

# 1998-1999 BRINGS NEW DEVELOPMENTS TO INDIANA'S WORKER'S COMPENSATION LAW

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## INTRODUCTION

The Worker's Compensation Act (the "Act")<sup>1</sup> strikes a compromise between employees and employers. It provides benefits to an injured worker while, at the same time, protecting the employer from conventional tort liability. The Act, as written, is fairly straightforward; however, it fails to address every contingency that arises under worker's compensation law. Certainly, times change, the courts are continually faced with new and distinct issues necessitating an interpretation of the Act that was first written so many years ago.

Indeed, the 1998–1999 survey period was no different. The courts addressed important issues such as the medical management of a claim, the bad faith statute, personal versus employment risks, evidentiary requirements, and a co-employee's intentional acts. This Article summarizes and comments upon the more significant worker's compensation cases published within this survey period as well as recent legislative changes to the Act.

### I. MEDICAL MANAGEMENT OF A CLAIM

Undoubtedly, two of most significant cases in this survey period were *Bloomington Hospital v. Stofko*<sup>2</sup> and *Memorial Hospital v. Szuba*.<sup>3</sup> Both cases addressed key aspects of an employer's obligation to medically manage the employee's worker's compensation claim.

#### A. *Bloomington Hospital v. Stofko*

Perhaps one of the most important cases decided by the Indiana Court of Appeals during this survey period was *Bloomington Hospital v. Stofko*.<sup>4</sup> In *Stofko*, the employee contracted Hepatitis C as a result of his employment, and his claim was accepted as compensable.<sup>5</sup> The parties stipulated to all aspects of the claim except the issue of future medical treatment.<sup>6</sup> The sole issue before the court of appeals was whether Bloomington Hospital should be required to provide all future medical treatment for Stofko's chronic disease.<sup>7</sup> Bloomington

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1. IND. CODE §§ 22-3-1-1 to 12 (1998).
2. 705 N.E.2d 515 (Ind. Ct. App.), *aff'd on rehearing*, 709 N.E.2d 1078 (Ind. Ct. App. 1999).
3. 705 N.E.2d 519 (Ind. Ct. App. 1999).
4. *Stofko*, 705 N.E.2d at 515.
5. *See id.* at 516.
6. *See id.*
7. *See id.*

Hospital argued that any application for future medical treatment was subject to Indiana Code sections 22-3-7-17<sup>8</sup> and 22-3-7-27.<sup>9</sup> The employer essentially urged the court of appeals to interpret these sections as limiting the period of time for which the board could order an employer to provide future medical services.<sup>10</sup>

The court of appeals declined to accept the employer's position. Instead, the court of appeals held that an order of future medical treatment was within the board's jurisdiction as part of the "original" award because the permanent partial impairment ("PPI") rating had not been previously adjudicated.<sup>11</sup> While it agreed with the employer that Indiana Code sections 22-3-7-17 and 22-3-7-27 restrict the *modification* of awards, the court noted that no modification was at issue in this case.<sup>12</sup> To the contrary, the employee's application for adjustment of claim

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8. Indiana Code § 22-3-7-17(b) provides:

After an employee's occupational disease has been adjudicated by agreement or award on the basis of permanent partial impairment and within the statutory period for review in such case as provided in section 27(i) of this chapter, the employer may continue to furnish a physician or a surgeon and other medical services and supplies, and the board may, within such statutory period for review as provided in section 27(i) of this chapter, on a proper application of either party, require that treatment by such physician or surgeon and such services and supplies be furnished by and on behalf of the employer as the board may deem necessary to limit or reduce the amount and extent of such impairment.

IND. CODE § 22-3-7-17(b) (1998).

9. Indiana Code § 22-3-7-27(1) provides:

The power and jurisdiction of the worker's compensation board over each case shall be continuing, and, from time to time, it may upon its own motion or upon the application of either party on account of a change in condition, make such modification or change in the award ending, lessening, continuing, or extending the payments previously awarded, either by agreement or upon hearing, as it may deem just, subject to the maximum and minimum provided for in this chapter. When compensation which is payable in accordance with an award or settlement contract approved by the board is ordered paid in a lump sum by the board, no review shall be had as in this subsection mentioned. Upon making any such change, the board shall immediately send to each of the parties a copy of the modified award. No such modification shall affect the previous award as to any money paid thereunder. The board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid. The board may at any time correct any clerical error in any finding or award.

IND. CODE § 22-3-7-27(1).

10. See *Stofko*, 705 N.E.2d at 518.

11. *Id.*

12. See *id.*

sought benefits and medical expenses in the form of an "original award."<sup>13</sup> The court of appeals stated:

in deciding that the Board has jurisdiction as part of an original award of Occupational Disease benefits to order payment of medical expenses for the lifetime of the employee, we are mindful that the Worker's Compensation Act and the Occupational Disease Act are for the benefit of the employee and that the Acts should be liberally construed so as not to negate their humane purposes.<sup>14</sup>

The court specifically focused on the fact that Hepatitis C is a continuing condition that would most likely result in deteriorating health and increasing medical expenses over the employee's lifetime and that an employee might not be adequately compensated by accepting a lump sum payment at the onset of the disease.<sup>15</sup>

While the Worker's Compensation Act itself does not plainly state that an employer might be required to provide future medical services for an indefinite amount of time, it is certainly clear from reading *Bloomington Hospital* that this potential liability exists. It is, in fact, this potential liability that creates somewhat of a problem when attempting to settle a claim where future medical treatment might be contemplated. Obviously, it is difficult to value the cost of such future treatment and, perhaps more importantly, whether such measures will in actuality be necessary in the long run. Thus, in many cases where settlement is not a viable option, the adjudication of an impairment may not be the end of a claim but, rather, the beginning of long-term medical management.

