

<sup>53</sup>See *Kottis v. United States Steel Corp.*, 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977); *Needham v. Fred's Frozen Foods, Inc.*, 359 N.E.2d 544 (Ind. Ct. App. 1977). See Note, *Dual Capacity Doctrine: Third Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553 (1979).

<sup>54</sup>388 N.E.2d 623 (Ind. Ct. App. 1979).

<sup>55</sup>*Id.* at 630. Cf. *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952) (upholding a judgment in favor of injured employee against employer-physician for malpractice in treatment of industry-related injury); *Hoffman v. Rogers*, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972) (holding company physician could be sued for alleged malpractice in treatment of employee's industrial-incurred injury); *Seaton v. United States Rubber Co.*, 223 Ind. 404, 61 N.E.2d 177 (1945) (holding company physicians liable for malpractice and as third parties under the Workmen's Compensation Act). See generally 2A A. LARSON, *supra* note 3, §§ 72.61, .80 (1976).

<sup>56</sup>388 N.E.2d at 626.

<sup>57</sup>*Id.* at 630.

relationship, not from the employer-employee *quid pro quo*—immunity from suit for acknowledgment of liability, which is the basis for compensation under the workmen's compensation scheme.<sup>58</sup>

The court relied upon a prior Indiana case, *Seaton v. United States Rubber Co.*,<sup>59</sup> to support its holding that company physicians are third parties, and not employees, as defined by the Workmen's Compensation Act,<sup>60</sup> rejecting the argument that *Seaton* was inapplicable because it predated the extension of immunity to co-employees.<sup>61</sup> The *Ross* court determined that the physicians were independent contractors<sup>62</sup> because the employer was precluded by medical practice from control over the manner in which the company physicians administered treatment to Ross.<sup>63</sup> The professional status and concomitant discretion in administering medical treatment forced a conclusion that the physicians' liability flowed from a capacity outside the employment relationship which the Workmen's Compensation Act was not designed to regulate.<sup>64</sup> Treatment occurring on the company premises by physicians paid by the same employer as Ross, did not mandate a different result.<sup>65</sup> The court's opinion also reflected a strong policy favoring medical competency and a fear that if physicians were permitted to avail themselves of the co-employee immunity that it might "induce industry [employing physicians] to encourage quackery, and place a premium upon negligence, inefficiency and wanton disregard of the professional obligations of medical departments of industry, toward the artisan."<sup>66</sup>

### C. Evidence

1. *The Residuum Rule.*—In *C.T.S. Corp. v. Schoulton*,<sup>67</sup> an age-old battle was renewed during the survey period concerning the use of hearsay evidence in administrative agency proceedings.<sup>68</sup>

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<sup>58</sup>*Id.* at 629. See Note, *The Malpractice Liability of Company Physicians*, 53 IND. L.J. 585 (1978).

<sup>59</sup>223 Ind. 404, 61 N.E.2d 177 (1945).

<sup>60</sup>*Id.* at 414, 61 N.E.2d at 181.

<sup>61</sup>388 N.E.2d at 628.

<sup>62</sup>*Id.* at 629.

<sup>63</sup>*Id.* (citing *Itterman v. Baker*, 214 Ind. 308, 316-17, 15 N.E.2d 365, 370 (1938)).

<sup>64</sup>388 N.E.2d at 629.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>383 N.E.2d 293 (Ind. 1978). See also Greenberg, *Administrative Law, 1979 Survey of Indiana Law*, 13 IND. L. REV. 39, 42-45 (1980); Karlson, *Evidence, 1979 Survey of Indiana Law*, 13 IND. L. REV. 257, 260-64 (1980).

<sup>68</sup>See generally K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 14.07-.09 (3rd ed. 1972); 3 A. LARSON, *supra* note 3, § 79.22 (1976); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 350-352 (E. Cleary ed. 1972); B. SMALL, *supra* note 3, § 12.6 (1950 & Supp.

Schoulton died of acute liver and kidney failure, and the industrial board determined that the cause was the inhalation of toxic fumes from a cleaning solvent, trichlorethylene, allegedly spilled and cleaned up by Schoulton at work. This finding was based solely upon the testimony of the deceased worker's family physician that Schoulton had told him "he had tripped over a barrel or bucket of cleaning solvent and that it spilled all over the floor and that he got down and cleaned it up."<sup>69</sup> The industrial board found the evidence sufficient to award compensation.

The Indiana Court of Appeals affirmed the board's ruling<sup>70</sup> and held that even though the statement in question did not fall within a traditionally recognized exception to the hearsay rule, it could nevertheless be considered as the basis for an award because the evidence was both necessary and trustworthy.<sup>71</sup>

The Indiana Supreme Court, in a three-two decision, granted transfer and vacated the holding that hearsay evidence could alone support an industrial board award of compensation,<sup>71</sup> thus adopting a modified version of the residuum rule.<sup>72</sup> The residuum rule, as adopted in several jurisdictions, permits an administrative agency to admit hearsay evidence, but requires an additional residuum of competent evidence to support an award of compensation as a matter of law.<sup>73</sup> Competent evidence refers to evidence which is admissible in a judicial proceeding and generally includes hearsay which is admitted without objection or pursuant to a recognized exception to the hearsay rule.<sup>74</sup>

