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2023 Worker's Compensation Institute

Indiana Continuing Legal Education Forum (ICLEF)

2023 Worker's Compensation Institute
November 8, 2023

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WORKER'S COMPENSATION INSTITUTE

November 8, 2023

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WORKER'S COMPENSATION INSTITUTE

Agenda

8:30 A.M. **Registration and Coffee**

8:55 A.M. Welcome and Introductions
Hon. Linda P. Hamilton and Alex M. Beeman, Program Chairs

9:00 A.M. Issues with Forms, Common Questions (including issues with 38911), Working with Claims Representatives, Hurdles in 2023
Jane R. Callies

10:00 A.M. Worker's Compensation Recent Case Law Update (1st half)
Anthony L. Holton and Joseph A. Zumpano, III

10:30 A.M. **Break**

10:45 A.M. Worker's Compensation Recent Case Law Update (2nd half)
Anthony L. Holton and Joseph A. Zumpano, III

11:15 A.M. Light Duty Work Trends, Reasonable Refusal of Light Duty, What is "Reasonable"
Tricia G. Bellich and Marisa R. Lareau

12:15 P.M. **Lunch Break (On your own)**

1:15 P.M. Worker's Compensation Board Roundtable – including your questions!
Hon. Linda P. Hamilton, Hon. Daniel G. Foote, Hon. Douglas W. Meagher, Hon. Sandra E. O'Brien, Hon. Diane L. Parsons, Hon. Kyle L. Samons, Hon. A. James Sarkisian

* Social Security Disability
* Settlements Negotiated by Adjusters and Written up by Attorneys

2:15 P.M. Attorney's Fees for Medicals (1st half)
Daniel A. Korban

2:45 P.M. **Break**

3:00 P.M. Attorney's Fees for Medicals (2nd half)
Daniel A. Korban

3:30 P.M. Ethics / Civility in Worker's Compensation and Related Practice
Jon R. Pactor

4:30 P.M. **Adjournment**

November 8, 2023

WORKER'S COMPENSATION INSTITUTE

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November 8, 2023

Hon. Linda P. Hamilton, Chair, Indiana Worker's Compensation Board, Indianapolis

Linda Hamilton was appointed by Governor Mitch Daniels as the Chairman of the Indiana Worker's Compensation Board in August of 2005. She had served as a Single Hearing Member of the Board since 1995, following her original appointment by Governor Evan Bayh. Linda grew up in Porter County, Indiana and attended Indiana University in Bloomington, where she graduated Phi Beta Kappa and thereafter received her law degree in 1983. After graduation, Linda clerked for the Honorable Judge Robert W. Neal of the Court of Appeals of Indiana for two years before joining the Fort Wayne law firm of Helmke, Beams, Boyer and Wagner. In 1991, she resigned her partnership in the firm to resume full-time work in the public sector as the City of Fort Wayne's staff attorney and later Corporate Counsel to City Utilities. In August of 2002 Linda left her City legal career to concentrate her professional efforts on worker's compensation matters.

Alex M. Beeman, Reminger Co. LPA, Evansville

Alex Beeman serves as the Managing Partner of Reminger's Evansville office, where he focuses on defense litigation matters involving general liability, worker's compensation, medical malpractice (including representation of correctional healthcare providers), governmental/public entity liability, insurance/bad faith liability, premises liability, and probate. Alex has a wide array of experience in all aspects of litigation, including the prosecution and defense of claims relating to estate administration, guardianships, will contests, and breaches of fiduciary duties. Prior to joining Reminger, Alex practiced general civil litigation, criminal defense, and appeals. Alex was also a felony public defender. He has tried multiple first chair jury trials. Having been involved in more than 30 appeals, he has also argued before both the Indiana and Seventh Circuit Court of Appeals.

Alex graduated from Indiana University Robert H. McKinney School of Law in 2013. Prior to law school, he received his Bachelor of Science from Ball State University in Muncie, Indiana, where he graduated summa cum laude.

TRICIA BELLICH

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Primary Practice(s)

- Workers' Compensation
- General Liability

Additional Practice(s)

- ADA Compliance & Defense
- FCRA Compliance & Defense
- Labor & Employment
- Employment Advice & Counseling
- Transportation

Education

- Valparaiso School of Law, *Juris Doctor*, Moot Court Society, 1995
- Indiana University - Kelley School of Business, Bachelor of Science, 1992
  - — Dean's List and Scholarship Recipient

Tricia Bellich is a partner in the Northwest Indiana office of Lewis Brisbois and a member of the Workers' Compensation Practice.

Tricia brings a wealth of Worker's Compensation and General Liability knowledge to the practice group. In her prior tenure, she served on the Management Committee and also as a Worker' Compensation Group Practice Leader for mid-sized regional law firms. She has a national presence in the field of Worker's Compensation serving as a trainer, speaker, and mentor for numerous individuals in this practice area. She uses her business acumen to counsel smaller local companies to large corporations on best practices in claims management, return to work issues and the importance of an inclusive, positive culture in the workplace.

Publications

Tricia has published various articles and practice guides for various organizations and publications on issues on the ever evolving concerns of best practices in claim management, Tips on Defense Strategies in Worker's Compensation Cases, Hybrid workforce, and work place safety.

Pro Bono & Philanthropy

Tricia is involved in giving back to her community through local food banks such as God's Groceries, American Cancer Society and Friends of ABRA, INC. Rescue Angels.

Professional Presentations

- National Worker's Compensation Seminar Speaker
- Speaker for CEU, NBI, and Indiana Continuing Legal Education Forum
- National trainer for various self-insureds and Insurance companies on Worker's Compensation and Employment Topics

Associations

- CLM
- IWCI
- Alliance of Women in Worker's Compensation
- Lake County Bar Association

Admissions

- State Bar Admissions:
  - Illinois
  - Indiana
- United States District Courts:
  - United States District Court for the Northern District of Indiana
  - United States District Court for the Southern District of Indiana

Jane R. Callies, Kopka Pinkus Dolin PC, Crown Point

Jane R. Callies has been defending workers' compensation cases since 1999. Throughout her career she has successfully taken dozens of cases to hearing before the Indiana Worker's Compensation Board and has had many Single Hearing Member decisions overturned to the client's benefit. Jane has represented a wide variety of clients, including large corporations and small businesses. She has presented workers' compensation seminars for the Indiana Continuing Legal Education Forum and the Lake County Bar Association. Jane successfully created and cultivated the entire workers' compensation program with her previous firm.

Jane is a seasoned trial attorney with extensive experience handling civil litigation matters for corporate clients, insurers, excess carriers, and third-party administrators in complex litigation. She has handled a variety of cases for personal and commercial clients in the areas of premises liability, commercial liability, retail and restaurant, workers' compensation, and automobile liability. As first chair counsel, Jane has personally tried several jury trials, defending clients against auto liability and premises liability claims.

Before joining Kopka Pinkus Dolin, Jane had significant experience handling general liability and Social Security/disability. She received her Bachelor of Science in Communications, cum laude, from Michigan Technological University, and her Juris Doctor, with honors, from Valparaiso University School of Law.

Jane enjoys helping her community in her spare time and currently serves as the President of the Calumet American Inns of Court (2022-2023).

Hon. Daniel G. Foote, Indiana Worker's Compensation Board, Indianapolis

Daniel G. Foote is a Single Hearing Member with the Indiana Worker's Compensation Board in Indianapolis, a position he has served since 2005. Dan hears worker's compensation and occupational disease cases in the northeastern district of Indiana and hears administrative appeals with his fellow Board members.

In 1992, Dan completed his undergraduate studies in Political Science, Latin American Studies and Spanish, graduating as a member of the Mortar Board Senior Honor Society. In 1993 he enrolled in the evening division at the Indiana University School of Law at Indianapolis. While attending law school, he took a position as a policy analyst with the Worker's Compensation Board and has been a member of Indiana's worker's compensation community ever since.

In 1997 Dan joined Locke Reynolds LLP in Indianapolis where he devoted his practice to worker's compensation, civil litigation and appeals. In 2002 he joined Due Doyle Fanning LLP, where he handled worker's compensation and occupational disease matters before the Board and the Court of Appeals. In 2005 Dan was appointed to his first four-year term with the Board, where he has served ever since. Dan currently devotes his private practice to civil litigation.

In his spare time, Dan has served in a variety of community and civic roles. He is a volunteer for Operation Walk, a group of orthopedic surgeons, anesthesiologists, nurses and physical therapists that provides free joint replacement surgeries in Nicaragua and Guatemala. Among other duties, Dan provides legal, logistical and translation support to the members of the medical team.

Anthony L. Holton, Reminger Co., LPA, Indianapolis

Tony Holton is a shareholder practicing out of Reminger Co., LPA's Indianapolis office. Tony has devoted his career to the defense of individuals and businesses in areas of professional liability - including insurance, real estate and financial services - as well as sports/entertainment facility liability, products liability, and workers' compensation.

Tony routinely handles litigation in state, federal, and administrative forums throughout Indiana and Illinois, as well as arbitration and other alternative dispute resolution proceedings. Tony strives to provide his clients with responsive service and clear, consistent communication throughout the litigation process. Tony ensures his clients receive honest and frank advice, whether that leads to pursuing a resolution or trial strategy.

Tony has written numerous publications and presented on a variety of practice areas, including wrongful death, financial services, workers' compensation, evidentiary matters at trial, and effective deposition practice.

Tony has geared his practice toward litigation ever since attending law school at Indiana University Robert H. McKinney School of Law, where he pursued an Advocacy Concentration and excelled in the school's Moot Court competition, being named into the Order of the Barristers.

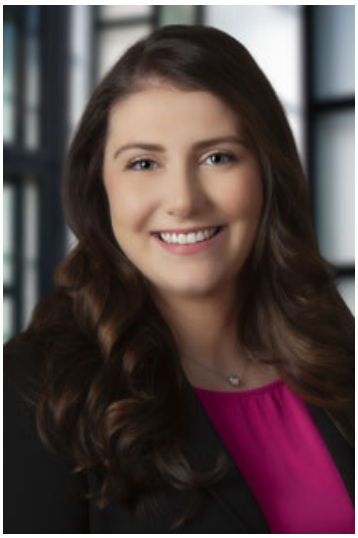
Daniel A. Korban, George C. Patrick & Associates, P.C., Crown Point

Dan Korban was born in Boston, Massachusetts, but has lived in the Midwest for over 20 years. He earned his Bachelor's degree from the University of Akron, graduating Summa Cum Laude. He then attended Valparaiso University Law School on a full scholarship. While there, he was selected to serve as an executive board member of the Moot Court Honors Society, competing nationally as an oralist.

With over a decade of experience, Dan represents clients in all aspects of worker's compensation and personal injury. He is a tenacious and successful litigator, guiding cases from conception to verdict. Dan has tried numerous cases both before the Indiana Worker's Compensation Board and in jury trials. He is dedicated to fighting for everyday people and being a defense against the power of the insurance industry.

Dan grew up working in the trades and continued working in construction to support himself through college. In his free time, he continues to enjoy working in his wood shop, mountain biking, following sports, and spending time with his wife and son.

Dan has been recognized by Super Lawyers as a "Rising Star" in the area of worker's compensation and was awarded the National Academy of Personal Injury Attorneys' 2023 Top Ten Attorney award.



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Marisa Lareau

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Marisa Lareau is an associate in the Northwest Indiana office of Lewis Brisbois and a member of the General Liability Practice. Ms. Lareau began her legal career at an Indiana based law firm, where she clerked throughout law school before becoming an associate. As an associate, Ms. Lareau primarily practiced medical malpractice defense.

Ms. Lareau grew up in St. John, Indiana. In her spare time she enjoys shopping, spending time with friends and family, spoiling her dog, and Pilates.

Primary Area(s) of Practice

- General Liability

Associations

- Lake County Bar Association
- Indianapolis Bar Association
- American Inns of Court
- Service League

Education

Indiana University McKinney School of Law

Juris Doctor, Health Law Certificate, 2019

- Phi Delta Phi Honor Society
- Moot Court
- Health Law Society
- Woman's Caucus
- Student Bar Association Mentor

Valparaiso University

Bachlor's degree in International Business, 2016

- Cambridge University study abroad program
- *The Journal of Value Based Leadership*, Student Contributor

Hon. Douglas W. Meagher, Indiana Worker's Compensation Board

Doug Meagher is a Hearing Judge with the Indiana Worker's Compensation Board. He was born and raised in Crawfordsville, Indiana, and is a graduate of Crawfordsville High School. He received his Bachelor of Science and Master of Public Administration degrees from Indiana State University and his Juris Doctorate degree from the Indiana University McKinney School of Law in Indianapolis.

Mr. Meagher began his career with Indiana state government with appointment to the Governor's Fellowship Program in 1983. He served as Executive Secretary of the Indiana Worker's Compensation Board from 1989 to 1994, and as a Member of the Board from 1994 to 1999. He practiced worker's compensation defense from 1999 to 2017, and was appointed a Member of the Board again in 2017.

Hon. Sandra E. O'Brien, Hearing Judge, Indiana Worker's Compensation Board, Indianapolis

Sandra O'Brien was appointed by Governor Holcomb as the district 1 Hearing Member for the Indiana Worker's Compensation Board in January 2019. Prior to her appointment, she was in private practice for 23 years focusing on personal injury, worker's compensation and appellate advocacy. She attended the University of Chicago where she earned a BA in Psychology with a concentration in neuropsychology. She thereafter attended Indiana University – Maurer School of Law in Bloomington, Indiana where she earned her JD while graduating Cum Laude and being honored to act as an editor on the Indiana Law Review.

Jon R. Pactor, Attorney at Law, Indianapolis

Jon Pactor: Since May of 1976, I have been a solo practitioner who has concentrated my practice on problems involving attorneys. My office is downtown Indianapolis, but I travel the state of Indiana. My office number is 317-636-0686, and my e-mail address is pactorlaw@iquest.net.

I usually represent their former clients, but some of my clients have been attorneys who have been suing their former attorneys. These problems include malpractice, attorney negligence, excessive attorney fees, retrieval of records, and ethics. On the flip side, I counsel attorneys on ethical issues. I have served as an expert witness.

I got into this area as a public service, and I still look at it that way. A good part of American society turns on the quality of its legal system, and the legal system depends upon the quality of the lawyers--as well as reasonable expectations of clients.

Lawyers should not be immune from accountability merely because they are lawyers. On the other hand, lawyers (or most of them) are human, too. I respect and admire the work of most attorneys, but if they mess up, their former clients need legal help to try to get some fair measure of adjustment and justice.

I have served on the Ethics Committee of the Indiana State Bar Association for many years. I have made several oral and written presentations to continuing education groups on the topics of attorney malpractice, attorney fees, and ethics. These presentations have either helped attorneys be more aware of pitfalls or, at least, helped them to catch up on their sleep.

Hon. Diane L. Parsons, Indiana Worker's Compensation Board Hearing Member

Diane Parsons serves as a Hearing Member on the Indiana Worker's Compensation Board, a position to which she was first appointed in 2006 by Governor Mitch Daniels. She hears all worker's compensation cases in the Indianapolis district, as well as all Full Board appeals of Single Hearing Member decisions. She manages the largest district in the state and is the first woman to be appointed as a Hearing Member for the Board's Indianapolis district. Ms. Parsons previously served as a Member and Vice President of the Emswiller, Williams, Noland & Clarke law firm, where she chaired the firm's Worker's Compensation Section. Prior to this she practiced worker's compensation and general personal injury defense at the Locke Reynolds law firm, where she became the second woman elected to the position of partner at the firm.

Ms. Parsons previously served as an aide to Lt. Governor John Mutz in the Orr/Mutz administration. She coordinated the drafting and Senate legislative enactment of the Orr/Mutz Economic Development Package, landmark legislation designed to stimulate Indiana's economy through the enactment of approximately 60 new economic development laws. She also served as Parliamentarian of the Indiana State Senate for four years, where she advised the President of the Senate on legislative compliance and matters of parliamentary procedure. She was the second woman in the history of the State of Indiana to be appointed to this position.

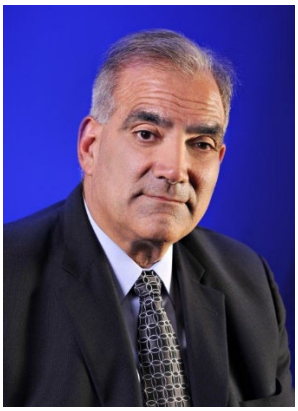
Ms. Parsons is a frequent ICLEF speaker, including its Masters Series on worker's compensation and its Epic Change series of seminars. She has been a speaker to the Indiana Trial Lawyers Association Worker's Compensation Section, the Defense Trial Counsel of Indiana Worker's Compensation Section, the Indiana Self-Insured Association, the Indiana Worker's Compensation Institute, and Indiana's Annual Worker Memorial Ceremony. She has served as a member of numerous professional associations throughout her career as well.

Ms. Parsons has also served on the charitable boards of Leadership and Renewal Outfitters and Kids' Chance of Indiana. She has served as a licensed foster parent and has created and co-chaired multiple social justice initiatives. She is trained in the transformational sciences and her transformational law work is included in the book Lawyers as Changemakers: The Global Integrative Law Movement by J. Kim Wright (2016 ABA). Ms. Parsons has been awarded a Sagamore of the Wabash for her distinguished service to the citizens of the State of Indiana.

Hon. Kyle L. Samons, Indiana Worker's Compensation Board, Indianapolis

Kyle Samons is a Hearing Judge with the Indiana Worker's Compensation Board. He was raised in Georgetown, Indiana and graduated from Floyd Central High School in 1999, then graduated from the University of Louisville with a Bachelor's degree in History and a minor in Political Science. Kyle's law degree is from the Louis D. Brandeis School of Law at the University of Louisville.
Military Service:
Kyle's studies at the University of Louisville were broken up when he enlisted in the United States Navy in October 2001. Kyle was a Plankowner aboard USS Chafee (DDG 90) and reached the rank of Petty Officer Second Class. During his time in the Navy Kyle deployed to the Northern Arabian Gulf in support of Operation Iraqi Freedom and Operation Enduring Freedom. Following four years of service, Kyle returned home to resume his studies at the University of Louisville.
Family:
In 2004 Kyle married Rebekah 'Ball' Samons from Fort Worth, Texas. Kyle and Rebekah now live in Greenville, Indiana with their four children.

Hon. A. James Sarkisian, Sarkisian Law Offices, Merrillville



A. James Sarkisian has spent over 20 years as an attorney working to preserve and protect people's rights. He began as a Deputy Prosecutor in Lake and Porter Counties. During that time, he learned that people who have suffered from traumatic experiences need help and a steady hand to guide them through difficult situations.

In 1986, Jim began representing families of loved ones killed or catastrophically injured by the negligence of others. Jim has learned that litigation requires thorough preparation and aggressive representation. Jim believes hard work, perseverance and integrity are necessary when representing his clients. Jim is committed to making sure that his clients are not taken advantage of by insurance companies who try to force a quick settlement for less than fair compensation.

Jim says, "Your case is important to me, but your trust and confidence are priceless. This office prides itself on preserving and protecting our clients' rights to the fullest extent allowed by law."

Jim is available to practice in state and federal courts in Indiana and Illinois and the Supreme Court of the United States.

Joseph A. Zumpano, III, Reminger Co., LPA, Indianapolis

Joseph Zumpano is an associate in Reminger's Indianapolis office. He focuses his practice on a variety of areas including general liability, product and premises liability, employment matters, trucking and transportation defense, and workers' compensation.

Joseph originally joined Reminger in 2021 as a law clerk.

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Hon. Douglas W. Meagher
Hon. Sandra E. O'Brien
Hon. Diane L. Parsons
Hon. Kyle L. Samons
Hon. A. James Sarkisian

Social Security Offset

42U.S.C. 424(a)

20 CFR 404.408(d)

Example 1

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Section One

Indiana Workers' Compensation Law

Jane R. Callies
Kopka Pinkus Dolin PC
Crown Point, Indiana

Section One

Indiana Workers' Compensation Law……... Jane R. Callies

Slide Presentation

KPD
ATTORNEYS AT LAW
KOPKA PINKUS DOLIN

Indiana Workers' Compensation Law

Presented by: Jane R. Callies, Kopka Pinkus Dolin

State Form 38911 Old & New

State Form 38911 - Old & New

Old Form 38911

Reset Form

REPORT OF TEMPORARY TOTAL DISABILITY (TTD) / TEMPORARY PARTIAL DISABILITY (TPD) TERMINATION
State Form 38911 (R8 / 1-14)

INDIANA WORKER'S COMPENSATION BOARD
402 West Washington Street, Room W196
Indianapolis, IN 46204
Telephone: (317) 232-3808
www.in.gov/wcb

* Your Social Security number is being requested by this state agency in accordance with IC 22-3-4-13; disclosure is voluntary, and you will not be penalized for refusal.

INSTRUCTIONS: 1. *You must report all compensation payments on this prescribed form. (IC 22-3-3-7)*
2. *Mail to the Worker's Compensation Board at the above address.*

Date of injury *(month, day, year)* | Accident number

CLAIM INFORMATION

Name of employer | Federal identification number | Telephone number ( )
Address of employer *(number and street, city, state, and ZIP code)*
Name of insurer | Insurer claim number
Address of insurer *(number and street, city, state, and ZIP code)*
Name of adjuster / case manager | Telephone number ( ) | E-mail address
Name of employee | Employee Social Security number *
Address of employee *(number and street, city, state, and ZIP code)*
Telephone number ( ) | E-mail address

BENEFIT TERMINATION / REDUCTION *(check all that apply)*

☐ In accordance with IC 22-3-3-7 (c), TTD/TPD benefits have been terminated due to the following *(check all that apply)*:
- ☐ The employee has returned to **ANY** employment;
- ☐ The employee has died;
- ☐ The employee has refused to accept suitable employment under Section 11 (IC 22-3-3-11);
- ☐ The employee has refused to undergo a medical examination under Section 6 (IC 22-3-3-6);
- ☐ The employee has received five hundred (500) weeks of TTD benefits or has been paid the maximum compensation allowed under IC 22-3-3-22;
- ☐ The employee is unable or unavailable to work for reasons unrelated to the compensable injury.
- ☐ Other ***(IF CHECKED, MEDICAL DOCUMENTATION MUST BE SERVED ON INJURED PARTY.)***
  - ☐ TTD benefits shall be terminated and Temporary Partial Disability (TPD) begun because employee has been released to part time work suitable to employee's disability.
  - ☐ Employer intends to terminate TTD/TPD benefits on _____ *(must be at least four (4) days after mailing or two (2) days after personal service)* because:
    - ☐ Treating physician has released employee to full time light duty work and employer has appropriate light duty work available.
    - ☐ Treating physician finds employee has reached MMI and/or employee is released to full time work *(check one)*: ☐ With restrictions ☐ Without restrictions

Explanation

COMPENSATION PAYMENTS

Average weekly wage $ | Number of weeks paid | Weekly rate $ | Start date of payments *(month, day, year)* | End date *(month, day, year)*
Total amount paid $ | Check one: ☐ Employee ☐ Dependent | Reason(s) for ending payments

EMPLOYEE'S OBJECTION TO TERMINATION OF TTD BENEFITS

If the employee disagrees with the proposed benefit termination, the employee must complete, sign and return a copy of this notice to the **Worker's Compensation Board** and **the employer** within **seven (7) days** after receipt. This notice can also be filed via the Dispute Termination of Benefits link on the Board's website.

Please check all that apply.
☐ Employee disagrees with the termination / reduction of benefits. ☐ Employee requires further medical care.
☐ Employee believes an independent medical examination (IME) may be helpful to resolve this dispute.

