

Worker's Compensation

ROBERT A. FANNING*

The practice of worker's compensation law in Indiana has seen significant change in 1988. In the short session of the Indiana General Assembly, the Worker's Compensation Act was the subject of unprecedented debate. In the courts, the ramifications of the *Evans v. Yankeetown Dock Corp.*¹ decision were still being felt as refinement of case law occurred.

I. SIGNIFICANT STATUTORY CHANGES

At least fourteen specific provisions of the Indiana Worker's Compensation Act were legislatively revised in 1988 by way of Senate Enrolled Act No. 402 and House Enrolled Act No. 1069.² In addition, numerous technical changes were made throughout the Act and other statutes where reference to the Act is made. The following is a discussion of the most significant revisions.

A. Benefit Changes

Of most significance to employees and employers in the State of Indiana were increases for temporary total disability benefits equaling approximately 55% over three years³ and increases for permanent partial impairment benefits equaling approximately 60% over three years.⁴ Employers and employees alike agreed with legislators that significant increases in benefit rates were reasonable and necessary. Of course, such benefit increases are not without cost. It is estimated that Indiana employers will see worker's compensation insurance rates rise approximately 27% overall in 1988, 10% of which can be directly attributed to legislative action.⁵

1. *Temporary Total Disability*.—The statutory method for computing temporary total disability benefits remains unchanged from previous law, with the benefit equaling two-thirds of an employee's average

* Partner, Locke, Reynolds, Boyd & Weisell, Indianapolis. B.S., Indiana University, 1973; J.D., Indiana University School of Law—Indianapolis, 1976.

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

2. See *infra* app. I at p. 570.

3. IND. CODE §§ 22-3-3-22, -7-19 (1988).

4. *Id.* §§ 22-3-3-10, -7-16.

5. See Indiana Compensation Rating Bureau Rate Request, filed July 1, 1988, with the Indiana Department of Insurance.

weekly wage up to a statutorily mandated maximum average weekly wage. For accidents occurring on and after July 1, 1988, however, the maximum average weekly wage to be used for the purpose of computing temporary total disability benefits is \$384 per week.⁶ The maximum temporary total disability benefit is therefore computed by multiplying two-thirds by \$384 to achieve a maximum benefit of \$256 per week. The temporary total disability benefit for an employee earning less than \$384 per week is arrived at by multiplying the employee's actual average weekly wage, subject to a \$75 per week minimum, by two-thirds, which will result in a temporary total disability benefit of something less than \$256 per week. An employee who is earning in excess of the maximum average weekly wage may receive, or in the event of his death his dependents may receive, a maximum of \$128,000 for compensation or death benefits.⁷

The Indiana General Assembly prospectively increased the temporary total disability benefit by establishing increased maximum average weekly wage figures for 1989 and 1990. On and after July 1, 1989, the maximum average weekly wage will be deemed to be \$411 per week, which will result in a maximum temporary total disability benefit of \$274 per week and a maximum combined compensation or death benefit of \$137,000. On and after July 1, 1990, the maximum average weekly wage rises to \$441 per week leading to a maximum benefit for temporary total disability of \$294 per week and a maximum compensation or death benefit of \$147,000.⁸

2. *Permanent Partial Impairment.*—The increase in permanent partial impairment benefits is the first since 1977. As in prior law, the maximum average weekly wage and the percentage factor to be applied for the purpose of computing the permanent partial impairment benefit are different from those used to figure temporary total disability benefits.⁹ For accidents occurring on and after July 1, 1988, the maximum average weekly wage for permanent partial impairment purposes is \$166 per week. Application of the statutory 60% factor results in a maximum permanent partial impairment benefit of \$99.60 per week. If an average weekly wage of less than \$166 per week is earned, the permanent partial impairment benefit is equal to 60% of the employee's actual average weekly wage.¹⁰

As with temporary total disability, permanent partial impairment benefits will increase in 1989 and 1990. On and after July 1, 1989, the

6. IND. CODE §§ 22-3-3-22(a), -7-19(a)(1) (1988).

7. *Id.* §§ 22-3-3-22(a), -7-19(h).

8. *Id.* §§ 22-3-3-22(a)(b), -7-19(g)(1), -7-19(j).

9. *See id.* §§ 22-3-3-10(a), -7-16(d).

10. *Id.*

maximum average weekly wage for permanent partial impairment purposes increases to \$183 per week, which results in a maximum permanent partial impairment benefit of \$109.80.¹¹ On and after July 1, 1990, the maximum average weekly wage for impairment purposes rises to \$200 per week, resulting in a maximum permanent partial impairment benefit of \$120 per week.¹²

3. *Credit for Excess Temporary Total Disability Benefits Paid.*—Effective July 1, 1988, the employer's credit for temporary total disability benefits paid in excess of fifty-two weeks has been changed so that the credit applies only after temporary total disability benefits have been paid for more than seventy-eight weeks.¹³ As with prior law, the credit is applied against permanent partial impairment benefits and benefits paid for specific losses and reduces such benefits dollar for dollar. The net effect of the statutory change is to increase the permanent partial impairment benefit for those employees who are temporarily totally disabled by their work-related injuries for more than fifty-two weeks. As an example, an employee who was injured on July 1, 1988, was temporarily totally disabled for seventy-eight weeks, was receiving temporary total disability compensation at the maximum rate and was assigned a 20% permanent partial impairment of the whole person, would receive a permanent partial impairment award of \$9,960.¹⁴ The same employee injured after July 1, 1986, and before July 1, 1988, would receive a permanent partial impairment award of \$2,560.¹⁵ Thus, for the employee who is disabled a year or more, the combination of an increased permanent partial impairment benefit and a reduced credit for excess temporary total disability paid makes a significant difference in the compensation received for a permanent partial impairment or scheduled loss.

