

# RECENT CASES IN WORKER'S COMPENSATION LAW

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## INTRODUCTION

This Article surveys recent cases arising under the Indiana Worker's Compensation Act<sup>1</sup> and the Indiana Occupational Diseases Act<sup>2</sup> (ODA) in Indiana and Federal courts. We draw not only on case law generated by the litigation of worker's compensation claims, but on a range of opinions arising out of civil actions in which the Act has become an issue.

Worker's compensation acts are a compromise between employers and employees designed to provide injured workers with a quick administrative remedy for work-related injuries while shielding employers from tort liability. Prior to the enactment of worker's compensation laws, employees could sue employers for work-related personal injuries. However, employees seldom prevailed at common law because employers invoked defenses such as assumption of risk and the fellow servant rule.<sup>3</sup>

Indiana's current worker's compensation law was enacted in 1929.<sup>4</sup> Under the Act, covered employers, with the exception of the state, other governmental entities and banking associations,<sup>5</sup> are required to carry insurance on worker's compensation liability.<sup>6</sup> Employers may be authorized by the Worker's Compensation Board (Board) to self-insure.<sup>7</sup>

The compensability of injuries under the Act is conditioned on five factors:

- 1) covered employment relationship,
- 2) personal injury or death,
- 3) by accident,
- 4) arising out of the employment,
- 5) arising in the course of employment.<sup>8</sup>

Where the above elements are met, the employee is entitled to necessary medical treatment,<sup>9</sup> statutorily prescribed compensation for lost wages,<sup>10</sup> and scheduled

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1. IND. CODE §§ 22-3-1-1 to 22-3-6-3 (1993 & Supp. 1996).

2. *Id.* § 22-3-7.

3. See 1 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 4.30 (1990).

4. Act of Mar. 14, 1929, ch. 172, 1929 Ind. Acts 536.

5. IND. CODE § 22-3-2-5 (1993).

6. *Id.* § 22-3-5-1(a)(1).

7. See *id.* § 22-3-5-3(a).

8. See *id.* § 22-3-2-2(a).

9. See *id.* § 22-3-3-4(a).

10. See *id.* § 22-3-3-8 (Temporary Total Disability, Permanent Total Disability); *id.* § 22-3-3-9 (Temporary Partial Disability).

compensation for permanent impairment.<sup>11</sup> In such cases, the Board's jurisdiction is exclusive, barring civil suits against employers for personal injury or death arising out of and in the course of employment. This exclusivity does not bar the employee from pursuing civil actions against third party tortfeasors.<sup>12</sup>

If a dispute arises over the compensability of a claim, the employee may file the Application for Adjustment of Claim<sup>13</sup> (Application) entitling the employee to a hearing before a member of the Board,<sup>14</sup> whose decision may be reviewed by the full Board.<sup>15</sup> Decisions of the full Board may be reviewed by the Indiana Court of Appeals.<sup>16</sup>

## I. EXCLUSIVE REMEDY CASES

### A. *Employee Suits Against Employers*

The exclusive remedy provision of the Act<sup>17</sup> is a perennial source of litigation, and was the subject of four significant cases during the survey period. As courts have noted since *Evans v. Yankeetown Dock Corp.*,<sup>18</sup> the provision represents "a 'quid pro quo in which sacrifices and gains of employees and employers are to some extent put in balance.'"<sup>19</sup> Although individuals injured in the course of employment are largely assured of medical treatment and compensation, employers are protected from the burdens of vexatious civil litigation. The limitation of awards to medical expenses and statutorily-prescribed compensation for lost wages and permanent impairment is perhaps at the root of plaintiff's attempts to circumvent the exclusive remedy of worker's compensation.

1. *Tacket v. General Motors Corp.*<sup>20</sup>—*Tacket* addressed two significant types of challenges to the Act's exclusivity provision. The first challenge involved intentional torts and the second challenge involved claims of purely emotional damages.<sup>21</sup> In so doing, *Tacket* provided an important explanation and application of what it termed "the *Baker* trilogy"<sup>22</sup> in the context of a wrongful discharge claim.

11. See *id.* § 22-3-3-10(c).

12. See *id.* § 22-3-2-13; *Stump v. Commercial Union*, 601 N.E.2d 327, 330 (Ind. 1992); *Williams v. R.H. Marlin, Inc.*, 656 N.E.2d 1145, 1150 (Ind. Ct. App. 1995).

13. The Application (Indiana State Form 29109) is the functional equivalent of a complaint in civil procedure.

14. IND. CODE § 22-3-4-5 (1993).

15. *Id.* § 22-3-4-7.

16. *Id.* § 22-3-4-8.

17. *Id.* § 22-3-2-6.

18. 481 N.E.2d 969 (Ind. 1986).

19. *Hurd v. Monsanto Co.*, 908 F. Supp. 604, 609 (S.D. Ind. 1995) (citing 2 LARSON, *supra* note 3, § 65.10). See also *Evans*, 481 N.E.2d at 971.

20. *Tacket v. General Motors Corp.*, 93 F.3d 332 (7th Cir. 1996).

21. *Id.* at 333-34.

22. *Id.* at 335 (citing *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271 (Ind. 1994)).

The "*Baker* trilogy" refers to three cases decided by the Indiana Supreme Court in 1994.<sup>23</sup> *Baker*, while rejecting the term "intentional tort exception" as previously coined in *National Can*,<sup>24</sup> nonetheless reaffirmed that intentional torts fall outside the Act's purview. The *Baker* court reasoned that, because the Act refers to injuries that occur "by accident," and because an injury that is intended by the employer or the employee cannot be said to be accidental, "intentional torts of an employer are necessarily beyond the pale of the act."<sup>25</sup> Moreover, *Baker* found that the intent must be that of the corporate entity, not merely a supervisor, manager or foreman.<sup>26</sup>

In *Foshee v. Shoney's, Inc.*,<sup>27</sup> the second case of the *Baker* trilogy, the court rejected a claimant's argument that she had met this "intent" requirement by alleging that her employer had "'allowed' events to transpire which posed 'an imminent likelihood of injury or death to the Plaintiff and where this injury or death was substantially certain to occur.'"<sup>28</sup> The court interpreted *Baker* to impose a clear two-part test: "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>29</sup>

*Perry*,<sup>30</sup> the third case in the trilogy, demonstrated that a claimant may escape the Act's exclusivity provision if certain nonphysical injuries are alleged.<sup>31</sup>

The *Tacket* court applied both the "intent" and the "emotional injury" lessons of the *Baker* trilogy. *Tacket's* litigation odyssey commenced after someone painted "Tacket Tacket What a Racket" on the wall of the GM assembly plant where Tacket worked. As the Seventh Circuit put it, "[t]o say that litigation ensued would be an understatement."<sup>32</sup> Two weeks after Tacket's original defamation suit against GM ended with a directed verdict in the employer's favor, the company fired Tacket. Tacket then sued in federal court for wrongful discharge, alleging intentional infliction of emotional distress.

The district court granted the employer's summary judgment motion on the ground that Tacket's claim was barred by the exclusivity provision of the Act.<sup>33</sup>

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23. For a complete discussion on these three cases, see G. Terrence Coriden & Daniel G. Foote, *1994 Survey of Recent Developments in Worker's Compensation*, 28 IND. L. REV. 1141 (1995).

24. *National Can Corp. v. Jovanovich*, 503 N.E.2d 1224 (Ind. Ct. App. 1987), *overruled by Baker*, 637 N.E.2d at 1273.

25. *Baker*, 637 N.E.2d at 1273. "Intentional" was defined as "nothing short of deliberate intent to inflict an injury, or actual knowledge that any injury is certain to occur, will suffice. See *Tacket*, 93 F.3d at 334 (quoting *Baker*, 637 N.E.2d at 1275).

26. See *Tacket*, 93 F.3d at 334 (citing *Baker*, 637 N.E.2d at 1275).

27. 637 N.E.2d 1277 (Ind. 1994).

28. *Id.* at 1279 (quoting plaintiff's complaint).