The modified rule adopted by the supreme court can be divided into four parts: (1) the industrial board is not held to the strict rules of evidence applicable in judicial proceedings<sup>75</sup> and, therefore, the

1976); Cohen, *Hearsay Evidence in Workers' Compensation Adjudications: The Forgotten Standard*, 27 F.I.C.Q. 392 (1977); Cooper, *The Admissibility of Hearsay in Hearings Before Workmen's Compensation Commissions*, 31 DICTA 423 (1954); Davis, *The Residuum Rule in Administrative Law*, 28 ROCKY MTN. L. REV. 1 (1955); Note, *The Weight to be Given Hearsay Evidence By Administrative Agencies: The "Legal Residuum" Rule*, 26 BROOKLYN L. REV. 265 (1960); Note, *The Sufficiency of Uncorroborated Hearsay In Administrative Proceedings: The California Rule*, 8 LOY. L.A.L. REV. 632 (1975); Note, *The Residuum Rule and Appellate Fact Review: Marriage of Necessity*, 13 RUTGERS L. REV. 254 (1958); Annot., 36 A.L.R.3d 12, § 27 (1971).

<sup>69</sup>383 N.E.2d at 294.

<sup>70</sup>354 N.E.2d 324 (Ind. Ct. App. 1976).

<sup>71</sup>383 N.E.2d at 297.

<sup>72</sup>*Id.* at 296.

<sup>73</sup>*Id.* at 295. See Cohen *supra* note 68, at 396-97; Annot., *supra* note 68.

<sup>74</sup>See 383 N.E.2d at 295-97; K. DAVIS, *supra* note 68, § 14.07; B. SMALL, *supra* note 3, § 12.6, at 388-89.

<sup>75</sup>383 N.E.2d at 295. See *Harrison Steel Casting Co. v. Daniels*, 147 Ind. App. 666, 263 N.E.2d 288 (1970); IND. ADMIN. R. & REGS. § (22-3-4-6)-1 (1976), which provides *inter alia*:

The industrial board will not be bound by the usual common law or statutory

admission of hearsay will not alone mandate appellate reversal;<sup>76</sup> (2) hearsay is considered improper and no authority requires the board to admit it;<sup>77</sup> (3) if hearsay is admitted without objection by the opposing party, or pursuant to a recognized exception to the hearsay rule, it can form the sole basis for an award of compensation;<sup>78</sup> (4) if, however, proper objection is raised, then the hearsay will not support an award of compensation without a residuum of competent evidence.<sup>79</sup> The primary distinction between Indiana's rule and the rule of other jurisdictions is that hearsay is considered improper evidence in Indiana. Therefore, within the board's discretion, hearsay evidence can be admitted but cannot form the basis of an award unless supported by a residuum of competence evidence.

There are several criticisms<sup>80</sup> of the residuum rule which are answered in the court's opinion. First, critics argue that the industrial board is an administrative agency and its proceedings are inherently dissimilar to those of a trial court.<sup>81</sup> They point out that in workmen's compensation proceedings the legislature has defined the issues—the primary issue being a determination of whether the accident arose out of and in the course of employment, in contrast to judicial proceedings in which the parties define the issues.<sup>82</sup> Second, whereas an industrial board consists of experienced specialists, a judicial proceeding is designed to have a neutral and uninformed trier of fact.<sup>83</sup> Finally, whereas the workmen's compensation scheme contemplates a continuing process of dispute settlement, a judicial

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rules of pleading and evidence, or by any technical rules of practice in conducting hearings, but will conduct such hearings and make such investigations in reference to the questions at issue in such manner as in its judgment are best adapted to ascertain and determine expeditiously and accurately the substantial rights of the parties and to carry out justly the spirit of "The Indiana Workmen's Compensation Act."

<sup>76</sup>The court adopted the dissenting opinion of Judge Buchanan of the court of appeals to the effect that "[t]he Board can admit all hearsay evidence without fear of automatic reversal. [However, if] properly objected to at the hearing and preserved on review and not falling within a recognized exception to the Hearsay Rule, then an award may not be based solely upon such hearsay.'" 383 N.E.2d at 296 (quoting 354 N.E.2d at 332 (Buchanan J., dissenting)). See *United Paperboard Co. v. Lewis*, 65 Ind. App. 356, 117 N.E. 276 (1917).

<sup>77</sup>383 N.E.2d at 295; *Bohn Aluminum & Brass Co. v. Kinney*, 161 Ind. App. 128, 314 N.E.2d 780 (1974); B. SMALL, *supra* note 3, § 12.6, at 388-89.

<sup>78</sup>383 N.E.2d at 296. See *Page v. Board of Comm'rs*, 155 Ind. App. 215, 292 N.E.2d 254 (1973).

<sup>79</sup>383 N.E.2d at 295.

<sup>80</sup>In addition to the three major criticisms which are discussed in the textual portion of this article, Professor Davis has set forth other common criticisms to the residuum rule. See K. DAVIS, *supra* note 68, § 14.07-.09.