4. *Burial Expense.*—The provision of the Indiana Worker's Compensation Act calling for the payment of burial expenses not to exceed \$2,000 was changed effective July 1, 1988, to allow for a payment of

11. *Id.*

12. *Id.* For tables outlining average weekly wage minimums, maximums and resulting benefits, see *infra* app. II at p. 573.

13. IND. CODE §§ 22-3-3-10(a), -7-16(d).

14. Five hundred weeks of whole body benefit times 20% permanent partial impairment (PPI) rating equals 100 weeks of PPI benefits times \$99.60 per week which equals \$9,960 PPI benefit.

15. Five hundred weeks of whole body benefit times 20% PPI rating equals 100 weeks of PPI benefits times \$75.00 per week which equals \$7,500 PPI benefit. Subtracting the credit for twenty-six weeks of temporary total disability benefits paid in excess of fifty-two weeks at \$190 per week equals a credit of \$4,940 and a net PPI benefit of \$2,560.

up to \$4,000.¹⁶ This revision reflects the increased cost of burial and related services and comes closer to providing the full cost of a modest funeral and internment. The payment of burial expenses is not compensation for the purpose of determining the statutory maximum payment for compensation pursuant to Indiana Code sections 22-3-3-22 and 22-3-7-19, and is payable even where there are no dependents entitled to receive compensation.¹⁷

5. *Artificial Body Members.*—The employer is required to provide an artificial member, braces or prosthodontics where a compensable injury has led to the amputation of an arm, hand, leg or foot, the enucleation of an eye or the loss of natural teeth or existing prosthodontics.¹⁸ New statutory language makes it clear that the employer may be required to provide more than one artificial member when “medically required.” The term “medically required” is specifically defined in the Act to exclude normal wear and tear.¹⁹ Thus, an employee who has suffered the amputation of a leg and receives an artificial member may be entitled to the replacement of that member where changes in the size, shape or further treatment of the stump make necessary the fitting of a new prosthetic device. However, where the employee has satisfactorily used an artificial member and wears it out, the employee is responsible for the repair or replacement of the device.

B. *Notification Regarding Suspension of Benefits*

Various provisions of the Indiana Worker’s Compensation Act have allowed for the suspension of benefits where the employee has refused to accept tendered medical services,²⁰ undergo medical examination,²¹ accept tendered employment,²² or where a dependent refuses to allow an autopsy to be performed.²³ Each of the foregoing sections of the statute have been changed effective July 1, 1988, so as to require that the employee or dependent be served with a notice setting forth the consequences of such an employee or dependent refusal. The Worker’s Compensation Board was mandated under these sections to prescribe the form for such notice and, in response, the board has developed a proposed form for use by employers in this regard. The final format

16. IND. CODE §§ 22-3-3-21, -7-15 (1988).

17. *See* *Lasear, Inc. v. Coffin*, 99 Ind. App. 461, 192 N.E. 841 (1934).

18. IND. CODE § 22-3-3-4(e) (1988).

19. *Id.*

20. *Id.* §§ 22-3-3-4(c), -7-17(b).

21. *Id.* §§ 22-3-3-6(a), -7-20(a).

22. *Id.* §§ 22-3-3-11(a), -7-16(e).

23. *Id.* §§ 22-3-3-6(h), -7-20(i).

and the form document itself should be available soon. As of this time, the proposed language for the form states:

NOTICE TO EMPLOYEE/DEPENDENT
OF SUSPENSION OF BENEFITS

Notice is hereby given, pursuant to the Worker's Compensation and Occupational Disease Acts of Indiana, of the consequences of your refusal described below: (Check appropriate paragraph)

- () Refusal to accept medical treatment, services and supplies, provided by or on behalf of your employer, shall bar your compensation otherwise payable during the period of refusal. (I.C. 22-3-3-4)
- () Refusal to allow an autopsy shall result in a suspension of all compensation. (I.C. 22-3-3-6).
- () Refusal to accept employment, suitable to your partial disability, shall bar any compensation during such refusal unless, in the opinion of the Worker's Compensation Board of Indiana, such refusal was justified. (I.C. 22-3-3-11).²⁴

The proposed notice also contains an acknowledgment of receipt to be signed and dated by the employee or dependent. Such acknowledgement is not required by the statutory revision and the refusal of an employee to acknowledge receipt of the notification will not prevent an employer from suspending benefits. Of course, it will be inappropriate for an employer to suspend benefits until the employee has been served with the notice, and problems may develop with regard to what is adequate service. It is suggested that personal delivery to the employee or dependent or transmittal by United States mail, postage pre-paid, to the address stated on the Agreement as to Compensation (Form #12 or Form #13) will be sufficient.²⁵ This is so inasmuch as service of pleadings pursuant to Rule 5(B) of the Indiana Rules of Trial Procedure,²⁶ as incorporated by Rule 6 of the Rules of the Worker's Compensation Board of Indiana,²⁷ is complete upon delivery or service by mail. Neither the statute nor the board's proposed notice require proof of actual receipt before benefits may be suspended.