29. *Id.* at 1281.

30. *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282 (Ind. 1994).

31. *Perry*, 637 N.E.2d at 1288-89.

32. *Tacket*, 93 F.3d at 333.

33. *Id.*

On appeal, the Seventh Circuit held that Tacket's claim failed because he had shown neither that GM was the "alter ego" of the supervisors who had fired him, nor that there was any evidence of a corporate policy to fire employees who file a lawsuit.<sup>34</sup> "Absent any such evidence, Tacket cannot establish that General Motors, as a corporate entity distinct from any of its managers, intended to injure him."<sup>35</sup>

However, the Seventh Circuit found that the third case of the Baker trilogy—*Perry*—did provide "a thin reed on which [Tacket's] claim remains afloat."<sup>36</sup> Like the plaintiff in *Perry*, Tacket alleged emotional injuries rather than an impairment, disability, or physical injury within the meaning of the Act. Therefore, the court reinstated Tacket's claim for non-physical injuries, and noted that recovery for any physical injuries was still solely within the province of the Indiana Worker's Compensation Board.<sup>37</sup>

What *Tacket* does not address directly is the applicability of the Act to nonphysical "stress" injuries arising out of employment. A number of cases, most importantly *Hanson v. Von Duprin*,<sup>38</sup> have held that such harms are not necessarily outside the Act's coverage. *Perry* did not specifically overrule these cases, but may raise questions as to the compensability of non-physical "stress" claims coverage under the Act, to the extent such claims were compensable prior to *Perry*.

2. *Hurd v. Monsanto Co.*<sup>39</sup>—In *Hurd*, Westinghouse employees attempted to bring a class action lawsuit against their employer and Monsanto, the manufacturer of PCBs,<sup>40</sup> alleging that the companies had deliberately exposed them to dangerous chemicals. Class certification was denied, but two employees continued the suit.<sup>41</sup> Both defendants filed motions to dismiss. The employer's motion was based on the exclusivity provisions in both the Act<sup>42</sup> and the ODA.<sup>43</sup> The trial court granted the motions and the plaintiffs appealed.

Both plaintiffs had worked at Westinghouse for over thirty years. During that time, plaintiffs were exposed to PCBs, which are carcinogenic. Plaintiffs alleged that the defendants had intentionally withheld information regarding the hazards of working with PCBs. Both plaintiffs had physical symptoms which they linked to the exposure. The suit included counts for fraud, conversion, battery, breach

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34. *Id.*

35. *Id.* at 335.

36. *Id.*

37. *Id.*

38. *Hanson v. Von Duprin, Inc.*, 507 N.E.2d 573 (Ind. 1987).

39. 908 F. Supp. 604 (S.D. Ind. 1995).

40. Polychlorinated biphenyl dielectric fluid.

41. *Hurd*, 908 F. Supp. at 607.

42. IND. CODE § 22-3-2-6 (1993).

43. *Id.* § 22-3-7-10. The ODA did not apply to the facts involved because the ODA requires a showing of disability, or inability to work. *Id.* "Disabled" means that an employee cannot work, but in this case both employees continued to work. Therefore, the court found that the ODA did not apply to the facts of this case. *Hurd*, 908 F. Supp. at 609.

of contract, and intentional harm, and sought punitive damages against Westinghouse.

Plaintiffs argued simply that "a cause of action based on an intentional tort does not fall under the preview [sic] of the Worker's Compensation Act."<sup>44</sup> The court responded to plaintiffs' assertion by noting that intentional torts are outside of the Act only when the employer "intends to inflict an injury or has actual knowledge that an injury is certain to occur."<sup>45</sup> However, plaintiffs did not show that Westinghouse intended to inflict any injury nor had knowledge that an injury was certain to occur.<sup>46</sup>

Plaintiffs alleged in their complaint that Westinghouse kept information from its employees with the knowledge that injury was certain to occur. However, the court addressed this allegation by reviewing other facts alleged in the complaint. For instance, the complaint stated that injuries from PCBs are "likely" and that exposure to PCBs increases the "risks" associated with the job.<sup>47</sup> Therefore, the court concluded that Plaintiffs had failed to establish that Westinghouse had knowledge that injury was certain to occur.<sup>48</sup>

In essence, the court declined to broaden the standard of intent and knowledge established in *Baker* to include situations where the injury is "likely" to occur or where the "risks" of injury are increased.<sup>49</sup> The court held that an employer's knowledge that an injury is substantially certain to occur is insufficient.<sup>50</sup> Ultimately, the court adhered to the standard of *Baker* that the employer must have known that injury was "certain" to occur.<sup>51</sup>

3. *Campbell v. Eckman/Freeman Associates*.<sup>52</sup>—In *Campbell*, the court decided that a "rehabilitation specialist" hired by the employer was not shielded by the exclusive remedy provision of the Act. Campbell injured his arm at work and received medical benefits and temporary total disability compensation. The employer's insurance carrier hired a rehabilitation specialist whose duty is to "assist and monitor the care given to injured employees while the employee is receiving medical care and rehabilitation."<sup>53</sup> After Campbell's worker's compensation claim was settled, he filed a negligence suit alleging that the rehabilitation specialist and his treating physician<sup>54</sup> had caused nerve and muscle

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44. *Hurd*, 908 F. Supp. at 610.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Campbell v. Eckman/Freeman & Assocs.*, 670 N.E.2d 925 (Ind. Ct. App. 1996), *trans. denied*.

53. *Id.* at 927.

54. The pro se plaintiff initially filed the Indiana Department of Insurance form complaint for medical malpractice. The physician was dismissed from the action due to plaintiff's failure to submit the case to a medical review panel. Eckman/Freeman did not move for dismissal on the

damage to his shoulder and arm, which resulted in pain and suffering, loss of wages, and mental anguish.

Eckman/Freeman's summary judgment motion was granted by the trial court, and Campbell appealed. Eckman/Freeman argued that because it was hired by the employer's insurance carrier, it was immune from a negligence suit by Campbell because of the exclusivity provision of the Act.<sup>55</sup> The court recognized that the Act does not allow actions against third party tortfeasors when the third party is the employee's employer or co-worker.<sup>56</sup>

In holding that rehabilitation specialists are not exempt from liability for negligence, the court relied on *Stump v. Commercial Union*,<sup>57</sup> which held that the exclusive remedy provision does not bar an employee's action against the employer's worker's compensation carrier for injuries proximately caused by the carrier's tortious conduct.<sup>58</sup> Although the court noted that *Campbell* did not involve the unconscionable breach of a duty that occurred in *Stump*, the court did not believe that the Act was intended to shield third parties from liability for negligence arising out of their dealings with injured workers.<sup>59</sup>

In examining the merits of the plaintiff's negligence claim, however, the court found that Eckman/Freeman did not owe a duty to the plaintiff.<sup>60</sup> Accordingly, the result below was affirmed.<sup>61</sup>

4. *Gonzalez v. Clinton*.<sup>62</sup>—The *Gonzalez* decision illustrates the difficulty facing a plaintiff who hopes to escape the exclusivity of the Act. Alexandra Gonzalez was a passenger in the car her husband was driving when the car was struck from behind by Clinton, a co-worker. Gonzalez attempted to circumvent the exclusivity provision of the Act in order to sue Clinton.

Gonzalez, her husband and Clinton were all employees of Inland Steel. Clinton and Mr. Gonzalez had just completed their work shift and were leaving Inland's parking lot when the accident occurred. Mrs. Gonzalez originally testified that she was not scheduled to work that day, but instead, had come to the plant to pick up her husband. However, Mrs. Gonzalez later changed her testimony to add that she was at a work-related meeting prior to meeting her husband. Later, she admitted that she had not attended a meeting, but had instead stopped to visit a co-worker about a personal matter.

On appeal, Mrs. Gonzalez argued that the trial court should not have

same grounds because it is not a health care provider as defined under the Medical Malpractice Act.

