

# 1994 SURVEY OF RECENT DEVELOPMENTS IN WORKER'S COMPENSATION

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## INTRODUCTION

As the industrial revolution advanced during the late nineteenth century and production became the business of capital rather than the family unit, farmer, or artisan, injured workers and their families were devastated by industrial accidents. Workers had no guaranteed means of recovering medical expenses and lost wages resulting from work-related injuries. Injured workers could seldom prevail at common law, wherein traditional defenses such as assumption of risk and the fellow-servant doctrine applied. However, on the rare occasion that an employee could prevail in a lawsuit, the burden of a large civil judgment could devastate the employer.

Worker's compensation developed as a response to the need to protect employers from civil judgments and litigation and also to cover employees for medical expenses and lost wages, while mitigating the harsh results of the common law. Under worker's compensation, the common law defenses of assumption of risk and the fellow servant rule are unavailable to the employer, while remedies for pain and suffering and consequential damages are unavailable to the employee. Instead, injured employees receive prescribed compensation in the form of wage replacement schedules and medical benefits, employers are protected from civil liability, and the public is relieved from direct responsibility for those disabled in work-related accidents. Worker's compensation places the cost of these benefits on the consumer of the employer's product or service, through the medium of insurance.<sup>1</sup>

The issue of fault is generally not relevant to a determination of compensability under the Indiana Worker's Compensation Act.<sup>2</sup> Thus, the employee may recover for accidental injuries where the employer is without fault. However, pursuant to section 22-3-2-6 of the Indiana Code, worker's compensation is the employee's exclusive remedy for injury or death by accident arising out of and in the course of employment.<sup>3</sup> In other words, the employee may not bring a civil suit against an employer for personal injuries by accident arising out of and in the course of employment.

In Indiana, all employees and employers are bound to accept and pay compensation and medical benefits for "personal injury or death by accident arising out of and in the course of the employment."<sup>4</sup> The employee is entitled to statutorily prescribed

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1. ARTHUR LARSON, LARSON'S WORKMEN'S COMPENSATION, § 1-1. (desk ed., 1989).
2. *Id.*
3. IND. CODE § 22-3-2-6 (1993).
4. *Id.* § 22-3-2-2.

compensation for lost wages,<sup>5</sup> scheduled compensation for permanent impairment,<sup>6</sup> and statutory medical benefits.<sup>7</sup>

If a dispute arises over the compensability of a claim, the employee is entitled to a hearing before a member of the Worker's Compensation Board.<sup>8</sup> Hearing member decisions may be reviewed by the Full Worker's Compensation Board.<sup>9</sup> Decisions of the Full Board may be reviewed by the Indiana Court of Appeals and the Indiana Supreme Court.<sup>10</sup>

The Occupational Diseases Act (ODA), also administered by the Worker's Compensation Board, provides rights and remedies nearly identical to those found in the Worker's Compensation Act to employees for "disablement or death by occupational disease arising out of and in the course of the employment."<sup>11</sup>

## I. EXCLUSIVITY CASES

### A. *Intentional Torts and the Exclusive Remedy Provision of the Worker's Compensation Act*

On June 28, 1994, the Indiana Supreme Court handed down three decisions addressing the viability of intentional tort actions by employees against employers.<sup>12</sup> These decisions clarified the law as to when injured employees may pursue employers for civil damages, instead of seeking scheduled compensation under the Worker's Compensation Act.

1. *Baker v. Westinghouse*.—The leading case was *Baker v. Westinghouse Electric Corp.*,<sup>13</sup> in which the United States District Court for the Southern District of Indiana certified questions of Indiana law under Appellate Rule 15(O) to the Indiana Supreme Court. In the federal action, former employees of Westinghouse Electric Corporation's operations in Bloomington and Muncie had brought a federal action alleging that exposure to toxic substances had caused neurological and central nervous system disorders.<sup>14</sup> At issue was whether an "intentional tort exception" to the exclusivity provisions of the Worker's Compensation Act<sup>15</sup> and ODA exists.<sup>16</sup>

The Indiana Court of Appeals had previously declared an "intentional tort exception" to the Worker's Compensation Act in *National Can Corp. v. Jovanovich*.<sup>17</sup> In *National*

5. *Id.* §§ 22-3-3-7 to -9.

6. *Id.* § 22-3-3-10.

7. *Id.* §§ 22-3-3-4, -5.

8. *Id.* § 22-3-4-5.

9. *Id.* § 22-3-4-7.

10. *Id.* § 22-3-4-8.

11. *Id.* § 22-3-7-2.

12. *See supra* text accompanying note 2.

13. 637 N.E.2d 1271 (Ind. 1994).

14. Barb Albert, *Court Makes It Easier for Injured Workers to Sue*, INDIANAPOLIS STAR, June 29, 1994, at B5.

15. IND. CODE § 22-3-2-6 (1993).

16. *Id.* § 22-3-7-6.

17. 503 N.E.2d 1224 (Ind. Ct. App. 1987), *overruled by Baker*, 637 N.E.2d 1271.

*Can*, the court held that "if an employer intentionally injures an employee, the Act does not apply."<sup>18</sup> Thus, it has been generally accepted that the employer's intentional torts may be actionable notwithstanding the exclusive nature of the Worker's Compensation Act.

*Baker* does not change the result reached in *National Can* that intentional torts may be actionable, but it rejects the concept of an "exception" to the Act. The landmark decision in *Evans v. Yankeetown Dock Corp.*,<sup>19</sup> where the supreme court held that "injury or death by accident" as used in the Worker's Compensation Act means unexpected injury or death,<sup>20</sup> anticipated the demise of the intentional tort "exception" outlined in *National Can* and its progeny. Relying on *Evans*, the *Baker* court reasoned: "Because we believe an injury occurs 'by accident' only when it is intended by neither the employee nor the employer, the intentional torts of an employer are necessarily beyond the pale of the act."<sup>21</sup> Thus, the Act contemplates no "exceptions." Instead, it is the exclusive remedy for "injuries or death by accident arising out of and in the course of the employment," and injuries that occur outside of that rule, such as those intended by the employer, may be actionable outside of the Act.<sup>22</sup>

The court next addressed the level of intent necessary to constitute "intent" to harm, and who must intend the harm in order for the employer to be liable to civil suit. On the first issue, the court upheld the *National Can* rule that "nothing short of deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice."<sup>23</sup>

The court also upheld *National Can* on the question of who must intend the injury. Imputing intent to the employer for actions committed by supervisors or foremen does not suffice, and would expose employers to tort liability for acts over which they have little control.<sup>24</sup> The court noted that injuries by co-workers have been treated as "by accident" in Indiana.<sup>25</sup> Accordingly, it must be the employer who harbors the intent and not merely a supervisor, manager, or foreman.<sup>26</sup>

In sum, under *Baker*, plaintiffs may pursue civil damages against an employer. However, in order to withstand the employer's invocation of the Worker's Compensation Act as a defense, civil plaintiffs must show: 1) an intentional injury; 2) committed by the employer itself; and 3) "deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur."<sup>27</sup>

With respect to the ODA, the *Baker* court concluded that no intentional tort exception exists, and further held that the legislature intended the ODA as the exclusive remedy for

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18. *Id.* at 1232. This reasoning was followed by the appellate courts in *Gordon v. Chrysler Motor Corp.*, 585 N.E.2d 1362 (Ind. Ct. App. 1992), and *Cox v. American Aggregates Corp.*, 580 N.E.2d 679 (Ind. Ct. App. 1991).

19. 491 N.E.2d 969 (Ind. 1986).

20. *Id.* at 975.

21. *Baker*, 637 N.E.2d at 1273.

22. *Id.*

23. *Id.* at 1275.

24. *Id.*

25. *Id.* at 1275 n.6.

26. *Id.* at 1275.

27. *Id.*

all occupational diseases arising out of and in the course of employment, whether accidental or intentional.<sup>28</sup> The ODA contains an exclusive remedy provision in section 22-3-7-6 of the Indiana Code. The provision states: "The rights and remedies granted under this chapter . . . on account of death or disablement by *occupational disease* arising out of and in the course of employment shall exclude all other rights and remedies of such employee . . . ."<sup>29</sup> The ODA substitutes the phrase "occupational disease" in place of the "by accident" element found in the Worker's Compensation Act,<sup>30</sup> this difference was critical to the court's conclusion that intentional torts were "beyond the pale of the Act."<sup>31</sup>

The court determined that because the ODA does not contain the "by accident" language, the legislature did not intend for civil remedies to be available for intentionally caused occupational diseases.<sup>32</sup> In other words, under the ODA, the employee does not have to show that an injury was "by accident," but merely that the occupational disease arose out of and in the course of employment.<sup>33</sup> Accordingly, to withstand an employer's invocation of the ODA as a defense to a tort claim, a plaintiff would have to prove that the occupational disease did not arise out of the employment nor in the course of employment.

This construction means that the ODA should provide an administrative remedy for both accidental and intentionally caused occupational diseases arising out of and in the course of employment. However, even if the General Assembly intended that an employer would be permitted to intentionally inflict occupational diseases with immunity from civil liability, such a policy does not seem to promote caution on the part of employers.