Explanation

EMPLOYER CERTIFICATION / RECEIPT OF EMPLOYEE / DEPENDENT

Employer and employee must sign below to certify service or acknowledge receipt of this notice.
I certify that the foregoing is true and that a copy of the relevant medical documentation is attached.

Signature of employer | Date of service *(month, day, year)*
Printed name | By *(check one)*: ☐ US Mail ☐ Personal service
Signature of employee | Date received *(month, day, year)*
Printed name | By *(check one)*: ☐ US Mail ☐ Personal service

New Form 38911

Termination of Benefits/Request for IME
State Form 38911 (R8 / 1-14)

INDIANA WORKER'S COMPENSATION BOARD
402 West Washington Street, Room W196
Indianapolis, IN 46204
Telephone: (317) 232-3808
www.in.gov/wcb

Date of Injury (month, day, year) | Jurisdiction Claim Number

CLAIM INFORMATION

Name of Injured Worker | Name of Employer
Address (number and street, city, state, and ZIP code) | Address (number and street, city, state, and ZIP code)
Telephone Number | Name of Claim Administrator
E-mail Address | Administrator Claim Number

CLAIMS ADJUSTER INFORMATION

Name of Claims Adjuster | Telephone Number
Address (number and street, city, state, and ZIP code)
E-mail Address

BENEFIT TERMINATION *(check all that apply)*

* If termination is NOT due to one of the 5 reasons enumerated in IC 22-3-3-7 (d), 4 additional days of TTD are owed. In accordance with IC-22-3-3-7(d), TTD/TPD benefits have been/will be terminated due to the following:

S1	☐ The injured worker has returned to any employment*; **OR** has been released by the treating physician to return to work;
S2	☐ The injured worker has refused to undergo a medical examination under Section 6 (IC 22-3-3-6)*;
S3	☐ The injured worker has refused to accept suitable employment under Section 11 (IC 22-3-3-11)*;
S4	☐ The injured worker has died*;
S5/S6	☐ The injured worker is unable or unavailable to work for reason unrelated to the compensable injury*;
S7	☐ The injured worker has received five hundred (500) weeks of TTD/TPD benefits or has been paid the maximum compensation allowed under IC 22-3-3-22*;
S8	☐ The injured worker has changed jurisdiction to a state other than Indiana;

Explanation

DISPUTE OF BENEFIT TERMINATION AND/OR REQUEST FOR AN INDEPENDENT MEDICAL EXAMINATION (IME)

If the injured worker disagrees with proposed benefit termination, the injured worker must complete, sign and send a copy of this notice to the **Worker's Compensation Board** and **the employer** within **seven (7) days** of receipt. Preferably, this notice may be filed via the **Dispute Termination of Benefits** link on the Board's website. **PLEASE DO NOT MAIL THIS FORM TO THE BOARD UNLESS THE INJURED WORKER HAS NO ACCESS TO THE INTERNET.**

Please check all that apply:
☐ Employee disagrees with the termination of benefits ☐ Employee requires further medical care
☐ Employee believes an independent medical examination (IME) may be helpful to resolve this dispute

Reason for Objection

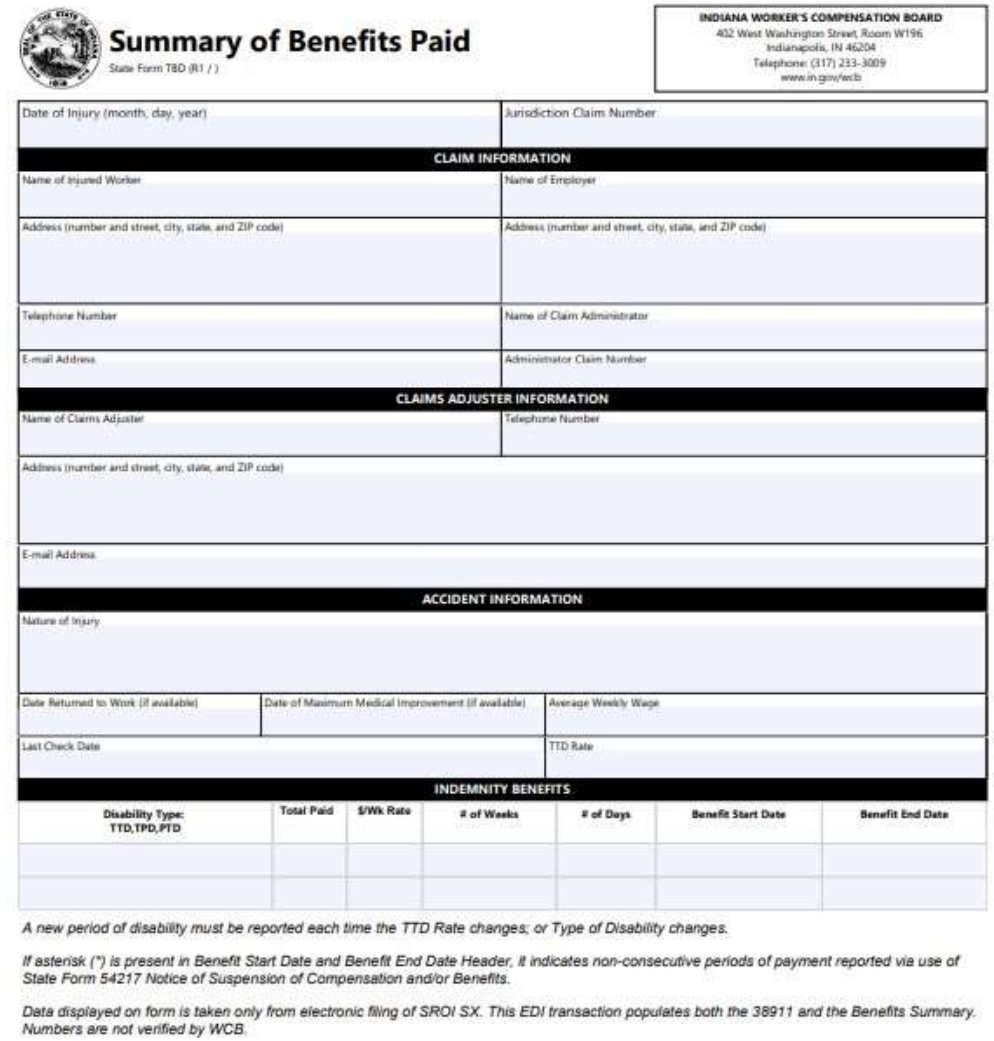
Signature of Employee | Date Received (month, day, year)
Printed Name | By (check one): ☐ US Mail ☐ Electronic Service

CERTIFICATION OF SERVICE

Employer must sign below to certify service.
I certify that this information is true and that a copy of the relevant medical documentation is attached.

Signature of Employer | Date of Service (month, day, year)
Printed Name | By (check one): ☐ US Mail ☐ Electronic Service

Summary of Benefits



Summary of Benefits Paid

State Form TBD (R1 /)

INDIANA WORKER'S COMPENSATION BOARD
402 West Washington Street, Room W196
Indianapolis, IN 46204
Telephone: (317) 233-3009
www.in.gov/wcb

Date of Injury (month, day, year)	Jurisdiction Claim Number

CLAIM INFORMATION

Name of Injured Worker	Name of Employer
Address (number and street, city, state, and ZIP code)	Address (number and street, city, state, and ZIP code)
Telephone Number	Name of Claim Administrator
E-mail Address	Administrator Claim Number

CLAIMS ADJUSTER INFORMATION

Name of Claims Adjuster	Telephone Number
Address (number and street, city, state, and ZIP code)	
E-mail Address	

ACCIDENT INFORMATION

Nature of Injury		
Date Returned to Work (if available)	Date of Maximum Medical Improvement (if available)	Average Weekly Wage
Last Check Date		TTD Rate

INDEMNITY BENEFITS

Disability Type: TTD,TPD,PTD	Total Paid	$/Wk Rate	# of Weeks	# of Days	Benefit Start Date	Benefit End Date

A new period of disability must be reported each time the TTD Rate changes; or Type of Disability changes.

If asterisk (*) is present in Benefit Start Date and Benefit End Date Header, it indicates non-consecutive periods of payment reported via use of State Form 54217 Notice of Suspension of Compensation and/or Benefits.

Data displayed on form is taken only from electronic filing of SROI SX. This EDI transaction populates both the 38911 and the Benefits Summary. Numbers are not verified by WCB.

EDI 3.1 Reporting

- On March 20, 2019, the Indiana Board transitioned to EDI 3.1 Reporting
  - This necessitated a change in forms processes from the Forms Portal to EDI
  - The Board has published an Implementation Guide and a FAQs about this implementation on their page
- More information can be found here:
  - https://in.gov.wcb/
  - https://www.in.gov.wcb/2586.htm

EDI Workflow

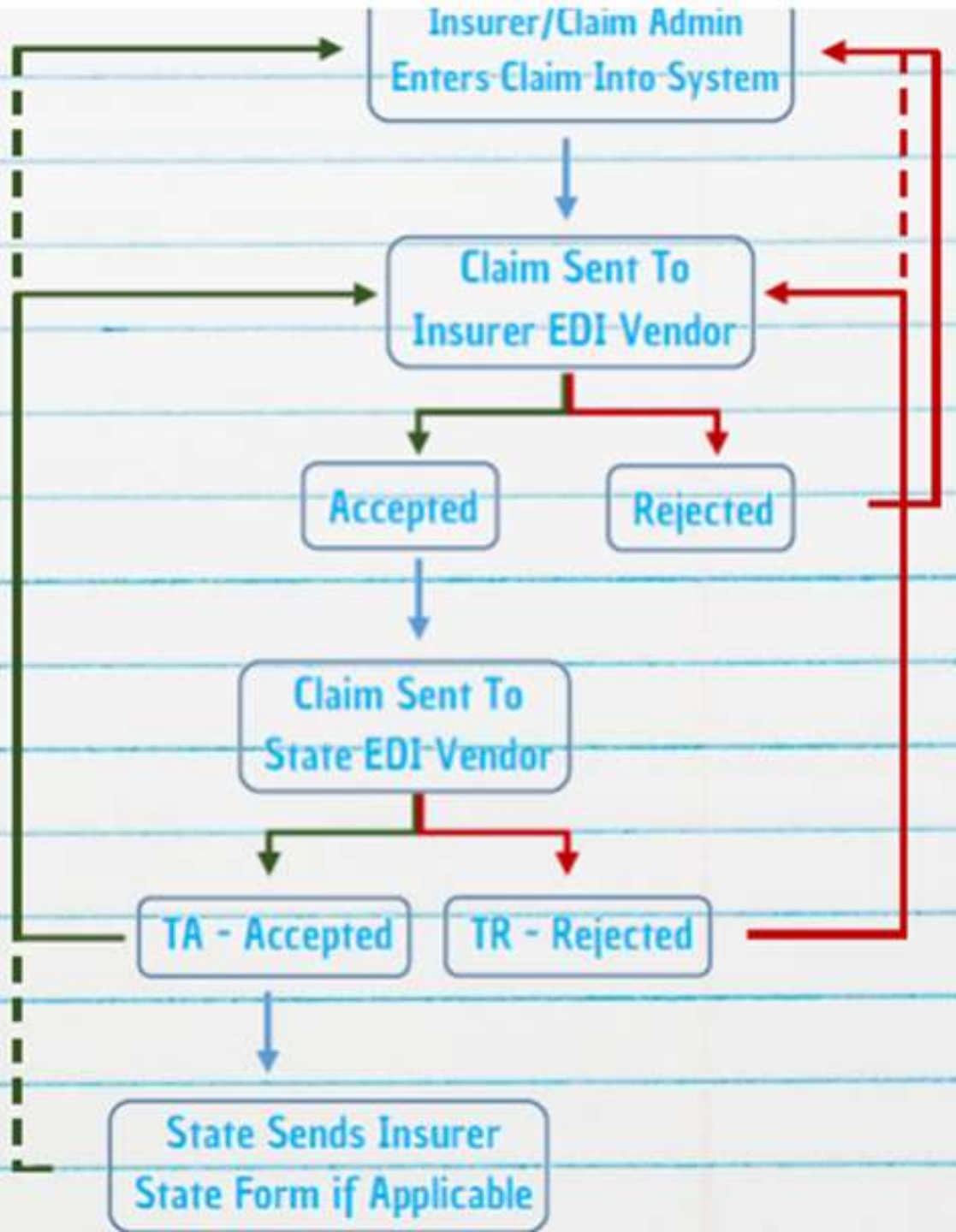
3B. EDI WORKFLOW

Monday – Friday:

The cut-off for receipt of data from IN WCB Trading Partners will be 1:00 AM EST. IN WCB Trading Partners will receive acknowledgment files no later than 5:00 AM EST pending any unforeseen processing issues.

Friday (after the cutoff), Saturday and/or Sunday:

Trading Partners can connect and upload FROI/SROI files and will receive acknowledgment files no later than 5:00 AM EST on Monday pending any unforeseen processing issues.



From: Rachakonda, Sowmya <SRachakonda@wcb.IN.gov>
Sent: Tuesday, October 18, 2022 12:43 PM
To: Brodskaya, Yekaterina <YBrodskaya@wcb.IN.gov>
Subject: FW: Report of TTD/TPD Termination - SF 38911 - [redacted] - ClaimAdminNumber: [redacted]

From: rmail@wcb.in.gov [mailto:rmail@wcb.in.gov]
Sent: Friday, September 23, 2022 11:00 AM
To:
Subject: Report of TTD/TPD Termination - SF 38911 - [redacted] - ClaimAdminNumber: [redacted]

Dear [redacted]

Your Report of TTD/TPD Termination has been processed for Jurisdiction Claim Number:#[redacted].

Please click here here to view/print a copy of the completed 38911 and Benefit Summary form. Please forward both to the injured worker or the worker's attorney.

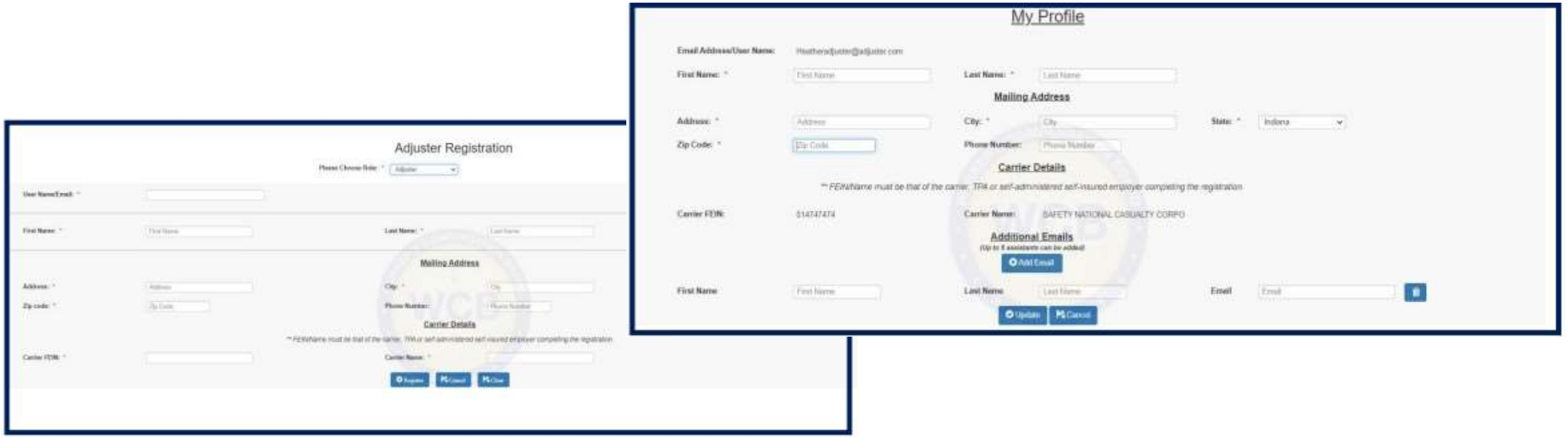
Thank you.
IN WCB

Please note that automatic form creation is in test. Review the linked form carefully before sending it to an injured worker. To report any bugs with this or any other auto generated form please contact IT@wcb.in.gov. If you need a form to move forward please use a fillable version of the form found here as a temporary work around.

Report of TTD/TPD Termination – SF 38911

PPI Adjuster Portal Submission

- Access Portal in Gateway at https://wcbgateway.wcb.in.gov/wcbgateway
- Register for the WCB PPI Portal
- Navigate to the My Profile page and add your information and up to five additional emails



PPI Submission Portal Overview

- This electronic submission portal is for insurance adjusters to submit their PPI claims to the WCB for approval
- There are three options for action: Suspension of Compensation, My Filings, and PPI
- Under the PPI Section, the portal has two options: PPI Dashboard and Submitting new PPI

PPI Dashboard

- There are five options on the PPI Dashboard
  - All: all filings will be displayed
  - Approved: adjusters will receive an email for each PPI approved noting the approval
  - Rejected: adjusters will receive an email from the WCB noting the rejection reason
  - Compliance: adjusters will receive an email from the WCB noting the filing has been accepted for compliance
  - Pending Review: list of the registrants PPIs currently pending review

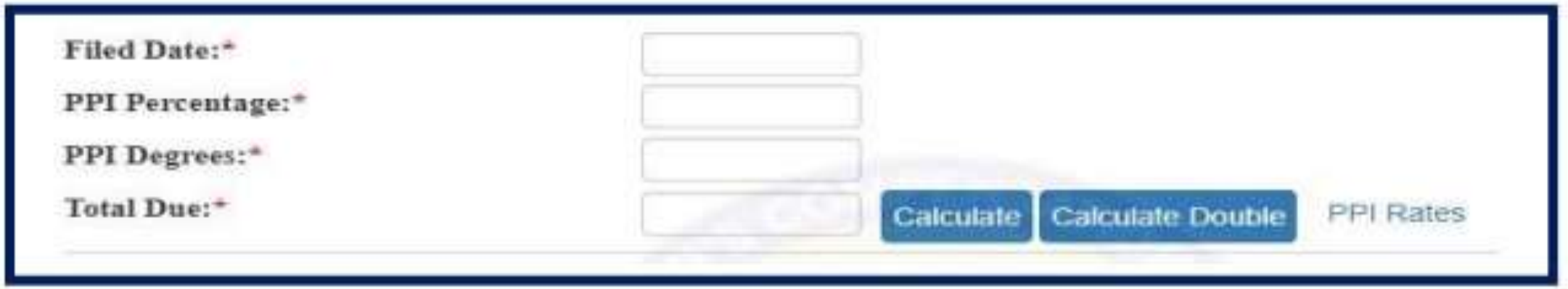
Submitting a New PPI

- Select “New PPI” at the top page to the left of the “Back” button
- The PPI Dashboard will also display the option to submit a new PPI from this area without navigating to the “New PPI” submission menu

- New PPIs must have a First Report of Injury (FROI) filed. The submission of the FROI will generate a Jurisdiction Claim Number (JCN)
- Adjusters can search for the injury (note: 2 of 4 data fields must be completed
  - Jurisdiction Claim Number (JCN) – assigned when FROI is filed
  - Date of Injury
  - Last Name
  - First Name

Additional Required Fields During Submission

- Filed Date
- PPI Percentage (the most specific body part injured and rated by the MD)
- PPI Degrees (use the matching applicable full degrees i.e. 100, 50, 45, etc.)
- Total Due (activate the auto-calculate option by clicking the calculate button)



Uploading Supporting Documentation

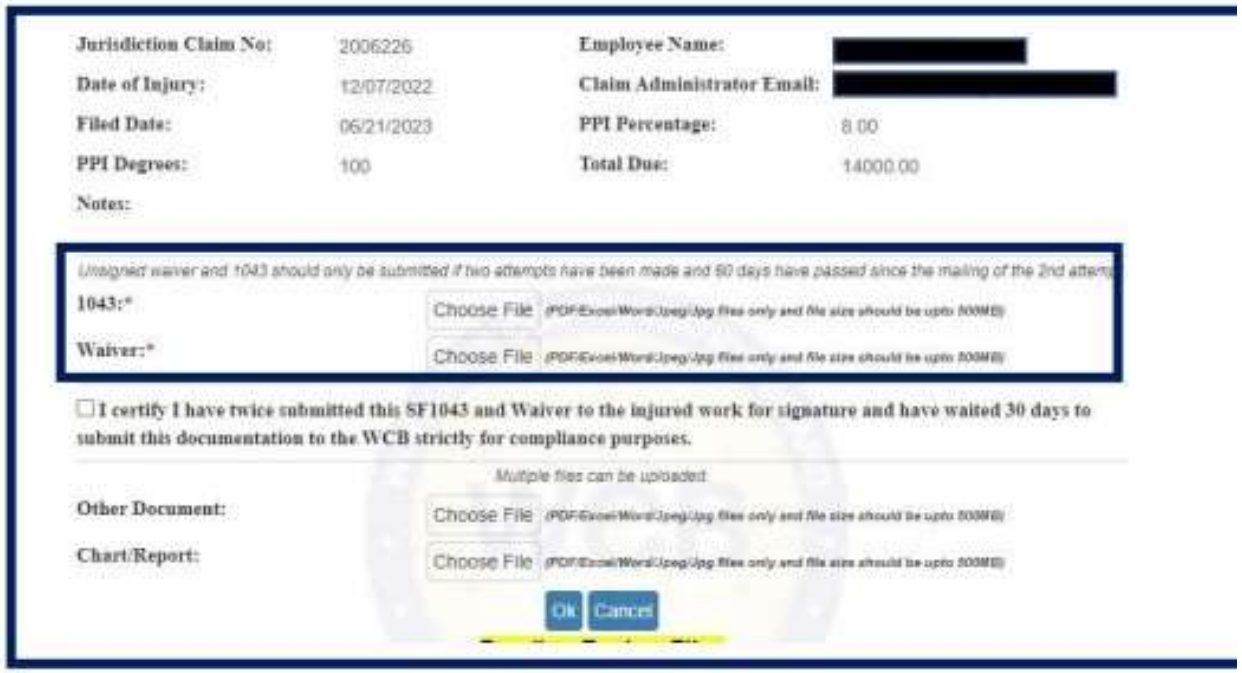
- Upload types accepted: .pdf, .jpeg, .doc
- Maximum file size is 500 MB. If the file is too large, you may split the files and upload additional files under other document

Uploading Supporting Documents

- Documents can be uploaded by dragging and dropping or by searching its location
- Each document must be uploaded under the correct heading individually
  - Form 1043—with employer or adjuster signature and employee signature
  - Medical Report—treating physician on physician's letterhead with signature
  - Completed and Signed—employee waiver of examination by personal physician (SF 53913)
  - If submission is to be submitted for compliance purposes, submitter must certify that the injured worker's signature was requested two times and the 30-day wait period has passed prior to submission for compliance
  - Other Documents
    - Chart/Support—medical charts, reports, etc.
    - Notes—may be added in the notes section at the bottom of the PPI submission menu
- Cover letter is optional information and will pop up after the OK button has been clicked

Re-Submitting PPI Due to Rejection

- Access the resubmit function in the portal, navigate to the PPI Dashboard, the PPI Dashboard will display the PPI type, by drop down menu. Select **Rejected**
- Locate the JCN for the rejected documents
- Under the Action heading on the right, click the **Resubmit** button
- The documents that have been rejected will display an upload opportunity under the Action heading
- Drag and drop or find your file to upload.
- If the rejection has not been resolved in 15 days, the adjuster will receive a reminder every 15 days until the issue has been resolved.