<sup>81</sup>Cohen, *supra* note 68, at 394-95.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

proceeding contemplates a one time dispute settlement process.<sup>84</sup> Although these distinctions are theoretically sound, each workmen's compensation case deals with a specific factual determination which is much narrower than the broad issues defined by the legislature. Furthermore, even though board members are experts who deal with workmen's compensation issues on a regular basis, there is no rational basis for ignoring the lessons taught in judicial proceedings that hearsay is often unreliable and any trier of fact, whether a trial judge who is trained not to be influenced by hearsay, juror or administrative board member, is susceptible to the influence of hearsay evidence.<sup>85</sup> Justice Prentice's majority opinion emphasized this point:

There simply is no logic to bestowing upon administrative agencies the unrestricted right to ignore the hearsay rule—a right for good reasons denied to juries and trial judges as fact finders . . . . There is no basis, however, for suggesting, as opponents of the rule appear to do, that administrative agency fact finders are more perceptive of truth, than are judges and juries, or that they are more likely to find the truth when left to their own devices than when operating under time tested and honored rules of evidence.<sup>86</sup>

The majority noted four reasons why hearsay evidence is inherently suspect: (1) generally, the out-of-court assertion is not made under oath; (2) the demeanor and credibility of the declarant cannot be observed; (3) the likelihood of inaccuracy or fraud is great; and (4) there is no opportunity for the opposing party to cross-examine the declarant.<sup>87</sup> The residuum rule does not prevent an industrial board from considering hearsay evidence, but merely puts an outer limit on the use of that evidence in the final determination of rights under the Workmen's Compensation Act.

Next, critics of the rule argue that any prejudicial effect of the hearsay can be ameliorated by judicial review as to whether the hearsay was necessary and trustworthy.<sup>88</sup> The suggestion has also

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<sup>84</sup>*Id.*

<sup>85</sup>*But see* 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 4b, at 36-43 (1940) [hereinafter cited as WIGMORE].

<sup>86</sup>383 N.E.2d at 296.

<sup>87</sup>*Id.*

<sup>88</sup>K. DAVIS, *supra* note 68, § 14.07, at 278, elaborates on this position as follows:

The first and most important step in understanding the residuum rule—a step that too many courts have failed to take—is to recognize what is and what is not the alternative to the residuum rule. The alternative is to allow agencies and reviewing courts to exercise discretion in determining in the light of circumstances of each case whether or not particular evidence is

been made that if it is unclear upon which evidence the board's ruling was based, the court can remand the case to the board with directions to explain more fully the basis of its award.<sup>89</sup> There are two problems with this approach. First, the appellate court would be required to probe into the necessity and trustworthiness of the hearsay. The appellate courts in Indiana have traditionally refused to weigh the evidence or determine the credibility of witnesses, limiting review to a determination of whether the record supports the ruling as a matter of law.<sup>90</sup> In *Schoulton*, the majority stated:

Opponents of the rule are quick to point out that rejection of the rule does not require a reviewing court to accept a finding based upon incompetent evidence but only that it may accept it or not, according to its own determination of whether the supporting evidence was reliable and substantial. Such a viewpoint is not compatible with our established rule of appellate review against determining the weight of the evidence and the credibility of witnesses.<sup>91</sup>

Second, it can be argued that a remand to the board for clarification would create unnecessary delay for the worker or his family in receiving compensation. Therefore, a major purpose of the Workmen's Compensation Act—to provide a guaranteed and expeditious remedy for industrial accidents—would be defeated.<sup>92</sup>

Finally, opponents of the residuum rule argue that there is a fallacy in equating legally competent evidence with trustworthy evidence while ignoring the possibility that hearsay evidence might be equally probative and trustworthy.<sup>93</sup> The Indiana courts have recognized, however, that the board's fact-finding process should not be hampered by the procedural and evidentiary technicalities used

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reliable even though it would be excluded in a jury case. In the exercise of such discretion, agencies and reviewing courts will in many circumstances find that particular hearsay or other so-called incompetent evidence has insufficient reliability. Rejection of the residuum rule does not mean that an agency is compelled to rely upon incompetent evidence, it means only that the agency and the reviewing court are free to rely upon the evidence if in the circumstances they believe that the evidence should be relied upon. Rejection of the residuum rules does not mean that a reviewing court must refuse to set aside a finding based upon incompetent evidence; it means only that the court may set aside the finding or refuse to do so as it sees fit, in accordance with its own determination of the question whether the evidence supporting the finding should be deemed reliable and substantial in the circumstances.

<sup>89</sup>See Cohen, *supra* note 68, at 397-98.

<sup>90</sup>383 N.E.2d 296. See B. SMALL, *supra* note 3, § 12.14 (1950 & Supp. 1976).

<sup>91</sup>383 N.E.2d at 296.

<sup>92</sup>Malton v. Malton, 92 Ind. App. 698, 133 N.E.2d 369 (1931). See generally B. SMALL, *supra* note 3, § 12.7 (1950 & Supp. 1976).

<sup>93</sup>See 1 WIGMORE, *supra* note 85, at 41-42.

in courts of law.<sup>94</sup> The board is vested with the discretion to admit reliable hearsay, even over an objection thereto, and consider this evidence in formulating its determination.<sup>95</sup> The wide discretion vested in the board is a recognition of the board's expertise, the necessity for an informal fact-gathering process, and a recognition that hearsay may be reliable and helpful in a determination of the cause of an industrial accident.<sup>96</sup>

Thus, the residuum rule merely imposes a threshold safety mechanism to guard against cases in which the hearsay is not otherwise supported. The rule also prevents the appellate courts from becoming a "super industrial board," forced to weigh the evidence and determine its credibility before it can perform its traditional appellate function of determining whether the award is supported by sufficient evidence as a matter of law. Clearly, the debate concerning the residuum rule will continue, but, as modified, it is the rule in Indiana.