Notwithstanding early pronouncements on the decision, *Baker* is no invitation to plaintiffs to pursue civil actions. The day after *Baker* was handed down, an article appeared in the *Indianapolis Star* with the headline *Court Makes It Easier for Injured Workers to Sue*.<sup>34</sup> Actually, the court merely reaffirmed the historic rule that makes it difficult for injured workers to circumvent the exclusive remedy provision. The *Baker* court essentially adopted the rule and reasoning in Larson's treatise:

Intentional injury inflicted by the employer in person on his employee may be made the subject of a common-law action for damages on the theory that, in such an action, the employer will not be heard to say that his intentional tort was an "accidental" injury and so under the exclusive provisions of the compensation act. The same result may follow when the employer is a corporation and the assailant is, by virtue of control or ownership, in effect the alter ego of the corporation.<sup>35</sup>

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28. *Id.* at 1276-77.

29. IND. CODE § 22-3-7-6 (1993) (emphasis added).

30. *Baker*, 637 N.E.2d at 1276.

31. *Id.* at 1273.

32. *Id.* at 1276-77.

33. *Id.* at 1277.

34. Albert, *supra* note 14, at B5.

35. LARSON, *supra* note 1, at § 68.00.

Under *Yankeetown* and *Baker*, injuries or death will be compensable under the Worker's Compensation Act where each of the following elements can be shown: 1) personal injury by accident; 2) personal injury arising out of the employment; and 3) personal injury arising in the course of employment.<sup>36</sup> *Yankeetown* held that the phrase "by accident" means an "unexpected event" or an "unexpected result."<sup>37</sup> Under this definition of "by accident," a broad array of injuries is actionable under the Act and not in tort, as long as the claimant can prove that the accidental injury arose out of and in the course of employment. For plaintiffs wishing to pursue intentional tort actions for injuries arising out of and in the course of employment, only a truly intentional tort committed by the owner or the alter ego of a company will be actionable.

*Yankeetown* and *Baker* reinforce the stability of Indiana worker's compensation. *Yankeetown* provides broad coverage under the Act. While it will remain difficult for plaintiffs to seek civil damages for injuries arising out of and in the course of employment, *Baker* guarantees that the Act will not be swallowed by large numbers of tort actions.

2. *Foshee v. Shoney's Inc.*—The supreme court addressed an act of violence in the workplace in *Foshee v. Shoney's Inc.*<sup>38</sup> The question on review was whether worker's compensation would be the victim's exclusive remedy against her employer. Following *Baker*,<sup>39</sup> the court held that the trial court's decision barring the plaintiff's tort claim was correct.<sup>40</sup> Amy Foshee began working at Shoney's in 1989, and became the object of harassment from a co-worker, Eric Holmes. The complaints of Foshee and other employees about Holmes were reported to management, who did not remedy the problem. On November 15, 1989, Foshee was scheduled to work with Holmes, and the harassment continued. At the end of Holmes' shift, Teresa Blosl, a manager, informed Foshee that Holmes would no longer be working at the restaurant.

Foshee claimed that Holmes returned to Shoney's four times that evening. Upon the first visit, a manager warned Foshee "to stay behind the waitress' line, so that nothing [would] happen to [her]."<sup>41</sup> Foshee's shift ended, but she remained on the premises, because Blosl and Charles Ervin, another manager, had asked her for a ride home. Holmes returned a second time, claiming that he intended to harm Foshee. Blosl instructed Foshee to hide in the women's restroom. Later, Holmes returned with Michael Vance to pick up Shoney's employee Raymond Vance, and left before 11:00 p.m.

Around 11:30 p.m. Blosl, Ervin, and Foshee were leaving the restaurant and were approached by Holmes and the Vance brothers, who had been lying in wait. Ervin and Blosl were killed first, and the store's night deposit bag was taken from Ervin. Holmes then knifed Foshee repeatedly and left her for dead. Foshee called for help from a pay phone before collapsing.

Foshee's civil complaint alleged that Shoney's "allowed" events to transpire which posed 'an imminent likelihood of injury or death to the Plaintiff and where this injury or

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36. *Yankeetown*, 491 N.E.2d at 973.

37. *Id.* at 974-75.

38. 637 N.E.2d 1277 (Ind. 1994).

39. *See supra* text accompanying notes 13-36.

40. *Foshee*, 637 N.E.2d at 1279.

41. *Id.*

death was substantially certain to occur” and that Shoney’s placed “inexperienced and untrained” management on duty the evening of November 15, 1989.<sup>42</sup> Shoney’s moved for judgment on the pleadings based on the exclusive remedy provision of the Worker’s Compensation Act, arguing that Foshee had failed to state a claim upon which relief could be granted. The trial court granted Shoney’s motion and entered final judgment in its favor.<sup>43</sup>

The judgment was affirmed on appeal on the reasoning that Foshee’s injuries arose out of and in the course of her employment and were accidental.<sup>44</sup> Foshee conceded that her injuries arose in the course of her employment. The court of appeals also found that Foshee’s injuries did not qualify for the “intentional tort exception” found in *National Can.*<sup>45</sup> The supreme court granted transfer to harmonize the appellate decision in *Foshee* with the supreme court’s disposal of the “intentional tort exception” to the Act in *Baker*.<sup>46</sup>

The supreme court first addressed the defendant’s use of a Trial Rule 12(C) motion for judgment on the pleadings. Because Shoney’s defense was based on the exclusive remedy provision of the Act, Shoney’s was asserting that jurisdiction belonged to the Worker’s Compensation Board. The court thus pointed out that raising the exclusive remedy provision as a defense to a tort action attacks the civil court’s subject matter jurisdiction, and the proper defensive motion is therefore a Trial Rule 12(B)(1) motion to dismiss for lack of subject matter jurisdiction.<sup>47</sup>

The court went on to address the merits of Foshee’s tort action in light of its decision in *Baker*, which refuted the existence of an “intentional tort exception” to the Worker’s Compensation Act. Rather,

[u]nder *Baker*, two requirements must be met before an injury can be said to have been intended by the employer and thus not “by accident.” The tort must have been committed by the employer (or by the employer’s alter ego), and the employer must also have intended the injury or actually known that injury was certain to occur.<sup>48</sup>

Foshee proved neither that the corporation was the tortfeasor’s alter ego, nor that the on-site managers owned or controlled Shoney’s. She did not suggest the existence of any “regularly made policy or decision of Shoney’s which prompted her injuries,”<sup>49</sup> and she failed to prove that her injuries were intended by Shoney’s. The court therefore held that worker’s compensation was her exclusive remedy.<sup>50</sup>

Only Justice DeBruler dissented. Acknowledging *Yankeetown* and *Baker*, DeBruler argued that Foshee had stated a claim against Shoney’s if her complaint were read as

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42. *Id.*

43. *Id.* at 1279-80.

44. *Id.* at 1280.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1281.

49. *Id.*

50. *Id.*

required by Trial Rule 8(F).<sup>51</sup> According to DeBruler, the facts of the case should have lead to a different result. He stated:

Foshee clocked out at 10:00 p.m. and changed into civilian clothes. She agreed to give two managers a ride home in her car. This served her personal interests and not those of Shoney's. She remained in the restaurant, waiting for the two managers. This was a public area. The restaurant was open until 11:00 p.m. During this hour, the danger to Foshee's physical well-being became manifest to all then present.<sup>52</sup>

Justice DeBruler stated that Foshee's complaint did not state a worker's compensation claim, but it did state a civil claim against Shoney's.<sup>53</sup> DeBruler's dissent highlights that although *Yankeetown* and *Baker* appear to have settled long-debated questions of law, plaintiffs may continue to seek tort remedies by arguing the facts of each case. Though an employer may not have harbored sufficient intent to injure an employee, the plaintiff may still argue that injuries did not arise out of and in the course of employment.

3. *Perry v. Stitzer Buick GMC, Inc.*—The supreme court addressed an employee's civil rights and tort claims against an employer in *Perry v. Stitzer Buick GMC, Inc.*<sup>54</sup> The employer raised the exclusive remedy of the Worker's Compensation Act as a defense. The opinion detailed Stitzer's conduct as alleged by Perry, an African-American who became one of Stitzer's top sales agents after joining the dealership in August of 1987. By November of 1987, Perry had become the target of a racially-motivated attempt to force him out of the dealership. On November 11, a Stitzer general manager informed Perry and another African-American co-worker of his belief that all black people steal. Perry reported the incident to the manager's immediate supervisor to no avail. Later that day, the leasing manager used the word "nigger" in Perry's presence.<sup>55</sup>

Another day, Perry needed a sales manager's approval on a sale. The manager, who routinely referred to Perry as "dummy" and "stupid," became violent because Perry had been unable to complete a sale to an elderly black couple and called him a "black son of a bitch" and other epithets. Perry was then shoved into the sales office where he was threatened with termination. Finally, Perry was told to "get [his] ass out there and try to sell another car."<sup>56</sup> He answered "yes sir," wiped the spit off his face, and left the showroom amid the joking of his co-workers.<sup>57</sup> Stitzer employees then "bet" he would not return. When Perry did return for the next day of business, the sales manager said, "Damn, he's still here."<sup>58</sup> The next day, Perry was fired.

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51. *Id.* at 1282. Indiana Trial Rule 8(F) states: "All pleadings shall be so construed as to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points." IND. R. TR. P. 8(F).

52. *Foshee*, 637 N.E.2d at 1282.

53. *Id.*

54. 637 N.E.2d 1282 (Ind. 1994).

55. *Id.* at 1284.

56. *Id.* at 1285.

57. *Id.*

58. *Id.*

Perry brought suit against Stitzer Buick GMC, Inc., its president David Stitzer, secretary-treasurer Byron Stitzer, sales manager Tony Houk, general manager David Loury, and leasing manager Carl Weidner, all in their official capacities. Perry's complaint alleged assault, slander, and assault and battery.