Updates

Law Updates

- On March 18th, 2022, Governor Holcomb signed HB 1153 into law
- Effective January 1, 2023, Ambulatory Outpatient Surgical Center (ASC) will be added to the definition of "medical service facility" under the workers' compensation law. ASCs will be reimbursed at 200% of the Medicare rate for the same procedure provided in the same facility on the same day.
- Increases benefits for injuries and disablements by 3% each year for four years, beginning on July 1, 2023.

Thank you!

Jane R. Callies
Senior Attorney
Crown Point
jrcallies@kopkalaw.com
219-794-1888

Section Two

Indiana Worker's Compensation Law
Recent Case Law Update

Anthony L. Holton
Reminger Co., LPA
Indianapolis, Indiana

Joseph A. Zumpano, III
Reminger Co., LPA
Indianapolis, Indiana

Section Two

Indiana Worker's Compensation Law
Recent Case Law Update……. Anthony L. Holton
Joseph A. Zumpano, III

Slide Presentation

REMINGER

RESULTS • PERIOD

Indiana Worker's Compensation Law – Recent Case Law Update

ICLEF®

REMINGER.

Presenters

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Today's Topics

First Half – Recent Amendments to the WCA and corresponding case law

Second Half – Other recent cases and topics

REMINGER.

Recent Amendments to the WCA

Four Major Changes

1. Timeline for Claims

2. Updated Rates // PPI

3. “Medical Services Facilities”

4. “Clean Claim Provisions”

REMINGER.

Timeliness

The WCA is a "non-claim statute"

Ind. Code § 22-3-3-3

- The right to compensation under the Indiana WCA "shall be forever barred unless within two (2) years **after the occurrence of the accident** . . . , a claim for compensation thereunder shall be filed with the worker's compensation board."

New Timelines for Applications

Ind. Code § 22-3-3-3**(b)**

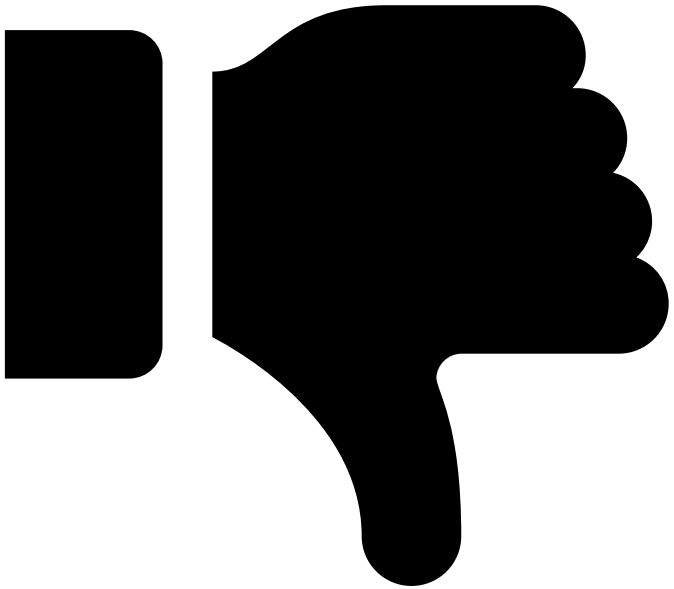
Effective July 1, 2022, if TTD or TPD payments are made, the two-year period begins to run “on the last date for which the compensation . . . was paid.”

What Constitutes "Compensation"?

- ***Sharp v. Armstrong Relocation*, *210 N.E.3d 849 (Ind. Ct. App. 2023)***
  - An Indiana resident injured in Indiana while driving for a Kentucky-based company in 2018
    - Received TTD and medical benefits under Kentucky's WCA, but never sought such benefits in Indiana
  - IW files an Application for Adjustment of Claim in Indiana in 2021.
    - Argues that **IC § 22-3-3-27** applies to his claim because he was receiving benefits at the time his Application was filed

So, does § 22-3-3-27 allow an IW to file a late Application if they were receiving benefits in another state?

Section 22-3-3-27(a) provides that the Board may "make such modification or change in the award ending, lessening, continuing, or extending the payments ***previously awarded*** . . . subject to the maximum and minimum" set forth in the Indiana Worker's Compensation Act.



Notably, the injured worker was **not** prevented from benefits under the Indiana WCA due to his receipt of Kentucky benefits.

He simply had to file on time.

REMINGER.

Computation of the SOL

***Santos v. Franciscan Health* (Ind. Ct. App. July 24, 2023)**

- Workplace injury occurred on December 5, 2019. No TTD/TPD benefits paid by the employer.
  - Accordingly, the deadline for the worker to file her Application was December 5, 2021 – which was a **Sunday**.
- Injured Worker mails her Application to the board via certified mail on December 6, 2021.

Does Trial Rule 5's exclusion of weekends and holidays apply to Applications for Adjustment of Claims?

Application of the Trial Rules

When the procedural rules of the WCA are ***in conflict*** with the Trial Rules, the WCA prevails

However, since the WCA is silent as to the method of computation for the time of filings, Trial Rules 5 and 6(A) apply.

REMINGER.

Joinder of Parties

Gilley's Antique Mall v. Sarver, 157 N.E.3d 549 (Ind. Ct. App. 2020)

631 IAC 1-1-7

All persons should be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and the board at any time, upon a proper showing, or of its own motion, may order that any additional party be joined, when it deems the presence of the party necessary.

Is this provision an exception to the two-year time limitation?

Joinder of Parties

Gilley's Antique Mall v. Sarver

NO. 631 IAC 1-1-7 only allows for addition of parties "**upon a proper showing**."

- If the statutory time period has lapsed, there is no proper showing.

Other Notable Amendments

REMINGER.

Updated Disability Rates

July 1, 2023-June 30, 2024	
Degrees 1-10	$1,803
Degrees 11-35	$2,011
Degrees 36-50	$3,282
Degrees 51-100	$4,182

July 1, 2024-June 30, 2025	
Degrees 1-10	$1,857
Degrees 11-35	$2,071
Degrees 36-50	$3,380
Degrees 51-100	$4,307

July 1, 2025-June 30, 2026	
Degrees 1-10	$1,913
Degrees 11-35	$2,133
Degrees 36-50	$3,481
Degrees 51-100	$4,436

July 1, 2026-June 30, 2027	
Degrees 1-10	$1,970
Degrees 11-35	$2,197
Degrees 36-50	$3,585
Degrees 51-100	$4,569

Updated AWW Rates

DOI occurring on or after	Max AWW	Max Compensation
July 1, 2023	$1,205	$402,000
July 1, 2024	$1,241	$414,000
July 1, 2025	$1,278	$426,000
July 1, 2026	$1,316	$439,000

“Clean claim” provisions

A claim for payment submitted by a provider with “no defect, impropriety, or particular circumstance requiring special treatment preventing payment.”

Must be paid or denied within 30 days or is automatically established as a clean claim

Nurse Case Managers

The WCB recently published guidance regarding the role of NCMs

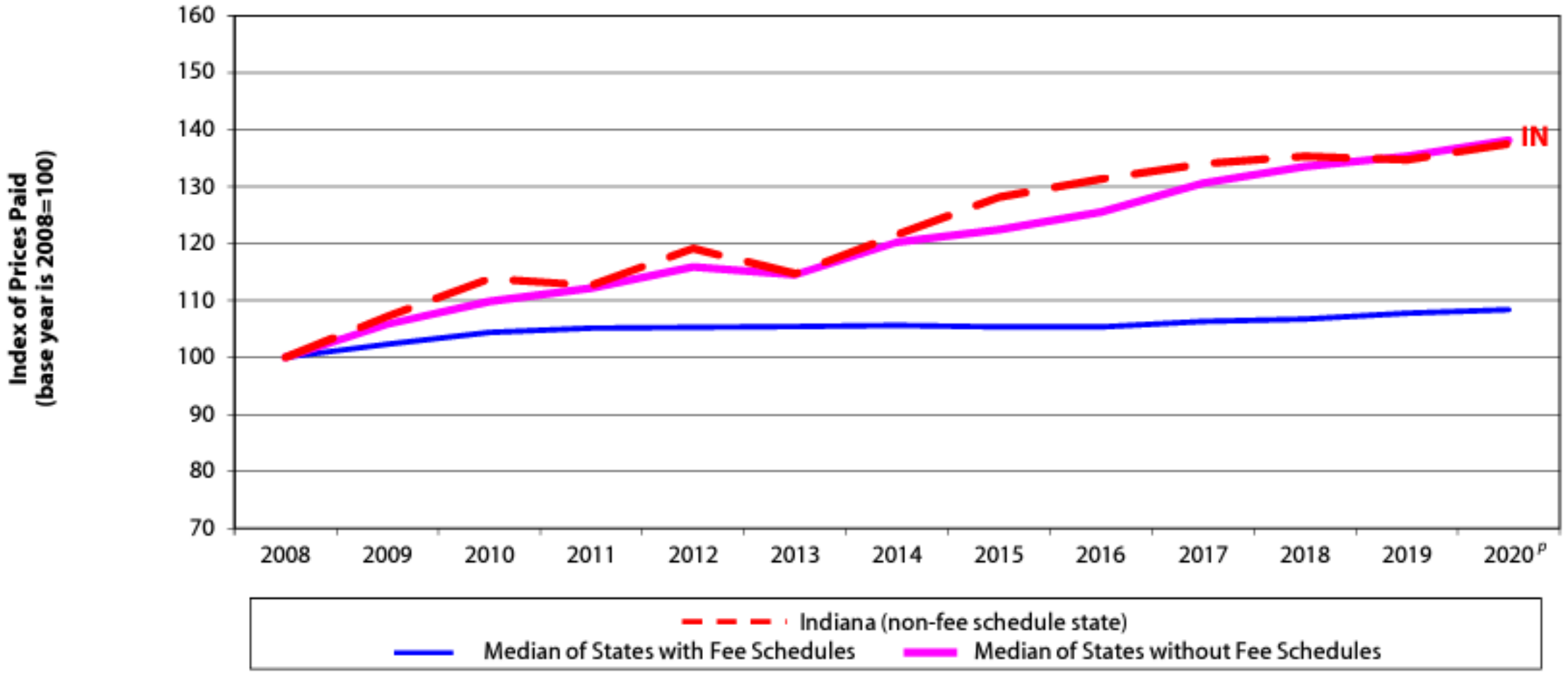
- A liaison among the medical provider, the employer and the IW
- Keeping the adjuster apprised of the IW's medical needs
- It is not the NCM's role to determine compensability

Medical Services Facility

"Ambulatory Outpatient Surgical Center" added to the definition of "medical service facility" in Ind. Code § 22-3-6-1(j)

Adding ASCs to this definition caps their reimbursement for worker's compensation at 200% of Medicare reimbursement rate

Fee Schedules?



REMINGER.

REMINGER

RESULTS. PERIOD.

Other Cases/ Topics

Medical Causation/Admission of Evidence

A worker claims that he was injured after falling at a gas station, while on the job.

Security footage captured a portion of the incident, but not the fall itself.

Was it error for the hearing member to exclude the security footage from submission to the IME physician?

Medical Causation/Admission of Evidence

PeopLease/PLC Services LLC, et al. v. Marshall Snuffer, 2023 Ind.App. Unpub. LEXIS 517 (Ind. Ct. App. 2023)

No. The Hearing Member did not err in prohibiting the submission of the surveillance footage.

However, this ruling is narrowly tailored to the circumstances.

Joint Employer Liability

In the same case, the Hearing Member found that the three defendants were Joint Employers and ordered that ""all three (3) shall contribute to [the IW's] payment compensation."

The defendants argued that this holding was contrary to law because the parties had an agreement that one of the defendants could not "be forced to contribute to the payment of benefits"

Joint Employer Liability

The Order did not allocate contribution between each of the Defendants.

The distribution of payment is an issue for the Defendants to sort amongst themselves

Mental Incompetence

Ind. Code § 22-3-3-30 provides that “ "[n]o limitation of time provided in [the Act] shall run against any person who is mentally incompetent[.]”

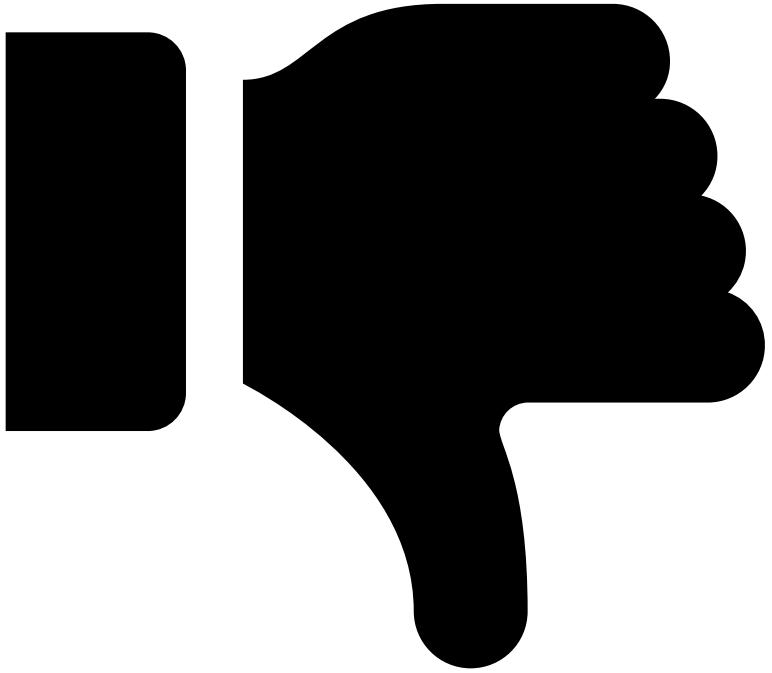
***A.S. v. State* (Ind. Ct. App. Aug. 17, 2022)**

- Injured Worker filed Applications in 2021 for two incidents which happened in 2001 and 2002
- Now seeks comp benefits ~20 years later on grounds of mental incompetency.
- Does a diagnosis of bipolar disorder render a person “incompetent” for purposes of the WCA?
- "Mental incompetence" is defined in INDIANA CODE § 1-1-4-5(12) as "of unsound mind." However, "of unsound mind" is not currently defined in the Indiana Code.

Waiver of Exclusive Remedy?

Allen v. Smithfield Package Meat Corp., 2021 Ind. App.Unpub. LEXIS 728 (Ind. Ct. App. 2021)

Does an employer waive the WCA's exclusive remedy provision by denying an employee's worker's compensation claim on the basis of the employee's failure to follow safety provisions?



"[T]he Act's rights and remedies are exclusive and exclude all other rights and remedies of an injured employee." – "**But the Act does not guarantee recovery for an employee**"

REMINGER.

Wrongful Discharge

Indiana recognizes three exceptions to the at-will employment doctrine

- One of which is where an employee is terminated for exercising a clear statutory right or obeying a legal duty (i.e., seeking Worker's Compensation benefits)

Three step approach to retaliatory discharge

1. Employee bears a burden to present evidence which implies a connection between the filing of a Worker's Compensation claim and his/her discharge
2. Burden then shifts to employer to identify a legitimate reason for termination
3. Employee then has the opportunity to prove this legitimate reason was "pretextual"

Constructive Discharge?

"A constructive discharge occurs when an employer purposefully creates working conditions, which are so intolerable that an employee has no other option but to resign."

Tucker v. Estate of Estate of Troy Shirar (Ind. Ct. App. Aug. 3, 2022)

- A trucker was injured on the job and was unable to finish his delivery
- He then had difficulty contacting the employer to obtain WC information and the employer was rude when contact was finally made

Constructive Discharge

Here, the injured worker was an independent contractor and never attempted to return to work

However, "rude or boorish behavior" by superiors with respect to a WC claim can constitute a constructive discharge. *See, e.g., Tony v. Elhart County*, 918 N.E.2d 363 (Ind. Ct. App. 2009) (IW ridiculed by supervisor – "faker" and "trouble boy")

Course of Business

Q.D.-A., Inc. v. Ind. Dep't of Workforce Dev., 114 N.E.3d 840 (Ind. 2019)

What is the definition of "course of business" in the employment context?

Course of Business

"if an enterprise undertakes an activity, not as an isolated instance but as a regular or continuous practice, the activity will constitute part of the enterprise's usual course of business irrespective of its substantiality in relation to the other activities engaged in by the enterprise."

Here, drive-away services were not a part of *Q.D.-A's* regular course of business. The driver was operating an "independently established business."

Questions?

REMINGER.

Thank you!

REMINGER

RESULTS. PERIOD.

Section Three

Light Duty Programs: What are the Alternatives?

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Section Three

Light Duty Programs:
What are the Alternatives?..... Tricia G. Bellich
Marisa R. Lareau

Indiana Light Duty: Alternative Solution 1

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Light Duty Programs: What are the Alternatives?

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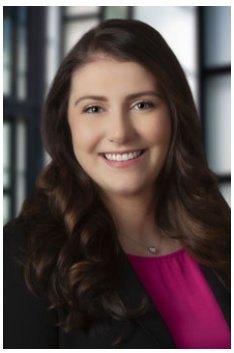

INDIANA LIGHT DUTY : ALTERNATIVE SOLUTION

When an employee is injured, it affects every aspect of his/her life. Not only is the employee recovering from an injury which occurred during the course and scope of her employment, but also economic consequences are at the forefront of the employee's thought process. Honestly, very few individuals have the luxury of working for the sheer enjoyment of employment, but rather the typical majority of individuals hold a job to pay for the necessities and priorities of factors in life. It is often said that one should do what you love and ideally, that is the goal to reach that goal and you're also able be able to pay the bills. For many, work is necessary to pay for the ability to do the things and for providing those that you love. So, when an employee's world is turned upside down by a workplace injury, sometimes providing an alternative work position or environment is a welcomed experience. On the other hand, it can create stress and issues not ever contemplated by the employer. Therein lies the rub and the need for reasonableness in determining what is the best back up plan when traditional light duty does not exist.

In Indiana, the light duty statute is as follows:

IC 22-3-3-11 Partial disability; refusing employment; notice

Sec. 11. (a) If an injured employee, only partially disabled, refuses employment suitable to his capacity procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the worker's compensation board such refusal was justifiable.

(b) Before compensation can be denied under this section the employee must be served with a notice setting forth the consequences of the refusal of employment under this section. The notice must be in a form prescribed by the worker's compensation board.

Requirements to IC 22-3-3-11

Under Indiana Code Section 22-3-3-11 (2008), an employer is permitted to reduce its worker's compensation obligation by procuring for the injured employee employment by which he can earn some wages without injury to himself. *K-Mart Corp. v. Morrison*, 609 N.E.2d 17, 31 (Ind. Ct. App. 1993), *trans. denied*.

However, the employment must be suitable to his capacity procured to him and any refusal must be justified by the Indiana Worker's Compensation Board ("WCB"). The second prong requires notice of consequences of the refusal on a form prescribed by the WCB.

What is Suitable?

When an employee is not at MMI, an employer must tender "light duty" employment (accommodations) or pay temporary total disability ("TTD'). The "economic argument" (by way of employee cutbacks) does not escape an employer's obligation to pay TTD. *Platinum Constr. Group, LLC v. Collings*, 988 N.E.2d 1153 (Ind. Ct. App. 2013), involved an injured worker received TTD benefits and was eventually released back to full duty, which in effect, terminated TTD. Shortly thereafter, the worker was laid off for "economic reasons" because the company dissolved.

After being laid off, worker tried to work at two other companies but found he had *ongoing physical limitations*. A subsequent IME determined he was not at MMI. He filed his application, and the board eventually awarded him additional TTD benefits following his layoff through the date he eventually reached MMI. *(emphasis added.)*

If the injured worker returns for light-duty work or for fewer hours than he or she worked before the injury, the worker may be paid temporary partial disability (TPD) benefits. TPD benefits will cover the difference between the worker's pre- and post-injury wages (up to the maximum mentioned above for TTD). TPD benefits last for a maximum of 300 weeks.

What is Proper Notice?

In a case in which the WCB of Indiana affirmed a single hearing member's decision awarding a claimant compensation for temporary total disability benefits for injuries he sustained while working for an automobile manufacturer, the appellate court concluded the Board's findings were inadequate because the Board made no determination under Ind. Code Ann. § 22-3-3-11(a) whether the claimant's "refusal" to do the sedentary work he was offered was justifiable. *Gordon v. Toyota Motor Mfg.*, 53 N.E.3d 477, 2016 Ind. App. LEXIS 115 (Ind. Ct. App. 2016).

That is because Indiana Code Section 22-3-3-11(b) provides that, *before compensation can be denied under the statute*, the employee must be served with a notice setting forth the consequences of the refusal of employment under that section. The notice must be on a form prescribed by the worker's compensation board. *Id.* Gordon maintains that Toyota did not provide him with any such notice and, thus, that Toyota could not deny him benefits based on his refusal to do the light duty work it had offered him. On appeal, Toyota does not contend, and there is no evidence in the record, that Toyota complied with the notice requirement under the statute.

What is the Pay?

If the injured worker returns for light-duty work or for fewer hours than he or she worked before the injury, the worker may be paid TPD benefits. TPD benefits will cover the difference between the worker's pre- and post-injury wages (up to the maximum mentioned above for TTD). TPD benefits last for a maximum of 300 weeks.

Are Light Duty Programs Required in Indiana?

Indiana does not necessarily require employers to offer light duty jobs once approved by medical providers, however the WC act incentivizes the same. If the worker's pay for light duty is below that of one's full duty job before the injury or one is unable to work the number of hours previously, the injured worker can qualify for temporary partial disability (TPD) payments. However, if light duty wages exceed the average weekly wage as outlined in Indiana workers' compensation laws, the injured employee is likely ineligible for TPD.

- Case law and various factors encourage take the injured worker to light duty. The consensus – "Generally speaking, you should try to perform the light duty work, as long as the work offered is "reasonable". The employer should not ask you to perform any duties that are beyond the doctor's work restrictions."
- The question as to what is reasonable is still up for debate.

- Argument to be made is if it is within the employee's intellectual abilities, and within their doctor's restrictions, it's reasonable.

Overview in General

A number of state and federal laws, including both the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), directly address light duty assignments and employers' responsibilities. According to the American Bar Association, the ADA and FMLA do not require companies to offer modified duty roles to injured workers. Even so, the ADA does mandate 'reasonable accommodations' for employees who experience a workplace injury or illness. These options can include paid medical leave or light duty jobs.

Overall, it's important to be aware of employer and employee rights related to transitional work assignments to avoid any regulatory issues. In terms of OSHA's recordkeeping requirements, light duty assignments can be considered a recordable restriction in certain scenarios. The main exception is when an employee's physician states that the worker is able to perform all of his or her regular duties and work a full-time schedule.

Workers protected under the FMLA can't be disciplined or terminated after refusing to perform light duty jobs. However, if a health care provider approves an employee's return with light duty work restrictions but they still refuse, they could lose their workers' comp and disability benefits.

According to the Job Accommodation Network (JAN), an injured worker is less likely to return to work the longer he or she is on leave. In addition, the U.S. Census Bureau and Bureau of Labor Statistics have estimated the cost of absenteeism to exceed $40 billion a year. Return-to-work (RTW) programs can help facilitate an employee to be able to stay at work while recovering from his or her illness or injury.

Charitable light duty

Employers that do not have any available light-duty positions are increasingly implementing alternative return-to-work programs where the injured workers are placed with an outside organization, such as a non-profit or charity, and paid their regular wages until they are released to return to their original positions.

Such an arrangement could help get workers back on their feet quicker and may even speed up the healing process by working in conjunction with, or as an alternative to, physical therapy to utilize and strengthen the injured body parts in controlled environments. By engaging in community service, the employee is returning to a job and is productive, albeit in new and different ways. The employer is getting the benefit of goodwill in the community, as well as assisting the employee in the healing and reconditioning process.