55. *Id.* at 929. The court first noted that a summary judgment motion is inappropriate where the Act's exclusivity provision is raised as a bar to plaintiff's complaint. *Id.* (citing *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994)).

56. *Eckman/Freeman*, 670 N.E.2d at 930.

57. 601 N.E.2d 327 (Ind. 1992).

58. *Id.* at 332. *Stump* specified the "tortious conduct" as a gross negligence, intentional infliction of emotional distress, or constructive fraud. *See id.* at 333.

59. *Eckman/Freeman*, 670 N.E.2d at 931-32.

60. *Id.* at 934.

61. *Id.* at 935.

62. 663 N.E.2d 1157 (Ind. Ct. App. 1996).

dismissed her claim because she was engaged in a personal mission and was thus outside the Act. The court noted that if an employee is not engaged in work for the employer, but is solely on a personal mission on the employer's premises, the injury is not covered by the Act because it does not arise out of the employment.<sup>63</sup> However, more importantly, the court held that once a defendant raises the exclusivity provision of the Act, the employee has the burden to prove that the claim falls outside of the Act.<sup>64</sup>

Mrs. Gonzalez had the burden of proving that she was engaged in a personal mission, and that her claim was therefore outside of the Act. In this regard, the court found that Mrs. Gonzalez had failed to meet her burden. The court found that Mrs. Gonzalez's statements regarding her purpose at the plant were inconsistent and unreliable.<sup>65</sup> Therefore, the court concluded that Mrs. Gonzalez had not sustained her burden of proving that she was on a personal mission, and the trial court was affirmed.<sup>66</sup>

### B. Suits Against the Employer's Compensation Carrier

1. *Background: Stump v. Commercial Union.*<sup>67</sup>—In 1992, the Indiana Supreme Court held that the exclusive remedy provision of the Act did not bar an action against an employer's compensation insurance carrier for injuries proximately caused by the the carrier's fraud, gross negligence, or intentional infliction of emotional distress.<sup>68</sup> The court cited authority in which injuries allegedly caused by the carrier did not arise out of the employment.<sup>69</sup> The court refused to "absolve worker's compensation insurance carriers . . . of their responsibilities in the event of additional injuries or harm proximately caused by their actionable conduct."<sup>70</sup>

The *Stump* decision has resulted in a series of state and federal cases exploring the scope of a worker's compensation insurer's tort liability to injured workers.<sup>71</sup>

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63. *Id.* at 1158 (citing *Lona v. Sosa*, 420 N.E.2d 890, 894-95 (Ind. Ct. App. 1981)).

64. *Id.*

65. *Id.*

66. *Id.*

67. 601 N.E.2d 327 (1992).

68. *Id.* at 332.

69. *Id.* at 330 (citing *Baker v. American States Ins. Co.*, 428 N.E.2d 1342 (Ind. Ct. App. 1981)).

70. *Id.* at 331.

71. *See* *ITT Hartford Ins. Group v. Trowbridge*, 626 N.E.2d 567 (Ind. Ct. App. 1993) (holding that claimant who sued carrier under theories of intentional infliction of emotional distress, fraud, and intentional deprivation of statutory rights must demonstrate successful resolution of his worker's compensation claim before proceeding against the carrier); *see also* *Connecticut Indemnity Co. v. Bowman*, 652 N.E.2d 880 (Ind. Ct. App. 1995) (holding that the Board's denial of a motion for bad faith attorney fees under Indiana Code section 22-3-4-12 did not estop a claimant from litigating the issue of carrier bad faith in a civil claim, where the Board had not decided the fact issue of carrier bad faith because the claimant had brought his motion after the

2. *Rayford v. Lumberman's Mutual Casualty Co.*<sup>72</sup>—*Rayford* indicates the care plaintiffs must take in demonstrating that the injuries complained of are caused by the insurance carrier and that the action is not merely an attempt to obtain civil damages for a work-related injury. In January 1992, Rayford suffered a compound and comminuted fracture of his right femur while working. Rayford received medical benefits and TTD compensation. He also attended psychological counseling on the advice of his lawyer and requested that Lumberman's cover the bills. Lumberman's paid for five sessions. After the fifth session, the counselor determined that Rayford exhibited suicidal tendencies, and he furnished a letter stating that Rayford needed further treatment.

Lumberman's refused to pay for additional counseling. In September 1992, Rayford attempted suicide. He was hospitalized and Lumberman's suspended TTD compensation and refused to pay for psychological services. At the time, Rayford did not file an Application with the Board.

Rayford's diversity suit alleged that the carrier's failure to provide psychological services directly resulted in his suicide attempt and constituted gross negligence. The insurer moved for dismissal, arguing that the suit was barred by the exclusive remedy provision. The court found that evidence indicated that Rayford's psychological problems resulted from the workplace accident and therefore his exclusive remedy was the Act.<sup>73</sup> Rayford's remedy, therefore, was to file an Application with the Board arguing entitlement to further medical benefits under the Act.<sup>74</sup>

This case demonstrates that plaintiffs seeking recourse for alleged injuries in the federal courts must take care to establish an independent injury proximately caused by the insurance carrier. The court apparently did not consider whether Rayford's psychological problems, although traceable to a work-related injury, were tortiously exacerbated by the carrier's behavior.

3. *Fleischmann v. Wausau Business Insurance Co.*<sup>75</sup>—The plaintiff in *Fleischmann* put a new spin on suits against worker's compensation insurance carriers, alleging that Wausau's negligent safety inspection of its insured's facility was the cause of her work-related injury. Like *Rayford*, *Fleischmann* highlights the burden on plaintiffs to establish an independent injury caused by the carrier that is distinguishable from the underlying injury arising out of and in the course of employment.

From August 1989 to August 1990 Wausau insured Styline Industries for worker's compensation liability. Under the policy, Wausau was entitled to conduct "safety surveys" at Styline plants, although by contract the surveys were not undertaken "to perform the duty of any person to provide for the health and safety of [Styline's] employees or the public."<sup>76</sup> In May 1990, a Wausau safety

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parties had stipulated issues to be decided by the Board).

72. 44 F.3d 546 (7th Cir. 1995).

73. *Id.* at 548.

74. *Id.* at 549.

75. 671 N.E.2d 473 (Ind. Ct. App. 1996).

76. *Id.* at 475.

consultant inspected one of Styline's plants and recommended several safety improvements. In June 1990, Fleischmann lost her hand when it was pulled into a laminating machine that she was cleaning. Worker's compensation liability was accepted, and medical benefits and compensation were paid.

Subsequently, Fleischmann filed suit against Wausau, alleging that Wausau's negligence in conducting safety inspections at Styline should have revealed the safety problem that proximately caused her injury. Wausau filed a motion for summary judgment arguing that 1) the trial court lacked subject matter jurisdiction because of the exclusive remedy provision of the Act,<sup>77</sup> and 2) that Wausau was statutorily immune from liability. Fleischmann filed a cross-motion for summary judgment requesting that the trial court find that Wausau was not entitled to immunity. Both motions were denied, and an interlocutory appeal ensued.

Addressing the exclusivity issue, the court pointed out that the Act defines an employer to include the "employer's insurer so far as applicable."<sup>78</sup> Thus, while recognizing the *Stump* decision, the court reasoned that the tort liability of a carrier is limited by the exclusive remedy provision for accidental injuries arising out of and in the course of employment.<sup>79</sup> If a civil action against a carrier is to go forward, the plaintiff has the burden of showing that the claim falls outside of the coverage of the Act.<sup>80</sup>

The court found that Fleischmann's claim was based solely on an accidental injury arising out of and in the course of employment and that she had not met her burden of showing that her injuries were caused by anything other than her work accident. Accordingly, the court reversed the denial of summary judgment.<sup>81</sup>

## II. LIMITATIONS PERIOD AND THE JOURNEY'S ACCOUNT STATUTE

In July 1996, the court of appeals held that the Journey's Account Statute<sup>82</sup>

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77. On appeal, the court noted that a summary judgment motion which raises the issue of a trial court's lack of subject matter jurisdiction is properly before the court as a motion to dismiss, and will be treated as such under *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994). *Fleischmann*, 671 N.E.2d at 475.