At trial, Stitzer relied on *Yankeetown*<sup>59</sup> in requesting summary judgment, arguing that "there is no genuine issue of material fact that the [p]laintiff's [c]omplaint is barred by the exclusivity provision of the Indiana Worker's Compensation Act."<sup>60</sup> The trial court granted the request.<sup>61</sup>

As discussed in *Foshee v. Shoney's, Inc.*,<sup>62</sup> summary judgment is based on a finding that no material issues of fact necessitate trial. Yet the invocation of the exclusivity provision of the Worker's Compensation Act "presents a threshold question concerning the court's power to act."<sup>63</sup> Accordingly, the proper affirmative defense would be a motion to dismiss for lack of subject matter jurisdiction.<sup>64</sup> As for the burden of proof on subject matter jurisdiction, the *Perry* court stated that "[t]here is a strong public policy favoring the coverage of employees under the act. Thus, when the plaintiff's own complaint recites facts demonstrating the employment relationship[,] . . . the burden shifts to the plaintiff to demonstrate some grounds for taking the claim outside of the Worker's Compensation Act."<sup>65</sup>

Because Stitzer's motion should have been converted by the trial court to a motion to dismiss for lack of subject matter jurisdiction, the burden would have shifted to Perry to establish jurisdiction. On appeal, Perry alleged that the employer's intentional torts fell outside of the scope of the Worker's Compensation Act. However, court found that the mere allegation of an intentional tort was insufficient to establish jurisdiction.<sup>66</sup> Under the companion decision in *Baker v. Westinghouse*,<sup>67</sup> the employee must show that the injuries were not "by accident." Furthermore, under *Baker*, tortious intent will be imputed to the employer only where the employer is the tortfeasor's alter ego, and the corporation has substituted its will for that of the individual who committed the tortious acts.<sup>68</sup> The court concluded that Perry failed to establish trial court jurisdiction on the grounds that he had suffered intentional, non-accidental injuries at the hands of Stitzer.<sup>69</sup>

However, Perry advanced another argument in favor of trial court jurisdiction by arguing that his injuries were not contemplated by the Worker's Compensation Act. The

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59. See *supra* text accompanying note 12.

60. *Perry*, 637 N.E.2d at 1286.

61. *Id.*

62. See *supra* text accompanying notes 38-52.

63. *Perry*, 637 N.E.2d at 1286.

64. *Id.*

65. *Id.* (citing *Burgos v. City of New York*, 98 A.D.2d 788 (N.Y. App. Div. 1983); *Doney v. Tambouratgis*, 587 P.2d 1160 (Cal. 1979)); cf. 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 12-12 (1993).

66. *Perry*, 637 N.E.2d at 1287.

67. See *supra* text accompanying notes 13-36.

68. *Perry*, 637 N.E.2d at 1287 (citing *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1275-76 (Ind. 1994)).

69. *Id.* at 1288.

court agreed with Perry that his embarrassment, humiliation, and damage to reputation and character do not constitute "personal injury or death" for purposes of compensability under section 22-3-2-2.<sup>70</sup> Perry and Stitzer agreed that Perry had suffered no physical injury, loss of ability to work, or loss of function. Were it not for his termination, Perry would have been willing and able to continue to work at Stitzer.

What, then, does the phrase "personal injury or death" contemplate? Certainly the definition would have to include "disability" and "impairment." The Worker's Compensation Act contains schedules for the limited compensation of impairment and disability.<sup>71</sup> "Impairment" refers to an employee's loss of physical function.<sup>72</sup> "Disability" refers to an injured employee's inability to work.<sup>73</sup> In the instant case, however, Perry's injuries resulted in no impairment nor disability. Summary judgment was reversed and the case was remanded.<sup>74</sup> The court explained as follows:

In sum, the injuries at the heart of Perry's complaint were not physical, nor was there any impairment or disability as those terms are comprehended by the act. Accordingly, we hold that Perry's claims are not barred by the exclusive remedy clause of the Worker's Compensation Act because, alone, they present no injuries covered by the act.<sup>75</sup>

The holding that worker's compensation is not the exclusive remedy for nonphysical injuries and the remand of the case reminds the practitioner that there are actually four elements necessary for establishing compensability of a work-related grievance under section 22-3-2-2 of the Indiana Code: 1) personal injury or death; 2) personal injury or death by accident; 3) personal injury or death arising out of the employment; and 4) personal injury or death arising in the course of employment.

Justice Dickson, concurring with the result and reasoning of the majority's decision, would have gone further. On remand, Perry's claim would be subject to the application of the fellow-servant rule,<sup>76</sup> which might shield Stitzer from tort liability. Dickson asserted that the time was appropriate to restrict the application of the doctrine, arguing that the rule was developed prior to the enactment of worker's compensation schemes and that employers are now "insulated from full responsibility for personal injuries to their employees by the worker's compensation law and its prohibition of common law personal injury actions."<sup>77</sup>

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70. *Id.*

71. *See* IND. CODE §§ 22-3-3-7 to -10 (1993).

72. *Perry*, 637 N.E.2d at 1288 (citing *Talas v. Correct Piping Co.*, 435 N.E.2d 22 (Ind. 1982); *Perez v. United States Steel Corp.*, 359 N.E.2d 925 (Ind. Ct. App. 1977)).

73. *Id.* (citing *Talas*, 435 N.E.2d at 26).

74. *Id.* at 1289.

75. *Id.*

76. Under the fellow servant rule an employer is not liable for acts against one employee by another employee, even though the employer would be liable for the act if it were committed against a non-employee. *Id.*

77. *Id.*

*B. Tort Actions Against Owners and Contractors: Wolf v. Kajima*

In *Wolf v. Kajima International Inc.*,<sup>78</sup> the supreme court granted transfer to consider the tort liability of owners or general contractors to injured employees of subcontractors, where the general contractor had arranged and paid for worker's compensation coverage on behalf of the subcontractor.<sup>79</sup> Wolf, an employee of C.J. Rogers, lost his left leg below the knee and suffered a crushed right femur when a section of steel fell from a crane at the Lafayette Subaru-Isuzu Automotive (SIA) plant.<sup>80</sup> C.J. Rogers was subcontracting for Kajima International, the general contractor at the SIA project. Wolf received worker's compensation benefits for his injuries from a "wrap-around" policy purchased for C.J. Rogers by SIA. The policy was designed to insure SIA and its contractors and subcontractors, including C.J. Rogers, with separate policy certificates.<sup>81</sup>

Wolf then brought a negligence action against SIA and its general contractor, Kajima International. The trial court granted summary judgment in favor of Kajima and SIA on the grounds that public policy demanded that SIA and Kajima be treated as "statutory employers" because they provided worker's compensation benefits to Wolf.<sup>82</sup> Accordingly, SIA and Kajima would receive the benefit of the exclusive remedy provision of the Worker's Compensation Act.

On appeal, summary judgment was reversed.<sup>83</sup> The court noted that although an owner or general contractor has the duty to require a subcontractor to show certification by the Worker's Compensation Board of insurance coverage,<sup>84</sup> it has no statutory duty to purchase worker's compensation insurance on behalf of contractors.<sup>85</sup> Rather, the duty to insure falls to the immediate employer.<sup>86</sup> If an owner or general contractor failed to seek a certificate of coverage from a contractor that is found to have been without coverage, the owner or general contractor, pursuant to section 22-3-3-14(b) of the Indiana Code, becomes secondarily liable for the payment of worker's compensation.<sup>87</sup>

SIA argued that because it had failed to exact a certificate of compliance from C.J. Rogers, it was now secondarily liable to Wolf for worker's compensation benefits and immune from tort liability. The court rejected this argument, as SIA had voluntarily purchased the insurance on behalf of C.J. Rogers.<sup>88</sup>

The court held that "an owner or general contractor does not alter its status concerning potential tort liability to employees of contractors or subcontractors by directly purchasing worker's compensation insurance on behalf of subcontractors," and the exclusive remedy of worker's compensation does not apply to prohibit employees from

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78. 629 N.E. 2d 1237 (Ind. 1994).

79. *Id.*

80. *Wolf v. Kajima Int'l*, 621 N.E.2d 1128 (Ind. Ct. App. 1993).

81. *Id.* at 1129.

82. *Id.* at 1129-32.

83. *Id.* at 1132.

84. IND. CODE § 22-3-2-14(b) (1993).

85. *Wolf*, 621 N.E.2d at 1132.

86. *Id.*

87. *Id.*

88. *Id.* at 1132.

asserting third-party claims against persons other than the employer.<sup>89</sup> The Indiana Supreme Court granted transfer and adopted, by reference, the holding in the decision of the court of appeals.<sup>90</sup>

C. *Exclusive Remedy Provision: Appellate Decisions*

1. *McQuade v. Draw Tite, Inc.*—The plaintiff in *McQuade v. Draw Tite, Inc.*<sup>91</sup> was injured in a work-related accident at Mongo Electronics, a subsidiary of Draw Tite, on April 27, 1993. A claim was filed under the Worker's Compensation Act the following day. The plaintiff also filed a negligence suit in the LaGrange Circuit Court against Draw Tite. Draw Tite successfully moved for summary judgment based on the exclusivity provision of the Act, and the plaintiff appealed.<sup>92</sup> *McQuade* addressed two issues. For the first time, the Indiana court discussed the question of whether a parent corporation could be liable for negligence when a compensable worker's compensation injury occurred at a subsidiary operation. Second, the court addressed the propriety of using a motion for summary judgment when attempting to invoke the exclusivity defense to a civil lawsuit.