#### B. *Memorial Hospital v. Szuba*<sup>16</sup>

On December 22, 1993 Michael Szuba sustained head injuries when he slipped and fell in Memorial Hospital's parking lot.<sup>17</sup> The employer, Memorial Hospital, paid Szuba's medical expenses but, because he did not miss more than seven days of work, Szuba did not file for temporary total disability benefits.<sup>18</sup> No permanent partial impairment ("PPI")<sup>19</sup> rating was tendered, presumably due to the fact that injury was slight. Szuba, however, later filed an Application for Adjustment of Claim requesting Memorial Hospital to obtain such a rating.<sup>20</sup>

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13. *Id.*

14. *Id.* at 518-19 (citation omitted).

15. *See id.* at 519.

16. 705 N.E.2d 519 (Ind. Ct. App. 1999).

17. *See id.* at 520.

18. *See id.*

19. PPI benefits are payable after the injury is quiescent and the permanent loss of a physical function has been medically assessed. The PPI rating is a rating by degrees assigned to represent the employee's permanent loss of function. Compensation of that loss is determined by the scheduled rate that corresponds to the given PPI rating. *See* IND. CODE § 22-3-3-10 (1998).

20. *See Szuba*, 705 N.E.2d at 520.

The issue before the Indiana Court of Appeals was whether Memorial Hospital had an obligation to obtain a PPI rating for Szuba's injuries.<sup>21</sup>

Memorial Hospital argued that the Worker's Compensation Act does not assign the responsibility to obtain a rating to any particular party and that because the rating is an "element" of Szuba's application for benefits, he ought to have the burden of proving PPI.<sup>22</sup> The court of appeals, however, rejected Memorial Hospital's argument, stating that:

[T]he statute anticipates that the employer will provide care through the determination of PPI. Reading the statute liberally as required by the Act, we find that the initial PPI determination is part of an employee's necessary medical treatment . . . . We hold that the burden of producing a PPI rating lies with the employee only where the employee disagrees with the determination provided by the employer's physician.<sup>23</sup>

Interestingly, the court of appeals indicated in a footnote that the expense of a subsequent PPI determination obtained by an employee, i.e., a second opinion, must be reimbursed to the employee by the employer if it is ultimately accepted by the Worker's Compensation Board.<sup>24</sup>

In light of the *Memorial Hospital* opinion, the employer's obligation to medically manage a claim can be understood to include all of the following: the selection of physicians, the preparation of forms, the computation of benefits, the provision of alternative work, and now the determination of PPI. From the employer's perspective, the application of *Memorial Hospital* is somewhat problematic, particularly in a situation where an employer is faced with an injury that is relatively slight in nature and the employee is treated only a few times with minimal lost time from work. The only practical way to meet the employer's obligation is to communicate at the outset with the employee's treating physician and request that as part of the initial and continuing treatment the physician provide his opinion whether a permanent loss of function has occurred. If the physician's opinion in that regard is solicited during the course of the treatment rather than weeks or months later, the expense of a re-examination for the employee for the sole purpose of impairment may be avoided.

From an employee's perspective, if an employer fails to obtain a PPI rating for an injured employee, it raises the question as to whether they might be liable under the bad faith statute.<sup>25</sup> Certainly, as an employee's advocate, one would make that argument but, from a practical standpoint, it would likely boil down to whether the failure to obtain a PPI rating was merely an oversight or a blatant disregard of the employer's obligation to obtain such rating.

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21. *See id.*

22. *See id.* at 524.

23. *Id.* (citation omitted).

24. *See id.* at 524 n.11.

25. *See* IND. CODE § 22-3-4-12.1 (1998).

## II. THE BAD FAITH PROVISION

During the 1997-98 survey period, the Indiana Legislature enacted Indiana Code section 22-3-4-12.1 that provided the Worker's Compensation Board with exclusive jurisdiction to adjudicate whether an employer, worker's compensation administrator, or a worker's compensation insurance carrier "has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling the claim for compensation."<sup>26</sup> An employer, worker's compensation administrator, or worker's compensation carrier liable under this provision faces a \$500 to \$20,000 penalty plus attorney's fees and costs.<sup>27</sup> Until this year, there were no reported decisions interpreting this statutory provision. In 1999, not only was this provision constitutionally challenged, but the Indiana Court of Appeals addressed the phrases "adjusting or settling" and "independent tort" within the meaning of Indiana Code section 22-3-4-12.1 (hereinafter the "bad faith statute" or the "bad faith provision").