Where an employer requests an employee to submit to a physical examination, prudence dictates that the notice required by Indiana Code sections 22-3-3-6 and 22-3-7-20 be given in advance of the scheduled

24. WORKER'S COMPENSATION BOARD OF INDIANA, NOTICE TO EMPLOYEE/DEPENDENTS: STATE FORM 42606 (May 1988).

25. *Id.*

26. IND. R. TR. P. 5(B).

27. IND. ADMIN. CODE tit. 630, r. 1-1-6 (1988).

examination if there is any possibility that the employee will refuse the same. Otherwise, if the employee fails to keep the appointment, it is likely that a second examination will have to be scheduled, with the notice being sent prior to the second examination, before the employee will be deemed to have knowledge regarding the effect of such refusal sufficient to suspend benefits.²⁸

*C. Payment of Medical Expenses by Insurer Required Where
Approved by Employer*

The Indiana Worker's Compensation Act defines "employer" to include, so far as is applicable, the employer's worker's compensation insurer.²⁹ The Indiana General Assembly revised the definition to also state: "However, the inclusion of an employer's insurer within this definition does not allow an employer's insurer to avoid payment for services rendered to an employee with the approval of the employer."³⁰

The change was sought to remedy the refusal by some insurance companies to pay medical bills which were incurred by the employee at the direction or approval of the employer at a time before the insurance carrier had an opportunity to undertake the management of the medical aspects of the case. The statutory change serves to clarify the prior policy of the Worker's Compensation Board which required payment of medical expenses incurred at the direction or approval of the employer, even though the insurer would have recommended or preferred a different treatment or medical provider.

An issue which will no doubt be raised by this changed definition is whether or not the compensation insurance carrier may undertake a change of physician where the employer had previously designated a physician or approved the employee's use of a physician. In the author's opinion, the statutory change found at both Indiana Code section 22-3-6-1 and section 22-3-7-9(a) does not prohibit the insurance carrier and the employer from agreeing upon a medical provider or course of treatment other than that originally designated. This is so because the Act requires the employer to provide the medical care³¹ but does not limit the employer's choice of a physician to one particular doctor.

28. The proposed notice does not make specific reference to medical examinations under IND. CODE § 22-3-3-6 (1988) or *id.* § 22-3-7-20, but the notice regarding medical treatment will likely be deemed synonymous with a notice regarding medical examination.

29. IND. CODE §§ 22-3-6-1(a), -7-9(a) (1988).

30. *Id.*

31. For example, a physician is required after an injury, IND. CODE § 22-3-3-4(a) (1988), and during temporary total disability. *Id.* § 22-3-3-4(b). Further, the employee can be required to submit to an examination during the period of claimed disability or impairment. *Id.* § 22-3-3-6(a).

D. Medical Reports as Evidence

The practice of the Worker's Compensation Board of Indiana before July 1, 1988, was to allow medical testimony either in person, by deposition, or where all parties agreed, by the introduction of a medical report.³² The unavailability of the medical provider did not need to be established as a prerequisite to the use at trial of a deposition or agreed report. In its 1988 session, the Indiana General Assembly was extensively lobbied to allow the admission of medical reports, even where the parties could not agree to stipulate their admission. The stated purpose for the change was to avoid the expense associated with obtaining medical depositions. The result has been an extensive revision of Indiana Code section 22-3-3-6, which may significantly affect practice before the Worker's Compensation Board.

In summary, the prior law provided that a physician, whether selected by the employer or the employee, was required to prepare a statement in writing of the conditions evidenced by his examination of the employee and to provide the statement to the opposing party.³³ The law required that the statement be exchanged as soon as practicable but not later than ten days before the date upon which the case was set for trial.³⁴ In practice, the statement was provided by the doctor to the party who had retained him, and that party's attorney exchanged the statement with opposing counsel. The physician's statement was required to contain "the history of the injury, or claimed injury, as given by the patient, the physical or mental condition of such employee, and the nature and extent or amount of disability or impairment, if any, of such employee."³⁵ If no report of an examination was exchanged as required, then the physician could not testify before the Worker's Compensation Board, either in person or by deposition, as to such examination.³⁶

As changed, the law still requires a statement in writing from the doctor, but the exchange of the report must take place at least thirty days before the hearing and the statement must contain the following:

- (1) The history of the injury, or claimed injury, as given by the patient.
- (2) The diagnosis of the physician or surgeon concerning the patient's physical or mental condition.
- (3) The opinion of the physician or surgeon concerning the causal relationship, if any, between the injury and the pa-

32. IND. CODE § 22-3-3-6 (1982).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

tient's physical or mental condition, including the physician's or surgeon's reasons for the opinion.

- (4) The opinion of the physician or surgeon concerning whether the injury or claimed injury resulted in a disability or impairment and, if so, the opinion of the physician or surgeon concerning the extent of the disability or impairment and the reasons for the opinion.
- (5) The original signature of the physician or surgeon.³⁷

If a statement meets the five requirements of subsection (e), then it "may be submitted by either party as evidence by that physician or surgeon at a hearing before the worker's compensation board."³⁸ Such a statement shall be admitted into evidence by the Worker's Compensation Board "unless the statement is ruled inadmissible on other grounds."³⁹ Language added to the statute provides a procedure for objecting to the physician's statement on the basis that the same does not meet any or all of the five requirements of subsection (e).⁴⁰ A failure to object pursuant to subsection (e) precludes further objection as to whether the statement meets the requirements of subsection (e), but apparently does not waive objections to admissibility on other grounds.⁴¹