McQuade argued that Draw Tite, as the parent corporation of Mongo, was amenable to civil suit as a third party under section 22-3-2-13 of the Indiana Code,<sup>93</sup> while Draw Tite claimed immunity under section 22-3-2-6,<sup>94</sup> the exclusive remedy provision. The question of whether a parent corporation could be considered liable as a third party for a work-related accident where a claim for worker's compensation had been filed against the subsidiary had not previously been addressed. However, the Seventh Circuit had addressed the same issue of Indiana law in *Reboy v. Cozzi Iron & Metal, Inc.*<sup>95</sup>

In *Reboy*, the parent Cozzi corporation asked the court to "pierce the corporate veil" and find that a subsidiary "was so highly integrated with the Cozzi corporation that they should be treated as one corporate entity for the purpose of applying the exclusivity provision."<sup>96</sup> This "corporate veil" test would require that separate corporate identities "be disregarded where one corporation is so organized and controlled and its affairs are so conducted by another corporation that it is a mere instrumentality or adjunct of the other corporation."<sup>97</sup>

In addition to *Reboy*, the court relied on a Michigan appellate decision for further guidance. In *Verhaar v. Consumers Power Co.*,<sup>98</sup> the court cited several factors to be applied in "reverse piercing" in the corporate veil test, including: 1) the use of a combined worker's compensation policy; 2) combined bookkeeping and accounting system; 3) a single personnel policy; 4) control of the employee's duties; 5) payment of

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89. *Wolf*, 629 N.E.2d at 1237 (citing *Wolf*, 621 N.E.2d at 1132).

90. *Id.*

91. 638 N.E.2d 818, 819 (Ind. Ct. App. 1994).

92. *Id.* at 818.

93. IND. CODE § 22-3-2-13 (1993).

94. *Id.* § 22-3-2-6.

95. 9 F.3d 1303, 1308 (7th Cir. 1993).

96. *Id.*

97. *Id.*

98. 446 N.W.2d 299 (Mich. Ct. App. 1989).

wages; and 6) performance of the employee's duties as an integral part of the employer's business toward the accomplishment of a common goal.<sup>99</sup> The *McQuade* court adopted this test.<sup>100</sup>

The court cited author Arthur Larson for the proposition that the most significant factor in determining liability of the parent corporation is actual control.<sup>101</sup> The higher the degree of control exercised by the parent, the more likely it is that parent and subsidiary will be found to constitute a single entity for purposes of worker's compensation and the exclusivity provision. The court then adopted a synthesis of the Seventh Circuit and Michigan decisions as the standard against which the relationship of parent and subsidiary companies would be evaluated. Because the trial court found, and both parties agreed, that Draw Tite had the right and the ability to control all aspects of the operations of Mongo Electronics, there was sufficient factual evidence to confer immunity on Draw Tite.<sup>102</sup> Draw Tite and Mongo had a combined worker's compensation insurance policy, had prepared combined Federal Income Tax filings, had similar personnel policies, and all accounting and payroll was performed by Draw Tite for Mongo.<sup>103</sup>

The court of appeals accordingly concluded that the plaintiff's action against the parent corporation was barred by the exclusivity provision. However, following the recent supreme court decision in *Perry v. Stitzer Buick GMC, Inc.*,<sup>104</sup> the court reversed and remanded the case with instructions to enter a dismissal for lack of subject matter jurisdiction pursuant to Indiana Trial Rule 12(B)(1).<sup>105</sup> In *Perry*, the supreme court held that the use of summary judgment was improper, reasoning that the defense of exclusivity attacks the civil court's subject matter jurisdiction.<sup>106</sup>

2. *Seaton-SSK Engineering, Inc. v. Forbes*.—In *Seaton-SSK Engineering, Inc. v. Forbes*,<sup>107</sup> the court addressed the applicability of the exclusive remedy provision of the Act to civil actions against third parties. Clearly, the Worker's Compensation Act does not bar civil suits against third party tortfeasors.<sup>108</sup> Although a worker injured by accident arising out of and in the course of employment will not win a civil remedy against his employer, the worker might collect in third party suits. For example, a delivery driver injured in an automobile accident might collect worker's compensation and also collect from the driver of the other automobile. Section 22-3-2-13 of the Worker's Compensation Act entitles the insurance carrier to a lien on proceeds from such third-party actions.<sup>109</sup>

In the instant case, however, a question arose as to whether the parties sued by Forbes were actually third parties. In November 1988, Forbes, an employee of CMI-Permanent

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99. *Id.* at 300-01.

100. *McQuade v. Draw-Tite, Inc.*, 638 N.E.2d 818, 820 (Ind. Ct. App. 1994).

101. *Id.* at 820-21.

102. *Id.* at 821-22.

103. *Id.* at 822.

104. 637 N.E.2d 1282 (Ind. 1994); *see supra* text accompanying notes 54-77.

105. *McQuade*, 638 N.E.2d at 822.

106. *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994). For a discussion of that case, *see supra* subpart I.A.3.

107. 639 N.E.2d 1048 (Ind. Ct. App. 1994).

108. *Id.* at 1049 (citing *Stump v. Commercial Union*, 601 N.E.2d 327, 330 (Ind. 1992)).

109. *See* IND. CODE § 22-3-2-13 (1993).

Mold, lost his right arm while operating a molding machine manufactured by Seaton-SSK.<sup>110</sup> Permanent Mold paid statutory worker's compensation to Forbes.<sup>111</sup> In November 1990, Forbes sued a number of third parties, including CMI (the parent company of CMI-Permanent Mold), and Seaton-SSK (a subsidiary of CMI and the manufacturer of the molding machine).<sup>112</sup>

Although CMI, Seaton, and Permanent Mold were all organized as separate corporations, CMI and Seaton relied on a 1963 Utah decision, *Cook v. Peter Kiewit Sons Co.*<sup>113</sup> for the proposition that they comprised one "employing unit," and accordingly moved for summary judgment, arguing that Forbes' civil suit was barred by section 22-3-2-6, the exclusivity provision of the Act.<sup>114</sup> The sole issue on review was whether the exclusive remedy provision of the Worker's Compensation Act applied to CMI and Seaton because Forbes received Worker's Compensation from Permanent Mold.

The court noted that treatment as an employing unit might be appropriate because CMI and its subsidiaries pursued a "common profit objective" and "all subsidiaries directly or indirectly bear the cost of providing worker's compensation benefits."<sup>115</sup> CMI and Seaton also argued that it would be inequitable to order "double payments" by one employing unit. They relied on a 1992 Michigan decision, *Isom v. Limitorque Corp.*,<sup>116</sup> for the contention that the Worker's Compensation Act should be construed liberally when asserted as a defense because it must be liberally construed to allow benefit collection.<sup>117</sup>

CMI and Seaton argued, assuming that they comprised one employment, that Forbes was actually attempting to invoke the "dual capacity" doctrine available in some jurisdictions, which the court here characterized as "*an exception to the exclusive remedy of the worker's compensation scheme.*"<sup>118</sup> The rationale of the dual capacity doctrine is that the employer may breach a duty not arising out of the employer-employee relationship, or that the employer may cause an injury in a role other than that of employer, for example, by manufacturing a defective product.<sup>119</sup> If the molding machine manufactured by Seaton was unsafe, there might be a breach of duty not directly related to the employment relationship of Forbes and Permanent Mold.<sup>120</sup>

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110. *Forbes*, 639 N.E.2d at 1048.

111. *Id.*

112. *Id.*

113. 386 P.2d 616, 618 (Utah 1963).

114. *Forbes*, 639 N.E.2d at 1048-49.

115. *Id.* at 1049.

116. 484 N.W.2d 716, 716 (Mich. Ct. App. 1992).

117. *Forbes*, 639 N.E.2d at 1049.

118. *Id.* (emphasis added). Note that the court characterized the dual capacity doctrine as an exception to § 22-3-2-6, although the July supreme court decision in *Baker v. Westinghouse* rejected the theory of an intentional tort exception to the Act. See *supra* text accompanying notes 13-36.

119. *Forbes*, 639 N.E.2d at 1050 (citing *White v. E.I. DuPont de Nemours and Co.*, 523 F. Supp. 302, 303 (W.D. Va. 1981) and *Kelly v. Johns-Manville Corp.*, 590 F. Supp. 1089, 1102 (E.D. Pa. 1984)).

120. *Id.*

However, the court rejected the dual capacity doctrine, following *Needham v. Fred's Frozen Foods, Inc.*<sup>121</sup> In that case, the court of appeals had rejected the dual capacity doctrine where a worker was injured while cleaning a pressure cooker manufactured by his employer, stating that civil liability would be inconsistent with the Act's statutory abrogation of "all other rights and remedies" against the employer.<sup>122</sup>

Having disposed of the possibility of affirming the trial court's summary judgment based on the dual capacity doctrine, which would have depended on a finding that CMI, Seaton, and Permanent Mold comprised one "employment unit," the court proceeded to decide whether those companies were separate corporate entities. Forbes, citing Michigan authorities, argued for the adoption of an "economic reality" test involving consideration of the "totality of the circumstances surrounding the work performed," such as: control of worker duties; payment of wages and benefits; the right to hire, fire, and discipline; and the performance of duties as an integral part of the employer's business.<sup>123</sup> Based on the record regarding the relationship of CMI, Seaton, and Permanent Mold, the court found that a question of fact existed as to whether "'the totality of circumstances surrounding the work performed' is such that CMI or Seaton" exercised control over Permanent Mold employees.<sup>124</sup>

The court decided that a factual determination as to the integration between CMI and its subsidiaries was a necessary prerequisite to the application of section 22-3-2-6 of the Indiana Code.<sup>125</sup> If the defendants were not found to be a single employing unit, they would be vulnerable to civil suit. The court ruled that summary judgment was properly denied.<sup>126</sup>

3. *Peavler v. Mitchell & Scott Machine Co.*—In *Peavler v. Mitchell & Scott Machine Co.*,<sup>127</sup> the court addressed another act of violence against an employee. In May of 1991, Peavler was working for Mitchell & Scott Machine Company when she was shot and killed by her ex-boyfriend. The gunman had previously entered the premises to threaten Peavler and had been escorted out of the plant. At the time of the shooting, no guards were on duty and the gunman did not report to anyone before entering.