### A. *Borgman v. State Farm Insurance, Co.*

In *Borgman v. State Farm Insurance Co.*,<sup>28</sup> the court of appeals held that the bad faith statute was constitutional and, further, due to its procedural nature, was applicable to all pending claims, even those claims alleging injuries prior to July 1997—the effective date of the statute.<sup>29</sup>

Ms. Borgman was employed by Sugar Creek Animal Hospital, and its worker's compensation insurance carrier was State Farm Insurance Company ("State Farm").<sup>30</sup> Ms. Borgman was injured on June 24, 1995 when she fell into one of the kennels maintained at her employer's place of business. She suffered injuries to her arm and neck and sought treatment from her family physician on the same day.<sup>31</sup> State Farm paid for that doctor visit and Ms. Borgman did not seek further medical treatment until February 1996.<sup>32</sup>

On February 19, 1996, Ms. Borgman resigned from her employment with Sugar Creek Animal Hospital. She continued, however, to have pain associated with her injury and, therefore, returned to her family physician where she was referred to a neurologist, Dr. Chase.<sup>33</sup> She treated with Dr. Chase in March and April 1996 returning to her family physician in May 1996. After this visit, her employer opined that her condition was not related to the original June 1995

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26. IND. CODE § 22-3-4-12.1(a). For a discussion of the enactment of the bad faith provision, see Carol Modesitt Wyatt, *Recent Developments in Worker's Compensation Law*, 32 IND. L. REV. 1137, 1146 (1998).

27. See IND. CODE § 22-3-4-12.1(b).

28. 713 N.E.2d 851 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 307 (Ind. 1999).

29. See *id.* at 855-56.

30. See *id.* at 853.

31. See *id.*

32. See *id.*

33. See *id.*

work-injury.<sup>34</sup> She was then evaluated in June 1996 by Dr. Shay, at the request of State Farm, whose diagnosis revealed damage to Ms. Borgman's neck and advised that surgery was necessary to eliminate the compression of the nerve root.<sup>35</sup> State Farm denied her worker's compensation claim on July 29, 1996, and she subsequently filed an Application for Adjustment of Claim on November 21, 1996.<sup>36</sup>

In November 1997, State Farm sent Ms. Borgman to be evaluated by a different physician and at that time began providing worker's compensation medical benefits to Ms. Borgman. On July 22, 1998 the Borgmans filed a complaint in civil court against State Farm and Sugar Creek Animal Hospital contending that State Farm had wrongfully denied Ms. Borgman's worker's compensation claim for eighteen months.<sup>37</sup> They further alleged that State Farm acted in bad faith and in contravention of its duties under the Act in denying her claim for benefits. Ms. Borgman requested damages for pain and suffering, punitive damages, and attorneys fees. Mr. Borgman also asserted a loss of consortium claim.<sup>38</sup>

State Farm filed a motion to dismiss arguing that the trial court lacked subject matter jurisdiction and that Ms. Borgman's exclusive remedy was before the Worker's Compensation Board.<sup>39</sup> Ultimately, the Indiana Court of Appeals agreed.<sup>40</sup> The court held that the 1997 bad faith statute pre-empted the practice of suing one's employer or worker's compensation administrator or carrier as third party tortfeasor alleging an independent tort or negligent handling of the claim.<sup>41</sup> While the Borgmans argued that the bad faith provision should not be applied retroactively, the court stated that "the statute is procedural and merely sets forth the proper forum for claims alleging lack of diligence, bad faith or independent torts on the part of the employer, their worker's compensation administrator and the insurance carrier."<sup>42</sup> Thus, the 1997 bad faith statute reaches not only those claims with an injury date of July 1997 forward but also all pending claims regardless of the injury date.<sup>43</sup>

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34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.* at 855.

41. *See id.* Prior to the enactment of the bad faith provision, an action by an employee against his or her employer or worker's compensation administrator or carrier could have been maintained in civil court for an independent tort, fraud, or gross negligence. *See, e.g.,* Stump v. Commercial Union, 601 N.E.2d 327 (Ind. 1992); Vakos v. Travelers, Ins., 691 N.E.2d 499 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 168 (Ind. 1998).

42. *Borgman*, 713 N.E.2d at 855 n.1.

43. *See also* Samm v. Great Dane Trailers, 715 N.E.2d 420, 423 (Ind. Ct. App. 1999) (holding that retroactive application of the bad faith provision was appropriate), *trans. denied*, No. 84A01-9810-CV-381, 2000 Ind. LEXIS 66 (Ind. Jan. 26, 2000).

The court in *Borgman* also addressed the constitutionality of the bad faith provision. Ms. Borgman argued that the bad faith statute violated the Open Courts Clause of the Indiana Constitution, as set forth in article I, section 12,<sup>44</sup> because it improperly grants the Worker's Compensation Board the authority to consider claims beyond work-related incidents.<sup>45</sup> The court rejected Ms. Borgman's theory stating that article I, section 12 "does not prevent the legislature from modifying or restricting common law rights and remedies in cases involving injury to person or property."<sup>46</sup> With respect to the bad faith statute, the court held that the legislature was merely acting to restrict the remedy available for a breach of duty imposed upon the employer or worker's compensation carrier.<sup>47</sup> The court further noted that "the statute simply designates the proper forum for bringing enumerated claims against the worker's compensation insurance carrier and does not operate to strip the Borgmans of an established right or recourse."<sup>48</sup>