Only time will tell how well the statutory revision works. Certainly there is some question as to the "other grounds" upon which the written statement might be ruled inadmissible in light of the fact that the statute says that the written statement may be submitted and shall be admitted provided that it meets the requirements of subsection (e). The language seems to leave open the possibility that a party may submit the report if it meets the requirements of subsection (e), but the Worker's Compensation Board may not admit the report if objected to on grounds other than compliance with subsection (e). Of course, there will also be disputes as to whether or not the statement complies with subsection (e), and the party submitting the report will be at risk in that regard if he fails to correct objections raised by his opponent as to the statement's compliance with subsection (e). In many cases, medical depositions will still be taken and submitted to the Worker's Compensation Board. Even in the face of an apparently complete medical report, few parties will give up the right to cross-examine the doctor or to provide him with additional information which may lead to a more complete opinion.

37. *Id.* § 22-3-3-6(e) (1988).

38. *Id.* § 22-3-3-6(d).

39. *Id.* § 22-3-3-6(e).

40. *Id.* § 22-3-3-6(g).

41. *Id.*

E. Worker's Compensation Act and Worker's Compensation Board

House Enrolled Act 1069 changes the term "workmen's compensation" to "worker's compensation" throughout the Act and renames the Industrial Board of Indiana the "Worker's Compensation Board of Indiana."⁴² The renaming of the Industrial Board was said to be prudent because of its periodic confusion with other agencies or organizations.

II. SIGNIFICANT COURT OF APPEALS DECISIONS

A. *Ramifications of Yankeetown Definitions*

Employers, employees and insurers are still struggling with the application of the *Yankeetown*⁴³ decision to jurisdictional and compensability issues. The Supreme Court in *Yankeetown* held that questions of jurisdiction and compensability are to be determined by an application of the same criteria to each issue. Thus, the Worker's Compensation Board has jurisdiction and an employee is entitled to worker's compensation benefits where there has been an injury (1) by accident, (2) arising out of and (3) in the course of the employment. In mandating the three-part test for jurisdiction as well as for compensability, the Indiana Supreme Court felt compelled to address the definition of "by accident" and, in so doing, made clear its belief that the term "by accident" means "unexpected injury."⁴⁴ The unexpected injury test can be met by occurrence of either an unexpected event or an unexpected result.⁴⁵ Although an injury causing event such as a "fall, slip, trip, unusual exertion, malfunction of machine, break, collision, etc."⁴⁶ is certainly "by accident," the unexpected occurrence of a physical symptom while engaged in normal and routine employment activity without one of the above-enumerated events is also an injury by accident.⁴⁷ In both the event and result theories of accident, a crucial modifier is that the event or result be unexpected. It is the unexpectedness of the injury which gives employers and employees a yard stick by which to measure compensability but is also the element of the definition of "by accident" definition which is likely to lead to continued dispute with regard to both compensability and jurisdictional issues.

42. *Id.* § 22-3-1-1(a).

43. *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969 (Ind. 1986).

44. *Id.* at 974.

45. *Id.*

46. *Ellis v. Hubbell Metals, Inc.*, 174 Ind. App. 86, 93, 366 N.E.2d 207, 211 (1977) (enumerating the activities which could constitute an unexpected event).

47. *See Lock-Joint Tube Co. v. Brown*, 135 Ind. App. 386, 395, 191 N.E.2d 110, 114 (1963) (stating the unexpected result theory of accident).

1. *Compensability*.—The element of unexpectedness may be found in many cases reported before *Yankeetown*.⁴⁸ A recent application of the unexpected injury test is found in *Eastham v. Whirlpool Corp.*⁴⁹

Eastham had been a long term employee of Whirlpool when, on June 14, 1982, his job was changed. On that day, he worked without complaint and made no report of an accident to his employer.⁵⁰ He failed to report for work for six days thereafter and, on June 21, 1982, asked to see the company doctor. The doctor saw him that day, diagnosed muscle soreness, possibly related to his new job, and released him to return to work.⁵¹ Eastham did not return to work, asked for a medical leave of absence, and thereafter sought conservative medical treatment on his own.⁵² The full Worker's Compensation Board found that Eastham's muscle soreness was not an accidental injury within the meaning of the Act because muscle soreness was to be expected during the first day or so of Eastham's new job.⁵³

On appeal, Eastham argued that because the Worker's Compensation Board had found that he had sustained muscle soreness while doing his job, the necessary causal connection between the work and the injury was established.⁵⁴ The Indiana Court of Appeals pointed out, however, that before causation, *i.e.*, whether the injury arises out of the employment, need be considered, the Worker's Compensation Board must determine whether an accident occurred.⁵⁵ In *Eastham*, the evidence was that workers often complained of muscle soreness after starting the job in question and the court of appeals held that the full Worker's Compensation Board had correctly applied the law in determining that no unexpected injury had occurred.⁵⁶ In other words, because muscle soreness was to be expected the first day on the job, muscle soreness under such circumstances was not an accident.

48. Early cases which discussed the word "accident" enunciated the requirement that the event be "unexpected." See, *e.g.*, *Haskell & Barker Car Co. v. Brown*, 67 Ind. App. 178, 187, 117 N.E. 555, 557 (1917). See also *Houchins v. J. Pierponts*, 469 N.E.2d 786, 787 (Ind. Ct. App. 1984) (In *Houchins*, the involved employee knew that certain activity would cause her knee to lock up. While engaged in that activity at work, the knee did lock up and the injury was therefore not unexpected.); *City of Anderson v. Borton*, 132 Ind. App. 684, 178 N.E.2d 904 (1961) (In *Borton*, there was evidence that Borton's back condition was such that a trivial act such as walking could cause pain. Therefore, the injury was not unexpected.).