78. *Fleischmann*, 671 N.E.2d at 476 (quoting IND. CODE § 22-3-6-1(a) (1993)).

79. *Id.*

80. *See id.* (citing *Campbell v. Eckman/Freeman & Assocs.*, 670 N.E.2d 925, 930 (Ind. Ct. App. 1996), *trans. denied*).

81. *Id.* at 477.

82.

(a) This section applies if a plaintiff commences an action and the plaintiff fails in the action from any cause except:

- (1) negligence in the prosecution of the action;
- (2) the action abates or is defeated by the death of a party; or
- (3) a judgment is arrested or reversed on appeal.

(b) If subsection (a) applies, a new action may be brought not later than the later of:

- (1) three (3) years after the date of such determination under subsection (a); or
- (2) the last date an action could have been commenced under the statute of

applies in worker's compensation cases.<sup>83</sup> That holding may allow worker's compensation plaintiffs additional time to file an Application with the Board in the event an action in another forum has abated.

Cox was employed as a welder for American Aggregates from April through October 1986. In March 1987, Cox, alleging intentional torts, filed a lawsuit against his employer. The court held that the claim was barred by the exclusive remedy provision.<sup>84</sup> Cox then filed an Application with the Board. American Aggregates argued that the Application was untimely, and the Board granted dismissal under the Act's two-year limitations statute.<sup>85</sup>

On appeal, the court held that Cox's Application was saved from dismissal by the Journey's Account Statute.<sup>86</sup> The court applied the *Vesolowski*<sup>87</sup> analysis:

In order to claim the saving power of the Journey's Account Statute, a plaintiff must have filed his original cause of action timely. Moreover, the decision ending the original action must not have been on the merits. Finally, the plaintiff must meet the conditions set forth in the Journey's Account Statute.<sup>88</sup>

At the time the statute of limitations dispute arose between Cox and his employer, the statute allowed five years to refile in a different forum in cases where the plaintiff's action failed for certain reasons.

It should be noted, however, the legislature amended the Journey's Account Act in 1993 to limit new filings to three years from the date the original action abated or the limitations period applicable in the new forum, whichever occurs later.<sup>89</sup> The holding in *Cox v. American Aggregates Corp.* may leave plaintiffs with an extended time frame for filing an Application with the Board after a civil suit filed against the employer is found barred by the exclusive remedy provision of the Act.

limitations governing the original action; and be considered a continuation of the original action commenced by the plaintiff.

IND. CODE § 34-1-2-8 (1993).

83. *Cox v. American Aggregates Corp.*, 667 N.E.2d 215, 218 (Ind. Ct. App. 1996).

84. *See Cox v. American Aggregates Corp.*, 580 N.E.2d 679 (Ind. Ct. App. 1991).

85. *Cox*, 667 N.E.2d at 216. "The right to compensation . . . shall be forever barred unless within two (2) years after the occurrence of the accident, or if death results therefrom, within two (2) years after such death, a claim for compensation shall be filed with the worker's compensation board." IND. CODE § 22-3-3-3 (1993).

86. *Cox*, 667 N.E.2d at 218.

87. *Vesolowski v. Repay*, 520 N.E.2d 433 (Ind. 1988).

88. *Cox*, 667 N.E.2d at 218 (citing *Vesolowski*, 520 N.E.2d at 435).

89. Act of Apr. 27, 1993, No. 239, 1993 Ind. Acts 4454 (codified at IND. CODE § 34-1-2-8 (1993)).

## III. TEMPORARY PARTIAL DISABILITY

*Kohlman v. Indiana University*<sup>90</sup> established that temporary partial disability compensation is unavailable under the Act after the employee reaches maximum medical improvement.<sup>91</sup> Temporary partial disability (TPD) compensation is designed to encourage employers and employees to agree to light or part-time duty during the healing period for a work-related injury. TPD makes up a portion of the difference between the employee's light duty wage and the employee's pre-injury wage. The issue in *Kohlman* is whether the Act provides temporary partial disability after the employee has reached maximum medical improvement.

Kohlman was employed as a bus driver for Indiana University when she hit a pot hole. The impact resulted in injuries to Kohlman's neck, wrists, hand, arm, and shoulder. Kohlman's claim was accepted as compensable under the Act, and she received temporary total disability compensation and a four percent permanent partial impairment rating, which equated to \$2000. Because of her injuries, Kohlman's treating physician and personal physician conditioned her release to return to work on restrictions that prevented her from driving the school bus. Indiana University provided Kohlman with a job as a receptionist, which was within her restrictions but paid a lower salary.

At the single hearing member level, both parties stipulated that the only issue was whether Kohlman could recover temporary partial disability because of the continuing wage loss she incurred as a result of the permanent restrictions placed upon her from the treating physician. Kohlman argued that a \$2000 impairment award did not even cover one year of the wage loss difference. The single hearing member found that Kohlman could not recover temporary partial disability after she had already reached maximum medical improvement and recovered an award for impairment. The full board affirmed the decision.

The court of appeals noted that no provision in the Act indicates that an employer is obligated to pay temporary partial disability benefits after the plaintiff's condition is permanent and quiescent.<sup>92</sup> Accordingly, the court of appeals affirmed the Board's finding.<sup>93</sup> In so doing, the court expanded its holding in *Covarubias*,<sup>94</sup> which held that the plaintiff's inability to return to his original job did not justify an award of continuing temporary total disability compensation when the plaintiff had reached maximum medical improvement and had received an award for permanent impairment.<sup>95</sup>

In response to the plaintiff's contention that the \$2000 for permanent partial impairment was unfair compared to the \$10,000 annual wage loss she suffered

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90. 670 N.E.2d 42 (Ind. Ct. App. 1996).

91. See IND. CODE § 22-3-3-9 (1993).

92. *Kohlman*, 670 N.E.2d at 43-44.

93. *Id.* at 45.

94. *Covarubias v. Decatur Casting*, 358 N.E.2d 174 (Ind. App. 1976).

95. *Id.* The *Covarubias* court stated that "[o]nce the injury has reached a permanent and quiescent state, . . . the treatment period ends, and the extent of the permanent injury is assessed for compensation purposes." *Id.* at 176.

each year, the court stated that the Act was not intended to provide compensation to cover actual wage loss.<sup>96</sup> Instead, the Act is a series of carefully balanced compromises designed to share the social costs of work injuries.<sup>97</sup>

As Professor Larson stated, "A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he or she has lost; it gives claimant a sum which, added to his or her remaining earning ability, if any, will presumably enable claimant to exist without being a burden to others."<sup>98</sup>

#### IV. APPEALS FROM DECISIONS OF THE FULL WORKER'S COMPENSATION BOARD

Although most of the reported decisions interpreting provisions of the Act during this survey period arose out of civil litigation, two reported opinions were generated by appeals from the Full Worker's Compensation Board.

##### A. Sneed v. Associated Group Insurance<sup>99</sup>

*Sneed* established that an assignment of errors, although required by the Act, is no longer necessary due to changes in the Indiana Appellate Rules.<sup>100</sup>

Sneed was employed by Associated Group when she allegedly injured her knee in the company cafeteria. Sneed failed to report her fall until nearly two years after the occurrence, alleging that she had experienced a memory lapse. The single hearing member found in favor of the employer on the grounds that there was no medical documentation around the time of the fall and that the employee's explanation for failing to report the alleged injury was not credible. The full board affirmed the decision. Sneed appealed, but did not file an assignment of errors as required by statute.<sup>101</sup>

Effective February 1, 1996, the Indiana Supreme Court amended the appellate rules involving administrative agencies to eliminate the assignment of errors requirement.<sup>102</sup> The appellate court acknowledged a conflict between the supreme court's order and the statute requiring an assignment of errors, but decided that the change was "ameliorative" and "designed to remove a procedural impediment that has thwarted numerous litigants in their efforts to invoke our jurisdiction to review

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96. *Kohlman*, 670 N.E.2d at 44.