Peavler's personal representatives brought an action against her employer alleging negligence in failing to provide a reasonably safe workplace as the proximate cause of her death.<sup>128</sup> Peavler's representatives argued that the employer was aware of the danger to Peavler and should have taken reasonable precautions for her protection.<sup>129</sup> The employer

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121. 359 N.E.2d 544 (Ind. App. 1977).

122. *Id.* at 545. Another approach to dual capacity cases would be to dispose of the harsh rule barring all civil suits, in favor of following the plain language of the Act's compensability clause at IND. CODE § 22-3-2-2 (1993). The court could then rule on the question of whether an injury caused by the same employer's breach of the duty to manufacture a safe product "arises out of and in the course of employment." If injury due to the breach does not arise out of and in the course of employment, it could not be barred by § 22-3-2-6.

123. *Forbes*, 639 N.E.2d at 1050.

124. *Id.* at 1051-52.

125. *Id.* at 1051.

126. *Id.*

127. 638 N.E.2d 879 (Ind. Ct. App. 1994).

128. *Id.* at 880.

129. *Id.*

moved for judgment on the pleadings, arguing that the claim was barred by the exclusive remedy provision of the Worker's Compensation Act, which was granted by Marion Superior Court II.<sup>130</sup>

On appeal, the court noted that the defendant's motion for judgment on the pleadings was improper.<sup>131</sup> The opinion cited *Perry v. Stitzer Buick GMC, Inc.*<sup>132</sup> for the proposition that the appropriate motion for attacking the court's subject matter jurisdiction is made pursuant to Indiana Trial Rule 12(B)(1).<sup>133</sup>

In *Peavler*, the court addressed three types of risk that can cause injury or death: 1) risks distinctly associated with the employment; 2) risks personal to the claimant; and 3) "neutral" risks that have no particular employment or personal character.<sup>134</sup> Generally, risks that fall in the first and third categories are covered by the Indiana Worker's Compensation Act.<sup>135</sup> Harms of the second type, from risks personal to the employee, are "universally noncompensable" under the Worker's Compensation Act.<sup>136</sup> For example, the employee with a mortal enemy who seeks him out at work falls into the second category, and "the assault cannot be said to arise out of the employment under any circumstances."<sup>137</sup>

Indiana law provides that a personal squabble with a third person that culminates in an assault is not compensable under the act.<sup>138</sup> If, however, the assault might be reasonably anticipated because of the general character of the work (a "neutral" risk), the injury may be found to arise out of the employment.<sup>139</sup>

The decedent here was murdered by her ex-boyfriend; the animosity that culminated in murder arose not out of the employment but out of the plaintiff's personal life. The decedent's representatives alleged that the boyfriend had been escorted out of the workplace on a prior occasion and that the employer was negligent in allowing him to enter the premises and in failing to protect her. However, the court found that there was no contention nor evidence that would reasonably support this allegation.<sup>140</sup>

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130. *Id.*

131. *Id.*

132. 637 N.E.2d 1282 (Ind. 1994); *see supra* text accompanying notes 54-77.

133. *Peavler*, 638 N.E.2d at 880. At first glance, the facts in *Peavler* appear similar to those in the recent supreme court decision in *Evans v. Yankeetown Dock Corp.*, in which an employee was murdered by a gunman. In *Yankeetown*, the court stopped a wrongful death action brought by the decedent's representatives by holding that the accidental death arose out of and in the course of employment and was therefore actionable only under the Worker's Compensation Act. 491 N.E.2d 969, 976 (Ind. 1986). However, the gunman in *Yankeetown* was a fellow employee. *Id.*

134. *Peavler*, 638 N.E.2d at 881 (citing *K-Mart Corporation v. Novak*, 521 N.E.2d 1346, 1349 n.1 (Ind. Ct. App. 1988)); 1 LARSON, WORKMEN'S COMPENSATION LAW §§ 7.00-7.30 (1985)).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (citing *Wayne Adams Buick, Inc. v. Ference*, 421 N.E.2d 733 (Ind. Ct. App. 1981)).

139. *Id.*

140. *Id.*

The court of appeals thus held that Peavler's death resulted from a risk personal to her, and did not arise out of and in the course of employment.<sup>141</sup> The death would not be compensable under the Worker's Compensation Act, so the civil court had subject matter jurisdiction over the plaintiff's civil negligence action.

## II. STATE EQUAL PROTECTION CHALLENGE TO THE EXCLUSION OF FARM WORKERS FROM MANDATORY COVERAGE UNDER THE WORKER'S COMPENSATION ACT

### *A. Indiana's Exclusion of Agricultural Employees from Mandatory Coverage*

The article entitled *Farm Workers Can't Get Worker's Comp, Court Says*,<sup>142</sup> appearing in the *Indianapolis Star* on November 30, 1994, produced some confusion and a flurry of phone calls about the Indiana Supreme Court's ruling in *Collins v. Day*.<sup>143</sup> Although *Collins* produced no change in the law, the headline was misleading; although the law does not require that farm workers be covered, agricultural employers may elect coverage under the Worker's Compensation Act.

Employers and employees should be aware of Indiana's rule regarding who must carry coverage, as opposed to those who have the option to elect coverage. Accordingly, the law regarding coverage of farm workers will be examined here. The supreme court's opinion in *Collins* will then be discussed.

Section 22-3-2-9(a) of the Indiana Code exempts "farm or agricultural employees" and "the employers of such persons" from mandatory coverage under the Worker's Compensation Act.<sup>144</sup> However, under section 22-3-2-9(b) of the Indiana Code,<sup>145</sup> the employer has the option of waiving the exemption and purchasing worker's compensation insurance for farm or agricultural employees.

An agricultural employer might want to purchase worker's compensation coverage for a number of reasons under section 22-3-2-9(b) of the Indiana Code. First, it is humane to guarantee that a worker who is injured on the job will receive medical treatment. If medical bills are not covered by insurance, the costs of work-related accidents are passed on to the worker's family or to the taxpayers. Second, as discussed in numerous cases above, the exclusive remedy provision of worker's compensation protects the employer from jury verdicts in the event an injured worker brings a civil suit. *Baker v. Westinghouse Electric Corps*.<sup>146</sup> and its companion decisions<sup>147</sup> outline the extent of this protection.

The following rules have arisen under Indiana Code section 22-3-2-9. Farm and agricultural employees are those who do traditional types of farm work, such as driving

141. *Id.* at 882.

142. Barb Albert, *Farm Workers Can't Get Worker's Comp, Court Says*, INDIANAPOLIS STAR, Nov. 30, 1994, at A17.

143. 644 N.E.2d 72 (Ind. 1994). This opinion was handed down on November 28, 1994, two days before the newspaper article was published.

144. IND. CODE § 22-3-2-9(a) (Supp. 1994).

145. *Id.* § 22-3-2-9(b).

146. 637 N.E.2d 1271 (Ind. 1994).

147. *See supra* text accompanying notes 13-77.

tractors, and tending crops. Whether a laborer is a farm employee within the Worker's Compensation Act is determined from the character of the work performed, not from the general occupation or business of the employer.<sup>148</sup> The determinative factor in deciding whether a laborer is within the Act is the character and nature of services rendered by the employee.<sup>149</sup> This assessment must be made considering the entire scope of the employee's job, not just the work being performed at the time of injury.<sup>150</sup>

The term "agriculture" is "the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding, and management of live stock or poultry."<sup>151</sup> While farmers or agricultural employers are not required to carry worker's compensation coverage on employees whose jobs are entirely "agricultural," workers doing other types of work for agricultural employers may not be exempt from the Act.<sup>152</sup>

Therefore, a farmer or agricultural employer who hires laborers to perform non-agricultural work is *not* exempt from the Act. Conversely, an employer whose primary business is non-agricultural, but who hires laborers whose jobs are strictly "agricultural," is exempt from mandatory coverage under the Act. There is no perfect rule for determining who is covered by the Act. The facts and circumstances of each situation should be considered. The following authorities, however, illustrate the general rule.