49. 524 N.E.2d 23 (Ind. Ct. App. 1988).

50. *Id.* at 25, 27.

51. *Id.* at 25.

52. *Id.*

53. *Id.*

54. *Id.* at 27.

55. *Id.* at 28.

56. *Id.*

The holding of the court of appeals suggests that the question of unexpectedness is not necessarily to be determined from the employee's point of view.⁵⁷ If the Indiana Supreme Court's unexpected injury standard is to be useful, the test of unexpectedness must be an objective one, not based solely on what the employee says he expected. This is so because an employee, in expressing his subjective opinion, may be counted upon to indicate that he did not expect his injury.

In summary, "injury by accident" means unexpected injury. If the injury is caused by an unexpected event, an accident in the generally understood sense has occurred and compensability follows. Similarly, if the injury is the unexpected result of normal work activity, then an accident is deemed to have occurred, even without an outside event, and compensability must be granted. If, however, the "injury" is to be expected from a given work activity, for example, where muscle soreness or the recurrence of a pre-existing infirmity is anticipated, then an accident has not occurred and compensability must be denied.

2. *Jurisdiction and Exclusive Remedy.*—The second area where the ramifications of *Yankeetown* are being evaluated is jurisdiction and exclusive remedy. Indiana Code section 22-3-2-6 provides:

Rights and Remedies of Employee Exclusive—The rights and remedies granted to an employee subject to I.C. 22-3-2 through I.C. 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 I.C. 16-7-3-6.⁵⁸

Indiana Code section 22-3-2-6 suggests but *one* test for jurisdictional purposes. Thus, if an employee's claim involves personal injury or death by accident, then his exclusive remedy, as to his employer, is the Workers' Compensation Act and the proper jurisdiction for determining such claim is the Worker's Compensation Board.⁵⁹ The Indiana Supreme Court in *Yankeetown* held that the statute:

57. *Cf.* *Inland Steel Co. v. Almodovar*, 172 Ind. App. 556, 361 N.E.2d 181 (1977), as quoted with approval in *Yankeetown*. "[T]he test as to whether an injury is unexpected and so if received on a single occasion occurs by accident' is that the sufferer did not intend or expect that injury would, on that particular occasion, result from what he was doing." *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969, 974 (Ind. 1986) (quoting *Inland Steel Co. v. Almodovar*, 172 Ind. App. 556, 361 N.E.2d 181 (1977)).

58. IND. CODE § 22-3-2-6 (1988) (emphasis added).

59. IND. CODE § 22-3-1-2 (1988) provides that the Worker's Compensation Board has charge of the administration of the Worker's Compensation Act. IND. CODE § 22-3-1-3(b)(1) (1988) states that the Worker's Compensation Board is "authorized to hear, determine, and review all claims for compensation . . ." See *School City of Hammond v. Moriarity*, 120 Ind. App. 663, 93 N.E.2d 367 (1950).

Excludes all rights and remedies of an employee against his employer for personal injury or death if the following *three* statutory jurisdictional prerequisites are met:

- A. Personal injury or death by accident;
 - B. Personal injury or death arising out of employment;
 - C. Personal injury or death arising in the course of employment.
- Actions for employee injuries or death which do not meet each of these prerequisites are not excluded, and may be pursued in the courts.⁶⁰

The Indiana Supreme Court thus disagreed with the analysis of the court of appeals,⁶¹ and held that in order to determine the jurisdictional issue, a court must make an assessment as to whether the injury arose out of and in the course of the employment as well as whether it occurred by accident.

Application of the supreme court's three-part test is seen in *Consolidated Products, Inc. v. Lawrence*.⁶² In this case, Lawrence was employed as a waitress for Consolidated which operated a 24-hour restaurant. After her shift ended at 4:00 a.m., Lawrence delayed leaving the restaurant to have a milkshake. She then went to the parking lot with another woman who was going to drive her home. The women were abducted at knife-point and Lawrence was injured.⁶³ Lawrence filed a civil action hoping to free herself of the limited financial benefits of the Act, and claimed that her injury, though by accident, did not arise out of and in the course of the employment.⁶⁴ Consolidated filed a motion for summary judgment contending that the Worker's Compensation Act was the exclusive remedy; therefore, the trial court was without jurisdiction.⁶⁵ The motion was denied and an interlocutory appeal was taken.⁶⁶ The court of appeals followed the step-by-step analysis found in *Yankeetown* and reversed the trial court.⁶⁷

60. *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969, 973 (Ind. 1986) (emphasis added).

61. *Evans v. Yankeetown Dock Corp.*, 481 N.E.2d 121, 127 (Ind. Ct. App. 1986), *vacated*, 491 N.E.2d 969 (Ind. 1986). In discussing jurisdiction, the court of appeals concluded that the sole determination was whether or not an accident had occurred; if so, then the Worker's Compensation Board was the proper forum for determining whether that accident arose out of and in the course of the employment.

62. 521 N.E.2d 1327 (Ind. Ct. App. 1988).