Indiana /IN WCB has yet to rule or addressed the issue of suitable transitional light duty work. Unfortunately for employers and the vendors that facilitate charitable light duty work, there are no clear-cut guidelines.

Below is how Georgia and Illinois has handled charitable light duty/ alternative duty programs.

The Georgia State Board of Workers' Compensation, in a published Award from the Trial Division suggests a charitable job, much like any light duty position, must fit within the injured workers' restrictions imposed by their authorized treating physician. In this Award, a food pantry attendant job was found unsuitable where a job

description was approved by his authorized treating physician, a proper job offer was made, however the worker was consistently required to perform tasks outside of his given work restrictions. Therefore, the job was not a suitable job for that employee.

Concerning Illinois, an example can be found in *Gary Stegan v Reladyne, LLC*, 17 WC 07749. 19 IWCC 0174. A shoulder injury kept the employee from his usual work as a forklift operator. He could work light duty. The employer sought to challenge TTE decisions and took several actions. It had its own transitional work program that matched injured employees in other workplaces. Stegan was asked to report for light duty work at Habitat for Humanity. The employer clarified that it, rather than Habitat for Humanity, would pay Stegan his full salary and that he would remain subject to the employer's human resources and attendance policies. The employee declined to report to the job. Employer then filed an action to challenge Stegan's right to TTD. The Arbitrator agreed with the employee and ordered TTD. *The Arbitrator cited Saineghi v Demar Logistics*, 14 IWCC 1093 where the employee declined a volunteer position with a charity. Stegan's employer filed for review at the Commission, which reversed the Arbitrator. The IWCC noted that contrary to Saineghi, Stegan's employer offered to pay his salary while he worked for the charity. Stegan's employer itself made the offer and made clear that the employee would remain its employee, paid by the employer and subject to its human resources and attendance policies. Unlike other cases where authority over the employee was seemingly delegated to a third-party, Stegan's employer retained control over him. The IWCC found the employee gave no justification for refusing to participate in the light duty despite the work being in a different workplace. The IWCC noted that the employee made a decision to stay home and receive TTD rather than accept light duty and his full salary.

The Benefits of a RTW Program for Employers include:

- Increased productivity.
- Reduced costs due to overtime pay as other workers fill in.
- Reduced administrative costs associated with filling the position with temporary help.
- Controlled workers' compensation claim costs.
- Reduced short-term disability (STD) and long-term disability (LTD) costs.
- Reduction in absenteeism and days away from work.

Employees Benefit from an RTW Program because:

- They maintain some or all of their earnings.
- They maintain their skills and are productive contributors to their employers or charitable organizations that have partnered with their employer.
- They are likely to return to their pre-injury jobs more quickly.
- They maintain social connections and sense of purpose with their work routine.
- Knowledge that their employer is investing in them and want to keep the employee on.
- Contribute to society

- It is only a temporary position and may give an employee the opportunity to pick up a new skill or get more involved in his/her community.

Practical Tips for Creating an Alternative Duty Program

- Written policy in place
  - Employers should have a written light-duty or return-to-work policy in place before they need one.
  - A written policy ensures return-to-work procedures are followed consistently.
  - If light-duty or return-to-work opportunities are offered to some workers but not others, the employer can be exposed to employment discrimination litigation.
  - This policy should be given to new hires during onboarding.
- Written offer/notice of alternative duty/light duty
  - When alternative duty or light duty is offered, its suggested that it be provided to the employee in writing, outlining the implications of accepting, as well as outlining the pay, who the point person will be, and give the employee time to consider prior to agreeing/ rejecting to the alternative or light duty.
- Appointing a point person for the program
  - Employers should have a point person for these programs. Whether they be a member of HR or someone who specifically handles their return-to-work programs, this person needs to be either at the site, or available by phone for the employees who take advantage of this program.
  - This point person should be a liaison for the employee and the program in which they are participating and has a clear direction and understanding of the written policy in place, and can be contacted if any issues arise.
- Orientation for alternative duty/light duty program
  - An orientation for the alternative duty/light duty program would assist these employees by knowing what they need to wear, what is expected of them, if a uniform is required, etc. This should be coordinated by the point person.
- Geographical concerns
  - If possible, these programs would be conducted in the county of employment.
  - Additionally, if possible, having these programs at times in which the employee would usually be working.
- One size does not fit all
  - Employers should attempt to offer more than one alternative/light duty option for their employees.

Concerns raised over alternative duty programs

- Who is the employer? And what if re-injury occurs?
  - During transitional charitable light duty, employers should continue to dictate the time, manner and means of employment through their contractual agreement with the non-profit and any third-party

facilitator. An employer may continue to pay and regulate the salary of their employee just as if they were working a light duty position within their own operations. Furthermore, an employer should still require the attendance of the employee, and delineate the duties that may be performed within their work restrictions. By agreement and through exercise of control, the employer would remain responsible for any re-injuries that may occur during transitional charitable light-duty.

- Disclosing HIPAA information of an injured worker to non-profit is in violation of HIPAA and ADA.
  - The less being disclosed to outside parties the better. It is imperative to effectively communicate the work restrictions of the injured worker to the non-profit where they are serving. Therefore, disclosure of work restrictions to a manager or supervisor where the non-profit light duty will take place is necessary to effectively facilitate charitable light-duty work. Of course, in addition, any disclosure of information should also comply with the HIPPA regulations, and employer should not disclose the underlying medical condition of the employee to a third party or a non-profit. In accord, a non-profit should not engage in a conversation with any injured worker about his or her medical condition. The non-profit organization should be provided with only the necessary information regarding that employee's specific work restrictions.
  - Regarding the ADA, 42 U.S.C. §§12101-12701 requires that an employee with a disability be provided reasonable accommodation in performance of job duties, as long as it does not impose undue hardship to the employer. Thus, in order to comply with the ADA's requirement for reasonable accommodation, the employer needs to effectively communicate and assure that the injured worker's duties at the non-profit comply with the work restrictions imposed by their physician.
- 13th Amendment Concerns
  - Transitional charitable light duty does not constitute slavery or involuntary servitude. An injured worker who is placed in transitional charitable light duty is paid for his or her labor in compliance with labor and wage laws of the governing jurisdiction. The employee is faced with the choice of attempting a charitable light duty position or else risking loss of their income benefits, and this choice is no different than the one they would make if the position being offered were a part of the regular business of their employer.

Light Duty Costs

"If things are structured in a way that the employer has incentives to bring somebody back, then they'll strive to bring them back," says Karl Auerbach, MD, MS, MBA, FACOEM, assistant professor of environmental medicine and staff physician in occupational medicine at the University of Rochester (NY). "If the incentives are not there for bringing back both workers comp and nonworkers' comp [employees], managers tend to say, we don't want you back until you're 100%,' and that's unfortunate, because limited-duty programs can be valuable to employers."

Julie Miehe, RN, BSN, COHN-S, CM, an employee health nurse at St. Mary's Hospital Medical Center in Madison, WI, says decisions on bringing employees back on light duty at St. Mary's are based on the costs involved in work-related and off-duty injury leaves. "We're paying workers' comp and the costs of replacing them when they are hurt on the job, so there are two costs," she reports. "If they're off on nonwork-related causes, they are using their own vacation or sick leave, so the costs are less. "With work-related injuries, it's better to get them back to work," Miehle adds.

Some employers, such as The Lancair Co., a Bend, OR, manufacturer of airplane kits, give employees returning from workers' compensation injuries preference in light-duty assignments, but try to accommodate everyone. "There are always jobs to do that people can't find time to get done, so I'll send out an e-mail [to managers] with a description of the employee [who wants to return on limited duty], and then I'll just stand back and watch the replies pour in," says Leilani Monson, RN, occupational safety coordinator for The Lancair Co.

Auerbach says companies that think they are only losing money when employees are being paid workers' compensation **are forgetting the costs associated with nonwork injuries.** "Traditionally, companies treat them differently, and it's only the more enlightened companies that have more comprehensive programs" that don't differentiate between work-related and nonwork-related disabilities, Auerbach says. "If a person's not there, they're not there, regardless of the reason," he explains. "Either they'll be replaced at a cost to the employer, or their work will be spread out to create more work for the people left, or the work won't get done."

Added to that is the ultimate cost to employers who offer disability insurance that kicks in for nonwork-related disabilities. "Companies ultimately pay for disability insurance, just like they do workers' comp," Auerbach says. "There are variety of scenarios, depending on how the benefits are structured, but in the end, if a person's not there, it's costing someone money."

Auerbach says if a worker is receiving insurance benefits through a personal policy, and pays increased premiums as a result, he or she will make financial and work decisions based on the economic impact. If a company is paying benefits through workers' compensation, then the impact is on the employer.

"So the costs are ultimately the same with work-related injuries and nonwork-related injuries," he says. "Sometimes it comes out in dollars, sometimes in human resources interactions, and sometimes in insurance premiums."

Miehe says employees off work from job-related injuries always take priority when it comes to return-to-work placements, and sometimes even they are difficult to place in the hospital units, depending on their ability to perform when they come back. "Some units lend themselves to light duty more readily than others," she points out. "Nurses or nursing assistants can do things like watch monitors, monitor patients, that sort of light duty. Units can use some people to serve on committees, prepare educational pieces, set up competency testing, and act as mentors if they have earned that status."

Secretarial and administrative personnel are also easy to accommodate for light duty and are often able to do a large portion of their regular duties even before they are cleared to return to full workload, she says.

Miehe says she is more likely to reassign employees with work-related injuries to different units, but not as likely to do so for employees whose absences are not related to work. Some employees are harder to place, regardless of the nature of their disabilities. "I probably have the most problems with our plant maintenance workers because they can have some pretty serious injuries and finding light duty for them is next to impossible, whether they are off for on-duty or off-duty injuries," she says.

Auerbach says companies that adopt policies of consistently finding appropriate limited duty for employees returning from any disability are those that focus on longer-term benefits vs. the short-term issue of whether costs are paid in workers' compensation or disability insurance.

"It benefits everyone, including the company, to place anyone who's out in a job that's safe and appropriate, with input from knowledgeable physicians who can assess the job and determine if it is safe and appropriate," he says.

Miehe says each unit at St. Mary's decides how to accommodate nonwork-related employees as they are able, but the hospital does not obligate units to find light-duty work for employees returning from nonjob-related disability. Monson says her employer does what it can for any employee returning from disability, but gives priority to workers with job-related injuries.

"We offer it when we can, as long as they're not on probation and as long as they can do the things we need done," she says.

If an employee is on probation or has absenteeism issues, Monson says, that employee is likely to be suspended from returning to work until he or she is at 100% ability. Because preference is given to employees injured on the job, those who are injured off the job who return to limited duty might find they are in less preferential jobs.

"People want to be productive, and they don't like letting their co-workers down," Monson says. "We make beautiful airplanes here, and they're jazzed about what they do. Studies show people recover and heal faster with less depression when they are active in their usual routine, within their restrictions." Providing a way for employees to return to work breeds loyalty to the company, as well, she adds.

Varying States and How They Handle Light Duty

ILLINOIS

If you are hurt on the job in Illinois and receives workers' compensation benefits, your employer may offer you light-duty work. In certain cases, a doctor recommended by your employer might state that you are capable of performing light-duty work. However, if you see your regular doctor, he or she might think that you cannot. Unfortunately, many injured employees feel pressured and push themselves to return to work too fast, and risk sustaining further injury. When these discrepancies occur, you may have to attend a hearing to explain why you are declining the light-duty job offer. Saying that you are not interested, or it does not pay as much as your normal job is not a valid reason to refuse. Instead, simply explain to the judge that you think you are physically incapable of doing the job per your doctor's advice. The judge will weigh the evidence and make a decision regarding your claim. Accepting the light-duty job does not automatically mean your temporary disability benefits will stop. If you earn less than what you were making before your accident, you may be able to receive a portion of the difference in your wages.

CONNECTICUT

The Workers' Compensation Act requires employers to offer their employees light duty work, if such work is available, whenever an employee is recovered enough from a work-related injury to do light-duty work (CGA § 31-313). If the employee refuses the work or, in situations where the employer does not have appropriate work, does not submit proof of weekly job search contacts, then the employee's wage-replacement benefits can be cut. Benefits covering medical costs of work-related injuries are not affected. Claimants continue to receive

benefits until they (1) are recovered enough to return to their normal jobs or (2) reach their maximum medical improvement and may seek permanent partial disability status under WC.

NEW YORK

As in Connecticut, a claimant in New York can lose wage-replacement benefits if he or she (1) turns down light-duty work offered by the original employer or (2) does not show proof of a job search. Benefits for medical expenses are not affected. New York workers' compensation officials indicate the requirement to look for light-duty work emanates from well-established case law that holds "the claimant has an obligation to demonstrate an attachment to the labor market with evidence of a search for employment within medical restrictions," (2006 N.Y. App. Div. LEXIS 13544; 823 N.Y.S.2d 630).

VERMONT

Vermont WC regulations provide that a claimant who has been medically released to return to work with limitations and either fails or refuses to return to work, may have his or her wage replacement benefits cut. The regulations require a benefit termination notice to document that (1) the claimant was notified of his or her medical release for suitable work and obligation to "conduct a good faith search for suitable work," and (2) the claimant either failed to conduct a good faith search or has refused an offer of suitable work (VT Rule 18.1300). Specific steps to demonstrate a job search, such as reporting contacts with possible employers, are not required. Vermont officials say workers' compensation court judges determine what a "good faith" search is on a case-by-case basis, depending upon the totality of the facts.

RHODE ISLAND

Rhode Island does not require claimants receiving temporary partial disability benefits to search for a job, but it does require they take light-duty work with their original employer, if it is available. If the employer has suitable light-duty work and the claimant turns it down, the claimant's benefits are reduced as if the person had taken the job and benefits were reduced accordingly (R.I. General Laws, § 28-33-18.2). When a claimant reaches maximum medical improvement and is determined to have a permanent partial disability, the statute permits, but does not require, a WC judge to "take into consideration the performance of the employee's duty to actively seek employment" when considering the claim (R.I. General Laws, § 28-33-18). Matt Carey, the director of the Rhode Island Division of Workers' Compensation, said this option for the judge to look at the employee's job-search efforts is not generally seen as a mandate on the claimants.

GEORGIA

A fundamental mission of Georgia's workers' compensation laws is to encourage injured workers to return to work as soon as recovery from their injuries reasonably permits. The legislative policy is aimed at limiting the insurance companies' payout obligations and help encourage workers to rejoin the workforce. Georgia's State Board of Workers' Compensation (statute O.C.G.A. 34-9-40, rule 34-9-240) has issued rulings regarding light-work duty: "Effect of refusal of suitable employment by injured employee; attempting or refusing to attempt work with restrictions."

The new rule, which became effective July 1, 2021, in part provides that:

(b)… if the authorized treating physician releases an employee to return to work with restrictions and the employer tenders a suitable job to the employee within those restrictions, then:

(1) If the employee attempts the proffered job and is unable to perform the job for more than 15 working days, then weekly benefits shall be immediately reinstated, and the burden shall be upon the employer to prove that the employee is not entitled to continuing benefits: or

(2) If the employee refuses to attempt the proffered job, then the employer may unilaterally suspend benefits… Under those circumstances, the burden shall shift to the employee to prove continuing entitlement to benefits.

In a nutshell, if your employer offers you a light-duty job that fits within your doctor's prescribed restrictions, then you shall continue to receive benefits *only if* you try but can't perform the light duties for more than 15 days. If you refuse to try the light duties, your benefits will be immediately terminated. Your employer is not obligated to offer a light-duty job that falls within your doctor's restrictions. However, your employer has an incentive to offer one since failing to offer light-duty work will trigger the presumptions under the new rules effective July 1, 2021. If a suitable light-duty job within your doctor's restrictions isn't available, and you remain out of work in a light-duty status, your income benefits will continue for 52 consecutive weeks (or a maximum of 78 total non-consecutive calendar weeks).

CALIFORNIA

Per California Code of Regulations§ 10116.9(h), modified work or "light duty" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

If you were injured in 2013 or later and your employer can offer you work, the claims administrator must send you a "Notice of Offer of Regular, Modified, or Alternative Work" on DWC-AD form 10133.35. The claims administrator must send this to you within 60 days after the claims administrator learns you have a permanent partial disability that has become permanent and stationary, or "P&S". Your primary treating physician or another physician who makes this determination must complete and send the claims administrator a report of your permanent and stationary status and work capacity on DWC-AD form 10133.36.

The offer must be for a job that you are able to perform. In addition, the job must:

- Meet the work restrictions in the doctor's report
- Last at least 12 months
- Be within a reasonable commuting distance of where you lived at the time of injury.
- The offer could involve one of the following:
- Regular work. This is your usual job or position at the time of injury. It must pay the same wages and benefits that you were paid at the time of injury.

- Modified work. This is your old job with changes that meet the doctor's work restrictions. It must pay at least 85 percent of the wages and benefits that you were paid at the time of injury.
- Alternative work. This is work that is different from your old job and meets the doctor's work restrictions. It must pay at least 85 percent of the wages and benefits that you were paid at the time of injury. If your employer offers you work that meets all of the requirements described above:
- You have only 30 days to accept the offer. If you don't respond within 30 days, your employer could withdraw the offer.
- The claims administrator won't be required to offer you a supplemental job displacement benefit. This is true whether or not you accept the offer.
- However, an injured worker who is offered but refuses restricted work or light duty will not receive temporary disability benefits for the time he or she is not working.

WASHINGTON

Occasionally an employer wants to bring someone back to light duty, and can only afford to bring their employee back to work part-time or at a lower rate of pay. If this happens and your claim is still open, you may apply for Loss of Earning Power (LEP) benefits. You are not required to accept any job exceeding the restrictions given by your attending provider. However, if your employer offers you light duty or transitional work, approved by your attending provider, and you choose to decline it is unlikely you will be eligible to receive further time-loss or LEP benefits.

PENNSYLVANIA

Employers in Pennsylvania are not obligated to offer light-duty jobs. However, if an employer does have a light-duty job available, they must offer it to the injured employee. Before being offered light-duty work, you must be medically approved to perform light-duty work and receive a Section 306(b)(3) notice of ability to return to work. If your employer lacks light-duty work, you are not obligated to return to work.

CONTINUING EVOLUTION OF ALTERNATIVE PROGRAMS

Post COVID-19 Pandemic, employers have certainly experienced a push from employees for more benefits such has shorter work weeks, hybrid work schedules and tele-working situations. Granted, while some industries are not feasible for such arrangements, other industries have found ways to provide alternatives to the traditional work arrangement. This trend has caused a natural progress into the light duty work phenomenon. Studies have yet to have been completed with enough data to show the cost and benefit analysis of alternative light duty programs in a hybrid or remote work form. But, they are certainly in the testing phases. Benefits can be seen from a injured work who could possible not drive do to work restrictions, performing some type of data entry for the company. Taking this scenario a step further, an injured worker who was at home could do the data entry or tele-remote work for a non-profit. Again, it would add value to the injured workers day and also benefit the employer and community.

This hybrid type work would need to not be overwhelming to a injured worker as the goal is to allow

proper time to rehabilitate properly. So, again our analysis leads back to the same conclusion in that an such future programs must be reasonable in nature.

And we say to ourselves-What is a reasonable alternative light duty world?

If you have any questions regarding this topic or Indiana Worker's Compensation in general, please feel free to contact us.

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Section Four

Worker’s Compensation Board Roundtable

Hon. Linda P. Hamilton
Chairman
Worker's Compensation Board of Indiana
Indianapolis, Indiana

Hon. Daniel G. Foote
Hearing Member, Worker's Compensation Board of Indiana
Attorney at Law & Registered Civil Mediator
Indianapolis, Indiana

Hon. Douglas W. Meagher
Worker's Compensation Board of Indiana
Indianapolis, Indiana

Hon. Sandra E. O’Brien
Worker's Compensation Board of Indiana
Indianapolis, Indiana

Hon. Diane L. Parsons
Worker's Compensation Board of Indiana
Indianapolis, Indiana

Hon. Kyle L. Samons
Worker's Compensation Board of Indiana
Indianapolis, Indiana

Hon. A. James Sarkisian
Worker's Compensation Board of Indiana
Indianapolis, Indiana

Section Four

Worker's Compensation Board Roundtable…… Hon. Linda P. Hamilton
Hon. Daniel G. Foote
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Hon. Kyle L. Samons
Hon. A. James Sarkisian

Social Security Offset

42U.S.C. 424(a)

20 CFR 404.408(d)

Example 1

Example 2

Sample Social Security Spread Language

SOCIAL SECURITY OFFSET

42 U.S.C. 424(a)

(a) CONDITIONS FOR REDUCTION; COMPUTATION If for any month prior to the month in which an individual attains retirement age (as defined in section 416(*l*)(1) of this title)—

(1) such individual is entitled to benefits under section 423 of this title, and
(2)such individual is entitled for such month to—
(A)periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or . . .
(3) such total of benefits under sections 423 and 402 of this title for such month, and
(4)such periodic benefits payable (and actually paid) for such month to such individual under such laws or plans, exceeds the higher of—
(5) 80 per centum of his "average current earnings", or
(6)the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.
In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a continuous period of months) reduce such total below the sum of—
(7)the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and
(8)any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.
For purposes of clause (5), an individual's average current earnings means the largest of (A) the average monthly wage (determined under section 415(b) of this title as in effect prior to January 1979) used for purposes of computing his benefits under section 423 of this title, (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a)(1) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest, or (C) one-twelfth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a)(1) and 411(b)(1) of this title) for the calendar year in which he had the highest such wages and income during the period consisting of the calendar year in which he became disabled (as defined in section 423(d) of this title) and the five years preceding that year.

20 CFR 404.408(d)

(d) ***Items not counted for reduction.*** Amounts paid or incurred, or to be incurred, by the individual for medical, legal, or related expenses in connection with the claim for public disability payments (see § 404.408 (a) and (b)) or the injury or occupational disease on which the public disability award or settlement agreement is based, are excluded in computing the reduction under paragraph (a) of this section to the extent they are consonant with the applicable Federal, State, or local law or plan and reflect either the actual amount of expenses already incurred or a reasonable estimate, given the circumstances in the individual's case, of future expenses. Any expenses not established by evidence required by the Administration or not reflecting a reasonable estimate of the individual's actual future expenses will not be excluded. These medical, legal, or related expenses may be evidenced by the public disability award, compromise agreement, a court order, or by other evidence as the Administration may require. This other evidence may consist of:

(1) A detailed statement by the individual's attorney, physician, or the employer's insurance carrier; or

(2) Bills, receipts, or canceled checks; or

(3) Other clear and convincing evidence indicating the amount of expenses; or

(4) Any combination of the foregoing evidence from which the amount of expenses may be determinable.

Example 1

A man, working as a steelworker, has made the maximum Social Security income from age 20-55 and then retires to take a less physical job. Because of his high wage earning in his prior job, he is entitled to the maximum monthly SSDI payment, currently $3627/month, which equate to $43,524 per year.

He is now 60 and is making $60,000/year and suffers a disabling injury at work. He applies and is granted SSDI and is set to receive the maximum benefit. His employer disputes compensability. After a hearing, the Claimant wins and is awarded PTD benefits in the amount of $769.23 per week, which is $39.999.96 per year.

Social Security will reduce monthly benefits dollar for dollar for any amount over 80% of his prior average current earnings based on the combined earnings between SSDI and WC. Since he was making $60,000 per year just prior to the disabling event, the 80% threshold is $48,000. His SSDI and WC combine for a total of $83,523 per year, which is over the threshold by $35,523 so Social Security will reduce his SSDI benefits as long as he continues to receive WC. Instead of receiving $43,524 in SSDI, he will only received $8,001 so that his combined disability benefits amount to $48,000 per year.