#### B. *Samm v. Great Dane Trailers*<sup>49</sup>

Since the enactment of the bad faith statute, practitioners have, at least at the single hearing member level, debated what acts might constitute "bad faith," "lack of diligence," and "independent torts" as contemplated by the bad faith provision. In *Samm v. Great Dane Trailers*, the court considered the term "independent tort" within this context.<sup>50</sup>

On March 27, 1997 Samm injured his lower groin area while on the job. He sought treatment with his family physician on March 31, 1997 and was diagnosed with a hernia which would require surgery.<sup>51</sup> Samm requested worker's compensation benefits, and the employer responded by stating that it would have to investigate the matter. On April 3, 1997 Samm was advised by a company representative that the injury was not work-related and that he was being terminated for making a false claim for worker's compensation benefits.<sup>52</sup> Samm was terminated the following day. Great Dane ultimately refused to pay for Samm's medical expenses and benefits.<sup>53</sup> Samm filed a complaint in civil court

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44. Article I, section 12 of the Indiana Constitution provides that, "[a]ll courts shall be open; and every person, for injury done to him and his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely and without purchase; completely without denial; speedily without delay." IND. CONST. art. I, § 12.

45. See *Borgman*, 713 N.E.2d at 855.

46. *Id.* (citing *State v. Rendleman*, 603 N.E.2d 1333, 1337 (Ind. 1992)).

47. See *id.* at 856.

48. *Id.*<sup>1</sup>

49. 715 N.E.2d 420 (Ind. Ct. App. 1999), *trans. denied*, No. 84A01-9810-CV-381, 2000 Ind. LEXIS 66 (Ind. Jan. 26, 2000).

50. *Id.* at 423.

51. See *id.* at 422.

52. See *id.*

53. See *id.*

alleging that Great Dane falsely accused him of the criminal act of fraud constituting libel per se and that his discharge was in retaliation for pursuing his rights under the Indiana Worker's Compensation Act. He sought both compensatory and punitive damages.<sup>54</sup>

Great Dane moved the trial court to dismiss Samm's complaints for essentially the same reason as State Farm did in *Borgman*. On disposition of the case, the court in *Samm*, like in *Borgman*, held that the bad faith provision was retroactive in application.<sup>55</sup> The court, however, took a somewhat different approach in analyzing Samm's claim. The court undertook a discussion first of whether the legislature intended the phrase "adjusting or settling"<sup>56</sup> to include an employer's tortious actions occurring after it had denied an employee's request for benefits and, second, whether the legislature intended retaliatory discharge and defamation to constitute "independent torts" within the meaning of the bad faith statute.<sup>57</sup>

In its quest for defining "adjusting and settling," the court concluded in this instance that the denial of benefits constituted the final step of the company's procedure for adjusting and settling a claim.<sup>58</sup> In other words, it noted that there were no internal appeal procedures and, therefore, as soon as Great Dane told Samm that it was denying the claim, its "adjusting and settling" period was completed.<sup>59</sup> Implicit in the court's discussion is the presumption that had the same act occurred prior to the "official denial" of benefits that such act would have been said to have occurred during the "adjusting and settling" phase. The court stated, "We cannot say that the legislature intended the 'adjusting and settling' process to include the discharge of the claimant after the employer has finally denied his request for benefits."<sup>60</sup> Essentially, it can be inferred from *Samm* that an employer or worker's compensation administrator or carrier is subject to liability under the bad faith provision only during that time frame for which an initial decision on compensability is being determined and, also, for that period of time that the claim remains open in the event that compensability is accepted by the employer or insurance carrier.

The more fascinating component of *Samm*, however, was the court's discussion of what constitutes an "independent tort" under the bad faith statute. The court concluded that the legislature did not intend to include as an independent tort a claim of retaliatory discharge, where such claims are based upon an employee's allegation that he or she was discharged for filing or pursuing worker's compensation benefits.<sup>61</sup> Although recognizing that retaliatory discharge sounds in tort rather than contract, the court found that it was not an

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54. *See id.*

55. *See id.* at 423.

56. *Id.* at 424.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* at 425-26.

independent tort as contemplated by the statute.<sup>62</sup> The court focused primarily on the fact that Indiana is an at-will employment state<sup>63</sup> and that, as such, courts have acknowledged only limited exceptions to this doctrine, one of which an exception for employees discharged in retaliation for filing or pursuing worker's compensation benefits.<sup>64</sup> The court undertook a lengthy discussion of Indiana cases addressing this exception and, finally, concluded that:

The case law reflects a clear, definite policy in this State supporting an employee's right to file a claim for worker's compensation benefits and to be free from coercion or threats of termination in exercising that right. . . . We presume that the legislature was aware of this policy in passing I.C. 22-3-4-12.1 and intended no changes in the interpretation of such policy . . . .<sup>65</sup>

As further support for its holding, the court recognized that the bad faith provision allowed only a recovery of \$500 to \$20,000, "depending upon the degree of culpability and the actual damages sustained"<sup>66</sup> and that, given this statutory limit on the recovery, it would be inconsistent to with the Indiana Supreme Court's conclusion in *Frampton* that a wrongfully discharged employee is entitled to be "fully compensated."<sup>67</sup> Accordingly, it stated that had the legislature

intended to place matters of retaliatory discharge within the Board's exclusive jurisdiction and thereby eliminate the availability of a comprehensive remedy in a separate civil action, it would have specifically done so in express terms and not by making a generalized reference to intentional torts which, if proven, are compensable only by a limited award.<sup>68</sup>