The several authorities that follow found employers/employees exempt from the Act. A person employed to pick cucumbers on a farm, who was killed while driving a truck between housing furnished by a canning operation and a farm, was considered a "farm or agricultural employee" not within the Act.<sup>153</sup> The employee of a state girls' school whose duties were limited to working on a farm operated by the school was a farm employee not covered by the Act.<sup>154</sup> A minor employed as a farm hand to operate a tractor was not covered.<sup>155</sup> Farm laborers employed by Purdue University, whose duties are limited to farm work, have been found not to be covered by the Act.<sup>156</sup> "Occasional excursions into or out of agricultural duties are disregarded when the employee by virtue of his regular employment has status as either a covered or exempt employee."<sup>157</sup>

The authorities that follow found employers/employees bound by the Act. The employee of a farm implement business who travelled from farm to farm harvesting crops was not an agricultural employee exempted from the act.<sup>158</sup> A laborer employed by farmer as a carpenter to remodel a hog house was not an agricultural employee exempted

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148. *Smart v. Hardesty*, 149 N.E.2d 547, 549 (Ind. 1958); *see also Heffner v. White*, 45 N.E.2d 342, 345 (Ind. Ct. App. 1942).

149. *Strickler v. Sloan*, 141 N.E.2d 863, 866 (Ind. App. 1957).

150. *H.J. Heinz v. Chavez*, 140 N.E.2d 500, 503 (Ind. 1957).

151. *Fleckles v. Hille*, 149 N.E. 915, 915 (Ind. App. 1925).

152. *Makeever v. Marlin*, 174 N.E. 517, 518 (Ind. App. 1931).

153. *Chavez*, 140 N.E.2d at 502-04.

154. *Dowery v. State*, 149 N.E. 922, 923 (Ind. App. 1925).

155. 1950 Op. Att'y Gen. 125, 130.

156. 1931-1932 Op. Att'y Gen. 829, 832-33.

157. 1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 53.00 (1990).

158. *Strickler v. Sloan*, 141 N.E.2d 863, 866-69 (Ind. App. 1957).

from the act.<sup>159</sup> An employee hired to operate corn shredder owned by farmer was not an agricultural employee.<sup>160</sup> Farmers who hired employees to blast coal and load coal wagons for sale to a third person were miners, not agricultural employees.<sup>161</sup>

In summary, the following five guidelines can be applied in determining whether worker's compensation applies to a specific employee. 1) Employers who hire laborers to do strictly agricultural work, such as driving tractors, tending crops, or managing livestock, may not be required to purchase worker's compensation insurance, but insurance may be purchased under section 22-3-2-9(b) of the Indiana Code even where it is not mandated. 2) The supreme court's decision does not affect employers who want to purchase, or who have purchased, worker's compensation insurance. If a farm/agricultural employee is injured or killed by accident arising out of and in the course of employment, and the employer has elected coverage under section 22-3-2-9(b) of the Indiana Code, that employee may be covered. 3) Employees whose employers have not opted for coverage may or may not be covered by the Worker's Compensation Act. If the employee is not covered by the Act, he or she may have other rights against the employer under the common law. 4) Farmers or other presumably agricultural employers who hire laborers to perform non-agricultural work should provide worker's compensation coverage for those employees. 5) Primarily non-agricultural employers who operate farms may be exempt from covering employees whose labor is strictly limited to agricultural activities as defined in case law.

#### *B. Collins v. Day*

*Collins v. Day*<sup>162</sup> presented state and federal equal protection challenges to Indiana's exclusion of farm and agricultural employees from mandatory worker's compensation coverage at section 22-3-2-9(a) of the Indiana Code.<sup>163</sup> Article I, Section 23 of the Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."<sup>164</sup> The plaintiff/appellant argued that the exemption of agricultural laborers from the worker's compensation act violates Section 23 because it extends to a special class of employers an immunity denied to the general class of employers.

Eugene Collins was employed on the farm of defendant Glen Day, and on February 8, 1989, suffered a broken leg in an accident. Collins incurred \$12,000 in medical expenses and claimed lost wages of \$140 per week, in addition to the loss of use of a residence. The defendant had not elected to provide worker's compensation coverage under section 22-3-2-9(b), and thus denied liability to pay compensation and medical benefits to Collins. Collins's claim was denied at a worker's compensation hearing and by the full Board. On appeal, Collins asserted his constitutional arguments.

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159. *Heffner v. White*, 45 N.E.2d 342, 345-46 (Ind. App. 1942).

160. *Hahn v. Grimm*, 198 N.E. 93 (Ind. App. 1935).

161. *Hanna v. Warren*, 133 N.E. 9 (Ind. App. 1921).

162. 644 N.E.2d 72 (Ind. 1994).

163. IND. CODE § 22-3-2-9(a) (1993).

164. IND. CONST. art. I, § 23.

The supreme court's analysis may be summarized as follows. The court held that Article 1, Section 23 of the Indiana Constitution requires that statutes granting unequal privileges and immunities may be upheld based on three rules:

First, the disparate treatment . . . must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.<sup>165</sup>

The court, in applying the above standards of review to the statutory exemption, found that "inherent distinctions" between agricultural and non-agricultural employees are "reasonably related" to the exemption.<sup>166</sup> These included 1) the prevalence of sole proprietorships and small employment units, 2) the nature of farm work and its inherent risks, 3) the level of worker training and experience, 4) the traditional informality of the agricultural employment relationship, and 5) the peculiar difficulties faced by agricultural employers in passing the cost of coverage on to the ultimate consumer.<sup>167</sup> The court also refused to find that Section 23 is violated by the voluntary election of coverage made available by section 22-3-2-9(b).<sup>168</sup>

Assuming that the statutory exemption of farmworkers does not now violate Section 23, do the characteristics of farm employment continue to support the exemption of from a policy standpoint? Under *Collins*, this question will only be answered by the legislature. However, if agricultural production continues to evolve from a family-oriented activity to a capital-intensive industry increasingly dominated by "agribusiness," will the "reasonable relation" of section 22-3-2-9(a) to the class of farm employers be eroded? Will the exemption become unconstitutional?

The supreme court hinted at such a possibility in its opinion. In its amicus brief, the Migrant Farmworker Project of the Legal Services Organization of Indiana ("the Project") argued that the constitutionality of the agricultural exemption had been eroded since the enactment of worker's compensation in 1915. The amicus brief was cited by the court for the Project's position that "the nature of agricultural work and the structure of agriculture . . . today is so radically different than in 1915, that the continued exclusion of farmworkers from worker's compensation coverage does not comply with legislat[ive] intent."<sup>169</sup>

The court recognized that preferential treatment of a class of persons may later cease to be constitutional due to intervening socio-economic changes.<sup>170</sup> However, the court was unconvinced in this case that the plaintiff had carried "the burden on the challenger [of constitutionality] to negative every reasonable basis for the classification."<sup>171</sup>

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165. *Collins*, 644 N.E.2d at 80.

166. *Id.* at 81.

167. *Id.*

168. *Id.* at 82.

169. *Id.* at 81 (citing Brief of Amicus Curiae at 3A).

170. *Id.*

171. *Id.*

Representing the interest of approximately 8600 migrant farmworkers, the Amicus Curiae detailed trends in Indiana agriculture in support of its contention that the constitutionality of the exemption had been eroded. Ninety-eight percent of migrant farm workers are Hispanic.<sup>172</sup> Ninety-five percent are uninsured for medical problems.<sup>173</sup> Seventy percent live in migrant labor camps, which are generally owned by a farmer or processing plant.<sup>174</sup>

Agribusiness has increased in importance in Indiana, while the traditional family farm mode of production has declined. There is a corresponding increase in the number of employees, rather than family members, performing agricultural work. This trend is marked by a decrease in the number of farms and an increase in the acreage of farms. In 1920, there were 205,126 farms in Indiana, and by 1978 there were only 70,506 farms.<sup>175</sup> Nationwide, it is projected that the largest one percent of farms will account for fifty percent of all farm production.<sup>176</sup>

The Amicus Curiae also pointed out that because employers of farm workers may elect coverage under section 22-3-2-9(b), worker's compensation insurance for agricultural classifications is readily available. The insurance premium rate for the classification that would cover most of Indiana's migrant farm workers is \$2.68 per \$100 of payroll.<sup>177</sup>

Finally, the Project's brief highlighted the risks associated with agricultural labor. Obviously, mechanization in agriculture and its attendant risks have increased dramatically since the enactment of the Worker's Compensation Act. For example, driving a tractor qualifies as a traditional type of farm work, and tractor drivers may therefore be exempt from the Act.<sup>178</sup> However, in 1920, there was just one tractor for every twenty-six farms; by 1969, there were 1.7 tractors for every farm.<sup>179</sup>

Several other health risks were documented, including heat stress,<sup>180</sup> and disabling skin disorders due to exposure to pesticides and the sun.<sup>181</sup> Pesticide exposure may also result in blurred vision, diarrhea, headaches, nausea, respiratory failure, paralysis, coma, and death.<sup>182</sup> Fractures, strains, back problems, and repetitive motion injuries also occur with frequency among farm labor.<sup>183</sup> At present, the medical costs of these injuries must be borne by the taxpayer or by workers and their families, unless the employer has elected coverage or has a medical-only insurance policy.

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172. Appendix to Brief of Amicus Curiae at Ap. 1, *Collins*, 644 N.E.2d 72 (No. 93502-9411-EX-1120).

173. *Id.*

174. *Id.*

175. *Id.* at Ap. 4.

176. *Id.* at Ap. 5.

177. Indiana Compensation Rating Bureau. The classification covering many migrant farm workers is Indiana Rating Code 0008, Gardening/Market Crops/Drivers.

178. *Smart v. Hardesty*, 149 N.E.2d 547, 549 (Ind. 1958).

179. Appendix to Brief of Amicus Curiae at Ap. 6, *Collins*, 644 N.E.2d 72.

180. *Id.* at Ap. 10.

181. *Id.*

182. *Id.*

183. *Id.* at Ap. 11.