97. *Id.*

98. LARSON, *supra* note 3, § 2.50.

99. *Sneed v. Associated Group Ins.*, 663 N.E.2d 789 (Ind. Ct. App. 1996).

100. *Id.* at 794.

101. "An assignment of errors . . . shall be sufficient to present . . . the sufficiency of the evidence to sustain the findings of facts." IND. CODE § 22-3-4-8(d) (1993).

102.

It shall be unnecessary to file a separate assignment of errors in the Court of Appeals to assert that the decision of any board, agency, or other administrative body is contrary to law. All issues and grounds for appeal appropriately preserved before the board, agency of other administrative body may be initially address in the appellate brief.

IND. APP. R. 4(C).

agency decisions."<sup>103</sup> Accordingly, the court applied the new appellate rule, which abolished the requirement of a separate filing for the assignment of errors to further the policy of deciding a case upon the merits whenever possible.<sup>104</sup>

The court proceeded to decide the case on the merits finding evidence of probative value capable of sustaining the Board's conclusions the court affirmed the decision of the Full Worker's Compensation Board.<sup>105</sup>

### B. *Hancock v. Indiana School for the Blind*<sup>106</sup>

In *Hancock*, the court of appeals addressed the discretion of the Board to choose between or to "average" permanent partial impairment ratings submitted by physicians. In practice, some hearing members are willing to average ratings, but others are reluctant to do so. The *Hancock* court apparently approved of a Board award that seemed to be based on a compromise of three medical reports, holding merely that there must be "competent evidence of probative value to support the Board's findings and that the findings must be sufficient to support the decision."<sup>107</sup>

Hancock sustained injuries when he tripped and fell at work. As a result of the accident, Hancock received several impairment ratings from several different physicians. One doctor assigned a 60% whole body impairment rating, another doctor assigned Hancock a 6% impairment to his lower extremity, and a third doctor gave him a 10% rating for his spine. The third doctor opined that the 10% spine rating and the 6% lower extremity rating should be added to make a 16% whole body rating. The single hearing member, faced with these ratings ranging from 16% to 60%, ultimately decided on a 25% whole body rating.

On appeal, the court held that the Board's finding of a 25% rating was within the evidence presented at the hearing and was sufficient to support the Board's decision.<sup>108</sup> Thus, the assignment of an impairment rating need not be based upon the specific rating of one physician.

## V. PLANNING FOR WORKER'S COMPENSATION LIABILITY

### A. *McQuade v. Draw Tite, Inc. Revisited*

The decision of the court of appeals in the case of *McQuade v. Draw Tite, Inc.* was reversed by the Indiana Supreme Court in December 1995.<sup>109</sup> The supreme court refused to entertain the defendant's request that the court "reverse pierce the corporate veil" to find that a separately-incorporated parent company was shielded

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103. *Sneed*, 663 N.E.2d at 796.

104. *See, e.g., Maldonado v. State*, 355 N.E.2d 843, 848 (Ind. 1976).

105. *Sneed*, 663 N.E.2d at 797.

106. 651 N.E.2d 342 (Ind. Ct. App. 1995), *trans. denied*.

107. *Id.* at 344.

108. *Id.*

109. 638 N.E.2d 818 (Ind. Ct. App. 1994), *rev'd*, 659 N.E.2d 1016 (Ind. 1995). The court of appeals decision was discussed in Coriden & Foote, *supra* note 27, at 1151-52.

by the exclusive remedy provision from a civil suit by a subsidiary's employee.<sup>110</sup> McQuade had argued that her employer's parent corporation was amenable to suit as a third party under section 22-3-2-13 of the Indiana Code.

In 1992, McQuade was injured while working for her employer, Mongo Electronics ("Mongo"), a subsidiary of Draw-Tite, Inc. ("Draw-Tite"). McQuade pursued her worker's compensation remedy against Mongo and also filed suit against Draw-Tite, alleging that it had assumed and negligently breached a duty of care for her job safety. The trial court granted summary judgment for Draw-Tite,<sup>111</sup> ruling that the exclusive remedy provision barred the suit, and the court of appeals affirmed.<sup>112</sup>

The court of appeals had indulged the defendant's request to "reverse pierce" the corporate veil, finding that its activities were so interconnected with Mongo's operations that they should be considered one employing entity for purposes of the Act.<sup>113</sup> The Indiana Court of Appeals adopted a synthesis of two rules on the issue. First, in *Reboy v. Cozzi Iron & Metal*,<sup>114</sup> the Seventh Circuit had held that separate corporate identities could 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>115</sup> The court of appeals also looked to a Michigan case, *Verhaar v. Consumers Power Co.*<sup>116</sup> which listed several factors to be applied in "reverse piercing the corporate veil," 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 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>117</sup> Applying the rule, the court of appeals held the separate corporate identities should be disregarded and held McQuade's suit barred by the exclusivity provision.<sup>118</sup>

The supreme court reversed,<sup>119</sup> adopting a more widely accepted approach to the issue of separate corporate identities and worker's compensation exclusivity. In *Boggs v. Blue Diamond Coal Co.*,<sup>120</sup> the court wrote:

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110. *McQuade*, 659 N.E.2d at 1020.

111. The proper motion would have been a motion to dismiss for lack of subject matter jurisdiction under Trial Rule 12(b)(2). See *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282 (Ind. 1994).

112. *McQuade*, 638 N.E.2d at 818.

113. *McQuade*, 659 N.E.2d at 1017.

114. 9 F.3d 1303 (7th Cir. 1993).

115. *Id.* at 1308.

116. 446 N.W.2d 299 (Mich. Ct. App. 1989).

117. *Id.* at 300-01.

118. *McQuade v. Draw Tite, Inc.*, 638 N.E.2d 818, 822 (Ind. Ct. App. 1994), *rev'd*, 659 N.E.2d 1016 (Ind. 1995).

119. *McQuade*, 659 N.E.2d at 1020.

120. 590 F.2d 655 (6th Cir. 1979).

A business enterprise has a range of choice in controlling its own corporate structure. But reciprocal obligations arise as a result of the choice it makes. The owners may take advantage . . . of dividing the business into separate corporate parts, but principles or [sic] reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee.<sup>121</sup>

The Indiana Supreme Court recognized its equitable power to disregard the corporate form to prevent fraud or unfairness to third parties.<sup>122</sup> However, the court also stated, "we perceive little likelihood that equity will ever require us to pierce the corporate veil to protect the same party that erected it."<sup>123</sup> Thus, the court concluded that the exclusive remedy provision does not prevent an employee from suing his or her employer's separately-incorporated parent corporation.<sup>124</sup>

### B. *D.A.X., Inc. v. Employers Insurance of Wausau*<sup>125</sup>

*D.A.X.* addressed the problems of insuring worker's compensation liability for employers located in Indiana but employing workers in other states. The case mandated that employers disputing premium issues with worker's compensation insurance carriers exhaust administrative remedies through the Indiana Department of Insurance before resorting to the courts.<sup>126</sup> In this case, the employer's failure to carry worker's compensation insurance on workers who were found during an audit to be non-Indiana employees subjected the employer to a retroactive assessment of a non-Indiana premium by its compensation carrier.

*D.A.X.* was an employee leasing company incorporated in Illinois with an office located just across the state line in Hammond, Indiana. *D.A.X.* employed truck drivers that it leased exclusively to High Noon Express, a trucking company incorporated and based in Illinois. Both companies were owned by the same family. In December 1988, *D.A.X.* applied for worker's compensation coverage for its drivers through the Indiana Compensation Rating Bureau.<sup>127</sup> The application stated that *D.A.X.* had no "operations in States other than Indiana."

Wausau issued a policy providing that the calculated premium was an estimate and that if the employer's actual exposures were not accurately reflected in the application, a final premium would be assessed based on the actual exposure. In

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121. *McQuade*, 659 N.E.2d at 1020 (citing *Boggs*, 590 F.2d at 661-62).