63. *Id.* at 1328.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1331. Had the court of appeals affirmed the denial of the motion to dismiss, the case may well have been tried to verdict. A finding in favor of the employer

The parties had agreed that an unexpected injury occurred; that is, that the injury was "by accident." The court of appeals then looked for and found a causal relationship between the injury and the employment by virtue of Lawrence being "exposed to a greater risk than those not working a late night shift, or those working in a different location or job."⁶⁸ The court of appeals also found the injury to be in the course of the employment, noting that Lawrence's delay in leaving the premises did not remove her from her employee status.⁶⁹ Thus, the Indiana Worker's Compensation Board was held to have the exclusive jurisdiction to determine Lawrence's claim against her employer.⁷⁰

When faced with Lawrence's claim, the Worker's Compensation Board won't have much to decide inasmuch as there has already been a judicial finding between the same parties that an accident arising out of and in the course of the employment has occurred. In effect, the requirement of *Yankeetown* that the three tests be met for jurisdictional purposes results in the usurpation of the function of the Worker's Compensation Board in determining claims and compensability. This is unfortunate because the Worker's Compensation Board has the expertise as well as the statutory mandate to determine employee injury claims. Further, because trial court determination of the underlying claim is required as part of the three-part jurisdictional inquiry, the parties are subject to the expense of presenting the entire claim rather than the presentation of limited facts sufficient to satisfy a simple jurisdictional inquiry.

An example of the difficulties of applying a three-part test for jurisdictional purposes is found in *House v. D.P.D., Inc.*⁷¹ House filed an occupational disease claim with the Worker's Compensation Board claiming that his exposure to noise at work damaged his hearing.⁷² The

would have precluded Lawrence from filing a worker's compensation claim against Consolidated. See, e.g., *Riverview Health Care v. Wright*, 524 N.E.2d 23 (Ind. Ct. App. 1988). The practitioner must remember that in the scramble to relieve the employee of the limited worker's compensation remedy, the employee may find himself in a situation where, there being no strict liability and no provable negligence, he receives nothing for his injury. Such a result was, of course, the evil sought to be remedied by the Worker's Compensation Act in the first place.

68. *Consolidated*, 521 N.E.2d at 1329.

69. *Id.* at 1330.

70. *Id.* at 1331. The Worker's Compensation Board's jurisdiction would be dependent upon a claim having been timely filed pursuant to IND. CODE § 22-3-3-3 (1988). It is interesting to note that Margaret Evans failed to file a claim with the Worker's Compensation Board against Yankeetown Dock Corporation within two years of the accident and when she did file her application for benefits, it was dismissed by the Board.

71. 519 N.E.2d 1274 (Ind. Ct. App. 1988).

72. *Id.* at 1275.

occupational disease claim was dismissed by the single hearing judge because there was no showing that House was disabled; a prerequisite to an occupational disease recovery.⁷³ House then filed a civil action arguing that since his hearing loss was not covered by the Occupational Disease Act, the exclusive remedy provision of Indiana Code section 22-3-7-6 did not apply to bar his civil claim.⁷⁴ The employer filed a motion to dismiss arguing that because House was making an employment related claim, the Worker's Compensation Board had the exclusive jurisdiction to hear it. The trial court dismissed House's claim.⁷⁵

The court of appeals affirmed the dismissal and indicated, in accord with the *Yankeetown* decision, that a claim is a worker's compensation claim if it is:

1. a personal injury or death by accident;
2. arising out of employment; and
3. arising in the course of the employment;⁷⁶

and is an Occupational Disease claim if the employee has suffered:

1. an occupational disease and
2. "disablement" or death.⁷⁷

According to the court of appeals, since there was no showing of disablement, the occupational disease claim was properly dismissed. The court of appeals also concluded that the applicability of the Worker's Compensation Act must be assessed before the jurisdictional issue can be resolved. The court found causation and course of employment⁷⁸ and held that the Worker's Compensation Board had the exclusive jurisdiction to determine the claim.⁷⁹

The first of the difficulties raised by the *House* decision relates to the court of appeals' recognition of the three-part test mandated by *Yankeetown* and its failure to apply all three tests. It seems clear that the court of appeals was confronted with a claim which was not compensable as an occupational disease and may very well not have been compensable as an accident.⁸⁰ The court of appeals apparently felt that

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1275-76.

78. *Id.* at 1276. The findings of "arising out of and in the course of" was made inasmuch as the employer conceded those points. *Id.*

79. *Id.*

80. See *Martinez v. Taylor Forge & Pipe Works*, 174 Ind. App. 514, 368 N.E.2d 1176 (1977). The court of appeals in *Martinez* applied the unexpected result theory of an

as a work-related claim, the Worker's Compensation Board should have the exclusive jurisdiction to make that determination. The court of appeals made the correct decision, and chose to defer to the Worker's Compensation Board the determination as to whether the loss of hearing was unexpected and therefore compensable under the circumstances.⁸¹ Technically, according to the *Yankeetown* decision, such inquiry would be required to be undertaken by the court in order to satisfy the first of the three jurisdictional tests.⁸²