Example 2

A 50 year old woman is making $40,000 per year and suffers an at-work injury. Her TTD rate is $512.89. Prior to settling her PPI and a time period of disputed TTD payments, she has a stroke which renders her permanently disabled under the Social Security rules and is now entitled to SSDI in the amount of $1700 per month, which is $20,400. One year after her SSDI payments begin, she settles her WC claim for $25,000 with no social security spread language.

Although these are two separate and independent incidents, she is still subject to the 80% threshold, which is $32,000 per year in her case, or her SSDI will be reduced. She is currently receiving $20,400 per year from SSDI. The lump sum payment of $25,000 puts her at a total between the two benefits of $45,400 per year, which is $13,400 over her 80% threshold. Her Social Security benefits of $20,400 per year will be reduced by $13,400 and she will receive only $7000 because of the reduction.

Sample Social Security Spread Language

For purposes of Social Security, after payment of attorney fees and expenses, Claimant will receive a net amount of $_____. This is for a permanent impairment that will affect Claimant for the rest of his/her life. The life expectancy tables indicate that Claimant, who was _____ years old at the time of the incident, has a life expectancy of ___ years, or _____months. Although being paid in lump sum, the $_____ represents $_____ per month for _____ months.

Example 1 - Settlement for PTD $384,615

For purposes of Social Security, after payment of attorney fees in the amount of $60,192.24 and expenses in the amount of $3,500, Claimant will receive a net amount of $320,922.75. This is for a permanent impairment that will affect Claimant for the rest of his life. The life expectancy tables indicate that Claimant, who was 60 years old at the time of the incident, has a life expectancy of 20.47 years, or 245.64 months. Although being paid in lump sum, the $320,922.75 represents $1,306.42 per month for 245.65 months.

$1,306.42 per month = $15,674.64 per year
SSDI = $43,524 per year

$59,198.65
Less $48,000 threshold

$11,198.64 reduction per year in SSDI instead of $35,523

Example 2 - Settlement $25,000

For purposes of Social Security, after payment of attorney fees in the amount of $5,000 and expenses in the amount of $1,250, Claimant will receive a net amount of $18,750. This is for a permanent impairment that will affect Claimant for the rest of her life. The life expectancy tables indicate that Claimant, who was 50 years old at the time of the incident, has a life expectancy of 32.24 years, or 386.88 months. Although being paid in lump sum, the $18,750 represents $48.46 per month for 386.88 months.

$48.46 per month = $581.52 per year
SSDI = $20,400 per year

$20,981.52

Under $32,000 threshold so there is no reduction of SSDI benefits

Section Five

Attorney's Fees for Medicals

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Section Five

Attorney's Fees for Medicals……. Daniel A. Korban

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Attorney's Fees for Medicals

I. Introduction

Attorney fees for plaintiff attorneys are regulated by Statute. The Indiana Code provides the Indiana Worker's Compensation Board with much discretion over the award of plaintiff attorney fees. While I.C. 22-3-1-4 sets a schedule for claimant attorney fees, it also grants the Board discretion to award fees on a case by case basis.

Under I.C. 22-3-4-12, it appears mandatory that the Board shall "fix and state" plaintiff's attorney fees whenever a claimant is represented by counsel. Case law holds that a contract or agreement for attorney fees contrary to those approved by the Board are unenforceable because only the Board can determine the proper amount of attorney fees.

The schedule for attorney fees found in I.C. 22-3-1-4 includes the percentages based on recovery. It also includes fees of "10% of the value of unpaid medical expenses; out-of-pocket medical expenses; or future medical expenses." What does this mean, in what circumstances are claimant attorneys entitled to it, and how does it apply in practice? What are some special factors to consider, and does the Indiana Code leave us in the dark on how to address those factors?

II. Statutes

A. Attorney Fee Schedule: I.C. 22-3-1-4:

> (a) As used in this section, "attorney's fees" means the fees requested for compensation for service provided by an attorney to a claimant under the worker's compensation law and the worker's occupational diseases law as provided under section 3(b)(3) of this chapter.
> (b) As used in this section, "board" refers to the worker's compensation board of Indiana established by section 1 of this chapter.
> (c) As used in this section, "claim" refers to a claim for compensation under IC 22-3-2 through IC 22-3-7 filed with the board.
> (d) The following schedule of attorney's fees applies to an attorney who represents a claimant before the board when the claim for compensation results in a recovery:
> (1) A minimum of two hundred dollars ($200).
> (2) Twenty percent (20%) of the first fifty thousand dollars ($50,000) of recovery.
> (3) Fifteen percent (15%) of the recovery in excess of fifty thousand dollars ($50,000).
> (4) Ten percent (10%) of the value of:
> (A) unpaid medical expenses;
> (B) out-of-pocket medical expenses; or
> (C) future medical expenses.

(e) The board maintains continuing jurisdiction over all attorney's fees in cases before the board and may order a different attorney's fee or allowance in a particular case.

General Comments

-22-3-1-4(d) appears to limit attorney fees to when an Application is filed

B. Approval of Attorney and Physician, Nurse and Hospital Charges: I.C. 22-3-4-12:

Except as provided in section 12.1 of this chapter, the fees of attorneys and physicians and charges of nurses and hospitals for services under IC 22-3-2 through IC 22-3-6 shall be subject to the approval of the worker's compensation board. When any claimant for compensation is represented by an attorney in the prosecution of his claim, the worker's compensation board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fees. The fee so fixed shall be binding upon both the claimant and his attorney, and the employer shall pay to the attorney out of the award the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award; provided, that whenever the worker's compensation board shall determine upon hearing of a claim that the employer has acted in bad faith in adjusting and settling said award, or whenever the worker's compensation board shall determine upon hearing of a claim that the employer has not pursued the settlement of said claim with diligence, then the board shall, if compensation be awarded, fix the amount of the claimant's attorney's fees and such attorney fees shall be paid to the attorney and shall not be charged against the award to the claimant.

III. Case Law

A series of cases confirm the exclusive authority the Worker's Compensation Board has over attorney fees:

A. *Buckler v. Hilt*, 200 N.E. 219 (Ind. 1936)

In *Buckler*, the Board's authority to limit attorney fees was challenged as unconstitutional based on the 14th Amendment in that it denies a person the liberty of contract and property. It was further challenged with the argument that the fee restriction singled out worker's compensation attorney because other practice areas did not have the same restrictions.

The court relied on precedent from other states (Nebraska) and found that the restriction on fees was a proper exercise of the state's police power. The court reasoned that if claimants have to pay unreasonable attorney fees, they will become wards of the

state. Therefore it is in both the claimant and public policy interest to maintain oversight of attorney fees in worker's compensation claims.

The court also determined that the fee oversight does not create a different class of attorneys, but rather applies to all attorneys in the same circumstances.

B. *K-Mart Corp. v. Novak*, 521 N.E.2d 1346 (Ind. Ct. App. 1988)

In *Novak*, Plaintiff's attorney asked the appellate court to award attorney fees on defendant's appeal. The Novak decision reaffirmed exclusive jurisdiction on attorney fees to the Board and stated: "to collect fees under this section [I.C. 22-3-4-12] the claimant first must request them from the Board and present evidence thereon, then the Board must make a determination on the request." *Id*. at 1352.

The court also found that appellate attorney were not warranted under then Appellate Rule 15(G) because defendant's appeal was not meritless.

C. *Wernle, Ristine & Ayers v. Yund*, 790 N.E.2d 992 (Ind. 2003)

In *Yund*, the Board's authority over medical expenses was confirmed and expanded. In this case, plaintiff entered into a retainer agreement with counsel which covered fees and also litigation expenses, which plaintiff was to reimburse counsel upon the resolution of the claim.

After a low settlement offer, plaintiff retained a medical expert to examine her, write a report, and testify on her behalf. Following the medical report, the settlement offer increased by about 400% (still only $8,500). Plaintiff turned down the offer and fired her lawyer. She then settled on her own for the $8,500.

Her prior attorney requested that fees and expenses be paid out of the settlement and plaintiff disputed the issue with the Board. The Board ruled that fees should be paid to counsel but that plaintiff's retained expert was not owed fees.

Counsel appealed the decision. The Board, by its Chairman, entered an appearance on behalf of the Board in the appellate case and wrote a brief in support of its decision, explaining that it did not feel that plaintiff's retained doctor was owed the fees requested. The appellate court affirmed the Board's award. The supreme court granted transfer and also affirmed.

The court found that the Board has discretion over medical expenses of both treating and non-treating medical providers. The court reasoned that because the Board found that plaintiff's retained expert was not owed his fee, there was no contradiction with the fee agreement executed by plaintiff. The court also acknowledged that the Act does not address litigation expenses nor a plaintiff's liability to reimburse her attorney for litigation expenses.

-Questions unanswered by *Yund*:
-What if attorney already paid physician?
-What if claimant or attorney contracted with physician re payment?
-The dissent talks about this and questions the practical application.

IV. Why is a 10% fee on medical appropriate

A. Provides a mechanism for claimant's attorney to get paid for working to get medical treatment going, or reimbursed
-without it, fees are very limited
-providers benefit

B. Provides mechanism for claimants to retain counsel when only issue is medical (PPI already resolved)

V. When is a 10% Fee on Medical Appropriate

A. Language of Act: I.C. 22-3-1-4(d)(4) and (e)

(4) Ten percent of the value of:
(A) unpaid medical expenses;
(B) out-of-pocket medical expenses; or -(why "OR"?)-
(C) future medical expenses.

-(BUT)-

(e) The board maintains continuing jurisdiction over all attorney's fees in cases before the board and may order a different attorney's fee or allowance in a particular case.

B. When directed care is disputed and plaintiff's attorney is successful in obtaining an order for additional directed care?

C. When a claim is settled on a 1043 Form and medical remains open?

D. When a claimant is determined to be totally permanently disabled and medical remains open?

E. Section 15 settlement with a structured medical account?

F. Police/Firefighters?

VI. A 10% Medical Fee Award in Practice

A. Who pays it?

-Claimant, Defendant, Medical Provider?

-Practice vs. Mandate. The Act does not specify, but in practice, the medical providers reduce their fees by 10%

-This is clearly in the discretion of the Board, but is it fair?

-I would argue yes—claimant attorneys are working to get them paid and therefore it is fair for them to bare some of the cost of the benefit.

-There are similar mechanisms in civil law with regard to the reduction of medical liens in a personal injury case

B. Special Considerations

-Bills from health care providers

-easy: their fees are subject to Act, pay 10% of the amount actually paid

-What about a non-ERISA group health lien?

-The Act says "Medical expenses" so does not limit it to medical providers

-So, reimbursement from comp insurance to group health insurance could be reduced by 10%

-What about an ERISA lien?

VII. Concerns

A. Does a 10% order chill a treating physician's willingness to provide treatment?

B. Does a 10% order create undue hardship on defendant with regard to accounting?

VIII. Practice Pointers

A. Attorney Fee Agreement

-Keep in mind, not enforceable unless fees are approved by the Board
-Include language: "or otherwise ordered by the Board."

B. Section 15 Agreements

-Always include attorney fees and expenses in Section 15 agreements

C. Awards

-Good language to ask for in awards:

"Plaintiff's counsel shall receive as additional attorney fees 10% of unpaid and future medical and hospital expenses ordered to be paid herein as collection costs from medical providers and medical insurance carriers; 90% of medical and hospital expenses is the total amount due and owing to the medical providers and medical insurance carriers, subject to I.C. 22-3-3-5.2, and upon payment, the medical provider and medical insurance carrier shall release Plaintiff and Defendant of any and all further obligation for the medical and hospital expense."

West's Annotated Indiana Code
Title 22. Labor and Safety
Article 3. Worker's Compensation System
Chapter 1. Worker's Compensation Board

IC 22-3-1-4

22-3-1-4 Definitions

Currentness

Sec. 4. (a) As used in this section, "attorney's fees" means the fees requested for compensation for service provided by an attorney to a claimant under the worker's compensation law and the worker's occupational diseases law as provided under section 3(b)(3) of this chapter.

(b) As used in this section, "board" refers to the worker's compensation board of Indiana established by section 1 of this chapter.

(c) As used in this section, "claim" refers to a claim for compensation under IC 22-3-2 through IC 22-3-7 filed with the board.

(d) The following schedule of attorney's fees applies to an attorney who represents a claimant before the board when the claim for compensation results in a recovery:

(1) A minimum of two hundred dollars ($200).

(2) Twenty percent (20%) of the first fifty thousand dollars ($50,000) of recovery.

(3) Fifteen percent (15%) of the recovery in excess of fifty thousand dollars ($50,000).

(4) Ten percent (10%) of the value of:

(A) unpaid medical expenses;

(B) out-of-pocket medical expenses; or

(C) future medical expenses.

(e) The board maintains continuing jurisdiction over all attorney's fees in cases before the board and may order a different attorney's fee or allowance in a particular case.

Credits

As added by P.L.134-2006, SEC.2.

I.C. 22-3-1-4, IN ST 22-3-1-4

The statutes and Constitution are current with all legislation of the 2023 First Regular Session of the 123rd General Assembly effective through July 1, 2023.

End of Document

West's Annotated Indiana Code
Title 22. Labor and Safety
Article 3. Worker's Compensation System
Chapter 4. Worker's Compensation: Administration and Procedures

IC 22-3-4-12

22-3-4-12 Rates and charges; attorney's fees; payment

Currentness

Sec. 12. Except as provided in section 12.1 of this chapter, the fees of attorneys and physicians and charges of nurses and hospitals for services under IC 22-3-2 through IC 22-3-6 shall be subject to the approval of the worker's compensation board. When any claimant for compensation is represented by an attorney in the prosecution of his claim, the worker's compensation board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fees. The fee so fixed shall be binding upon both the claimant and his attorney, and the employer shall pay to the attorney out of the award the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award; provided, that whenever the worker's compensation board shall determine upon hearing of a claim that the employer has acted in bad faith in adjusting and settling said award, or whenever the worker's compensation board shall determine upon hearing of a claim that the employer has not pursued the settlement of said claim with diligence, then the board shall, if compensation be awarded, fix the amount of the claimant's attorney's fees and such attorney fees shall be paid to the attorney and shall not be charged against the award to the claimant.

Credits
Amended by P.L.144-1986, SEC.48; P.L.258-1997(ss), SEC.10; P.L.1-2006, SEC.338, eff. Mar. 24, 2006.

Notes of Decisions (29)

I.C. 22-3-4-12, IN ST 22-3-4-12
The statutes and Constitution are current with all legislation of the 2023 First Regular Session of the 123rd General Assembly effective through July 1, 2023.

End of Document

209 Ind. 541
Supreme Court of Indiana.

BUCKLER
v.
HILT et al.

No. 26445.
|
March 3, 1936.

Synopsis
Suit by Emanuel E. Buckler against Ruby M. Hilt and another. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

West Headnotes (7)

[1] **Workers' Compensation** ⇐ Attorney Fees

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(U) Costs and Attorney Fees
413XVI(U)2 Attorney Fees
413k1980.8 In general
(Formerly 413k1981, 255k420 Master and Servant)

Under statute limiting attorney's fees in compensation cases to amount fixed by Industrial Board, enforceable claim for sum of money equal to designated per centum of anticipated award cannot be created by contract between attorney and employee. Burns' Ann.St. § 40-1516.

2 Cases that cite this headnote

[2] **Constitutional Law** ⇐ Fees

Workers' Compensation ⇐ Costs and fees

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k4017 Costs and Fees
92k4019 Fees
(Formerly 92k317(1), 92k317)
413 Workers' Compensation
413I Nature and Grounds of Employer's Liability
413k12 Constitutionality of Statutes
413k43 Costs and fees
(Formerly 255k347 Master and Servant)

Statute limiting attorney's fees in compensation cases to amount fixed by Industrial Board held not unconstitutional. Burns' Ann.St. § 40-1516; U.S.C.A.Const. Amend. 14, § 1.

[3] **Eminent Domain** ⬰ What Constitutes a Taking; Police and Other Powers Distinguished

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 In general
(Formerly 148k2(1))

Constitutional prohibition against taking of property without just compensation applies only to taking of private property under power of eminent domain, and does not restrain General Assembly in its exercise of police power of state. Const.Ind. art. 1, § 21.

3 Cases that cite this headnote

[4] **Eminent Domain** ⬰ Appointment of counsel; legal services

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.41 Appointment of counsel; legal services
(Formerly 148k2(1.1), 148k2(1))

Statute limiting attorney's fees in compensation cases to amount fixed by Industrial Board was proper exercise of police power of state, and hence was not violative of constitutional prohibition against taking of property without just compensation. Burns' Ann.St. § 40-1516; Const.Ind. art. 1, § 21.

6 Cases that cite this headnote

[5] **Workers' Compensation** ⬰ Costs and fees

413 Workers' Compensation
413I Nature and Grounds of Employer's Liability
413k12 Constitutionality of Statutes
413k43 Costs and fees
(Formerly 255k347 Master and Servant)

Statute limiting attorney's fees in compensation cases to amount fixed by Industrial Board held not unconstitutional as imposing restrictions upon contracts of attorneys practicing before Industrial Board which were not imposed upon contracts of attorneys in all fields of practice. Burns' Ann.St. § 40-1516; Const. art. 1, § 23.

1 Case that cites this headnote

[6] **Constitutional Law** ⬰ Fees

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k4017 Costs and Fees
92k4019 Fees
(Formerly 92k317(1))

Statute limiting attorney's fees in compensation cases to amount fixed by Industrial Board held not violative of due process. Burns' Ann.St. § 40-1516; U.S.C.A.Const. Amend. 14, § 1.

1 Case that cites this headnote

[7] **Workers' Compensation** ⇐ Costs and fees

413 Workers' Compensation
413I Nature and Grounds of Employer's Liability
413k12 Constitutionality of Statutes
413k43 Costs and fees

Statute limiting attorney's fees in compensation cases to amount fixed by Industrial Board held not unconstitutional. Burns' Ann.St. § 40-1516; U.S.C.A.Const. Amend. 14, § 1.

***542** ****219** Appeal from Marion Circuit Court; Earl Cox, Judge.

Attorneys and Law Firms

J. Fred Masters, of Indianapolis, for appellant.

****220** Oscar C. Hagemier and White, Wright & Boleman, all of Indianapolis, for appellees.

Opinion

TREANOR, Judge.

Appellant, as plaintiff below, brought suit to enforce a lien for attorney's fees against a judgment which the appellant, as attorney for appellee Hilt, had caused to be entered in the Marion circuit court upon a compensation award made by the Industrial Board of Indiana. Appellant's right to a lien for attorney's fees was predicated upon a contract between himself and appellee Hilt, and specifically upon the provision that appellant was to receive as fees for his services in prosecuting Hilt's industrial compensation claim a sum equal to 33 1/3 per cent. of any amount so received 'in compromise settlement, judgment or proceedings.'

A demurrer to the complaint to enforce appellant's lien was sustained by the trial court. Upon refusal of the plaintiff to plead further, judgment was rendered against him, and he now prosecutes this appeal. The sole error assigned is the court's action in sustaining the demurrer. To decide this appeal we must consider the meaning and constitutionality of section 65 of the Workmen's Compensation Act (section 40-1516, Burns' Ind.St.Ann.1933, Baldwin's Ind.St.1934, § 16441, Acts 1929, c. 172, § 65, p. 536) which reads as follows: 'The fees of attorneys and physicians and charges of nurses and hospitals for services under this act shall be subject to the approval of the industrial board. When any claimant for compensation is represented by an attorney in the prosecution of his claim, the industrial board shall fix the state in the award, if compensation be awarded, the amount of the claimant's attorney's fees. The fee ***543** so fixed shall be binding upon both the claimant and his attorney, and the employer shall pay to the attorney out of the award, the fee so fixed and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. The industrial board may withhold the approval of the fees of the attending physician in any case until he shall file a report with the industrial board on the form prescribed by such board.'

[1] Both the appellant and appellees assume, and we think correctly that the purpose and necessary effect of the provisions of section 65 are to limit attorneys' fees in compensation cases to an amount to be fixed by the Industrial Board. And this obviously precludes the possibility of creating by contract a valid and enforceable claim for a sum of money equal to a designated per centum of an anticipated award. And since appellant and appellees agree

that the correctness of the trial court's ruling upon the demurrer depends upon the constitutionality of section 65, as above construed, it is not necessary to set out the complaint and demurrer thereto.

In support of his assignment of error appellant urges the unconstitutionality of section 65 and insists that it is in conflict (1) with the Fourteenth Amendment to the Constitution of the United States[1] in that it denies a person liberty of contract and property without due process of law; (2) with section 21 of article 1 of the Indiana Constitution[2] in that it would permit one's property or services to be taken without just compensation; and (3) with ***544** section 23, article 1 of the Indiana Constitution[3] in that restrictions are imposed upon the contracts of attorneys practicing before the Industrial Board which are not imposed upon the contracts of attorneys in all fields of practice.

Sections of Workmen's Compensation Acts substantially the same as section 65 of the Indiana act uniformly have been held constitutional. In referring to provisions of the Michigan Compensation Act making attorneys' and physicians' fees in accident claims subject to approval of the ****221** board and exempting such payments for compensation from attachment, and making them unassignable, the Supreme Court of that state said: 'These restrictions in the act, as applied to those who submit to its provisions by election, certainly cannot be held unconstitutional. They were deemed by the Legislature proper and necessary to safeguard the interests of the class for whose benefit largely this act to 'promote the walfare of the people of the state' was passed; they are germane to the purpose of the act, and in light of conditions previously existing in litigation over personal injuries to workmen, of which courts of last resort have taken judicial notice in construing workmen's compensation acts, are beneficial and appropriate, if not essential, to an efficient administration of the law.' Mackin v. Detroit-Timkin Axle Co. (1915) 187 Mich. 8, 153 N.W. 49, 56. See, also, Sarja v. Pittsburgh Steel Ore Co. (1923) 154 Minn. 217, 191 N.W. 742; Chapman v. Railway Fuel Co. (1924) 212 Ala. 106, 101 So. 879; Gritta's Case (1922) 241 Mass. 525, 135 N.E. 874.

And in upholding the constitutionality of such a section in the Nebraska act the Supreme Court of Nebraska commented, in part, as follows:

'The question is as to whether the regulation is reasonable and is in the interest of the public welfare. If so, it does not conflict with the constitutional provisions. It is a matter of general knowledge ***545** that a large percentage of the persons who come under the Workmen's Compensation Act are not possessed of large means, but are dependent upon their earnings for the support of themselves and families. If the earning power of the bread-winner is destroyed or greatly impaired by an injury, he must look to the compensation provided by the statute for the support of himself and family, and, if this compensation may be depleted by an improvident or unreasonable contract for legal services, he and his dependents are likely to become public charges. It is in their interest, and the interest of the public as well, that they should be protected from contracts or charges for attorney's fees that are not reasonable. The statute does not fix an arbitrary charge, but leaves the amount to be determined and fixed by the judge. It will not be presumed that the judge will refuse to make a reasonable allowance or to approve a fair and just charge.

'We hold that the statute is a proper exercise of the police power of the state, and is not repugnant to the provisions of the federal Constitution, guaranteeing rights in property, due process of law, and equal protection of the law.' Dysart v. Yeiser (1923) 110 Neb. 65, 192 N.W. 953, 955.

The judgment of the Nebraska court in Dysart v. Yeiser was affirmed by the United States Supreme Court in an opinion from which we quote the following: 'The case is brought here on a contention that the statute as construed unreasonably restricts the liberty of contract and contravenes the Fourteenth Amendment by depriving the plaintiff in error of his liberty and property without due process of law. * * * But the question is specific, whether we can pronounce this law unreasonable, against the opinion of the Legislature and Supreme Court of the State. The Court

adverts to the fact that a large proportion of those who come under the statute have to look to it in case of injury and need to be protected against improvident contracts, in the interest not only of themselves and their families but of the the public. * * * When we add the considerations that an attorney practices under a license from the State and that the subject-matter is a right created ***546** by statute it is obvious that the State may attach such conditions to the license in respect of such matters as it believes to be necessary in order to make it a public good.'