122. *Id.* (citing *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1231-32 (Ind. 1994)).

123. *Id.*

124. *Id.*

125. 659 N.E.2d 1150 (Ind. Ct. App. 1996).

126. *Id.* at 1158.

127. *See* IND. CODE § 27-7-2-28.1 (1993). The ICRB reviews the application to determine whether the risk should be assigned to one of its members. Every insurance carrier authorized to write worker's compensation policies in Indiana is a member of the ICRB. If the ICRB assigns the risk to one of its members, the insurer has a statutory duty to issue a policy. *See id.* § 27-7-2-29(b). However, the members must have costs of operating the plan, including any losses.

the case of trucking operations, the audit procedure allows the insurer to charge premiums based upon the employees' state of residence if the audit determines that the employer does not have a bona fide terminal within the state of Indiana.

When Wausau began receiving worker's compensation claims under the D.A.X. policy naming High Noon Express as the employer, it arranged for an audit and an inspection of the Hammond facilities operated by D.A.X. The inspector discovered that the office consisted of a leased space in a truck stop along a toll road, and contained one desk and three or four chairs. D.A.X. employees did not load, unload, store, or transfer freight at the location. Thereafter, Wausau requested D.A.X. to provide personnel records so that it could assess premiums based on the state of residence of the truck drivers. D.A.X. did not cooperate, and Wausau proceeded to make a premium determination based on limited information.

In May 1990, Wausau sent D.A.X. an audit premium adjustment requesting payment of an additional \$186,110 to cover risk under Illinois worker's compensation law. D.A.X. refused to pay the premium. Wausau filed suit and obtained a judgment in that amount.

On appeal, the court held that Wausau had properly assessed the non-Indiana premium and that D.A.X. was estopped from challenging the assessment in the courts because it had failed to exhaust administrative remedies.<sup>128</sup> An "aggrieved person" must seek administrative review of actions by the ICRB or the insurance carrier.<sup>129</sup> The trial court's order was therefore affirmed.<sup>130</sup>

### C. *Davis v. Central Rent-a-Crane, Inc.*<sup>131</sup>

In *Davis* the court of appeals visited the issue of "borrowed" employees in rejecting a plaintiff's lawsuit against a crane operator, Cole, and the crane operator's employer, Central Rent-a-Crane. Because the court found that Cole was a borrowed employee of the plaintiff's employer, and thus a fellow servant of

128. *D.A.X.*, 659 N.E.2d at 1158.

129.

Every company or the bureau shall provide within Indiana reasonable means whereby any person aggrieved by the application of its filings may be heard on written request to review the manner in which such rating system has been applied in connection with the insurance afforded or offered. If the company or the bureau fails to grant or reject such request within thirty (30) days, the aggrieved person may proceed in the same manner as if the request had been rejected. Any aggrieved person affected by the action of such company or the bureau on such request may, within thirty (30) days after written notice of such action, appeal to the [Insurance] commissioner who, after a hearing held upon not less than ten (10) days written notice to the aggrieved person and to such company or the bureau, may affirm, modify, or reverse such action.

IND. CODE § 27-7-2-20.3(c)(2) (1993).

130. *D.A.X.*, 659 N.E.2d at 1158.

131. 663 N.E.2d 1177 (Ind. Ct. App. 1996).

the plaintiff, the suit was held barred by the exclusive remedy provision.<sup>132</sup>

Brandenburg Industrial leased a crane and crane operator from Central Rent-a-Crane. Davis, a Brandenburg employee, was working as foreman at a site where steel storage tanks were being dismantled when he was struck and injured by a piece of steel suspended from the leased crane. Davis and his wife sued Cole, the crane operator, and Central Rent-a-Crane for his injuries. The trial judge ruled for the defendants on the theory that Cole was a leased employee of Brandenburg, and as a co-employee of Davis, was protected from suit by the exclusive remedy provision of the Act.<sup>133</sup>

On review, the court of appeals treated the grant of summary judgment as a motion to dismiss for lack of subject matter jurisdiction.<sup>134</sup> Because public policy favors the inclusion of employees under the Act, the burden of proving that a claim falls outside of the Act shifts to the plaintiff once the defendant raises the Act's exclusivity defense.<sup>135</sup>

The trial court applied the seven-part test for determining whether an employer-employee relationship exists under *Hale v. Kemp*<sup>136</sup> and found that the operator of the crane was a borrowed employee.<sup>137</sup> The *Hale* factors are: 1) the right to discharge; 2) the mode of payment; 3) supplying tools or equipment; 4) belief of the parties in the existence of an employment relationship; 5) control over the means used in the results reached; 6) length of employment; and 7) establishment of the work boundaries.<sup>138</sup>

The court below found that Brandenburg could discharge Cole if his work was unsatisfactory; that Brandenburg supplied the hooks and chains used by Cole; that Brandenburg employees directed and controlled Cole's actions with regard to what loads to lift and how to lift them; and that Davis had the authority to stop Cole if Cole did anything improper with the crane. Although Davis showed that Brandenburg did not pay Cole and instead paid Central Rent-a-Crane for his services, this evidence was insufficient to overcome the other *Hale* factors.<sup>139</sup> On appeal, the court refused to overturn the trial judge's findings that Davis and Cole were co-employees.<sup>140</sup> The court further noted that Davis' claim against Central under a theory of respondeat superior was also barred because a claim could not

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132. *Id.* at 1180.

133. *See id.* at 1178.

134. *Id.* at 1179 (citing *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994) for the proposition that summary judgment is inappropriate for raising the exclusivity provision of the Act as a defense because it is an attack on the court's subject matter jurisdiction and summary judgment cannot be entered by a court without jurisdiction).

135. *See id.* (citing *Perry*, 637 N.E.2d at 1287).

136. 579 N.E.2d 63 (Ind. 1991).

137. *Davis*, 663 N.E.2d at 1179.

138. *Hale*, 579 N.E.2d at 67 (citing *Fox v. Contract Beverage Packers, Inc.*, 398 N.E.2d 709 (Ind. Ct. App. 1980)).

139. *Davis*, 663 N.E.2d at 1180.

140. *Id.*

be maintained against Cole.<sup>141</sup>

## VI. PLAINTIFF'S ATTORNEY'S FEES IN WORKER'S COMPENSATION MATTERS

Attorneys representing employees should note the following two cases applying the rules of professional conduct to fee agreements in worker's compensation cases.

### A. Rule 1.5(c) Requires Written Fee Agreements

In the case of *In re Anonymous*,<sup>142</sup> the supreme court held that Rule 1.5(c) of the Rules of Professional Conduct<sup>143</sup> requires that contingent fee arrangements be memorialized in a writing.<sup>144</sup>

The worker's compensation board, pursuant to statutory authority,<sup>145</sup> has adopted a contingent fee schedule governing claimant's attorney's fees.<sup>146</sup> The rule allows attorneys to retain fees from compensation recovered of: a minimum of \$100, and 20% upon the first \$10,000 recovered, 15% on the second \$10,000 recovered, and 10% on all recovery thereafter, although the Board may allow or order a different schedule in a proper case.<sup>147</sup> The Board may award fees not to exceed 10% of medical expenses actually in dispute and actually collected by the attorney upon proper application.<sup>148</sup>

In the case of *In re Anonymous*, the attorney was retained to handle a worker's compensation matter and explained to the client that fees would be contingent upon recovery of benefits and limited by the Board's fee schedule. After settling the case, the attorney correctly applied the schedule in calculating fees charged to the client. The attorney did not, however, furnish the client with a written contingent fee agreement explaining the method by which fees would be calculated, stating that he believed that the Board's published fee schedule obviated any need to do so.

In holding that Rule 1.5(c) requires a written fee agreement in worker's compensation matters, the court reasoned that such agreements reduce the possibility of misunderstandings.<sup>149</sup> The court advised against the assumption that

141. *Id.* (citing *Riffle v. Knecht Excavating, Inc.*, 647 N.E.2d 334, 337 (Ind. Ct. App. 1995)).