A second and potentially more disruptive problem which can be inferred from *House* relates to the use of identical tests for jurisdiction and compensability. With a civil case pending, the court of appeals apparently believed that *House's* claim, being for an employment related personal injury, was proper for Worker's Compensation Board determination. But, if the court of appeals had determined that the hearing loss was not an unexpected injury and therefore not compensable, an application of *Yankeetown* would lead to civil jurisdiction. This is so by virtue of the supreme court's statement that employee actions which do not meet each of the three tests are not excluded by the Worker's Compensation Act and "may be pursued in the courts."⁸³ In other words, if a claim meets the three-part test, the Worker's Compensation Board has the exclusive jurisdiction and a right to compensation exists; but, if the claim fails to meet any one of the three tests, compensation is denied and civil jurisdiction exists. The error of this proposition is that the Worker's Compensation Board can have the exclusive jurisdiction of a claim but determine that such claim is not compensable. For example, in *House*, the Worker's Compensation Board may very well determine that gradual hearing loss is not an unexpected injury and therefore is not an accident, and deny compensation. However, such denial does

accident to *Martinez's* gradual hearing loss and concluded that the hearing loss did not constitute an injury by accident. That result should not change because of the *Yankeetown* decision as the accident standard applied in *Martinez* was the same as proposed in *Yankeetown*.

81. *House*, 519 N.E.2d at 1276. Presumably, the court of appeals felt that the Worker's Compensation Board, as a finder of fact, would be well qualified to determine whether the injury was unexpected.

82. The court of appeals in *House* concluded that the question of whether an injury was "by accident" is resolved by looking to causation, thereby confusing the three tests. Such an approach side-stepped the difficult issue of determining whether gradual hearing loss was an accident after *Yankeetown*. Such an approach is at direct odds with the court of appeals' decision in *Eastham v. Whirlpool Corp.*, 524 N.E.2d 23 (Ind. Ct. App. 1988), where the determination of an accident was held to be completely separate from causation. The confusion may arise from the fact that the tests for jurisdiction and compensability are the same.

83. *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969, 973 (Ind. 1986).

not strip the board of its jurisdiction or the employer of the protection afforded it under the Worker's Compensation Act. Similarly, the finding in *Eastham v. Whirlpool Corp.*⁸⁴ that Eastham did not have an accident does not mean that Eastham has a civil cause of action for his strained muscles. One can also envision numerous other situations, such as where an employee with a long-standing vascular insufficiency in his lower extremities subsequently develops a skin ulcer on his leg and claims a right to compensation because he must stand at work. If the Worker's Compensation Board rules that the skin ulceration did not arise out of the employment, such ruling should not open the way for a civil action against the employer.

The Supreme Court in *Yankeetown*, by making its test for jurisdiction the same as that for compensability, arguably has opened the door for civil action in every case where compensation is denied because there was either no accident, or the injury did not arise out of or in the course of the employment. There are cases tried every week before the Worker's Compensation Board which result in a determination that one of those three elements for compensability is absent, but such determination does not lead one to conclude, *ipso facto*, that a civil court has jurisdiction.

B. *Jurisdiction and Exclusive Remedy as to Co-employees*

Two recent cases demonstrate the exclusive remedy defense and its application to co-employees. In *Sharp v. Bailey*,⁸⁵ Bailey was a truck driver who owned his truck and leased it to Jack Grey Transport, Inc. (Transport). Sharp was a truck driver whose rig was owned by Ruben Adams Trucking (Adams) and leased to Transport as well. Bailey was injured in a collision with Sharp and thereafter sued Sharp, Adams and Transport.⁸⁶ The trial court granted summary judgment in favor of Sharp and Adams but denied it as to Transport. The court of appeals found that Bailey was an employee of Transport because of the control which Transport had over him by virtue of the rules and regulations of the Interstate Commerce Commission. Thus, Bailey's exclusive remedy as to Transport was the Indiana Worker's Compensation Act.⁸⁷

The court of appeals affirmed the action of the trial court as to Sharp, holding that because he too was an employee of Transport, he and Bailey were co-employees.⁸⁸ The court went on to hold that the

84. 524 N.E.2d 23 (Ind. Ct. App. 1988).

85. 521 N.E.2d 368 (Ind. Ct. App. 1988).

86. *Id.* at 369.

87. *Id.* at 370.

88. *Id.* IND. CODE §§ 22-3-2-6 and 22-3-2-13 (1988) when construed together prohibit a suit against a fellow employee.

action against Adams must also fail. Because Sharp could not be liable to Bailey, Adams, as a co-employer of Sharp, could not be responsible to Bailey for Sharp's acts under a *respondeat superior* theory of liability.⁸⁹

In *Rogers v. Hembd*,⁹⁰ Rogers was an architect and a vice president/employee of Darryl's Restaurant. Hembd was employed by Darryl's Restaurant as a waitress. She was injured when she descended a flight of stairs to a landing and was struck by a door being opened onto the landing. Rogers had designed the restaurant, including the stairs, landing and door arrangement in question.⁹¹

In reversing a judgment in favor of Hembd, the court of appeals found that the Worker's Compensation Act was Hembd's exclusive remedy.⁹² Hembd argued that as an architect, Rogers was subject to suit as a third party because of his professional status. The court of appeals drew a distinction between Rogers' actions as an architect which were subject to the control of Darryl's Restaurant and the actions of a company physician who, by virtue of his profession, exercised judgment independent of his employer,⁹³ and found Rogers was an employee of the restaurant and, therefore, a co-employee of Hembd's. Hembd also argued that she was entitled to sue Rogers because of his dual capacity as both an employee and an officer of the corporation. That argument was likewise rejected.⁹⁴ Based upon these two cases, it can be safely stated that the revisions of the Worker's Compensation Act and the ramifications of *Yankeetown* have not disturbed the availability of the exclusive remedy defense to co-employee defendants in civil actions.

89. 521 N.E.2d at 370.