Yeiser v. Dysart (1925) 267 U.S. 540, 45 S.Ct. 399, 69 L.Ed. 775.

[2] In view of the holding of the United States Supreme Court in Yeiser v. Dysart, we must conclude that section 65 of our Workmen's Compensation Act does not violate section 1 of the Fourteenth Amendment to the Constitution of the United States.

[3] **[4]** This court has held that section 21 of article 1 of the Constitution of Indiana applies only to the taking of private property under the power of eminent domain, and, consequently, does not restrain the General Assembly in its exercise of the police power of the state. The legislation in question falls under the police power.

[5] Appellant also insists that section 65 violates section 23, article 1, of the Constitution of Indiana by imposing restrictions upon the contracts of attorneys practicing before the Industrial Board ****222** which are not imposed upon contracts of attorneys in all fields of practice. The act does not purport to create a special class of attorneys for Industrial Board practice, but imposes the same restriction upon all attorneys under the same circumstances; and affects only one special kind of professional business. The special factual situation characteristic of this particular business justifies the restrictions of section 65.[4]

We hold that section 65, Acts 1929, c. 172, p. 536 (section 40-1516, Burns', etc., 1933, Baldwin's Ind.St.1934, § 16441, supra) is a proper exercise of the police power of the state and does not violate either the State or Federal Constitution.

The Marion circuit court did not err in sustaining the demurrer to plaintiff's complaint.

Judgment affirmed.

All Citations

209 Ind. 541, 200 N.E. 219, 103 A.L.R. 901

Footnotes

1 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Section 1, Fourteenth Amendment Constitution of United States.

2 'No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.' Section 21, art. 1, Indiana Constitution.

3 'The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' Section 23, art. 1, Indiana Constitution.

4 See discussion in excerpts from the opinions in Mackin v. Detroit-Timkin Axle Co., supra, and Dysart v. Yeiser, supra.

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521 N.E.2d 1346
Court of Appeals of Indiana,
First District.

K–MART CORPORATION, Defendant–Appellant,
v.
Joseph NOVAK, as Husband of Margaret M. Novak, and as
Administrator of the Estate of Margaret M. Novak, Plaintiff–Appellee.

No. 93A02–8708–EX–330.
|
April 27, 1988.
|
Rehearing Denied June 8, 1988.

Synopsis

Employer appealed from decision of Industrial Board awarding workmen's compensation death benefits in lump sum to husband and widower of employee who was killed during lunatic's shooting spree. The Court of Appeals, Ratliff, C.J., held that: (1) evidence established that employee's death "arose out of" her employment; (2) Victims of Violent Crimes Act did not supersede Workmen's Compensation Act with respect to employee's death; (3) lump-sum award was inappropriate; (4) husband was not entitled to award of attorney's fees; and (5) award would be increased by 5% on appeal.

Affirmed in part, reversed in part and remanded with instructions.

Neal, J., concurred with separate opinion.

Procedural Posture(s): On Appeal.

West Headnotes (7)

[1] **Workers' Compensation** Relation to employment

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(D) Particular Causes, Circumstances, and Conditions of Injury
413VIII(D)14 Injuries by Acts of Co-Employee or of Third Person
413k689.1 Acts of Third Persons
413k689.5 Assaults
413k689.5(3) Relation to employment
(Formerly 413k690)

"Positional risk test," pursuant to which injury arises out of employment if it would not have occurred but for fact that conditions and obligations of employment placed worker's compensation claimant in position where he was injured, could be applied in case in which store employee was killed during lunatic's shooting spree, notwithstanding employer's contention that deviations from "increased risk

test," pursuant to which risk is incidental to employment if risk involved is not one to which public at large has objected, should be limited to traveling employee cases.

9 Cases that cite this headnote

[2] **Workers' Compensation** ⊷ Acts of third person

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)7 Accident or Injury and Consequences Thereof
413k1563 Assaults; Injuries by Acts of Co-Worker or Third Person
413k1563.3 Acts of third person
(Formerly 413k1565)

Evidence established that store employee's death as result of lunatic's shooting spree arose out of her employment as required by Workmen's Compensation Act, notwithstanding employer's contention that risk of being shot by lunatic was risk common to public and did not especially arise out of employment; because of her job, employee was at station in store, and had higher risk of encountering dangerous people, including lunatics. IC 22–3–2–5 (1982 Ed.).

9 Cases that cite this headnote

[3] **Workers' Compensation** ⊷ Injuries by Acts of Co-Employee or of Third Person

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(D) Particular Causes, Circumstances, and Conditions of Injury
413VIII(D)14 Injuries by Acts of Co-Employee or of Third Person
413k678 In general
(Formerly 361k223.1)

Victims of Violent Crimes Act did not supersede Workmen's Compensation Act with respect to store employee who was killed during lunatic's shooting spree. IC 16–7–3.6–1 et seq., 22–3–2–1 et seq. (1982 Ed.).

[4] **Workers' Compensation** ⊷ Periodic or lump sum payments

413 Workers' Compensation
413X Payment of Compensation and Compliance with Award
413X(B) Periodical or Commuted Payments
413X(B)1 In General
413k1005 Periodic or lump sum payments

Award of workmen's compensation benefits to husband and widower of deceased employee should not have been made in lump sum, inasmuch as employee was not minor and employer did not enter into agreement with husband for lump-sum award. IC 22–3–3–17 (1982 Ed.).

[5] **Workers' Compensation** ⊷ Proceedings

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(U) Costs and Attorney Fees
413XVI(U)3 Proceedings

413k1980.20 In general
(Formerly 413k1981)
Party who was awarded workmen's compensation death benefits was not entitled to award of attorney's fees because no such request was made to Industrial Board. IC 22–3–4–12 (1982 Ed.).

[6] **Workers' Compensation** Fees on appeal or proceedings to set aside award

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(U) Costs and Attorney Fees
413XVI(U)2 Attorney Fees
413k1980.17 Fees on appeal or proceedings to set aside award
(Formerly 413k1982)
Party who was awarded workmen's compensation death benefits was not entitled to award of appellate attorney fees because employer's appeal from Industrial Board decision was not meritless. Rules App.Proc., Rule 15(G).

[7] **Workers' Compensation** Modification

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)13 Determination and Disposition of Proceeding
413k1945 Modification
Award of workmen's compensation death benefits was increased by 5% on employer's appeal, rather than 10% as requested by party to whom benefits were awarded, because, although party was found to have been entitled to benefits, employer was successful in arguing that benefit award should not have been in lump sum. IC 22–3–4–8(f) (1987 Supp.).

1 Case that cites this headnote

Attorneys and Law Firms

***1347** Douglas F. Stevenson, Stevenson, Rusin & Friedman, Ltd., Chicago, for defendant-appellant.

Terrence M. Rubino, Hammond, for plaintiff-appellee.

RATLIFF, Chief Judge.

STATEMENT OF THE CASE

K–Mart Corporation (K–Mart) appeals from the Industrial Board of Indiana's (Board) award of workmen's compensation death benefits to Joseph Novak, husband and widower of Margaret Novak, deceased employee. We affirm in part, reverse in part, and remand with instructions.

FACTS

On May 28, 1985, around 6:00 P.M. James Koslow engaged in a maniacal shooting spree in St. John, Indiana. Koslow's shooting spree began on the eastside of U.S. Highway 41 and crossed to the west side of the highway into a K–Mart parking lot and ended inside the store. During the shooting spree Koslow shot and killed three (3) persons and wounded five (5) others. Margaret Novak was one of the persons killed. Margaret was employed by K–Mart as a clerk and was working at her station in the store at the time of her death. Margaret was the wife of Joseph Novak.

On May 31, 1985, K–Mart wrote to Joseph as follows:

> "Pursuant to the Indiana Worker's Disability Compensation Statute, you are entitled to reasonable expenses of burial in the amount not to exceed $5,000."

Record at 10. Thereafter, K–Mart paid Joseph Two Thousand Dollars ($2,000) for burial expenses. Joseph received another letter from K–Mart which stated in part as follows:

> "Please be advised that at this time we do not agree that Mr. Novak is a presumptive dependent."

On August 8, 1985, Joseph filed an application for compensation with the Board. K–Mart responded and argued among other things that Margaret's death did not "arise out of" her employment. On February 20, 1987, the Full Industrial Board found that Margaret's death was an accident which arose out of and in the course of her employment and awarded death benefit compensation to Joseph who was found to be a presumptive dependent. The Board found further that K–Mart was estopped by its representations from denying applicability of the Workmen's Compensation act and from challenging Joseph's right to recovery. K–Mart appeals the Board's findings and award.

ISSUES

Six (6) issues have been presented for review:

1. Whether the Board improperly determined that Margaret's death arose out of her employment?

2. Whether the Victims of Violent Crimes Compensation Act, Indiana Code sections 16–7–3.6–1 et seq. supersedes and prohibits recovery under the Workmen's Compensation Act, Indiana Code sections 22–3–2–1 et seq.?

3. Whether the decision of *Portman v. Steveco* (1983), Ind. App., 453 N.E.2d 284, should be overturned to the extent that presumptive dependency is applied to husbands?

4. Whether the Board determined improperly that K–Mart was estopped from denying applicability of the Workmen's Compensation Act and from raising defenses other than Joseph's status as a presumptive dependent?

5. Whether the Board erred by decreeing a lump sum payment?

6. Whether this court should assess attorney's fees and damages against K–Mart for challenging compensation and for filing an appeal without merit?

*1348 DISCUSSION AND DECISION

In challenging an award of compensation by the Board, K–Mart confronts a strong standard of review. This court will not disturb the Board's findings unless the evidence is undisputed and leads unerringly to a contrary result. *Sears Roebuck and Co. v. Murphy* (1987), Ind.App., 508 N.E.2d 825, 829 (transfer pending); *Blaw–Knox Foundry and Mill Machinery, Inc. v. Dacus* (1987), Ind.App., 505 N.E.2d 101, 102; *Burger Chef Systems, Inc. v. Wilson* (1970), 147 Ind.App. 556, 558, 262 N.E.2d 660, 662. This court neither reweighs the evidence nor judges witness credibility as these are functions of the Board. *Sears,* at 829; *Dacus,* at 102; *Wilson,* 147 Ind.App. at 558, 262 N.E.2d at 662. This court must disregard all unfavorable evidence, and must examine only that evidence and the reasonable inferences that can be drawn therefrom which support the Board's findings and decision. *Sears,* at 829; *Dacus,* at 102.

Issue One

K–Mart argues first that the Board erred by determining that Margaret's death "arose out of" her employment as required by Indiana's Workmen's Compensation Act. Specifically, K–Mart argues that an accident does not "arise out of" the employment unless the employment is shown to involve a risk that is uncommon to the public, and peculiar to the employment. K–Mart suggests additionally that the risk of being shot by a lunatic was a risk common to the public and did not "arise out of" Margaret's employment. Thus, K–Mart argues the Board improperly awarded compensation.

K–Mart correctly points out that the person seeking the benefit of the Act carries the burden of proving its applicability. *Lona v. Sosa* (1981), Ind.App., 420 N.E.2d 890, 894, *trans. denied; Wilson,* 147 Ind.App. at 559, 262 N.E.2d at 662; *Stanley v. Riggs Equipment Co.* (1961), 133 Ind.App. 86, 90, 178 N.E.2d 766, 768. To recover under the Act a claimant must establish that an injury occurred "by accident arising out of and in the course of employment". Ind. Code § 22–3–2–5; *Evans v. Yankeetown Dock Corp.* (1986), Ind., 491 N.E.2d 969, 973. This court construes these terms of the Act liberally and in favor of the employee so that the humane purposes of the Act will not be defeated. *Evans,* at 971. K–Mart recognizes that "arising out of", and "in the course of" are two separate elements, and only challenges the Board's determination as to the "arising out of" element. The "in the course of" element, which refers to the time, place, and circumstances of the accident, is unchallenged and clearly was established.

The "arising out of" element is referred to as the causal connection between the accident and the employment. An accident "arises out of" the employment when a causal relationship exists between the injury and the employment. *Evans,* at 975; *Murphy,* at 830. The causal connection is established by showing that a rational mind might comprehend that the accident was a risk incidental to the employment. *Dacus,* at 102. However, the risk need not be expected or foreseeable to be incidental to the employment. *Id.* at 102–03. The determination of whether the accidental risk was an incident of employment is fact sensitive, and accordingly, is entrusted to the Board. *Murphy,* at 829; *Wayne Adams Buick, Inc. v. Ference* (1981), Ind.App., 421 N.E.2d 733, 736, *trans. denied.*

As a general rule, under Indiana law a risk is incidental to the employment if the risk involved is not one to which the public at large is subjected. *E.I. DuPont DeNemours v. Lilly* (1948), 226 Ind. 267, 272, 79 N.E.2d 387, 389; *Segally v. Ancerys* (1985), Ind.App., 486 N.E.2d 578, 581; *Lincoln v. Whirlpool Corp.* (1972), 151 Ind.App. 190, 196, 279 N.E.2d 596, 599–600; *Citizens' Independent Telephone Co. v. Davis* (1950), 121 Ind.App. 20, 25, 94 N.E.2d 495, 498, *trans. denied* 229 Ind. 217, 97 N.E.2d 490. This general rule is referred to as the "increased risk" test. *Olinger Const. Co. v. Mosbey* (1981), Ind.App., 427 N.E.2d 910, 913, *trans. denied; Lincoln,* 151 Ind.App. at 196, 279 N.E.2d at 599. Our courts do not always require proof of an increased risk. For example in assault cases, especially in those involving traveling ***1349** employees or employees subjected to street perils, the "arising out of" element can be satisfied without proof of an increased risk to the employee. *Clem v. Steveco, Inc.* (1983), Ind.App., 450 N.E.2d 550, 553; *Suburban Ready Mix Concrete v. Zion* (1983), Ind.App., 443 N.E.2d 1241, 1242; *Ference,* at 737; *Mosbey,* at 913; *Burroughs Adding Machine Co. v. Dehn* (1942), 110 Ind.App. 483, 503, 39 N.E.2d 499, 507; *Lasear v. Anderson* (1934), 99 Ind.App. 428, 434, 192 N.E. 762, 765. Our supreme court also appears to have dispensed with the need to show an increased risk in a recent case in which an employee was attacked and killed by a lunatic. *Evans,* at 975. These cases allow proof of a causal connection under the "positional risk" test. *Olinger,* at 913; 1 Larson,*Workmen's Compensation Law* § 6.50 (1985).

Larson comments on the "positional risk" test, as follows:

> "An important and growing number of courts are accepting the full implications of the positional-risk test: An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. It is even more common for the test to be approved and used in particular situations. This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment."

1 Larson, at § 6.50. Larson suggests that the positional risk test is used increasingly in assault cases to show the causal connection when the assault is shown to fall into a category [1] of neutral risks. *Id.* at § 11.30. Larson's neutral category of assaults includes:

> "Those assaults which are in essence equivalent to blind or irrational forces, such as attacks by lunatics, drunks, small children, and other irresponsibles; completely unexplained assaults and assaults by mistake."

1 Larson, § 11.30. The facts of the present case fit within Larson's category of neutral assaults. Margaret was killed during the shooting spree of a lunatic. Therefore, as in the traveling employee and the street risks cases, this court will determine whether Margaret's death arose out of her employment based on the "positional risk" test. Authority from other jurisdictions supports our decision to analyze lunatic attacks under the "positional risk" test. 1 Larson, at § 11.32(b).

[1] K–Mart argues that the risk in the present case should not be analyzed under the "positional risk" test. K–Mart acknowledges that Indiana does not adhere to a strict application of the "increased risk" test in all cases, but suggests that Indiana's deviations from this test are, and should be limited to traveling employee cases. K–Mart emphasizes the reasoning in the Court of Appeals decision in *Citizens* ***1350** *Independent Telephone Co. v. Davis* (1950), 121 Ind.App. 20, 94 N.E.2d 495, *trans. denied,* 229 Ind. 217, 97 N.E.2d 490, which suggested

that our supreme court specifically adopted and required the use of the "increased risk" test in *E.I. DuPont DeNemours v. Lilly* (1948), 226 Ind. 267, 79 N.E.2d 387. This court disagrees and K–Mart's reliance on the court of appeals reasoning is misplaced. Our supreme court denied transfer in *Davis* and did so by written opinion. *Citizens Independent Telephone Co. v. Davis* (1951), 229 Ind. 217, 97 N.E.2d 490. Denial of transfer by written opinion was not the general practice of the supreme court at that time. The supreme court denied transfer in this manner to state that the denial was not an affirmance of the court of appeals reasoning and interpretation of *Lilly. Davis,* 229 Ind. at 219, 97 N.E.2d at 491. Thus, the court of appeals' reasoning in *Davis* that use of the "increased risk" test was mandated by the supreme court was rejected by implication. This court notes also that the Act does not require use of the "increased risk" test. Furthermore, this court believes that the policy of the Act favors a liberal construction which would grant compensation to the employees in cases involving neutral risks.

[2] In the present case, the evidence established that Margaret was at her station in the K–Mart store because of her employment. Absent her employment, Margaret would not have been required to be at the store, and would not have been subjected to the risk of death at the hands of a lunatic gunman. Thus, the risk was connected causally to, and was an incident of Margaret's employment with K–Mart. Therefore, the Board did not err by finding that Margaret's death "arose out of" her employment.

This court notes also that the Board's finding that Margaret's death "arose out of" her employment with K–Mart would be supportable under the "increased risk" test. The facts presented to the Board, although conflicting, indicated that the risk of encountering dangerous people was higher for Margaret than the non-employed general public. Unlike persons who do not work in stores and who would not be required to deal with and encounter potentially dangerous people, because of her job, Margaret was required to deal with the public and encounter potentially dangerous persons including lunatics. Therefore, the Board did not err by concluding that Margaret's death was compensable.

Issue Two

[3] K–Mart argues next that Margaret's death is not compensable under the Workmen's Compensation Act. K–Mart suggests that the facts of the present case fall within the scope of the Victims of Violent Crimes Act, Indiana Code section 16–7–3.6–1 et seq., and that the more specific Crimes Act should be interpreted to supersede the Workmen's Compensation Act when injuries result from violent crimes. K–Mart is mistaken. When two statutes involve the same general subject matter, the statutes should be construed so as to give effect to both acts if possible. *Bell v. Bingham* (1985), Ind.App., 484 N.E.2d 624, 627. A later or more specific statute should not be construed to repeal or supersede the more general or previous statute unless an irreconcilable conflict exists or unless the legislature clearly intended such a result. *Indiana State Highway Comm'n v. Bates and Rogers Const., Inc.* (1983), Ind.App., 448 N.E.2d 321, 324. The legislature's intent is determined by a review of the whole statute. *Adult Group Properties, Ltd. v. Imler* (1987), Ind.App., 505 N.E.2d 459, 463.

This court's review of the Crimes Act, reveals that the legislature did not intend to supersede a victim's right to compensation under the Workmen's Compensation Act. In fact, the Crimes Act makes specific reference to the Workmen's Compensation Act in Indiana Code § 16–7–3.6–11, which provides, in part, as follows:

> "Award modification to reflect other benefits or contributory fault of victim—Refund for overpayment required. —(a) The division shall reduce an award made under this chapter by the amount of benefits received or to be received from the following sources, if those benefits result ***1351** from or are in any manner attributable to the bodily injury or death upon which the award is based:
>
> (1) Restitution from the offender.

(2) Benefits from a third party on behalf of the offender.

(3) Benefits from public or private pension programs, including social security benefits.

(4) Benefits from proceeds of insurance policies.

(5) *Benefits under IC 22–3–2 through IC 22–3–6.*

(6) Unemployment compensation benefits.

(7) Benefits from other public funds.

Compensation shall be further reduced, or denied, to the extent that the claimant's loss is recouped from any other collateral sources. Additionally, the division shall determine whether the victim vigorously pursued recovery against available collateral sources described in this subsection. If the division finds that a victim has failed to pursue an applicable collateral source of recovery, the division shall reduce or deny an award under this subsection by the amount that is available to the victim through the collateral source."

This section of the Crimes Act reveals that the legislature intended that a victim could and should recover under both acts but would have to reduce his recovery under the Crimes Act by that amount which was received under the Workmen's Compensation Act. Therefore, the Board was not prohibited from awarding compensation.

Issue Three

K–Mart argues next that our decision in *Portman v. Steveco* (1983), Ind.App., 453 N.E.2d 284, should be overturned to the extent that presumptive dependency is applied to husbands as well as wives. In *Portman,* the Third District of this court held that Indiana Code section 22–3–3–19 unconstitutionally discriminated against male survivors as compared to similarly situated female survivors. *Portman,* at 287. K–Mart does not challenge this holding; [2] rather, K–Mart argues that the Third District fashioned an improper remedy. This court disagrees. In fashioning the remedy the Third District looked to the legislative intent of the Act and determined that an extension of presumptive dependency was favored. *Portman,* at 287–88. This intent was forwarded by striking the unconstitutional portion of the statute, and by extending the presumption of dependency to males as well as females. The Third District fashioned the proper remedy and this court will not reverse its determination.

Issue Four

K–Mart argues next that the Board erred by finding that K–Mart was estopped from arguing that compensation was not available under the Act. Regardless of the merit of this issue, our determination that the Board's award of compensation was proper under the Act and supported by the evidence renders this issue moot. Therefore, we do not decide this issue.

Issue Five

[4] K–Mart argues last that the Board erred by awarding a lump sum payment. Under the Act the Board may award a lump sum payment pursuant to Indiana Code section 22–3–3–25, which provides as follows:

"Lump sum payment of commutable value of instalments.—In unusual cases, upon the agreement of the employer and the employee or his dependents, and the insurance carrier, and the approval of the industrial board, compensation may be redeemed, in whole or in part, by the cash payment, in a lump sum, of the commutable value of the instalments to be redeemed.

> "The board may, at any time, in the case of permanently disabling injuries of a minor, require that he be compensated by the cash payment in a lump sum of the commutable value of the unredeemed ***1352** instalments of the compensation to which he is entitled.
>
> "In all such cases, the commutable value of the future unpaid instalments of compensation shall be the present value thereof, at the rate of three per cent [3%] interest, compounded annually."

In the present case, neither of the pre-conditions to a lump sum award exists. Margaret was not a minor and K–Mart did not enter into an agreement with Joseph for a lump sum award. Therefore, the lump sum award was improper, and accordingly this portion of the Board's decision is reversed and remanded with instructions to award compensation according to Indiana Code section 22–3–3–17, which provides for payment over five hundred (500) weeks.

Issue Six

[5] **[6]** Joseph argues that this court should award attorney's fees. Joseph improperly bases his claim on Indiana Code section 34–1–32–1. The proper statutory provision for attorney's fees in workmen's compensation cases is Indiana Code section 22–3–4–12. To collect fees under this section the claimant first must request them from the Board and present evidence thereon, then the Board must make a determination on the request. None of the foregoing conditions precedent to an award of attorney's fees exists in the present case. Thus, an award of fees cannot be sustained by this court under this statute. To the extent that Joseph's request for fees could be interpreted as a request for appellate attorney fees, this court holds such fees are not warranted. To award appellate attorney fees under Appellate Rule 15(G) for a meritless appeal the proponent must establish that the appeal was "utterly devoid of all plausibility". *Orr v. Turco Mfg. Co.* (1987), Ind., 512 N.E.2d 151, 153. The present appeal does not meet this test. Therefore appellate attorney's fees are denied.