142. 657 N.E.2d 394 (Ind. 1995).

143. "A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. . . ." IND. R. PROF. CONDUCT 1.5(c).

144. *In re Anonymous*, 657 N.E.2d at 395.

145. "When any claimant for compensation is represented by an attorney in the prosecution of his claim, the industrial board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fees." IND. CODE § 22-3-4-12 (1993).

146. *See* IND. ADMIN. CODE tit. 631, r. 1-1-24 (1996). No Board limitation applies to fees payable to defense counsel.

147. *See id.*

148. *See id.*

149. *In re Anonymous*, 657 N.E.2d at 395 (citing G. HAZARD & W. HODES, *THE LAW OF LAWYERING*, § 1.5 (2d ed. 1990)).

clients will fully understand fee provisions established by law absent the presentation of a written agreement and found that principles underlying the requirement of a writing are as applicable to situations where fee schedules apply as where they do not.<sup>150</sup>

*B. Fee Agreements in Excess of Board Schedule and Rule 1.5(a)*

In a subsequent case, an attorney fee agreement calling for fees exceeding the amounts provided by the Board's schedule was declared unreasonable under Rule 1.5(a) of the Rules of Professional Conduct.<sup>151</sup>

In 1987, the attorney undertook representation of a client in contemplation of a worker's compensation action or related third party suit. The fee agreement included a provision for a 20% fee contingent on recovery before the Board. Thereafter, the attorney filed an Application under the Occupational Diseases Act.<sup>152</sup> In 1989, the client signed a renegotiated contingent fee contract, agreeing to pay the attorney upon recovery 33 1/3% for recovery upon Board hearing, 40% for recovery upon appeal to the court of appeals, and 50% for recovery upon appeal to the supreme court. The contract further provided "This agreement is made in recognition of the fact that the case is extremely complicated and involves necessary attorney time in excess of the typical case." The attorney did not advise the client of the provisions of the Board's attorney fee schedule.<sup>153</sup>

In 1988, the case was heard by a member of the Board, and in 1989 the Board entered an award of compensation to be paid at the weekly rate of one hundred \$178 for five hundred weeks, for a total of \$89,000. The Board's decision included an award of attorney's fees specifically reciting the provisions of 631 I.A.C. 1-1-24. Under the Board's fee schedule, the attorney fee award would have totaled \$10,500.

Fifteen days later, the employer appealed the decision to the full Board. The attorney filed a petition before the Board for approval to charge fees in excess of the Board's schedule, arguing that he had been required to expend a large number of hours on the case. In March 1990, the full Board affirmed the single member's award in all respects, denying the petition for additional fees. In April, the employer issued a check for \$34,354 to the employee and her attorney,<sup>154</sup> out of which the attorney took a fee of \$27,000.

Fees in excess of the presumptive limits in 631 I.A.C. 1-1-24 have been held

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150. *Id.*

151. *In re Maley*, 674 N.E.2d 544 (Ind. 1996).

152. The Occupational Diseases Act is administered by the Board but provides compensation and benefits for "death or disablement arising out of and in the course of employment." IND. CODE § 22-3-7-2 (1993).

153. IND. ADMIN. CODE tit. 631, r. 1-1-24 (1996).

154. The court's opinion does not make clear why the employer did not issue a check for the total amount of the award, \$89,000. It is possible that the payment was a partial lump sum intended to bring the client up to date on compensation due since the date her disability began.

unenforceable.<sup>155</sup> Finding that the attorney retained fees in excess of the Board's rule without obtaining approval of the Board and without advising the client that the fee agreement was unenforceable, the court held the fee unreasonable and in violation of Rule 1.5(a).<sup>156</sup>

In recommending an appropriate discipline, the disciplinary commission's hearing officer noted several mitigating circumstances. The attorney had a clean disciplinary record after thirty-eight years of practice in Indiana. Colleagues described him as "well-prepared," "honest," and "diligent." The attorney testified that he had expended 500 hours on his client's case. Finally, the attorney and his client had settled their fee dispute, where in open court the attorney apologized to his client.

The court, however, noting that the attorney had deliberately kept a fee far in excess than that allowed by law, found that the "public import" of excessive fees requires a sanction greater than a private reprimand.<sup>157</sup> Accordingly, the attorney was sanctioned by public reprimand and admonishment.<sup>158</sup>

## VII. DEFINITION OF AGRICULTURAL EMPLOYEE

Certain types of employments are exempt from mandatory worker's compensation coverage under the Act.<sup>159</sup> Among the exemptions are those for "farm" and "agricultural" employments.<sup>160</sup> The meaning of the term "agricultural employee" as used in the Act was explored in *Rieheman v. Cornerstone Seeds, Inc.*<sup>161</sup>

Cornerstone Seeds was a wholesaler which sold seed corn to retailers. Cornerstone hired teams of workers to detassel corn during a three-week period each July. Corn detasslers were transported by truck to the fields, where they pulled the tassels from the tops of corn plants. Rieheman was severely injured when she slipped and fell and was struck by a Cornerstone truck.

Rieheman filed a civil suit against her employer. Cornerstone filed a motion to dismiss for lack of subject matter jurisdiction, on the theory that the suit was barred by the exclusive remedy provision of the Act. The trial court found that Rieheman was not an exempt farm employee and granted the employer's motion.

On appeal, Rieheman argued that her civil suit against Cornerstone was viable because the corn detasslers were exempt agricultural employees.<sup>162</sup> Cornerstone argued that because it engaged in a business that farmers do not ordinarily

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155. *Maley*, 674 N.E.2d at 546 (citing *Buckler v. Hilt*, 200 N.E. 219 (Ind. 1936); *Bauer v. Biel*, 177 N.E.2d 269 (Ind. App. 1961)); *Rickert v. Schreiber*, 66 N.E.2d 769 (Ind. App. 1946)).

156. *Id.*

157. *Id.* at 547 (citing *In re Myers*, 663 N.E.2d 771, 774 (Ind. 1996)).

158. *Id.*

159. For a detailed summary of coverage requirements, see DANIEL G. FOOTE, GUIDE TO INDIANA WORKER'S COMPENSATION § 2, at 6-14 (1996).

160. IND. CODE § 22-3-2-9(a) (1993).

161. 671 N.E.2d 489 (Ind. Ct. App. 1996), *trans. denied*.

162. See IND. CODE § 22-3-2-9(a) (1993).

conduct, and because corn detassellers perform tasks not ordinarily conducted by farmers, Rieheman was not a farm or agricultural employee and that her lawsuit was therefore barred by the exclusive remedy provision.

Cornerstone's defense ran up against a long-established line of cases holding that worker status is determined by the character of the work performed by the employee and not by the general occupation or business of the employer.<sup>163</sup> Indiana has long held that the term "agriculture" relates to "the science or art of cultivating the soil, producing crops, and raising livestock . . ."<sup>164</sup> Thus, the fact that Cornerstone was a "wholesale production company" and not a farm was not relevant.<sup>165</sup>

The court further pointed to a distinction between the "farm" and "agricultural" employments and held that Rieheman was an agricultural worker.<sup>166</sup> Although the terms have substantially the same meaning, if there is any difference, the latter has the broader meaning.<sup>167</sup> Thus, if Rieheman was not a farm worker, her work was agricultural in nature, bringing her within the broader "agricultural" exemption. Holding that Rieheman was an exempt agricultural employee, the court reversed the trial court's dismissal of her civil suit.<sup>168</sup>

The *Rieheman* case reminds employers that there is a significant risk of civil liability to businesses with employees performing agricultural work. Businesses that have agricultural operations may wish to consider the costs and benefits of electing worker's compensation coverage under the Act<sup>169</sup> in order to avoid potential tort liability.