The court did, however, hold that defamation was, per se, an "independent tort" within the meaning of the bad faith provision.<sup>69</sup> Nonetheless, the court remanded the case for further analysis as to whether the defamation occurred during the "adjusting and settling" process.<sup>70</sup> Put simply, the court stated that if Samm's claim was denied because it was not work-related *and* it was fraudulent, then the defamation would seem to have occurred concurrently with the adjusting and settling of a claim so as to bring the action within the jurisdiction of the Worker's Compensation Board.<sup>71</sup> On the other hand, if Samm's claim was

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62. *See id.* at 424.

63. *See id.* at 425.

64. *See Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

65. *Samm*, 715 N.E.2d at 426.

66. *Id.* (quoting *Frampton*, 297 N.E.2d at 428).

67. *Id.*

68. *Id.* (footnote omitted).

69. *Id.* at 427.

70. *Id.*

71. *See id.*

denied because it was not work-related, and he was subsequently terminated for fraudulently submitting a claim, then the defamation would seem to have occurred separately and independently from the employer's procedure for adjusting and settling a claim so as to remove it from the jurisdiction of the Worker's Compensation Board.<sup>72</sup>

### III. CHOKING DETERMINED A "PERSONAL RISK"

In *Indiana Michigan Power Co. v. Roush*,<sup>73</sup> Ralph Roush had a history of eating his food without chewing and, during his employment, choked on a sandwich that had been made available after the conclusion of a meeting.<sup>74</sup> Efforts to perform the Heimlich maneuver were unsuccessful and Roush was taken to the hospital. Roush subsequently died as a result of the choking incident, and a worker's compensation claim was brought by his widow.<sup>75</sup>

The Worker's Compensation Board found that the employee's death was compensable; however, the court of appeals reversed their decision.<sup>76</sup> The court re-iterated the general rule that risks causing injury or death to an employee can be divided into three categories: "(1) risks distinctly associated with the employment; (2) risks personal to the claimant; and (3) 'neutral' risks which have no particular employment or personal character."<sup>77</sup> Risks falling into the first and third category are covered under the Indiana Worker's Compensation Act but risks falling into the second category are not.<sup>78</sup> The court of appeals acknowledged that personal activities undertaken at work for the employee's comfort and convenience have been held to be compensable in the past,<sup>79</sup> but, if an injury occurs there must be some causal connection to the employment.<sup>80</sup> The court of appeals held that placing large amounts of food into Roush's mouth and attempting to swallow it whole was a personal risk and that "[n]othing about Roush's employment increased his risk of choking or was causally connected to

72. *See id.*

73. 706 N.E.2d 1110 (Ind. Ct. App.), *trans. denied* 726 N.E.2d 309 (Ind. Oct. 21, 1999) (mem.).

74. *See id.*

75. *See id.* at 1112.

76. *See id.*

77. *Id.* at 1114 (quoting *Four Star Fabricators, Inc. v. Barrett*, 638 N.E.2d 792, 794 (Ind. Ct. App. 1994)).

78. *See id.*

79. *See id.* The court cites, as examples, *Vendome Hotel Inc. v. Gibson*, 105 N.E.2d 906, 910 (Ind. Ct. App. 1952) (accident in which employee's fingers were severed when employee reached into employer's icemaker to get ice for personal consumption held arising out of and in the course of employment) and *Prater v. Indiana Briquetting Corp.*, 251 N.E.2d 810, 813 (Ind. 1969) (accident in which employee was killed when struck by a train while employee was traveling to nearby business establish to purchase soft drinks held arising out of and in the course of employment).

80. *See Roush*, 706 N.E.2d at 1115.

it."<sup>81</sup>

#### IV. NO MEDICAL DOCUMENTATION NECESSARY

It has been a longstanding practice in worker's compensation that an employee provide medical documentation that he or she is unable to perform his or her regular work duties. In a clear departure from this practice, the court of appeals in *Tanglewood Terrace v. Long*<sup>82</sup> held that an employee can offer lay testimony regarding his or inability to work and that medical documentation of disability is not required in Indiana.

In *Tanglewood*, the injured employee, Sonya Long, alleged two distinct injuries. The first occurred when the employee twisted her body in an effort to answer the telephone while sitting at her desk and the second injury occurred when Ms. Long was pulled down while she was assisting a resident in the Tanglewood nursing home.<sup>83</sup> The single hearing member, as well as the full Board, found in favor of Long and awarded temporary total disability benefits, permanent partial impairment, and appropriate medical care.<sup>84</sup> The pertinent issue on appeal was the hearing member's determination that Long was entitled to temporary total disability benefits given the absence of any medical documentation to support her claim.<sup>85</sup> The court of appeals noted that, although a practice amongst worker's compensation litigators, there was no Indiana case law or statutory authority mandating that an employee establish an inability to temporarily perform his or her job duties by medical evidence.<sup>86</sup> It stated, "compensation boards may rely to a considerable extent on their own knowledge and experience in uncomplicated medical matters, and in such cases awards may be upheld without medical testimony or even in defiance of the only medical testimony."<sup>87</sup>

From a practical standpoint, as an employer, it might be prudent in borderline cases to have an injured employee evaluated by the company doctor, or other physician with regard to the ability to work. While, at first glance, this might appear to place the burden of proof upon the employer, it would seem that if an employee is able to offer lay testimony that the employer might likely need a medical evaluation to dispute his or her claim even though the employee retains no expert.