Professor Larson, in his treatise on worker's compensation law, argues that the traditional justifications of farm-labor exemptions are difficult to support.<sup>184</sup> Clearly, strong policy considerations support protecting small and family farmers from the burdens of "handling the necessary records, insurance, and accounting."<sup>185</sup>

If this is the reason, it ought to follow that the exemption should be confined to small farmers and not at the same time relieve from compensation responsibility the . . . farms which have much more in common with industry than with old-fashioned dirt farming.<sup>186</sup>

Larson takes issue with the argument that agricultural employers cannot pass the cost of compensation insurance on to the consumer.

Less convincing is the argument that the farmer cannot, like the manufacturer, add his compensation cost to the price of his product and pass it on to the consumer. This might be true if an isolated state attempted compulsory coverage, but if all states extended coverage to farm labor, there would be no competitive disadvantage so far as the domestic market is concerned. As to the disparity between the domestic and world market, that problem already exists, and will not become essentially different because of a slight change in one domestic agricultural cost factor.<sup>187</sup>

Finally, Larson refutes the argument that farm workers do not need the protection of worker's compensation:

Least convincing of all is the assertion that farm laborers do not need this kind of protection. Whatever the compensation acts may say, agriculture is one of the most hazardous of all occupations. In 1964, of 4,761,000 agricultural workers, 3,000 were fatally injured, while of 17,259,000 manufacturing employees, the number of fatalities was 2,000.<sup>188</sup>

Indiana is one of eleven states that retains a statutory exemption for farm and agricultural labor.<sup>189</sup> As of 1990, thirty-nine worker's compensation jurisdictions covered agricultural workers, with fourteen jurisdictions extending the same coverage as is available to all workers and twenty-five imposing some limitations not applicable to the general class of employees.<sup>190</sup> Limiting conditions vary from state to state. Some jurisdictions exclude family members, others exclude employees earning less than a certain amount.<sup>191</sup> Other jurisdictions protect small farmers who employ less than a certain number of workers.<sup>192</sup>

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184. LARSON, *supra* note 157, at § 53.20.

185. LARSON, *supra* note 157, at § 53.20.

186. LARSON, *supra* note 157, at § 53.20.

187. LARSON, *supra* note 157, at § 53.20.

188. LARSON, *supra* note 157, at § 53.20.

189. LARSON, *supra* note 157, at § 53.10.

190. 4 LARSON, *supra* note 157, at App. A-4-1.

191. LARSON, *supra* note 157, at § 53.10.

192. LARSON, *supra* note 157, at § 53.20.

Similar compromise options might be available to Indiana. For example, a mandatory medical-only provision covering farm workers could be added to the Act. This would guarantee that at least the medical costs of injuries are not passed on to workers, their families, or the taxpayers. Of course, many small farms remain in Indiana, upon which the imposition of mandatory worker's compensation coverage might be overly burdensome. Therefore, a distinction could be drawn allowing small and family farm operations to remain exempt from mandatory coverage, while requiring mandatory coverage of larger, corporate agricultural operations. One basis for this distinction could be the number of employees. Any combination of these options would likely pass constitutional muster under *Collins* by protecting the traditional family farmer from full obligations under the Act.

In conclusion, although the statutory exemption of farm labor from mandatory coverage under the Worker's Compensation Act was not found unconstitutional, the "reasonable relation" of the exemption to distinctions between agricultural and non-agricultural employers may not long survive, if the economic trends discussed above continue. It might be time to reweigh the policy considerations of the farm worker exemption.

### III. CIVIL ACTION AGAINST EMPLOYER'S WORKER'S COMPENSATION CARRIER

In 1992, the Indiana Supreme Court held that a worker could maintain a civil cause of action against an employer's worker's compensation insurance carrier for mishandling a worker's compensation claim, independently of any claim for injuries under the Worker's Compensation Act.<sup>193</sup> In September of 1989, the plaintiff in the instant case, *ITT Hartford Insurance Group v. Trowbridge*,<sup>194</sup> slipped in grease and injured his left ankle while working at a Ponderosa Steakhouse.<sup>195</sup> In December of 1989, the Worker's Compensation Board approved an agreement between the parties for the payment of temporary total disability (TTD) compensation to Trowbridge.<sup>196</sup> ITT then terminated the claimant's compensation on the theory that Trowbridge had pre-existing problems with his ankle.<sup>197</sup> Trowbridge then filed an Application for Adjustment of Claim, the Board's administrative complaint, disputing the termination of TTD payments.<sup>198</sup>

In April 1991 Trowbridge brought suit against his employer's insurance carrier, ITT Hartford Insurance Group, alleging that the carrier "intentionally, willfully, fraudulently, and without just cause" terminated worker's compensation payments.<sup>199</sup> Theories of intentional infliction of emotional distress, constructive fraud, actionable fraud, and intentional deprivation of statutory rights were added in an amended complaint.<sup>200</sup> The defendant moved for dismissal based on the prematurity of the plaintiff's suit, arguing that

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193. See *Stump v. Commercial Union*, 601 N.E.2d 327 (Ind. 1992).

194. 626 N.E.2d 567 (Ind. Ct. App. 1993).

195. *Id.* at 568.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

Trowbridge had failed to exhaust administrative remedies, and that the pending decision of the Worker's Compensation Board as to the compensability of his injuries would be outcome-determinative.<sup>201</sup> The trial court denied dismissal.<sup>202</sup>

The court of appeals held that the employee had to demonstrate resolution of his worker's compensation claim before he could maintain a third-party action against insurer for misconduct in handling his claim.<sup>203</sup> The court said that Trowbridge would have to show, by successfully litigating his administrative claim, that ITT wrongfully denied compensation to which he was entitled.<sup>204</sup> Thus, his civil action theories were inherently dependent upon whether he was entitled to continued compensation.<sup>205</sup> The court also stated that the prematurity defense does not challenge the merits of an action and that Trowbridge would be free to reinstate the action upon maturity.<sup>206</sup> Accordingly, the case was remanded with instructions to dismiss without prejudice.<sup>207</sup>

#### IV. 578 WEEKS OF TTD ALLOWED: *LOWELL V. JORDAN*

In *Lowell Health Care Center v. Jordan*,<sup>208</sup> the court of appeals held that the claimant could recover in excess of 500 weeks of worker's compensation.<sup>209</sup> Lowell Health Care Center appealed the full Worker's Compensation Board's adoption of a single hearing member decision awarding the claimant seventy-eight weeks of temporary total disability and 500 weeks of total permanent disability.<sup>210</sup>

In March 1990, Jordan injured her back while attempting to move a wheelchair-bound patient. Lowell accepted the injury as compensable and paid temporary total disability compensation. The parties eventually disputed the amount of compensation payable. Section 22-3-3-8 of the Indiana Code provides:

With respect to injuries occurring on and after July 1, 1976, causing temporary total disability or total permanent disability for work, there shall be paid to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages, as defined in [Indiana Code] 22-3-3-22, for a period not to exceed five hundred (500) weeks.<sup>211</sup>

At the same time, section 22-3-3-10(b) of the Indiana Code provides:

With respect to injuries in the following schedule occurring on and after July 1, 1989, and before July 1, 1990, *the employee shall receive, in addition to*

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201. *Id.* at 568-69.

202. *Id.* at 569.

203. *Id.* at 570.

204. *Id.* at 569.

205. *Id.*

206. *Id.* at 570.

207. *Id.*

208. 641 N.E.2d 675 (Ind. Ct. App. 1994).

209. *Id.* at 678.

210. *Id.*

211. IND. CODE § 22-3-3-8 (1993) (emphasis added).

*temporary total disability benefits not exceeding seventy-eight (78) weeks on account of the injury, a weekly compensation of sixty percent (60%) of the employee's average weekly wages, not to exceed one hundred eighty-three dollars (\$183) average weekly wages, for the period stated for the injury . . . [f]or injuries resulting in total permanent disability, five hundred (500) weeks.*<sup>212</sup>

Although section 22-3-3-8 limits awards to 500 weeks, section 22-3-3-10(b) provides for recovery of total permanent disability for 500 weeks, *in addition* to temporary total disability of seventy-eight weeks or less. The majority viewed these provisions as facially in conflict, and applied case law to resolve the issue. The court was bound to "adopt the construction which sustains the Act, carries out its purpose, and renders all parts thereof harmonious."<sup>213</sup> Under *State ex rel. Sendak v. Marion County Superior Court*,<sup>214</sup> the *Lowell* court looked to the most recent legislative action on the statutes in question, which was a 1988 amendment to section 22-3-3-10(b) providing the seventy-eight week period of TTD in addition to the 500 weeks payable for total permanent disability.<sup>215</sup> The court gave due deference to the Worker's Compensation Board's determination, and looked to the purpose of worker's compensation, which "is for the benefit of the employee and 'should be liberally construed so as not to negate the Act's humane purposes.'"<sup>216</sup> Thus, the majority affirmed the Full Board's award of 578 weeks of compensation.<sup>217</sup>

Judge Riley dissented, finding no conflict between the two code sections. Riley stated: "As the majority concedes, [Indiana Code] 22-3-3-8 specifically limits a general award of total disability to 500 weeks . . . . Acceptance of the majority's interpretation of [Indiana Code] 22-3-3-10, ignores the unequivocal language of [Indiana Code] 22-3-3-8."<sup>218</sup>

Riley reasoned that the application of section 22-3-3-10 is limited to cases involving scheduled injuries.<sup>219</sup> Because Jordan suffered a non-scheduled back injury, Riley argued that section 22-3-3-10 would not conflict with section 22-3-3-8, but would instead delineate a narrow exception to the general limitation within the operation of section 22-3-3-8.<sup>220</sup> Furthermore, if the majority in *Lowell* is correct that the section 22-3-3-10(b) applies completely to permanent total disability and takes precedence over section 22-3-3-8, then the rate of payment for permanent disability would be sixty percent of the average weekly wage as provided in section 22-3-3-10(b), instead of 66 2/3% as provided in section 22-3-3-8.<sup>221</sup> Although the 1988 amendment to the Act opened up the possibility

212. *Id.* § 22-3-3-10(b) (emphasis added).