The many farm and agricultural employees exempted from the Act<sup>170</sup> face the possibility of carrying the burden of work-related injuries or passing costs on to their families or the taxpayers. Where workers pursue civil litigation, they face long delays and powerful common-law defenses. Indiana is one of a small number of states that retains a statutory exemption for farm or agricultural employments.<sup>171</sup>

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163. See *Rieheman*, 671 N.E.2d at 491-92 (citing *Evansville Veneer & Lumber Co. v. Mullen*, 65 N.E.2d 742, 743-44 (Ind. App. 1946)). The same rule was cited in *Smart v. Hardesty*, 149 N.E.2d 547, 549 (Ind. 1958); *Strickler v. Sloan*, 141 N.E.2d 863, 866 (Ind. App. 1957); and *Heffner v. White*, 45 N.E.2d 342, 345 (Ind. App. 1942).

164. *Rieheman*, 671 N.E.2d at 492. Although the court cited Webster's Ninth New Collegiate Dictionary for its definition of agriculture, a similar definition has been cited in Indiana cases. See *Fleckles v. Hille*, 149 N.E. 915, 915 (Ind. App. 1925).

165. See *Rieheman*, 671 N.E.2d at 493.

166. *Id.*

167. See *id.* at 492.

168. *Id.* at 493.

169. An employer who is exempt from the Act under Indiana Code section 22-3-2-9(a) may waive such exemption and accept the Act's provisions upon notification of the employee and the Worker's Compensation Board. See IND. CODE § 22-3-2-9(b) (1993).

170. *Id.* § 22-3-2-9(a).

171. As of 1990, 39 worker's compensation jurisdictions covered agricultural workers, with 14 jurisdictions extending the same coverage available to all workers and 25 imposing some restrictions not applicable to the general class of employees. See 4 LARSON, *supra* note 3, at app.

That exemption recently withstood a state equal protection challenge.<sup>172</sup>

### VIII. SECOND INJURY FUND

On November 14, 1996 the Indiana Supreme Court denied transfer in the case of *Linville v. Hoosier Trim Products*.<sup>173</sup> The denial of transfer means that the Second Injury Fund's interpretation of the statute will stand.

At issue in the *Linville* litigation were the definitions of the terms "loss or loss of use" and "total permanent impairment" as used in section 22-3-3-13(a) of the Indiana Code.<sup>174</sup> *Linville*, having suffered a preexisting 11% permanent partial impairment to her right hand, suffered subsequent work-related injury resulting in a 37% impairment to her left hand and applied for second injury benefits. Because *Linville* had neither "lost nor lost the use of" her hands, the administrator of the fund denied her petition for benefits, and a single hearing member and the full board affirmed the denial.

Unbeknownst to the Second Injury Fund,<sup>175</sup> *Linville* took her case to the court of appeals. In December 1995, the court handed down a decision favorable to *Linville*.<sup>176</sup> Writing for the majority, Judge Riley concluded that section 22-3-3-13(a) of the Indiana Code merely required a *partial* loss or *partial* loss of use of two of the listed body parts, as opposed to successive amputations or *total* losses of use.<sup>177</sup>

The court reversed itself on rehearing,<sup>178</sup> requiring that petitioners for second injury benefits show the amputation of total loss of two of the body parts listed in section 22-3-3-13(a) of the Indiana Code in order to qualify for section 13(a)

A-4-1.

172. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). For discussion, see Coriden & Footé, *supra* note 23, at 1158-62.

173. 664 N.E.2d 1178 (Ind. Ct. App. 1996), *trans. denied*. The decision below was discussed in Gregory M. Feary & Steven M. Pletcher, *1995 Developments in Worker's Compensation*, 29 IND. L. REV. 1139, 1155-56 (1996).

174.

If an employee who from any cause, had lost, or lost the use of, one (1) hand, one (1) arm, one (1) foot, one (1) leg, or one (1) eye, and in a subsequent industrial accident becomes permanently and totally impaired by reason of the loss, or loss of use of, another such member or eye, the employer shall be liable only for the compensation payable for such second injury. However, in addition to such compensation and after the completion of the payment therefor, the employee shall be paid the remainder of the compensation that would be due for such total permanent impairment out of a special fund known as the second injury fund . . . .

IND. CODE § 22-3-3-13(a) (1993).

175. The Second Injury Fund failed to appear for argument or file a brief.

176. *Linville v. Hoosier Trim Prods.*, 659 N.E.2d 250 (Ind. Ct. App. 1995), *vacated on reh'g*, 664 N.E.2d 1178 (Ind. Ct. App. 1996), *trans. denied*.

177. *Id.*

178. *Linville*, 664 N.E.2d at 1178.

benefits.

### IX. RECOVERING WORKER'S COMPENSATION LIENS

As discussed previously, injured workers have the right to pursue third party tortfeasors for civil damages. In the event the employee recovers from a third party, the employee has the option of either collecting the judgment and repaying the employer or the employer's compensation insurance carrier for compensation previously drawn or assigning the rights under the judgment to the employer or the insurance carrier.<sup>179</sup> Although *Protective Insurance Co. v. Cody*<sup>180</sup> is a textbook civil procedure case, it merits a glance from attorneys counseling employers or employees in situations in which an employer asserts a worker's compensation lien.

The defendants in the case, all residents of Pennsylvania, were involved in a work-related auto accident in West Virginia. Their employer, Morgan Drive Away (MDA), was an Indiana corporation. The accident was caused by the negligence of a third party resident of Ontario, Canada. The plaintiff-carrier in the case, Protective Insurance, was incorporated in Indiana and paid worker's compensation to the accident victims.

Each of the victims later reached settlements with the third party, entitling Protective to its statutory lien on worker's compensation paid.<sup>181</sup> Protective sought to enforce its lien by filing a diversity action in the United States District Court for the Southern District of Indiana. The defendants filed a motion to dismiss for lack of personal jurisdiction.<sup>182</sup> At issue was whether the defendants' "contacts" with the State of Indiana would reach a minimum threshold satisfying the requirements of specific personal jurisdiction.<sup>183</sup>

Protective asserted the existence of three "contacts" between the defendants and Indiana. First, the defendants knowingly entered into an employment contract with the local agent of an Indiana corporation. The court, however, found that employment activities of the defendants were centered in Pennsylvania, and that employment negotiations actually took place there after the defendants responded to an advertisement in a Pennsylvania newspaper.<sup>184</sup>

Second, the defendants submitted and received employment-related documents such as tax forms and paychecks from the employer's Indiana headquarters. The court found Protective's reliance on this evidence unpersuasive because "[t]he defendant's conduct in relation to the forum state, not the unilateral actions of the plaintiff determine jurisdiction."<sup>185</sup> Third, Protective argued that the defendants' acceptance of worker's compensation benefits paid

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179. IND. CODE § 22-3-2-13 (1993).

180. 882 F. Supp. 782 (S.D. Ind. 1995).

181. See IND. CODE § 22-3-2-13.

182. FED. R. CIV. P. 12(b)(2).

183. *Protective*, 882 F. Supp. at 785.

184. *Id.* at 786.

185. *Id.* (quoting *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir. 1992)).

pursuant to Indiana worker's compensation law qualified as a minimum contact. The court held that the payment of worker's compensation to an employee does not establish contacts between the employee and the forum state.<sup>186</sup> "Rather, [the defendants] simply accepted the workers' benefits provided by MDA without any personal involvement in the negotiation process between MDA and its insurance carrier."<sup>187</sup> The defendants had originally sought worker's compensation under Pennsylvania law.

The court thus refused to hale the defendants into an Indiana court simply because their worker's compensation claims had been treated under Indiana law, holding that an assertion of personal jurisdiction over the defendants would not comport with "fair play and substantial justice" where the defendants did not reside, nor commence, their relationship within the state of Indiana.<sup>188</sup>

### CONCLUSION

As these recent cases show, Indiana's worker's compensation law continues to balance the compromise between employers and employees by providing an administrative remedy for injured workers while shielding employers from civil liability. During the survey period, the courts have undertaken to apply the holdings of the Indiana Supreme Court in the *Baker* trilogy. We look forward with interest to the impact of these decisions.

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186. *Id.* at 787.

187. *Id.*

188. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).