#### V. INTENTIONAL ACTS

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81. *Id.*

82. 715 N.E.2d 410 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 316 (Ind. Dec. 28, 1999) (mem.).

83. *See id.* at 413.

84. *See id.* at 412.

85. *See id.* at 413.

86. *See id.* at 414.

87. *Id.* (quoting 7 ARTHUR LARSON & LEX K. LARSON, *THE LAW OF WORKER'S COMPENSATION* § 79, at 15-426.32(66) (1952)).

This survey period, the Indiana Supreme Court, in two companion cases, *Tippmann v. Hensler*<sup>88</sup> and *Wine-Settergren v. Lamey*,<sup>89</sup> discussed whether a civil suit could be maintained by an injured employee against a co-employee for his or her alleged “intentional acts.”

#### A. *Tippmann v. Hensler*

In *Tippmann*, Dennis Tippmann and Brian Hensler were co-employees of Tippmann Pneumatics, Inc. Hensler was employed as a paintball gun assembler while Tippmann worked in the service department repairing paintball guns.<sup>90</sup> During a scheduled break, Tippmann began “playing around” by aiming a paintball gun at Hensler that Tippmann had just serviced and inquiring, “[w]here do you want me to shoot you at?”<sup>91</sup> Hensler responded by leaving the room and returning with another paintball gun. The two then began conversing and were no longer pointing the paintball guns at each other.<sup>92</sup>

The other employees in the break room began shooting paintball guns down the length of the room at a designated testing area “just for fun” and, eventually, Hensler joined in this activity.<sup>93</sup> Tippmann angrily told the employee to quit firing due to the “mess” left behind by the discharged paint. In defiance, Hensler “dry fired” his gun at the ceiling.<sup>94</sup> Tippmann then loaded his paintball gun and told Hensler he was going to shoot him. Hensler left the room and after he had left Tippmann fired at the exit door to make a loud sound and “scare” Hensler. Unfortunately, Hensler unexpectedly returned, and, upon re-entering the room, Hensler was struck with the paintball in the left eye causing severe and permanent damage.<sup>95</sup>

Hensler filed a worker’s compensation claim against the employer that was ultimately settled by agreement. He then filed a claim in civil court against Tippmann alleging that Tippmann’s negligence caused the injury or, in the alternative, that Tippmann intentionally caused the injury.<sup>96</sup> Tippmann moved for summary judgment arguing that the exclusive remedy provision of the Worker’s Compensation Act<sup>97</sup> barred Hensler’s claim.

The trial court denied Tippmann’s motion, and, on interlocutory appeal, the court of appeals reviewed the case and remanded for a factual determination of whether Hensler was an active participant in the horseplay.<sup>98</sup> Before further

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88. 716 N.E.2d 372 (Ind. 1999).

89. 716 N.E.2d 381 (Ind. 1999).

90. See *Tippmann*, 716 N.E.2d at 373.

91. *Id.*

92. See *id.*

93. *Id.*

94. *Id.* at 374.

95. See *id.*

96. See *id.*

97. See IND. CODE § 22-3-2-6 (1998).

98. See *Tippmann v. Hensler*, 654 N.E.2d 821, 826 (Ind. Ct. App. 1995), *vacated*, 716

findings could be made, the Indiana Supreme Court granted transfer.

The Act provides an exclusive remedy against an employer for accidental injuries that arise out of and in the course of the injured employee's employment.<sup>99</sup> This immunity extends to suits against those "in the same employ[ment]" as the injured worker when the injury occurred."<sup>100</sup> Thus, the Indiana Supreme Court noted that Hensler could maintain a civil action against Tippmann if it could be shown that either (1) the injury was not accidental or did not arise out of and in the course of the employment; or (2) that Hensler and Tippmann were not in the "same employment" at the time of the injury.<sup>101</sup>

The court undertook an analysis of prior Indiana opinions addressing the issue. It began by reviewing *Evans v. Yankeetown Dock Corp.*,<sup>102</sup> wherein the court concluded that an injury "by accident" meant "accidental injury" and not "injury caused by an accident."<sup>103</sup> Given that interpretation, the Indiana Supreme Court had previously adopted the following test for determining when an accidental injury occurred: whether the sufferer intended or expected that injury would, on a particular occasion, result from what he was doing.<sup>104</sup> Then, in *Baker v. Westinghouse Electric Corp.*,<sup>105</sup> the Indiana Supreme Court modified the test to also consider the employer's intentions and expectations stating, "[b]ecause we believe an injury occurs 'by accident' only when it is intended by neither the employee nor employer, the intentional torts of an employer are necessarily beyond the pale of the act."<sup>106</sup>

Tippmann argued that according to *Baker*, his intention was irrelevant as the only intent that mattered was that of the injured employee and the employer.<sup>107</sup> The Indiana Supreme Court rejected Tippmann's argument and, instead, extended the *Baker* rule to encompass co-employees.<sup>108</sup> The proper inquiry, stated the court, was "[d]id the party who is advocating the applicability of the Act intend for harm to result from the actions that party undertook?" If so, then the injury did not occur 'by accident' for that particular litigant."<sup>109</sup> Applying this test to the particular facts at hand, the Indiana Supreme Court held that Tippmann had the intent to cause injury to Hensler and, therefore, the injuries were not "by accident."<sup>110</sup>

*Tippmann* definitely broadens the area of a civil litigation against co-

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N.E.2d 372 (Ind. Sept. 22, 1999).