213. *Lowell*, 641 N.E.2d at 678 (citing *Holmes v. Review Bd. of Ind. Employment Sec. Div.*, 451 N.E.2d 83, 88 (Ind. Ct. App. 1983)).

214. 373 N.E.2d 145 (Ind. 1978) (holding that courts must look to the most recent legislative action to resolve statutory conflicts).

215. *Lowell*, 641 N.E.2d at 678.

216. *Id.* (citing *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425, 427 (Ind. 1973)).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. IND. CODE §§ 22-3-3-8, -10(b) (1993).

of a construction allowing in excess of 500 weeks, prior to that time, it was generally accepted in the worker's compensation community that awards were limited to 500 weeks of compensation.

#### V. APPEALS FROM DECISIONS OF THE FULL BOARD

A denial of benefits by the Full Board was overturned and remanded by the court of appeals in *Zike v. Onkyo Manufacturing, Inc.*<sup>222</sup> The court of appeals found that: 1) the board applied the improper standard in denying claim; 2) amendments to ODA establishing specific requirements for terminating benefits once begun could not be applied retroactively; and 3) denial of TTD could not be based on finding that claimant's condition became permanent and quiescent.<sup>223</sup>

In 1989, the plaintiff developed hypersensitized pneumonitis from exposure to soldering fumes. The Full Worker's Compensation Board adopted a single hearing member's findings that the workplace exposure caused the plaintiff's illness, and that the condition prevented her from resuming her job at Onkyo.<sup>224</sup> It was found that the symptoms of the condition would subside approximately two weeks after an exposure, and at that point the plaintiff would no longer be incapacitated.<sup>225</sup> The Board found that the plaintiff could work so long as she were not exposed to the soldering fumes, and was therefore not disabled.<sup>226</sup> Accordingly, compensation was denied.<sup>227</sup>

On appeal, Zike argued that the Board erred in denying her claim by treating it as falling under Worker's Compensation rather than the ODA. Zike also contended that the 1991 amendments to the ODA should have been applied in her case. The court agreed that the Board erred in the treatment of her claim, and cited *Spaulding v. International Bakers Services, Inc.*<sup>228</sup> for the premise that the standards for assessing disability under the Worker's Compensation Act and ODA are not identical.<sup>229</sup> The court found that the evidence would not have supported the Board's decision under the proper standard.<sup>230</sup> However, the court found that the amendments to the ODA did not apply to the claim because the claim arose before the amendment was enacted, and the amendment was not intended to apply retroactively.<sup>231</sup>

Section 22-3-7-9(e) of the Indiana Code defines "disability" and "disablement" for purposes of the ODA as follows:

"[D]isablement" means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims

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222. 622 N.E.2d 1055 (Ind. Ct. App. 1993).

223. *Id.* at 1058.

224. *Id.* at 1057.

225. *Id.*

226. *Id.*

227. *Id.*

228. 550 N.E.2d 307, 308-10 (Ind. 1990).

229. *Zike*, 622 N.E.2d at 1057.

230. *Id.* at 1058.

231. *Id.*

compensation or equal wages in other suitable employment, and "disability" means the state of being so incapacitated.<sup>232</sup>

Following *Spaulding*, the court stated that the determination of disability under the Worker's Compensation Act hinges on the capacity to work, whereas under the ODA the sine qua non is the capacity to earn wages.<sup>233</sup> "While barely distinguishable, we are not prepared to declare that these standards will never require different results under appropriate facts."<sup>234</sup> While the evidence heard by the Full Board indicated that the plaintiff was capable of working at some type of employment, it did not support a determination that she could earn equal wages in other suitable employment that she was capable of performing.<sup>235</sup>

Finally, the opinion briefly discussed the applicability of permanence and quiescence under the ODA. Under the Worker's Compensation Act, a finding that the employee's condition is permanent and quiescent—that the injury will neither respond to further medical treatment nor worsen—may lead to the termination of temporary total disability payments. In the present case, the court anticipated that the issue of whether Zike's condition was permanent and quiescent might arise on remand as the reason for Onkyo's termination of TTD. It was noted that Onkyo contended that a determination as to permanence and quiescence is "as fully applicable to claims under the Occupational Diseases Act as it is to the Worker's Compensation Act."<sup>236</sup> The court disagreed, stating "an occupational disease may not lend itself to a determination of permanence and quiescence."<sup>237</sup> Because the record showed that Zike's occupational disease would continue to manifest itself under certain circumstances, the court stated that a finding of permanence and quiescence would be improper.<sup>238</sup> The case was remanded for redetermination.<sup>239</sup>

In *Four Star Fabricators, Inc. v. Barrett*,<sup>240</sup> the court addressed the issue of whether cumulative trauma injuries might be compensable where a degenerative physical condition develops in the workplace and later manifests itself as a debilitating injury outside of the workplace. Barrett worked as a burning machine operator at Four Star from 1984 through 1992. His work required him to maneuver, lift, and cut 100 to 200 pound steel plates, sometimes manually and sometimes with the assistance of pry bars or mechanical lifts. In 1988, Barrett was struck in the back by a piece of equipment and injured while lifting a plate. Barrett was treated and missed three days of work. Later, Four Star experienced a substantial increase in business that resulted in a proportional

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232. IND. CODE § 22-3-7-9(e) (1993).

233. *Zike*, 622 N.E.2d at 1057-58.

234. *Id.* at 1058 (quoting *Spaulding v. International Bakers Svcs., Inc.*, 550 N.E.2d 307, 310 (Ind. 1990)).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. 638 N.E.2d 792 (Ind. Ct. App. 1994).

increase in the amount of lifting and bending Barrett was required to do, and he began experiencing back pain while working.<sup>241</sup>

In April 1992, Barrett felt a sharp pain and a "pop" in his back when he stooped to pick up his infant. He was subsequently diagnosed with a herniated disk and did not return to work until November 1992. Barrett was awarded worker's compensation benefits by the Board.<sup>242</sup> On appeal, Four Star contended that evidence did not support the determination that there was a causal relationship between Barrett's injury and his employment, but that Barrett had merely suffered an unrelated accident at home.<sup>243</sup>

Section 22-3-2-2 of the Indiana Code grants compensation to employees for "personal injury or death by accident arising out of and in the course of employment."<sup>244</sup> "Arising out of" refers to the origin and cause of the injury, while "in the course of" means the time, place and circumstances under which the injury took place.<sup>245</sup> Under these definitions, the court reasoned, Four Star relied too heavily on the fact that the "pop" in Barrett's back occurred at home.<sup>246</sup> Furthermore, under *Yankeetown*, the "by accident" requirement was held to mean "the unexpected consequence of the usual exertion or exposure of the particular employee's job."<sup>247</sup> Thus an injury may be compensable where it "happens day after day on the job and the combination of all the days [produces] the injurious result."<sup>248</sup>

Such "cumulative trauma" injuries may arise "in the course of employment" even though the employee is not working at the time the injury manifests itself.<sup>249</sup> Instead, the facts of each case determine whether an injury arises in the course of employment, and in this case, evidence led to the conclusion that the injury was caused by his employment.<sup>250</sup> He had been injured previously, had performed strenuous repetitive motions at an increased pace thereafter, and three physicians believed that his job was "related" to or "contributed" to his injury.<sup>251</sup>

The court found that evidence was sufficient to show that the plaintiff had suffered injury by accident arising out of and in the course of employment.<sup>252</sup> The existence of the requisite causation of an injury is a question of fact for the Board and will not be disturbed

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241. *Id.* at 794.

242. *Id.*

243. *Id.*

244. IND. CODE § 22-3-2-2 (1993).

245. *Barrett*, 638 N.E.2d at 795 (citing *Fields v. Cummins Fed. Credit Union*, 540 N.E.2d 631, 635 (Ind. Ct. App. 1989)).

246. *Id.*

247. *Id.* (citing *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969, 974 (Ind. 1986)). *See supra* notes 19-37 and accompanying text.

248. *Id.* (citing *Union City Body Co. v. Lambdin*, 569 N.E.2d 373, 374 (Ind. Ct. App. 1991)).

249. *Id.*

250. *Id.* at 796.

251. *Id.*

252. *Id.*

if based on the evidence.<sup>253</sup> Though one doctor stated his opinion in terms of "probability" that the injury was work-related, the opinion was sufficient to support the Board's factual conclusion.<sup>254</sup>

#### CONCLUSION

The cases discussed above, especially the Indiana Supreme Court decisions addressing the exclusive remedy provision, will affect the way attorneys approach civil and administrative claims arising out of work-related injuries. The low compensation levels available under the Indiana Worker's Compensation Act will continue to generate civil claims by injured workers. However, the court has clearly drawn the lines as to what claims against employers might be heard outside of the Worker's Compensation Act.

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253. *Id.*

254. *Id.* at 796-97.