[7] Joseph argues last that the Board's award should be increased by ten percent (10%) under Indiana Code section 22–3–4–8(f) which provides, as follows:

> "An award of the full board affirmed on appeal, by the employer, shall be increased thereby five percent (5%), and by order of the court may be increased ten percent (10%)."

This court agrees the award should be increased, because the award was affirmed. However, since K–Mart successfully argued the impropriety of the lump sum award, the award is increased only by five percent (5%).

Affirmed in part, and reversed in part and remanded with instructions to order payment over five hundred (500) weeks and to increase the award by five percent (5%).

ROBERTSON, J., concurs.

NEAL, J., concurs with separate opinion.

NEAL, Judge, concurring.

I agree with the majority opinion in its totality, but I wish to add one more observation. In *Wayne Adams Buick, Inc. v. Ference* (1981), Ind.App., 421 N.E.2d 733, *trans. denied,* a bookkeeper of an automobile agency was mugged

and robbed of personal possessions by hoodlums while mailing company letters in a mailbox just across the street from the agency. Based on the peril of the street doctrine, we held that her injuries arose out of the employment. In discussing the peril of the street doctrine, we note that on the streets of cities vehicles may collide, mad dogs may run wild, gunmen may discharge their weapons, madmen may be afoot, and police may shoot at fugitives. In such encounters an employee, while conducting his employer's business, may be injured, in which event the cases hold that his injuries arose out of the employment.

K–Mart is a large open concept store which is as accessible as the open street to lunatics and gunmen. The same philosophical underpinning which supported the recovery in *Wayne Adams* supports the recovery here. Recovery is not to be denied because Margaret Novak was performing her duties just inside the store, and not just outside the store as was Lucille ***1353** Ference. Causation and results are identical in the two cases.

All Citations

521 N.E.2d 1346

Footnotes

1 Larson outlines three (3) categories of risks: (1) risks distinctly associated with employment, (2) risks personal to the claimant, and (3) risks of neither distinctly employment nor distinctly personal character (*i.e.*, neutral risks). Larson notes that the neutral category presents risk of loss problems because unfortunately the risk of loss of this category does not fall clearly upon either the industry or the employee. In answering the question of who should bear the burden for neutral risks Larson states,

> "[T]he usual answer in the past has been to leave this loss on the employee, on the theory that he must meet the burden of proof of establishing affirmatively a clear causal connection between the conditions under which he worked and the occurrence of the injury. More recently, some courts have reasoned in the following vein: Either the employer or the employee must bear the loss; to show connection with the employment, there is at least the fact that the injury occurred while the employee was working; to show connection with the employee personally there is nothing; therefore, although the work connection is slender, it is at least stronger than any connection with the claimant's personal life."

1 Larson, at §§ 7.00–7.30. Indiana appears to be among the trend of jurisdictions that place the burden on the industry for neutral risks. *See e.g., Evans v. Yankeetown Dock Corp.* (1986), Ind., 491 N.E.2d 969, 975.

2 This court notes that the Legislature's subsequent amendment to the statute in P.L. 152, 1987, § 6 which retained the language that the court of appeals struck in *Portman* is subject to the same constitutional infirmity.

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790 N.E.2d 992
Supreme Court of Indiana.

WERNLE, RISTINE & AYERS, Intervenor–Appellant,
v.
Janice YUND, Plaintiff–Appellee,
and
The Kroger Company, Defendant–Appellee.

No. 93S02–0207–EX–399.
|
June 30, 2003.
|
Rehearing Denied Sept. 9, 2003.

Synopsis

Claimant's attorney sought review of the Workers' Compensation Board's decision denying attorney reimbursement for physician's fees and litigation expenses. The Court of Appeals, 758 N.E.2d 558, affirmed, and on petition for rehearing, 764 N.E.2d 716, affirmed again. On petition for transfer, the Supreme Court, Dickson, J., held that Board's authority to limit physicians' fees in workers' compensation cases encompassed all fees of physician, including those of non-treating physician, and thus Board had authority to issue order that no expenses of doctor as they related to claimant were to be paid by claimant.

Affirmed.

Opinion, 764 N.E.2d 716, vacated.

Boehm, J., concurred in part and dissented in part with separate opinion.

West Headnotes (1)

[1] **Workers' Compensation** ⇐ Amount allowable
Workers' Compensation ⇐ Nature and Form of Remedy, and Jurisdiction and Venue

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(H) Medical or Other Expenses
413IX(H)1 In General
413k990 Amount allowable
413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(H) Medical or Other Expenses
413IX(H)2 Proceedings for Allowance or Recovery
413k992 Nature and Form of Remedy, and Jurisdiction and Venue
413k993 In general
(Formerly 413k1989)

Workers' Compensation Board's authority to limit physicians' fees in workers' compensation cases encompassed all fees of physician, including those of non-treating physician, and thus Board had authority to issue order that no expenses of doctor as they related to attorney's client were to be paid by client, despite claim that attorney/client contract was controlling, and that Board's order prohibited law firm from seeking client's payment of litigation expenses contrary to conduct rule; contract was subject to Board's authority, and no conduct rule was violated, as doctor was entitled to no fees. West's A.I.C. 22-3-1-3(b)(3), 22–3–4–12; 631 IAC 1–1–24; Rules of Prof.Conduct, Rule 1.8(e).

Attorneys and Law Firms

***992** James E. Ayers, Wernle, Ristine & Ayers, Crawfordsville, IN, Attorney for Appellant.

G. Terrence Coriden, Steve Carter, Attorney General of Indiana, David L. Steiner, Deputy Attorney General, Indianapolis, IN, Attorneys for Worker's Compensation Board Of Indiana.

On Civil Transfer

DICKSON, Justice.

This appeal challenges an order of the Indiana Worker's Compensation Board ("Board") stating that no expenses of a ***993** claimant-employee's physician shall be paid by the employee. We hold that such a determination is within the Board's authority to approve the fees of physicians, and that the record in this case fails to demonstrate that the Board's ruling conflicts with the attorney-client fee agreement or the lawyer's professional obligations regarding the payment of litigation expenses.

The designation of parties to this appeal arises from the unusual procedural history of this case. Janice Yund retained James E. Ayers of the Crawfordsville, Indiana, law firm of Wernle, Ristine & Ayers ("WR & A"), to represent her in a Worker's Compensation claim against The Kroger Company for an employment injury on November 18, 1995. The attorney-client relationship of WR & A and Yund was reflected in a written "Contract to Hire Attorney on Contingency Fee Basis for Worker's Compensation Matter." Record at 56. The contract stated, "Attorneys will be paid for their services at the formula amounts provided by current Worker's Compensation Board Rule and limited to such fees as may be approved by the Worker's Compensation Board" and recited the Board's current fee schedule, including "upon the first $10,000 of recovery, 20%." Record at 56. The contract also provided for payment of litigation expenses as follows:

> Client understands that there will be expenses involved in this case. Client agrees to pay all cost of investigation and preparation, including charges for medical or other examinations, tests, consultations and testimony from expert witnesses, depositions, reporting fees, travel, long-distance phone calls, copying, postage, etc. and that all such expenses should be paid directly from any award and to the extent any such expenses have been advanced by the Attorney, to Attorney from any award. If no recovery is made, or if the amount of any recovery is not sufficient to reimburse Attorney, Client is nevertheless still liable for out-of-pocket expenses incurred by Attorney regardless of whether or not a fee is received.

Record at 56. Ayers hired Dr. Franklin D. Nash to examine Yund and to provide expert testimony.

The matter proceeded to a hearing on April 27, 2000. Before the hearing began, Kroger increased its previous settlement offer of $4,000 to $7,500. During the hearing, Ayers called Dr. Nash, who testified briefly. He did not testify regarding his impairment evaluation of Yund, but only regarding the American Medical Association Guides for evaluating impairment. During its cross-examination of Dr. Nash, Kroger elicited his admission that, although a licensed physician, he was not an orthopedic surgeon, neurologist, physiatrist, or physical medicine and rehabilitation doctor. Dr. Nash also admitted that he had had no continuing medical education in the field of orthopedics in the last ten years, and that one hundred percent of his work in the worker's compensation arena "is for claimants and plaintiffs." Record at 160. Kroger presented evidence that the Medical Licensing Board had previously found that Dr. Nash had engaged in fraud and material deception in the course of his professional activities. A short time after the conclusion of the evidentiary hearing on May 23, 2000, Kroger increased its settlement offer to $8,500.

On June 10, 2000, Ayers advised Yund of this offer and the $2,336.63 in litigation expenses, of which $1,486 were expenses for Dr. Nash, who charged $986 for his examination of Yund and $500 for his testimony at her hearing. Two days later Yund terminated Ayers as her attorney and thereafter settled *pro se* directly with ***994** counsel for Kroger for $8,500. On June 20 Yund filed a complaint with the Board assailing the performance of Dr. Nash and his fees, alleging that her medical examination by Dr. Nash was conducted "in my attorney's office" and lasted only 5–8 minutes. Record at 40. Yund declared "I do not feel I owe [Ayers] the full amount he is asking." Record at 33.

The settlement was approved by Board Chairman G. Terrence Coriden on June 28, 2000, in an Award which ordered the settlement sum paid directly to Yund. Ayers then petitioned the Board for an attorney fee award of $1,700 plus $2,336.63 in expenses. The $1,700 attorney fee was consistent with the Board's fee schedule which provides for an attorney fee of 20% of recoveries under $10,000. Ind. Admin. Code tit. 631, r. 1–1–24. Yund responded with further complaints against Ayers in which she concluded: "I believe $1700.00 dollars (the 20% I agreed to pay for attorney fees[]] is more than fair. Mr. Ayers can pay whatever expenses HE has incurred out of that amount. Considering the facts of this case I feel I am being more than generous with this amount." Record at 68.

On August 4, 2000, Chairman Coriden ordered "that $1,200.00 shall be paid to plaintiff's counsel" but summarily added: "However, no expenses of Dr. Nash as they relate to the plaintiff shall be paid by the plaintiff." Record at 77. The award was silent as to the remainder of the expenses, and the attorney fees ordered were thus $500 less than the $1,700 fee to which Yund's attorney would have been entitled pursuant to the Board's fee schedule. The Full Board affirmed. Record at 111.

WR & A initiated this appeal. When both Yund and Kroger notified the Clerk of Courts of their intentions not to file any briefs, the Court of Appeals issued notice to the Indiana Attorney General and the Worker's Compensation Board, which filed a brief defending the Board's decision. Chairman Coriden personally appeared as counsel for the Board. Referring to his order regarding Dr. Nash's fees, the chairman's brief to the Court of Appeals states that, "[t]he Board found [Dr. Nash's charges for medical services] to be unreasonable." Br. of Board at 3. His brief also describes his order as a "decision to shield the plaintiff from the unreasonable charges of Dr. Nash." Br. of Board at 5. The Court of Appeals affirmed but held that the Board's ruling "does not supersede the terms of an attorney-client contract" nor does it "impair the respective rights and responsibilities of the parties under the contract, which are an ordinary civil matter." *Wernle, Ristine & Ayers v. Yund*, 758 N.E.2d 558, 562 (Ind.Ct.App.2001), *aff'd on reh'g*, 764 N.E.2d 716 (Ind.Ct.App.2002). We granted transfer. 783 N.E.2d 691 (Ind.2002).

In its appeal from the Board's Award, WR & A contends that: (a) the Board does not have statutory authority over an attorney's litigation expenses—specifically, the expenses for Dr. Nash as an expert witness and consultant in this case; (b) the Board should have honored and enforced the contract between WR & A and Yund; and (c) the Board's order forces WR & A to violate the requirements of Professional Conduct Rule 1.8 regarding payment of client expenses. WR & A does not contest the $1,200 attorney fee award, the adequacy of the Board's findings, nor the Board's determination as to the amount of Dr. Nash's fees. Dr. Nash did not seek review.

Under the Indiana Worker's Compensation Act ("the Act"), the Board is authorized "[t]o approve claims for medical services or attorney's fees and the charges for nurses and hospitals." ***995** Ind.Code § 22–3–1–3(b)(3). In relevant part, the Act also provides:

> [T]he fees of attorneys and physicians and charges of nurses and hospitals for services under IC 22–3–2 through IC 22–3–6 shall be subject to the approval of the [Board.] When any claimant for compensation is represented by an attorney in the prosecution of his claim, the [Board] shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fees. The fee so fixed shall be binding upon both the claimant and his attorney, and the employer shall pay to the attorney out of the award the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award....

I.C. § 22–3–4–12. Neither the Act nor the Indiana Administrative Code expressly refers to litigation expenses, nor do they address a claimant-employee's liability to reimburse her attorney for litigation expenses. *See* 631 IAC 1–1–24.

The Act does not distinguish between the fees of treating physicians and those of non-treating physicians whose services may include examinations, evaluations, expertise, testimony, etc. [1] It expressly provides that "the fees of attorneys and physicians" are subject to the approval of the Board. I.C. 22–3–4–12. We have long adhered to the rule that "the Worker's Compensation Act should be liberally construed to effectuate the humane purposes of the Act, and that doubts in the application of terms are to be resolved in favor of the employee." *Stump v. Commercial Union,* 601 N.E.2d 327, 331–32 (Ind.1992); *see also* *Talas v. Correct Piping Co., Inc.*, 435 N.E.2d 22, 28 (Ind.1982). In the absence of contrary statutory language, we conclude that the Board's authority to limit physicians' fees in worker's compensation cases encompasses all fees of physicians, including those of non-treating physicians.

We hold that the effect of the Board's order was to determine that Dr. Nash is entitled to no fee for his services in this case, and that such a determination is within the Board's authority to approve the fees of physicians.

WR & A next contends that its attorney/client contract with Yund is controlling, is not subject to the Board's approval authority, and should have been enforced by the Board. The WR & A/Yund contract itself acknowledges that the attorney fees were "limited to such fees as may be approved" by the Board. Record at 56. It has long been recognized that agreements to pay worker's compensation attorney fees contrary to the amounts approved by the Board are not enforceable. *Buckler v. Hilt,* 209 Ind. 541, 200 N.E. 219 (1936); *Bauer v. Biel,* 132 Ind.App. 224, 177 N.E.2d 269 (1961); *Rickert v. Schreiber,* 116 Ind.App. 621, 66 N.E.2d 769 (1946). WR & A does not challenge the Board's authority to approve its fees for services in this case, but argues that the Board may not invalidate other terms of the attorney-client agreement wherein Yund expressly agreed to be responsible for all

medical and other litigation expenses. Because Dr. Nash is entitled to no fees in this matter, however, WR & A is not obligated to pay Dr. Nash and thus Yund has no contractual responsibility to WR & A for these fees. The Board's order does not *996 improperly conflict with the attorney-client agreement.

WR & A also contends that the Board's order that Dr. Nash's expenses not be paid by Yund operates to prohibit WR & A from seeking Yund's payment of the litigation expenses for Dr. Nash's services, and thus requires payment of a client's litigation expenses contrary to the Rules of Professional Conduct.

The Indiana Rules of Professional Conduct prohibit a lawyer from providing financial assistance to a client, subject to two exceptions: "(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client." Ind. Professional Conduct Rule 1.8(e). Without explanation or supporting evidence, WR & A summarily alleges that these conditions "do not apply here." Br. of Appellant at 8. As observed by the Court of Appeals, it is not uncommon that, "despite a client's contractual agreement to reimburse the attorney for [litigation] expenses, the client may simply not have the funds available to pay and the attorney is forced to absorb the loss." *Wernle,* 758 N.E.2d at 562 n. 9.

Although the Board's order prohibits WR & A from seeking repayment of Dr. Nash's fees from Yund, WR & A has not established that it necessarily requires a violation of Rule 1.8(e). As noted above, because Dr. Nash is entitled to no fees in this matter, WR & A is not obligated to pay Dr. Nash and thus there is nothing for Yund to repay.

In addition, Rule 1.8(e) expressly permits lawyers to advance expenses of litigation if the client is indigent, and the record in this case does not exclude the possibility that Yund was indigent under Rule 1.8(e), which would relieve WR & A from seeking Yund's repayment if WR & A had been required to pay Dr. Nash's fees. Rule 1.8(e) also permits lawyers to advance expenses of litigation if repayment is "contingent on the outcome of the matter." A Board decision regarding the payment of a physician's fees for examination, consultation, and testimony is part of the "outcome" and could thus fall within this exception to Rule 1.8(e)'s proscription against lawyers providing financial assistance to a client. WR & A has failed to demonstrate that the Board's order compels a violation of Indiana Professional Conduct Rule 1.8.

We hold that the Board's order that "no expenses of Dr. Nash as they relate to the plaintiff shall be paid by the plaintiff" is within the Board's statutory authority to approve the fees of physicians. We further find that WR & A has failed to demonstrate that the Board's order necessarily conflicts with the WR & A/Yund fee contract, or with WR & A's obligations under Indiana Professional Conduct Rule 1.8(e). The judgment of the Worker's Compensation Board of Indiana is affirmed.

SHEPARD, C.J., and SULLIVAN and RUCKER, JJ., concur.

BOEHM, J., concurring in part and dissenting in part with separate opinion.

BOEHM, J, concurring in part and dissenting in part.
As I understand the majority opinion, it holds that Dr. Nash's charges are not recoverable by Dr. Nash from anyone. To reach that result, the majority reasons 1) the Board may approve physicians' charges for evaluative services as well as the charges by treating physicians; 2) the Board disapproved Nash's charges; 3) as a result, nobody owes Nash for his services; 4) the law firm's agreement with the worker that the worker will reimburse out of *997 pocket charges has no bearing on this issue because, in light of conclusion # 3, there is no charge to reimburse. I think this analysis focuses on the wrong agreement and resolves an issue that is not before the court involving

a party who is not before the court. The missing link in this chain of reasoning, and the one that in my view is controlling, is the arrangement between the lawyer and the doctor.

As I see it, the majority properly begins the resolution of this case by holding that fees of both treating and testifying physicians are subject to Board approval. I agree. But the issue is the consequences of Board disapproval of an expert's fee. We have long held that an attorney's agreement with a worker providing for a fee in excess of the fee permitted under the Board's schedule is unenforceable without Board approval. *Buckler v. Hilt,* 209 Ind. 541, 200 N.E. 219 (1936). Collection of such a fee is a violation of the prohibition in Rule Professional Responsibility 1.5(a) against collection of unreasonable fees. *In re Maley,* 674 N.E.2d 544, 546 (1996). That means the lawyer cannot collect a larger fee from the client, even if the client has agreed to it. As the majority points out, the statute makes "fees" of attorneys and physicians subject to Board approval, but does not explicitly refer to litigation expenses. I agree that a "fee" of a testifying physician is subject to this provision, just as much as the fee of a treating physician. Where I part company with the majority is in determining the consequences of Board disapproval of a testifying physician's fee. I agree with the majority that Board disapproval renders an expert's fee uncollectible from the client, whatever the client's fee agreement provides. This statutory scheme is designed to prevent exploitation of the worker by the professionals, and to maximize the amounts that are dedicated to compensating the victims of industrial accidents. Capping the amounts that can be charged to the worker is fully consistent with that goal. The lawyer is charged with knowledge of this arrangement and therefore cannot charge more than the fee arrangement provided by the Administrative Code, 631 IAC 1–1–24, unless the Board approves it.

It seems to me that the statute should be read to address the recovery of the expenses of litigation, whether testifying physicians or otherwise, when it provides that lawyers' "fees" are subject to approval. Just as a testifying physician's fee may be unreasonable, so also may other expenses be unreasonable in light of the nature of the case and the amounts involved. A physician's fee may be unreasonable because it is excessive for the services rendered. It also may be unreasonable not because the amount is unreasonably large for the service performed, but because performing the service was unreasonable under the circumstances of the case. Just as there may be too many depositions in garden spots around the world, there may be too much expert testimony for a particular case. If so the expense may be unreasonable even though the charges are in the amounts customarily paid for the goods or services. To be sure, any contention that an expense was unreasonable should be evaluated with a strong presumption that the expense was proper, and unreasonable expenses are hopefully rare. But if a lawyer incurs unreasonable expenses in pursuit of a claim it has the same effect on the worker as collection of an excessive fee for the lawyer's services. If the Board finds an unreasonable expense, it should be subject to disallowance and the worker should be relieved of that burden. Although it is not dispositive, it is interesting to note that WR & A apparently shares this view. The action that precipitated ***998** this issue was his petition for approval of fees and expenses, including Dr. Nash's fee, which was apparently treated as a litigation expense.

All of this, however, does not resolve the rights of persons other than the worker whose obligation to pay is terminated by the Board's finding that the expense is unreasonable. Whether the supplier of the unreasonable service can still collect from somebody is another issue. If the lawyer is the supplier, the answer is easy: an excessive fee is not collectible from the client, and I think it should be clear that the lawyer cannot circumvent that statutory provision by obtaining an undertaking from someone else—say, the worker's family—to pay a fee that the client could not be obliged to pay. The reason it is not unfair to put that burden on the lawyer is the lawyer is responsible for understanding the law and knowing that the Board's approval may be an obstacle to enforcement of a fee agreement.

The same reasoning does not apply to other suppliers of services. If for example, the Board determined that the lawyer's selection of Cancun as a deposition site was unreasonable and the expense should not be borne by the worker, neither the hotel in Mexico nor the reporter who transcribed the deposition should bear that economic burden. I would conclude, therefore, that at least some suppliers of unreasonable litigation services may collect

from the lawyer for services rendered. Indeed, in almost all those cases the lawyer, not the client, will be the person who made the decision to employ the vendor, and who contracted for the services. The supplier may not be aware of any limitations on the ability of the lawyer to recover from the client, or even that the lawyer is working on an Indiana Workers' Compensation matter.

A physician is in a somewhat different position from other suppliers of litigation services. The statute expressly purports to regulate physician's fees, and, whether treating or testifying, the doctor knows that a workers compensation matter is in issue. This brings me to what I think is the unresolved and unresolvable issue in this case. We have no basis to conclude what, if any, contract or course of dealing has governed the relationship between Dr. Nash and the lawyer. It is easy to imagine at least four scenarios: 1) the doctor agreed to take whatever the Board approves and no more; 2) the lawyer agreed to compensate the doctor at a given rate, whatever the Board approves; 3) there is no relevant agreement or course of dealing between the two or 4) the two operated on the assumption, mistakenly, that the worker would bear the doctor's fee.

WR & A here argues that the Board cannot disapprove Dr. Nash's fee, because to do so would require the lawyer to pay it in violation of Rule of Professional Conduct 1.8(e). I think this contention focuses the real issue, but proceeds from a number of flawed assumptions. For WR & A's argument to hold water, it must be true that Dr. Nash is entitled to recover from the lawyer as a matter of contract law and also that the lawyer's paying Dr. Nash would violate RPC 1.8(e). I think the first is unknowable on this record, though either a formal agreement or some doctrines of contract law arising from the conduct of the parties could product that result. Whether or not WR & A is liable to Nash in this case, the assumption that paying Nash would violate WR & A's professional obligations is in my view incorrect. RPC 1.8(e)(1) expressly authorizes a lawyer to absorb litigation expenses whose repayment by the client is "contingent upon the outcome of the matter." For the reasons already given, I agree that the workers' compensation statute precludes collection ***999** of Dr. Nash's fee from the worker. This prevents collection from the worker either directly, by payment by the worker to Dr. Nash, or indirectly by reimbursing the lawyer for an unreasonable litigation expense. If the expense is not disapproved, its payment by the worker may be authorized as an expense of litigation. But if it is disapproved, it may not be charged to the worker. As a matter of law, therefore, any reimbursement of a fee from the client's pocket is "contingent upon the outcome of the matter," namely the outcome that the Board not disapprove it. The Rules of Professional Conduct therefore present no obstacle to the lawyer's paying the doctor's fee without reimbursement from the client. The Restatement of the Law Governing Lawyers uses the same language. A lawyer may make a loan covering litigation expenses, "the payment of which to the lawyer may be contingent on the outcome of the matter." *Restatement (Third) of the Law Governing Lawyers* § 36 (2000). The comments make clear that this includes lawyer's payment of witness fee with only contingent reimbursement. *Id.* cmt. c.