99. See IND. CODE § 22-3-2-6.

100. *Tippmann*, 716 N.E.2d at 375 (quoting IND. CODE § 22-3-2-6).

101. *Id.* (citations omitted).

102. 491 N.E.2d 969 (Ind. 1986).

103. *Tippman*, 716 N.E.2d at 375 (citing *Evans*, 491 N.E.2d at 974).

104. See *id.*

105. 637 N.E.2d 1271 (Ind. 1994).

106. *Id.* at 1273.

107. See *Tippmann*, 716 N.E.2d at 375.

108. See *id.* at 376.

109. *Id.*

110. *Id.* at 381.

employees. While *Tippmann* purports to set forth rules for determining third-party tortfeasor liability, it also leaves much room for subjective interpretation of the facts. This decision, however, standing alone would not appear contrary to the intent of the Act to hold tortfeasors liable for their actions while still insulating employers behind the exclusive remedy provisions of the Act.

*B. Wine-Settergren v. Lamey*<sup>111</sup>

Robert Lamey and his co-employee, Cindy Wine-Settergren, were both working for a radio station.<sup>112</sup> Lamey worked as sports director and Wine-Settergren as a morning radio personality and news director. Wine-Settergren had recently returned to work following nose surgery and, as a consequence, her nose was particularly sensitive.<sup>113</sup> During a break, Lamey shouted loudly down the hall and, as a result, startled Wine-Settergren who exclaimed, "Oh, my God, Bob." Lamey, apologized for startling her and embraced her in a strong hug. As he hugged her, he pulled her head into his collarbone re-injuring her nose.<sup>114</sup> Wine-Settergren never filed a worker's compensation claim but, instead, filed a civil suit seeking permanent pain and suffering, loss of her senses of taste and smell, the need for cosmetic surgeries and lost wages associated with the surgeries. Lamey moved the court for a dismissal and, accordingly, the trial court dismissed the suit holding that the exclusivity provision of the Act precluded Wine-Settergren civil suit.

Applying the test enumerated in *Tippmann*, the Indiana Supreme Court concluded that Wine-Settergren's injuries were not intentionally caused and, therefore, went on to consider whether Lamey and Wine-Settergren were in the "same employment."<sup>115</sup> The Indiana Supreme Court noted that there were two lines of court of appeals cases discussing this concept.<sup>116</sup> The first line of cases, most notably, *Martin v. Powell*<sup>117</sup> and *Seiler v. Grow*,<sup>118</sup> focus upon "whether the accidental injury arose 'in the course of [the tortfeasor employee's] employment.'"<sup>119</sup> Thus, under this line of cases, application of the phrase "in the same employ[ment]" includes an analysis of the co-employee's injury causing actions to determine whether they were causally related to his employment.<sup>120</sup> Under this approach, non-job related action, for example, horseplay or sexual harassment, have been determined not to have a causal connection to the co-

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111. 716 N.E.2d 381 (Ind. 1999).

112. *See id.* at 383.

113. *See id.*

114. *See id.*

115. *Id.* at 384.

116. *See id.*

117. 477 N.E.2d 943 (Ind. Ct. App. 1985).

118. 507 N.E.2d 628 (Ind. Ct. App. 1987).

119. *Lamey*, 716 N.E.2d at 384 (quoting *Seiler*, 507 N.E.2d at 631; *Martin*, 477 N.E.2d at 945)).

120. *Id.* at 385.

employee's employment, thus, rendering the co-employee "not in the same employ[ment]" and vulnerable to civil suit.<sup>121</sup>

The other line of cases, exemplified best by *Weldy v. Kline*,<sup>122</sup> disapproved with the analysis in *Martin* and *Seiler* and, instead, stated that the court should not concern itself with action of the co-employee but, rather, the co-employee is in the same employment if he "could obtain compensation benefits [under] the same or similar circumstances" as the injured employee.<sup>123</sup> The *Weldy* test essentially asks whether the defendant, had he received rather than caused the injury, would have been able to recover similar benefits from the plaintiff's employer.<sup>124</sup>

The Indiana Supreme Court rejected the position taken in *Weldy* stating, "we cannot think of an instance where the defendant would be subject to [civil] suit under this test if he and the plaintiff were also co-employees."<sup>125</sup> In a thoughtful opinion considering precedent, legislative intent, and policy concerns, the court affirmed its "prior approval of the *Martin* standard for use in determining when a co-employee tortfeasor is 'in the same employ[ment].'"<sup>126</sup>