2. *Expert Testimony.*—In *Pike County Highway v. Fowler*,<sup>97</sup> the Indiana Court of Appeals decided that, in determining the cause of an injury, the industrial board may consider a physician's opinion based upon personal knowledge and another physician's deposition, even though the physician fails to specify the facts in the deposition upon which he relied. Fowler was an employee of the Pike County Highway Department and was injured when a 250 to 300 pound wooden plank was dropped on his foot. Fowler sought medical treatment from his family physician who diagnosed severe vascular damage and referred him to an orthopedic surgeon who in turn referred Fowler to a general surgeon with experience in vascular surgery. Fowler was last examined by his family physician on July 11, 1975, before Fowler consulted the general surgeon on the same day. After several operations, the general surgeon amputated Fowler's foot and lower leg due to a gangrenous condition on December 30, 1975.

At the industrial board hearing, the family physician testified that he had been Fowler's physician for approximately twenty-five years and that he had never known Fowler to be seriously ill or to have had any circulatory problems prior to the injury to his foot. The physician, relying upon unspecified parts of the general surgeon's deposition, concluded that Fowler's injury was caused by the plank. The board awarded compensation to Fowler.

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<sup>94</sup>383 N.E.2d 296; *Harrison Steel Castings Co. v. Daniels*, 147 Ind. App. 666, 263 N.E.2d 288 (1970).

<sup>95</sup>383 N.E.2d at 296.

<sup>96</sup>*Id.* See B. SMALL, *supra* note 3, § 12.6 (1950 & Supp. 1976).

<sup>97</sup>388 N.E.2d 630 (Ind. Ct. App. 1979).

The court of appeals held that there was no error in admitting the expert's opinion as to the cause of injury.<sup>98</sup> The family physician's firsthand knowledge of Fowler's medical history combined with the fact that the general surgeon, whose deposition had been relied upon, had reached a contrary conclusion as to the cause of Fowler's injury, supported the board's reliance upon the expert's opinion that Fowler's injury was caused by the industrial accident.<sup>99</sup> The court concluded that the expert's failure to specify what facts in the deposition were being relied upon did not change this result.<sup>100</sup> The court also noted three factors relating to this issue: (1) the family physician had firsthand knowledge of Fowler's condition and medical history and, therefore, did not have to base his opinion upon a hypothetical question;<sup>101</sup> (2) a physician may give an opinion as to the probable cause of injury even though he has not continuously attended the patient; and (3) the strict rules of evidence do not apply to industrial board proceedings, and the board committed no reversible error in admitting the expert's opinion even if an irregularity did exist in the manner in which the opinion was presented.<sup>102</sup>

#### *D. Rights of a Posthumous Unacknowledged Illegitimate Child*

During the survey period, section 22-3-3-19 of the Indiana Code<sup>103</sup> came under constitutional attack. Under the Workmen's Compensation Act, "presumptive dependents" have a favored compensation status.<sup>104</sup> Section 22-3-3-19 defines certain classes of dependents as:

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<sup>98</sup>*Id.* at 638.

<sup>99</sup>*Id.* at 635.

<sup>100</sup>The court found that except for the expert's subsequent explanation of the theory upon which he based his opinion and his admission that he had considered the other physician's deposition, he had otherwise laid a thorough factual foundation for his opinion. *Id.*

<sup>101</sup>The court stated the general rule applicable in judicial proceedings to be: "An expert witness speaking from personal observation need not be asked a hypothetical question prior to giving his opinion. *Murphy Auto Sales, Inc. v. Coomer*, 123 Ind. App. 709, 112 N.E.2d 589 (1953). Instead, he may express his opinion after stating the facts of which he has personal knowledge and upon which he is basing his opinion." 388 N.E.2d at 635.

<sup>102</sup>388 N.E.2d at 635.

<sup>103</sup>IND. CODE § 22-3-3-19 (Supp. 1979).

<sup>104</sup>*Id.* § 22-3-3-18 (1976) provides:

Dependents under this act . . . shall consist of three (3) classes, viz. (1) presumptive dependents, (2) total dependents in fact, and (3) partial dependents in fact. Presumptive dependents shall be entitled to compensation to the complete exclusion of total dependents in fact and partial dependents in fact and shall be entitled to such compensation in equal shares.