90. 518 N.E.2d 1120 (Ind. Ct. App. 1988).

91. *Id.* at 1121.

92. *Id.* at 1124.

93. *Id.* at 1122-23. See *Ross v. Shubert*, 180 Ind. App. 402, 407-08, 388 N.E.2d 623, 627-28 (1979) (company physicians were not immune from suit by virtue of the fellow servant rule).

94. 518 N.E.2d at 1122-23. The dual capacity argument was rejected based on *Witherspoon v. Salm*, 251 Ind. 575, 243 N.E.2d 876 (1969); *Jackson v. Gibson*, 409 N.E.2d 1326 (Ind. Ct. App. 1980); and *Needham v. Fred's Frozen Foods, Inc.*, 171 Ind. App. 671, 359 N.E.2d 544 (1977).

Appendix I

INDIANA WORKER'S COMPENSATION ACT

Summary of Changes

Senate Enrolled Act 402. (Changes effective July 1, 1988, except as indicated)

Benefit increases for temporary total disability equal approximately 55% over the next three years as follows:

After July 1, 1988, maximum average weekly wage equals \$384.00; maximum temporary total disability benefit equals \$256.00. Maximum death benefit equals \$128,000.

After July 1, 1989, maximum average weekly wage equals \$411.00; maximum temporary total disability benefit equals \$274.00. Maximum death benefit equals \$137,000.

After July 1, 1990, maximum average weekly wage equals \$441.00; maximum temporary total disability benefit equals \$294.00. Maximum death benefit equals \$147,000.

I.C. 22-3-3-22

I.C. 22-3-7-19

Benefit increases for permanent partial impairment equal approximately 60% over the next three years as follows:

After July 1, 1988, maximum average weekly wage equals \$166.00; maximum permanent partial impairment benefit equals \$99.60.

After July 1, 1989, maximum average weekly wage equals \$183.00; maximum permanent partial impairment benefit equals \$109.80.

After July 1, 1990, maximum average weekly wage equals \$200.00; maximum permanent partial impairment benefit equals \$120.00.

I.C. 22-3-3-10

I.C. 22-3-7-16

The credit against permanent partial impairment benefits for temporary total disability benefits paid in excess of 52 weeks has been changed so that the credit applies only after the payment of temporary total disability benefits for more than 78 weeks.

I.C. 22-3-3-10

I.C. 22-2-7-16

Funeral benefits will increase from \$2,000 to \$4,000.

I.C. 22-3-3-21

I.C. 22-3-7-15

Disability benefits will be subject to child support withholding.

I.C. 22-3-2-17

I.C. 22-3-7-29

All parties and attorneys will receive notices of hearings and of continuances.

I.C. 22-3-4-5

Real estate professionals, as defined by the statute, are exempted from the Worker's Compensation Act.

I.C. 22-3-6-1

I.C. 22-3-7-9

Artificial limbs and prosthetic devices must be replaced when "medically required." The term "medically required" does not include normal wear and tear.

I.C. 22-3-3-4

I.C. 22-3-7-17

Employees or dependents must be notified of the consequences of a refusal to accept tendered medical services, undergo medical examination, accept tendered employment or allow an autopsy.

I.C. 22-3-3-4

I.C. 22-3-3-6

I.C. 22-3-3-11

An insurer cannot refuse to pay the medical charges of a medical provider approved by the employer.

I.C. 22-3-6-1

I.C. 22-3-7-9

The current 20 year period between exposure to asbestos and disability has been increased to 35 years. The period for filing claims with the Residual Asbestos Injury Fund has been reopened to July 1, 1990. Upon the death of an individual receiving benefits from the Residual Asbestos Injury Fund, a dependent may receive the greater of the remaining 52 weeks of benefits or \$4,000.

I.C. 22-3-7-9

Dependents of the recipients of residual asbestos fund benefits who die before exhausting the remainder of their benefit receive the balance of the 52 week benefit or \$4,000 whichever is greater.

I.C. 22-3-11-3

House Enrolled Act 1069. (Changes effective July 1, 1988, except as indicated) The term "Workmen's Compensation" has been changed to "Worker's Compensation" throughout the Act.

The new name for the "Industrial Board of Indiana" will be the "Worker's Compensation Board of Indiana."

I.C. 22-3-1-1

The Worker's Compensation Board may set hearings in the county where the injury occurred or any adjoining county. (Effective March 5, 1988)

I.C. 22-3-4-5

Medical reports may be presented by either party in lieu of live testimony or deposition. The report must be exchanged 30 days prior to the hearing and contain the following information:

I.C. 22-3-3-6

I.C. 22-3-7-18

(1) The history of the injury, or claimed injury, as given by the patient.

(2) The diagnosis of the physician or surgeon concerning the patient's physical or mental condition.

(3) The opinion of the physician or surgeon concerning the causal relationship, if any, between the injury and the patient's physical or mental condition, including the physician's or surgeon's reasons for the opinion.

(4) The opinion of the physician or surgeon concerning whether the injury or claimed injury resulted in a disability or impairment and, if so, the opinion of the physician or surgeon concerning the extent of the disability or impairment and the reasons for the opinion.

(5) The original signature of the physician or surgeon. The worker's compensation board shall admit into evidence a statement that meets the requirement of this subsection unless the statement is ruled inadmissible on other grounds.

Any party may object to the report on the basis that it does not meet the requirements of the Act, but the objection must be made 20 days prior to the hearing.