In determining whether Lamey's actions were in the course of employment, the court noted that "in the course of the employment" refers to the time, place, and circumstances under which the accident occurs.<sup>127</sup> Certainly, the injury occurred during working hours in a vending machine area located upon the employer's premises and, thus, the first two prongs were clearly satisfied.<sup>128</sup> With respect to the "circumstances" under which the accident occurred, the Indiana Supreme Court reasoned that maintaining a congenial work environment where employees get along with each other is desired by both employees and employers and that Lamey's embracing hug and consolation of Wine-Settergren was an action reasonably expected between employees.<sup>129</sup> Accordingly, Lamey's actions were concluded to be in the course of his employment, thus preventing Wine-Settergren's civil action.<sup>130</sup>

What the supreme court does not answer, however, is: When does congenial behavior cross the line into something more? When does a concerned hug become sexual harassment? How does an employer advise a supervisor who is too "warm and fuzzy"? These are the types of questions that will no doubt be raised in future litigation.

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121. *Id.*

122. 616 N.E.2d 398 (Ind. Ct. App. 1993).

123. *Lamey*, 716 N.E.2d at 385 (quoting *Weldy*, 616 N.E.2d at 403).

124. *See id.*

125. *Id.*

126. *Id.* at 386.

127. *Id.* at 390 (citations omitted).

128. *See id.*

129. *See id.*

130. *See id.*

## VI. LEGISLATIVE AMENDMENTS

Finally, the Indiana General Assembly passed a few notable amendments to the existing Worker's Compensation Act including: mandatory electronic reporting, school to work students, doubling of PPI for some partial amputations, and changes to the second injury fund.

### *A. Mandatory Electronic Reporting*

Indiana Code section 22-3-4-13 was amended to require that all insurance carriers, self-insurers, and third party administrators responsible for submitting a First Report of Injury do so using electronic data interchange standards prescribed by the Board.<sup>131</sup> Previously, it was permissible to submit such reports via United States mail, however, this amendment mandates compliance with the electronic format by June 30, 1999.<sup>132</sup> If an entity cannot comply with the electronic filing rule by the June 30, 1999 deadline, then an implementation plan must be approved by the Board no later than June 30, 2000, which provides for electronic reporting of the First Reports of Injury no later than December 31, 2000.<sup>133</sup>

### *B. School to Work Students*

A student participating in on-the-job-training under the federal School to Work Opportunities Act<sup>134</sup> will be known as a "school to work student" and, to the extent he or she suffers an otherwise compensable injury, he or she will be entitled to medical benefits, PPI benefits, death benefits in a lump sum of \$175,000, and burial expenses.<sup>135</sup> A school to work student is not entitled to temporary total disability benefits or temporary partial disability benefits.<sup>136</sup> Further, should the school to work student seek to modify the award under Indiana Code section 22-3-3-27, the school to work student's average weekly wage is presumed to be equal to the federal minimum wage.<sup>137</sup>

### *C. Partial Amputations*

The Indiana Worker's Compensation Act provides scheduled impairments for certain losses, for example, total and partial amputations.<sup>138</sup> For injuries occurring after July 1, 1999, a PPI rating associated with the partial amputation of the fingers or toes, enucleation of an eye, or loss of a testicle shall be

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131. See IND. CODE § 22-3-4-13(b)(1) (1998).

132. See *id.*

133. See *id.* § 22-3-4-13(b)(2).

134. See 20 U.S.C. §§ 6101-6104 (1994).

135. IND. CODE §§ 22-3-2-2.5, 22-3-7-2.5.

136. See *id.* § 22-3-2-2.5(d)(1)-(2).

137. See *id.* § 22-3-2-2.5(c).

138. See generally *id.* § 22-3-3-10.

doubled.<sup>139</sup> This has been the case with total amputations since 1997, thus, this provision merely enhances the recovery available for partial amputations.

#### *D. Second Injury Fund*

The Worker's Compensation Board is now required to enter into a contract with an actuary or other qualified firm in order to calculate a recommended funding level for the second injury fund.<sup>140</sup> If the fund has a credit balance of less than \$1 million as of October 1 of any given year, then the Board must notify insurance carriers, other entities or self-insurers by October 1 that an assessment is necessary.<sup>141</sup> The assessment may not exceed 1.5% of temporary total disability, temporary partial disability, permanent partial impairment, permanent total disability and death benefits paid in the calendar year preceding the assessment due date and must be paid within thirty days of the assessment notice.<sup>142</sup> For insured employers, the assessment must be collected through a surcharge based upon the employer's premium and must be shown as a separate amount on the premium statement.<sup>143</sup>

#### CONCLUSION

As stated previously, the Worker's Compensation Act forms a compromise between employees and employers by providing benefits to an injured worker while, at the same time, protecting the employer from conventional tort liability. Certainly, as the times change, the courts will continue to be faced with new and distinct issues necessitating an interpretation of the Act. Several important opinions have been decided during the current survey year and practitioners look forward with interest to what the next survey period will bring.

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139. *See id.* § 22-3-3-10(c)(2).

140. *See id.* § 22-3-3-13.

141. *See id.* § 22-3-3-13(c)(2).

142. *See id.*

143. *See id.* § 22-3-3-13(e).