*Id.* § 22-3-3-19 (Supp. 1979) states *inter alia*:

The following persons are conclusively presumed to be wholly dependent for support upon a deceased employee and shall constitute the class

presumptive dependents, one of which is acknowledged illegitimate children. This section does not, however, define any class which would include unacknowledged illegitimate children. The discrimination between these two classes formed the basis of an equal protection challenge to the section. In *Anonymous Child v. Deceased Father's Employer*,<sup>105</sup> the Indiana Court of Appeals held this section to be unconstitutional and reversed an industrial board denial of compensation to a posthumous unacknowledged illegitimate child whose father had been killed in an industrial accident.<sup>106</sup>

The industrial board found that the deceased worker and natural mother had known each other for four months prior to his death; that they had planned to marry and were to obtain a marriage license the week in which the decedent was killed; that they were neither living together nor had the decedent contributed to her support; that they had commenced sexual relations about one month prior to his death and she had not had sexual relations with any other men during that period; and that the child was born approximately eight months after the decedent's death.<sup>107</sup>

The board determined that the child was in fact the child of the deceased worker, but denied compensation because the father had failed to acknowledge the child before his death.<sup>108</sup> The court of appeals found that this section, making compensation dependent upon the decedent's acknowledgment, was an unconstitutional violation of the equal protection of the law by discriminating against the class of posthumous illegitimate children.<sup>109</sup>

The Indiana Supreme Court granted transfer and vacated the opinion of the court of appeals<sup>110</sup> in *Bernacki v. Superior Construction Co.*,<sup>111</sup> upholding the constitutionality of section 22-3-3-19 upon a

known as presumptive dependents in section 18 of this chapter:

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(d) An unmarried child under eighteen (18) years upon the parent with whom he or she may not be living at the time of the death of such parent, but upon whom, at such time, the laws of the state impose the obligation to support such child.

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As used in . . . this section, the term "child" shall include stepchildren, legally adopted children, posthumous children and acknowledged illegitimate children.

<sup>105</sup>377 N.E.2d 407 (Ind. Ct. App. 1978), *vacated sub nom.* *Bernacki v. Superior Constr. Co.*, 388 N.E.2d 536 (Ind. 1979).

<sup>106</sup>377 N.E.2d at 413.

<sup>107</sup>*Id.* at 408.

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* at 411. In this determination, the court of appeals relied solely upon *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

<sup>110</sup>377 N.E.2d 407 (Ind. Ct. App. 1978).

<sup>111</sup>388 N.E.2d 536 (Ind. 1979).

finding that the state's interest in decreasing the problems associated with locating illegitimate children and in determining questionable claims of parenthood justified disfavored treatment of posthumous unacknowledged illegitimate children.<sup>112</sup> The supreme court stated:

It has been urged that, because of the alleged father's untimely death, he had no opportunity to acknowledge the child. We hasten to add that neither did he have an opportunity to deny it. To declare unconstitutional the acknowledgment requirement of the Act would not only create a class of recipients never contemplated by the Legislature, it would open wide the door to posthumous claims of paternity impossible of defense.<sup>113</sup>

#### *E. Right to Compensation Under the Act*

1. *Double Compensation and Prohibited Occupations.*—In *Franklin Flying Field v. Morefiled*,<sup>114</sup> a sixteen year old employee was injured while operating a bushog mower which ran over his leg and resulted in 100 percent permanent partial impairment.<sup>115</sup> The industrial board found that the employer had violated provisions of the Child Labor Laws limiting the length of work periods and requiring an employment certificate.<sup>116</sup> It further determined that the operation of a bushog mower was a prohibited hazardous occupation under the Child Labor Laws.<sup>117</sup> Based upon these violations, the board entered an award of double compensation.<sup>118</sup> Although it is unclear whether the double compensation award was based upon the violation of the Child Labor Laws, it is certain that the award was based, in part, upon the prohibited occupation statute.

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<sup>112</sup>*Id.* at 539.

<sup>113</sup>*Id.*

<sup>114</sup>375 N.E.2d 249 (Ind. Ct. App. 1978).

<sup>115</sup>*Id.* at 250 (injury not in issue).

<sup>116</sup>*Id.* at 250-51. See IND. CODE §§ 20-8.1-4-1 to -31 (1976 & Supp. 1979).

<sup>117</sup>IND. CODE § 20-8.1-4-24 (1976) specifies the prohibited occupations applicable to children under the age of 17.

<sup>118</sup>*Id.* § 22-3-6-1 (Supp. 1979) permits an award of double compensation if, the employee is a minor who, at the time of the accident, is employed, required, suffered or permitted to work in violation of the child labor laws of this state, the amount of compensation and death benefits, as provided in [this act], shall be double the amount which would otherwise be recoverable. The insurance carrier shall be liable on its policy for one half (1/2) of the compensation or benefits that may be payable on account of the injury or death of such a minor, and the employer shall be wholly liable for the other one half (1/2) of such compensation or benefits.

The Indiana Court of Appeals reversed the board's award of double compensation.<sup>119</sup> The court held that an employee is entitled to double compensation for violation of the Child Labor Laws only when the employee is under the age of sixteen.<sup>120</sup> If the employee is between the ages of sixteen and seventeen, double compensation can be awarded only if the injury resulted directly from a prohibited occupation.<sup>121</sup> In *Wynkoop v. Superior Coal Co.*,<sup>122</sup> cited in *Franklin*,<sup>123</sup> the court stated: "If a minor has reached the age of sixteen (16) years and is not employed, suffered or permitted to work at any occupation prohibited by law, he is not entitled to double compensation even though some other provision of the Child Labor Laws has been violated."<sup>124</sup> Strictly construing the prohibited occupation statute, the *Franklin* court held that the operation of a bushog mower was not a prohibited occupation<sup>125</sup> and reversed the board award as being contrary to law.<sup>126</sup>

2. *Amendment of the Award Provision.*—Section 22-3-3-27 of the Indiana Code<sup>127</sup> provides a general two-year statute of limitation for modification of original compensation awards, "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."<sup>128</sup> In *Gibson v. Industrial Board*,<sup>129</sup> the Indiana Court of Appeals upheld the constitutionality of the one-year limitation imposed by this section.<sup>130</sup>

The appellant was injured in an industrial accident on October 3, 1969. The appellant and her employer agreed that the extent of impairment was equivalent to six weeks of pay, and the industrial board approved this agreement on June 21, 1971. The appellant petitioned for a modification of the award on May 26, 1972. The issue

<sup>119</sup>375 N.E.2d at 252.

<sup>120</sup>*Id.* at 250 n.1.

<sup>121</sup>*Id.* at 250.

<sup>122</sup>116 Ind. App. 237, 63 N.E.2d 305 (1945).

<sup>123</sup>375 N.E.2d at 250.

<sup>124</sup>116 Ind. App. at 239, 63 N.E.2d at 306.

<sup>125</sup>375 N.E.2d at 252.

<sup>126</sup>*Id.* Because one purpose of the double compensation provision is to penalize an employer who subjects a child to unauthorized child labor practices and not necessarily to compensate the child for injuries sustained, the court's holding evidences an adherence to the traditional rule that penal statutes are to be strictly construed. *City of Fort Wayne v. Bishop*, 228 Ind. 304, 92 N.E.2d 544 (1950). Furthermore, the court suggested that the board may not have the authority to interpret the statute to determine if an occupation is hazardous, but may be limited to a strict application of the categories of prohibited conduct defined by statute. 375 N.E.2d at 251 n.3.

<sup>127</sup>IND. CODE § 22-3-3-27 (1976).

<sup>128</sup>*Id.* See B. SMALL, *supra* note 3, § 12.9, at 403.

<sup>129</sup>376 N.E.2d 502 (Ind. Ct. App. 1978).

<sup>130</sup>*Id.* at 505.

before the board was whether the one-year statute of limitations began to run on December 17, 1969, the last day for which compensation was made, or whether it began to run after the board's award was made final on June 21, 1971. The board concluded that the one-year period commenced on December 17, 1969, and that it had no jurisdiction to consider the appellant's petition for modification.

The court of appeals affirmed the board, strictly construing section 22-3-3-27 to mean that modifications must be sought within one year from the last day for which compensation was made, and rejected the date of injury, the date of the board's final award, and the date of last payment, stating that the application had to be filed "within one year from the distal end of the compensation period fixed in previous awards."<sup>131</sup>

The court also rejected the appellant's due process challenge to the statute.<sup>132</sup> Although the parties did not agree on the extent of impairment until approximately six months after the one-year limitation had run,<sup>133</sup> the appellant's opportunity to assert her full claim of injury before the board's final award was held by the court to satisfy the "meaningful opportunity to be heard" requirement of due process.<sup>134</sup> The court further held that the appellant was not deprived of equal protection of the law because the one-year limitation was a reasonable vehicle for carrying out the state's interest in finality of claims before the board.<sup>135</sup>

An attempt by the industrial board to limit an employer's liability for medical expenses relating to permanent partial impairment was rejected by the Indiana Court of Appeals in *Gregg v. Sun Oil Co.*<sup>136</sup> The court construed the one-year limitation of section 22-3-3-27 to include medical expenses relating to permanent partial impairment.<sup>137</sup>

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<sup>131</sup>*Id.* at 504.

<sup>132</sup>*Id.*

<sup>133</sup>*Id.* at 506 (facts cited in Garrard, J., concurring opinion).

<sup>134</sup>*Id.* at 504.

<sup>135</sup>*Id.* at 505.

<sup>136</sup>388 N.E.2d 588 (Ind. Ct. App. 1979).

<sup>137</sup>*Id.* at 589-90. Medical expenses are governed by IND. CODE § 22-3-3-4 (Supp. 1979), which provides in part:

If after an employee's injury has been adjudicated by agreement or award on the basis of permanent partial impairment and within the statutory period for review in such case as provided in [*id.* § 22-3-3-27 (1976)], the employer may continue to furnish a physician or surgeon and other medical services and supplies and the industrial board may within such statutory period for review as provided in [*id.* § 22-3-3-27], on a proper application of either party, require that treatment by such physician and other medical services and supplies be furnished by and on behalf of the employer as the industrial board may deem necessary to limit or reduce the amount and extent of such impairment.

It determined that this section was not intended to limit the length of time for which the board may award continuing medical expenses incurred by an employee subsequent to a work-related injury, but merely delineated a time frame within which applications for the award of medical expenses must be filed.<sup>138</sup> The court stated that as long as the petition for modification was filed within one year from the date of last payment under the award, whether that payment was part of the original or a subsequent modification of the award, the board had jurisdiction to consider the employee's claim for additional compensation.<sup>139</sup> The court recognized that an employer could be liable for the cost of injury-related medical expenses during the entire life of the worker.<sup>140</sup> Section 22-3-3-4<sup>141</sup> was held to impose the only limitation on the board's power to grant a modification once the board had been vested with jurisdiction by the claimant's compliance with the one-year limitation of section 22-3-3-27.<sup>142</sup> Section 22-3-3-4 of the Indiana Code states *inter alia* that the board has the discretion to award continuing medical expenses for that period of time which it deems "necessary to limit or reduce the amount and extent of such impairment."<sup>143</sup>

#### F. Statutory Amendments

1. "Employee" Under the Act. — Section 19-1-40-1 of the Indiana Code,<sup>144</sup> which defined a "volunteer fireman," was amended<sup>145</sup> to specifically exclude volunteer firemen from the definition of "employee" under both the Indiana Workmen's Compensation Act<sup>146</sup> and the Indiana Workmen's Occupational Disease Act.<sup>147</sup>

Section 22-3-6-1 of the Indiana Code<sup>148</sup> was amended to allow an owner of a sole proprietorship or a partner of a partnership an election to include himself as an employee under the workmen's compensation act if actually engaged in his respective business. In order to make the election, written notice must be given to the individual's insurance carrier and the industrial board.<sup>149</sup> The election does not

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<sup>138</sup>388 N.E.2d at 590.

<sup>139</sup>*Id.*

<sup>140</sup>*Id.* at 591.

<sup>141</sup>IND. CODE § 22-3-3-4 (Supp. 1979).

<sup>142</sup>388 N.E.2d at 591 n.6.

<sup>143</sup>IND. CODE § 22-3-3-4 (Supp. 1979).

<sup>144</sup>*Id.* § 19-1-40-1 (1976) (amended 1979).

<sup>145</sup>Act of Apr. 9, 1979, Pub. L. No. 186, § 1, 1979 Ind. Acts 893.

<sup>146</sup>IND. CODE §§ 22-3-2-1 to -6-3 (1976 & Supp. 1979).

<sup>147</sup>*Id.* §§ 22-3-7-1 to -36.

<sup>148</sup>*Id.* § 22-3-6-1 (1976) (amended 1979).

<sup>149</sup>*Id.*

become effective, however, until actually received by these entities.<sup>150</sup>

Sole proprietors and partners were given the same election to become employees under the occupational disease act by amendment to section 22-3-7-9 of the Indiana Code.<sup>151</sup> The same election prerequisites were adopted as were adopted in the amendment to section 22-3-6-1 of the Indiana Code.<sup>152</sup>

2. *Employer's Liability Under the Act.—a. Volunteer firemen.*—Section 19-1-40-7 of the Indiana Code<sup>153</sup> requires a municipality to procure compensation insurance for the benefit of its volunteer firemen. The statute was amended during the survey period to require a municipality which fails to procure the required insurance to pay any injured fireman an amount equal to that sum he could have received under the compensation policy.<sup>154</sup>

b. *Medical care.*—In addition to artificial members and braces, section 22-3-3-4 of the Indiana Code<sup>155</sup> was amended to require an employer to furnish prosthodontics to an injured employee pending adjudication of his permanent impairment claim.<sup>156</sup>

c. *Second injury fund.*—Section 22-3-3-13 of the Indiana Code<sup>157</sup> establishes a second injury fund to compensate employees who have sustained permanent and total impairment, but because part of that injury was caused by a prior injury, the employer is liable only for that portion of the impairment caused by the second employment-related injury. When the employer makes the payments required to compensate the worker for the second injury, the employer is discharged from liability. To the extent that the employee is still entitled to compensation for the remainder of his permanent impairment, he is compensated out of the "second injury" fund maintained by the state treasurer. The statute was amended to increase the amount an employer or his insurance carrier must pay into the fund

<sup>150</sup>*Id.* § 22-3-6-1 (1976), as amended by Act of Apr. 4, 1979, Pub. L. No. 228, § 1, 1979 Ind. Acts 1038.

<sup>151</sup>IND. CODE § 22-3-7-9 (1976), as amended by Act of Apr. 4, 1979, Pub. L. No. 228, § 2, 1979 Ind. Acts 1041.

<sup>152</sup>IND. CODE § 22-3-6-1 (1976 & Supp. 1979).

<sup>153</sup>*Id.* § 19-1-40-7.

<sup>154</sup>*Id.* § 19-1-40-7 (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 3, 1979 Ind. Acts 893.

<sup>155</sup>IND. CODE § 22-3-3-4 (1976) (amended 1979).

<sup>156</sup>*Id.* § 22-3-3-4 (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 1, 1979 Ind. Acts 1014. The amended version now reads: "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, or prosthodontics, the employer shall furnish an artificial member, proper braces, where required, and prosthodontics." (amended portion emphasized).

<sup>157</sup>IND. CODE § 22-3-3-13 (1976) (amended 1979).

from  $\frac{3}{4}\%$  to 1% of the total amount of all workmen's compensation paid to its employees or their beneficiaries for the "calendar year next preceding the due date of such payment."<sup>158</sup> Furthermore, under the old rule, if the fund maintained a minimum of \$300,000, the  $\frac{3}{4}\%$  would not be collected during that period. The amendment increases the amount which must be kept in the fund, before the new 1% assessment will be collected, to a minimum of \$400,000.<sup>159</sup>

3. *Compensation Schedules.*—*a. Volunteer firemen.*—Section 19-1-40-8 of the Indiana Code<sup>160</sup> defined the disability benefits a volunteer fireman was to receive. Under the old schedule, the fireman was entitled to a minimum weekly indemnity of \$50.<sup>161</sup> The amended schedule provides for a minimum weekly indemnity for total disability of \$100 for a total of 260 weeks.<sup>162</sup> The fireman is also entitled to a minimum of \$25,000 coverage for medical expenses.<sup>163</sup>

Section 19-1-40-9 of the Indiana Code states that the insurance policy must provide a minimum coverage of \$40,000 to the volunteer fireman for total and permanent disability arising from a compensable accident.<sup>164</sup> The statute was amended to delete language which imposed a maximum aggregate amount for payment of \$40,000.<sup>165</sup>

The statute was also amended to require each municipality to purchase a minimum of \$300,000 of insurance to cover the liability of its volunteer firemen for bodily injury or property damage caused by a fireman while acting within the scope of his duties at the scene of a fire or other emergency.<sup>166</sup> The statute also provides that "[t]he municipality *may* purchase a group insurance policy, or a separate policy for each fireman, whichever is of the lesser cost."<sup>167</sup>

*b. Schedule under Workmen's Compensation Act.*—Section 22-3-3-2 of the Indiana Code<sup>168</sup> was amended to include the post-July 1, 1977, schedule for injuries resulting in temporary total, temporary

<sup>158</sup>*Id.* § 22-3-3-13 (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 3, 1979 Ind. Acts 1014.

<sup>159</sup>*Id.*

<sup>160</sup>IND. CODE § 19-1-40-8 (1976) (amended 1979).

<sup>161</sup>*Id.*

<sup>162</sup>*See id.* § 19-1-40-8 (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 4, 1979 Ind. Acts 893.

<sup>163</sup>IND. CODE § 19-1-40-8 (Supp. 1979).

<sup>164</sup>*Id.* § 19-1-40-9(a) (1976) (amended 1979).

<sup>165</sup>*Id.* § 19-1-40-9(a) (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 5, 1979 Ind. Acts 893.

<sup>166</sup>IND. CODE § 19-1-40-9(b) (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 5(b), 1979 Ind. Acts 893. The prior statute read that a municipality *may* purchase a minimum of \$300,000 insurance to cover the liabilities of its volunteer firemen. IND. CODE § 19-1-40-9(b) (1976) (amended 1979).

<sup>167</sup>IND. CODE § 19-1-40-9(a) (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 5(b), 1979 Ind. Acts 893.

<sup>168</sup>IND. CODE § 22-3-3-22 (Supp. 1979).

partial and total permanent disability.<sup>169</sup> With respect to injuries occurring on or after July 1, 1977, but before July 1, 1979, an employee is entitled to a minimum of \$75 and maximum of \$180 weekly compensation. For injury occurring between July 1, 1979 and July 1, 1980, the maximum is increased to \$195. In all cases, weekly compensation payments may not exceed the average weekly wage of the employee at the time of injury.<sup>170</sup>

The statute was also amended<sup>171</sup> to establish a maximum compensation, exclusive of medical benefits, which may be paid during the aforementioned periods. The maximum compensation which may be paid for injury occurring between July 1, 1979 and July 1, 1980, is \$65,000. With respect to injuries occurring beginning July 1, 1980, the maximum compensation is \$70,000.<sup>172</sup>

*c. Schedule under Occupational Disease Act.*—Section 22-3-7-16 of the Indiana Code<sup>173</sup> was amended to include a schedule of benefits with respect to occupational diseases occurring on or after July 1, 1979. An employee is now entitled to receive in addition to disability benefits not exceeding fifty-two weeks, a weekly compensation of 60% of the employee's average weekly wage not to exceed \$125.<sup>174</sup>

Section 22-3-7-19 of the Indiana Code<sup>175</sup> was amended to include the post-July 1, 1979 compensation schedule. An employee is entitled to receive a minimum of \$75 and maximum of \$195 weekly compensation for occupational diseases arising between July 1, 1979 and July 1, 1980. For diseases arising beginning July 1, 1980, an employee is entitled to receive a minimum of \$75 and maximum of \$210.<sup>176</sup> The statute was also amended to provide that the maximum compensation an employee may receive during the period of July 1, 1979 and July 1, 1980, is \$65,000.<sup>177</sup>

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<sup>169</sup>*Id.* § 22-3-3-22(a), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 4, 1979 Ind. Acts 1014.

<sup>170</sup>IND. CODE § 22-3-3-22(a) (Supp. 1979).

<sup>171</sup>*Id.* § 22-3-3-22(b) (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 4, 1979 Ind. Acts 1014.

<sup>172</sup>IND. CODE § 22-3-3-22(b) (Supp. 1979).

<sup>173</sup>*Id.* § 22-3-7-16.

<sup>174</sup>*Id.* § 22-3-7-16(d) (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 5, 1979 Ind. Acts 1014.

<sup>175</sup>IND. CODE § 22-3-7-19 (Supp. 1979).

<sup>176</sup>*Id.* § 22-3-7-19(a) (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 6, 1979 Ind. Acts 1014.

<sup>177</sup>IND. CODE § 22-3-7-19(b) (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 6, 1979 Ind. Acts 1014.