Whether this legal regime leaves Dr. Nash with any recourse against the lawyer is unknowable on this record, but I would not hold, as I understand the majority does, that the law precludes collection of a disapproved expert fee from the lawyer under any circumstances. There may be cases where a doctor, particularly one with specialized skills and in great demand, may refuse to participate in a contingent fee arrangement and demand compensation at an agreed rate whether the Board approves or not. I can see no reason in policy why the lawyer should not be able to make the judgment whether the lawyer is willing to underwrite that potential expense. This is the same sort of risk/reward analysis lawyers engage in when evaluating any contingent fee arrangement. To be sure worker's compensation practice may be less lucrative than some other forms of contingent fee work, but it is the lawyer, not the law, who should be able to make the decision in a given case whether it is sensible to take that risk. The driving policy in these statutory provisions governing legal fees and expenses is protection of the worker. I think it is in the worker's interest that the lawyer be able to make an agreement with an expert whereby the lawyer assumes the risk of guaranteeing the expert's fees. Whether it is good judgment in any given case to enter into that arrangement should be left to the lawyer.

In sum, I agree with the majority that the Board may approve or disapprove the fees of a testifying physician. But I think the consequence of disapproval is only that the worker does not bear that cost, and the majority incorrectly purports to resolve payment as between the lawyer and the doctor. In my view the Board has no power to adjudicate the issue of whether the lawyer or the doctor bears that cost because the doctor is not a party to the proceeding and, unlike the lawyer, is not bound by the statutory restrictions on collecting from some collateral guarantor if the worker is not obligated for the fee. The Board itself seems to share that view. Its order stated that Dr. Nash's fees are not to be "paid by the plaintiff." It did not purport to have the effect the majority gives it, and I do not believe the Board has jurisdiction to make such a determination.

All Citations

790 N.E.2d 992

Footnotes

1 A reference to non-treating physicians is found in Indiana Code § 22–3–4–11 which permits the Board to appoint a physician to conduct a medical examination and to testify thereto, and specifies that the physician shall be allowed traveling expenses and a reasonable fee fixed by the Board, which shall be paid by the state on special order of the Board.

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Section Six

Workers Compensation: Ethics and Civility

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Section Six

Workers Compensation: Ethics and Civility……Jon R. Pactor

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Workers Compensation: Ethics And Civility

This paper addresses ethics specifically associated with workers compensation cases in Indiana. The body of Indiana case law on that topic is narrow. Although workers compensation is a narrow area of law, many ethical concerns applicable to other areas of law also apply to practitioners in the workers compensation arena. No attorney regardless of practice area cannot ignore civility, etiquette, and professionalism. Therefore, this paper also addresses those broader concerns.

Who Is The Client?

Many attorneys would be surprised to learn that often at the heart of a legal malpractice claim or a disciplinary action is an unanswered question: Is there an attorney-client relationship? The determination of whether an attorney-client relationship exists is fundamental. In terms of civil liability, with some exceptions, attorneys can only be liable to their clients. In terms of ethics, almost all of the provisions in the Rules of Professional Conduct depend upon whether an attorney-client relationship exists.

Attorneys may have an attorney-client relationship with clients on one matter, but not on another. This is true in a workers compensation situation. A workers compensation client may have an actual or potential third-party claim for negligence, products liability, or other tort. Does the workers compensation attorney also represent the claimant on the tort claims? Attorneys may believe that their representation is limited to the workers compensation claim, and thus they have no attorney-client

relationship with their clients on other matters. Conversely, clients may believe that they hire attorneys for the entire legal matter arising from an injury.

Thus, attorneys should state in writing at the outset the subject matter of the representation and the matters not subject to the representation. To state that the representation covers workers compensation may fall below the standard of care for civil liability purposes and violate Rule 1.1 of the Rules of Professional Conduct (competence) and Rule 1.4 (providing sufficient information to the client to make informed decisions.).

Conversely, attorneys representing employees on third-party claims need to inform the client about workers compensation, or the statute of limitations on the workers compensation claim may expire while the third-party claim is being processed. That happened in *Haskin v. Sullivan*, 550 N.E.2d 799 (Ind. Ct. App. 1990), *trans. denied.* Sullivan sued his attorneys because his workers compensation claim was not filed within the two-year statute of limitations. He switched attorneys who settled the tort claim. The settlement occurred after the statute of limitations for the workers compensation case had expired.

Sullivan contended that if they had advised him to timely file a workers compensation claim, he would have timely filed it and would have received temporary total disability payments, compensation for permanent partial impairment and payment of his medical expenses. The defendant-attorneys claimed that Sullivan's workers compensation claim was lost via I.C. § 22-3-2-13 when he settled a third-party claim. The Court of Appeals agreed with Sullivan that the claim was lost when the statute expired before the settlement.

In a scenario like that in *Sullivan*, attorneys ought to consider and inform their clients of the possible outcomes from successful workers compensation claims and from third-party claims. A workers compensation claim may have more certainty of a recovery but a lower limit of what may be recovered.

Although *Sullivan* dealt with attorneys who apparently were representing the client on all matters arising from the accident, it highlights the need for cooperation when clients have separate attorneys for the workers compensation claim and third-party claims.

Workers Compensation Attorneys Cannot Charge Or Collect Fees Greater Than Determined Administratively.

Professional Conduct Rule 1.5 and case law dictate that attorneys cannot charge or collect an unreasonable fee. The rule naturally applies to workers compensation cases. Indiana law schedules the fees for attorneys representing workers compensation claimants.

Attorneys who violate the rules on workers compensation fees may find that their contracts are unenforceable. *Wernle, Ristine & Ayers v. Yund*, 790 N.E.2d 992 (Ind. 2003). That may be the least of their problems. Attorneys who deliberately retain fees greater than allowed by the workers' compensation law violate Prof. Conduct Rule 1.5 and are subject to discipline.

In *Matter of Maley*, 674 N.E.2d 544 (Ind. 1996), the attorney's agreement with his worker compensation client provided the attorney with a contingent fee of 33 1/3 percent of the amount recovered through a board hearing. He did not inform the client that Indiana had set presumptive limits on attorney fees in workers' compensation actions. After the attorney succeeded in winning an award for his client, the board denied the attorney's request for 33 1/3% fee. The attorney then kept 33 1/3 percent of the award as his fee. The Court found that he had violated Rule 1.5(a) and issued a public reprimand.

The attorney in *Matter of Geller,* 777 N.E.2d 1099 (Ind. 2002) received a long suspension for a variety of misdeeds. He charged an excessive fee in a workers compensation case, but the Court did not disclose what it was. This decision also has an important point which pertains to language in settlement agreements or disbursement sheets. Geller included a provision in a distribution sheet that purportedly sought to release him from liability for malpractice.

Rule 1.5 also requires that attorneys for workers compensation claimants have their contingent-fee agreements memorialized in writing, notwithstanding that the fee is set by the administrative rules. In *Matter of Anonymous*, 657 N.E.2d 394 (Ind. 1995), the Supreme Court said that it was insufficient for the attorney to orally inform the client of the statutory contingent fee. Instead, attorneys representing claimants in workers compensation cases must comply with Prof. Conduct Rule 1.5 (c)'s requirement that a contingent fee be memorialized in writing. The Court said:

> "Written statements explaining the method by which attorney fees will be calculated reduce the possibility of misunderstandings between attorneys and

> their clients. An attorney should not assume that, absent a written agreement, legal provisions establishing limits on contingent fees will be fully understood by the client. The principles underlying the requirement that contingent fee agreements be written are as applicable to situations where fee ceilings apply as to those where they do not. We therefore find that the respondent violated Prof.Cond.R. 1.5(c) by failing to provide to his client the requisite written contingent fee agreement." *Matter of Anonymous*, 657 N.E.2d at 395.

Attorneys Cannot Charge Or Collect Unreasonable Expenses

Rule 1.5 (a) mandates that attorneys can neither charge nor collect an unreasonable expense.

Without citing that rule, the Supreme Court in *Wernle, Ristine & Ayers v. Yund*, 790 N.E.2d 992 (Ind. 2003) addressed an unreasonable expense. The problem focused on over $1,486 fees for the claimant's medical expert. The client fired her attorney and then settled with her employer, Kroger. She filed a complaint with the board and assailed the performance of the expert. The expert's examination lasted five to eight minutes in her attorney's office. She also complained about the fees of her attorney who was seeking $1,700.

The board awarded $1,200 in attorney fees and ordered that no expense be paid to the expert. The full board affirmed. The board did not require the firm to pay the claimant's legal expenses or make the client liable to reimburse the firm which pays the expert.

The Supreme Court affirmed the denial of the fees to the expert. It held that the board had authority to limit fees for non-treating physicians. A provision in the attorney-client contract about the client's obligation for expenses was ineffective as the expert was not owed anything.

Misuse Of Funds Collected From A Workers Compensation Claim

Workers compensation attorneys, especially those for the employees, collect money and put it into their trust accounts to cover liens as well as for disbursement of proceeds between the attorney and client.

The Rules of Professional Conduct require attorneys to hold money in which third parties may have an interest "with the care required of a professional fiduciary." *Matter of Kouros,* 735 N.E.2d 202, 204 (Ind. 2000); *Matter of Kinkead,* 661 N.E.2d 823, 825 (Ind. 1996). Rule 1.15(d) states:

> (d) Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Citing I.C. 35-43-4-3, the *Kouros* Court found that the attorney converted the funds held in trust by allowing them to be used for purposes unrelated to the client without the client's consent or knowledge. Such was a criminal act violating Rule 8.4(b). In another case, an attorney committed criminal conversion by mishandling trust funds from a workers compensation case. *Matter of Towell,* 699 N.E.2d 1138, 1139 (Ind. 1998).

Mishandling trust funds is not limited to criminal conversions. Attorneys have a duty under Prof. Conduct Rules 1.4 and 1.15(d) to inform the client of what claims may be made on the funds. In *Matter of Kinkead,* supra, 661 N.E.2d 823, 825, Kinkead represented a client on a worker's compensation matter. He put some of the settlement proceeds into his own checking account. The attorney falsely told the client that he had

spent the money on office rent. He violated Rules 1.4(a), 1.5(c), 1.15(a), 1.15(b), and 8.4(c).

Attorneys also have a duty under the plain language of Rule 1.15(d) to reach out to potential third-party claimants about their interest in the funds.

Sometimes attorneys give money in trust to clients to resolve liens. Attorneys who take that approach expose themselves both to civil liability to lienholders who do not get paid and also to disciplinary sanctions. *Matter of Allen,* 802 N.E.2d 922 (Ind. 2004)*; Matter of Conteh*, 845 N.E.2d 145 (Ind. 2006).

Another scenario with ethical pitfalls is the attempt by attorneys working for contingent fees to collect additional fees to resolve liens. This problem implicates several rules such as Prof. Conduct Rule 1.1 (competency), 1.5 (reasonable fees), and 1.7 and 1.8 (conflicts).

The Supreme court addressed this problem in *Matter Lehman,* 690 N.E.2d 696, 703 (Ind. 1997). After settlement of the personal injury case, Lehman compromised two liens, which were discounted by about $1,600. He did not inform the client that he would issue trust account checks to the insurers in the discounted amounts equal to two thirds of their respective liens and then keep the discounts. He relied on his interpretation of I.C. **§** 34-4-41-4 and Indiana case law as authority for retaining the savings. The Supreme Court held that Lehman violated Rules 1.5 (a) and (c), 1.7, and 8.4(c) as to these events.

Relating to Prof. Conduct Rule 1.1 (competence), attorneys need to exercise reasonable care to ascertain the amount of a lien. This problem arose in *Northern*

Indiana Public Service Co. v. Stokes, 595 N.E.2d 275 (Ind. Ct. App. 1992). The employer NIPSCO sued its employee and his attorney for satisfaction of a worker's compensation lien. The employee had won a jury verdict in a tort case and elected not to appeal, partly on the basis of what he thought NIPSCO's lien was. After foregoing the appeal, the employee learned that the lien was greater than what had been indicated. The trial court granted summary judgment for the employee and attorney. The Court of Appeals reversed. There was a genuine issue of material fact whether NIPSCO had given a correct lien amount and whether it was estopped to claim a greater amount.

Conflict Of Interest

Generally, conflicts of interest can apply to insurance defense counsel. Under Indiana law, insurance defense counsel have two clients—the insured and the insurer. This is a conflict of interest, but it is not per se disqualification. *Cincinnati Insurance Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999). But, it could become a conflict requiring disqualification.

Conflicts of interests can arise in workers compensation cases. One such case is *Cincinnati Ins. Co. v. Second Injury Fund,* 863 N.E.2d 1242, 1252, note 5 (Ind. Ct. App. 2007). Cincinnati Insurance had paid 500 weeks of compensation to the claimant totaling $86,665.00 and medical expenses of $967,058.00. Cincinnati Insurance, through its attorney filed an Application for Adjustment of Claim with the Worker's Compensation Board on behalf of the claimant. This case is too complicated for purpose of today’s presentation, but there was an apparent conflict when the attorney

represented the insurer and the claimant. It offers one Indiana example about conflicts of interest in workers compensation cases.

Withdrawal Of Representation

Failure to withdraw properly from a workers compensation case can justify a disciplinary sanction. In *Matter of Fogle*, 590 N.E.2d 572 (Ind. 1992), the Court suspended the attorney's license for his failure to withdraw from a workers compensation case and return the file for more than one year. He violated Prof. Conduct Rule 1.16.

The Lack of Civility Can Be Sanctionable

Civility is a topic rarely defined and addressed in legal circles. One can find codes of civility in local courts or bar associations. The Rules of Professional Conduct do not ignore civility, but they do not emphasize it, either. They do not provide a definition of civility. Paragraph 9 of its Preamble, however, states:

> ''[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

The word "civility" rarely arises in disciplinary decisions. The Indiana Supreme Court expressly found a lawyer's lack of civility when it suspended his license for 60 days in *Matter of McClure,* 652 N.E.2d 863 (Ind. 1995). McClure represented his wife at a

deposition in which he was a co-defendant with a corporation. She was a representative of the corporation. She consistently expressed a lack of knowledge or failure of memory with respect to certain funds. The overall tenor of the deposition was emotional and tense. During questioning, she indicated that she was not feeling well and rose from her seat. McClure threw contents of a soft drink cup on the plaintiff's attorney and grabbed him near or around his neck, restraining him in his chair. The disruption resulted in the deposition's premature conclusion. The Supreme Court said:

> "The Commission charged that the Respondent's attack was a criminal act. . . Offenses involving violence represent conduct that may be said to indicate a lack of characteristics relevant to law practice. *See Comment* to Prof.Cond.R. 8.4. Respondent's conduct demonstrated a complete lack of civility and a total breakdown of self restraint. We therefore find that the Respondent violated Prof.Cond.R. 8.4(b)." *Matter of McClure,* 652 N.E.2d at 864.

A narrow lesson of *McClure* teaches that an attorney's violent action in the course of representation of a client is a type of uncivil behavior.

In a well-known disciplinary case involving Attorney General Curtis Hill, the Supreme Court castigated the counsel in the case for uncivil briefing but imposed no sanction. The Court stated:

> "At the outset, we are compelled to note our strong disapproval and extreme disappointment with respect to the tenor of the parties' briefs in this case. The Commission repeatedly refers to Respondent in hyperbolic terms of sexual predation, and the Commission—entirely without support—accuses Respondent of having committed perjury at the final hearing simply because the hearing officer, in endeavoring to reconcile all the testimony (including Respondent's), found that Respondent's conduct amounted to battery. Respondent for his part alternately describes the Commission using terms such as 'imperialist,' 'coddling,' 'dismissive,' and 'arrogant,' and Respondent devotes far too much of his briefing to entirely unfounded attacks on the Commission's motives and integrity. There are many legitimate legal arguments to be made in this case, which makes the parties' inappropriate *ad hominem* attacks on one another a particularly

> frustrating distraction. We expect counsel to behave better in future cases." Matter of Hill, 144 N.E.3d 184, 188 (Ind. 2020).

The *Hill* decision teaches that ad hominem attacks, at least those which are unfounded, are outside the boundaries of civility.

The Supreme Court has addressed civility in civil litigation, too. These decisions give broader lessons than that of *McClure* and *Hill.* Justice David writing for the court in *Wisner v. Laney,* 984 N.E.2d 1201 (Ind. 2012) stated:

> "Professionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it." *Wisner* 984 N.E.2d at 1207.

In *Wisner,* the attorneys for both sides in a personal injury case made continuous verbal aspersions on the other. In addressing their uncivil behavior, the Supreme Court referred to the Oath Of Attorneys and said:

> All attorneys in Indiana take an oath and each and every statement in the oath is sacred. One particular statement is, "I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged." Ind. Admission and Discipline Rule 22. Our law schools are trying to train our law students in certain core values of the legal profession, and some of the most important for the future of our profession are collegiality, professionalism and civility. At every trial, indeed at every moment of our practice, we have the opportunity to better our profession. . .
>
> "Professionalism and civility must be the foundation of the practice of law. Upon this foundation we lay competency, honesty, dedication to the rule of law, passion, and humility. Every lawyer and every judge is charged with the duty to maintain the respect due to the courts and each other. Our clients and the public expect it. Our profession demands it." *Wisner,* 984 N.E. at 1207.

The lack of courtesy and etiquette may be uncivil behavior. In *Huntington Nat'l Bank v. Car-X Assoc. Corp*., 39 N.E.3d 652 (Ind. 2015), the Supreme Court set aside a

default judgment because of the uncivil behavior by plaintiff's counsel who did not contact the defendant-bank before taking a default judgment. The Court commented that it was a simple task to pick up a phone and remind opposing counsel of an imminent deadline—"a courtesy every attorney would like (and may very well need) extended to him or her at some point in his or her career. Such a moment of professionalism and civility can reap significant dividends, both in the resolution of the case itself and the legal community in general. By fostering a spirit of fair competition and collegiality, courteous attorneys better serve their clients and greatly improve the quality of our profession. . ." *Huntington Nat'l Bank*, 39 N.E.3d at 659.

Huntington teaches that the lack of such basic courtesy cost the clients a lot of time and money.

The First Amendment Is Not An Absolute Defense To Unethical Or Uncivil Speech By Attorneys.

Uncivil behavior often comes in oral communications and in writings such as legal filings, e-mails, letters, and texts. A discussion of the ethical rules of language is thus necessary, and a starting point is the First Amendment. Does the First Amendment shield attorneys from disciplinary sanctions?

The Indiana Supreme Court addressed the First Amendment's application to the disciplinary process as long ago as 1979. In *Matter of Terry,* 394 N.E.2d 94 (Ind. 1979), the Court disbarred Terry, the former judge of the Ripley Circuit Court. He defamed Justice Donald Hunter of the Indiana Supreme Court. The Court explained:

> "The Respondent is charged with professional misconduct, not defamation. The societal interests protected by these two bodies of law are not identical. Defamation is a wrong directed against an individual and the remedy is a

> personal redress of this wrong. On the other hand, the Code of Professional Responsibility encompasses a much broader spectrum of protection. Professional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations. In the past, this Court has noted that a disciplinary proceeding stands independent of the course of litigation from which acts of misconduct may arise. This independence is predicated on the unique nature of the interests protected through the disciplinary process." (cites omitted). *Matter of Terry,* 394 N.E.2d AT 95-96.

The Court re-affirmed *Terry i*n a later case decided under the Rules of Professional Conduct. "We emphasize that none of these violations are based on any communication that falls within Respondent's broad constitutional right to freedom of speech and expression. We conclude that Respondent's conduct far exceeded zealous advocacy and included repeated abuse of the tools of the legal system itself, including discovery, to direct scurrilous and repugnant attacks against his opponents and others." *Matter of Dempsey,* 986 N.E.2d 816 (Ind. 2013), *pet. reh. denied, pet. for cert denied.*

In some cases, the Supreme Court has found for the respondent-attorney under First Amendment principles. See, *Matter of Ogden*, 10 N.E.3d 499 (Ind. 2014)(attorney was still suspended for 30 days for other conduct that was not constitutionally protected.).

Enter Rule 8.4(g) Of The Rules Of Professional Conduct

Ethics and civility relate to insults, epithets, and word choice. Indiana was one of the first states to adopt a rule expressly related to bias or prejudice when it added Professional Conduct Rule 8.4(g), which took effect on April 1, 2002. The rule targets some conduct that was already sanctionable before its adoption. Rule 8.4(g) proscribes the use of irrelevant, biased language (and conduct) related to someone's race, ethnicity,

sexuality, economic status, and other characteristics while an attorney is acting in "a professional capacity."

> "(g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule."

The language of similar rules in other states varies. For example, some states use words like "discrimination" or "harassment," which are words in the model rule.[1]


"In civilized life, law floats in a sea of ethics." Earl Warren.

It is important to discern what the Indiana rule does not require. It does not require an attorney-client relationship. It does not require that the attorney know that the words or conduct manifest bias or prejudice. The rule does not require that "bias" and "prejudice" be only bias or prejudice "against." It could be bias and prejudice "for." The rule arguably may include bias or prejudice when the attorney is an employer.

[1] In 2016, the American Bar Association amended Model Rule 8.4(g) to make it professional misconduct to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Indiana has several cases—disciplinary decisions and court opinions—on discredited and sanctionable language. Some of these cases predate Indiana's adoption of Rule 8.4(g). Here are some examples.

1. **National Origin**. In *Matter of Barker,* 993 N.E.2d 1138 (Ind. 2013), an attorney represented the father in a divorce. Parenting rights were at issue. The attorney sent a letter to the wife's attorney. He disparaged the wife and referred to her as "an illegal alien." He tried to connect the mother's alleged violation of immigration laws with her violation of the father's court-ordered visitation rights. The letter was also sent to the judge. The attorney violated Rules of Prof. Conduct 4.4(a) and 8.4(g) and received a 30-day suspension with automatic reinstatement.[2]

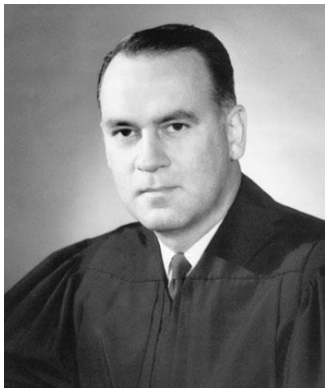
"No man is above the law and no man is below it; nor do we ask any man's permission when we ask him to obey it." Theodore Roosevelt, Third Annual Message, December 7, 1903.

In *Matter of Campiti*, 937 N.E.2d 340 (Ind. 2009), the attorney repeatedly made disparaging, irrelevant remarks about the mother in a hearing over modification of child support. He referred to her as not being a U.S. citizen and as receiving legal services with no charge. A fact in aggravation

[2] Rule 4.4. Respect for Rights of Third Persons
(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

was that the remarks were made in a public courtroom. He received an agreed public reprimand for violation of Rule 4.4(a) and Rule 8.4(g).

2. **Anti-Semitism**. An attorney was pro se in foreclosure and bankruptcy proceedings. He committed several ethical violations in addition to bigoted language. In 2009, he handed out flyers in downtown Indianapolis about his bankruptcy. The flyers, which were titled "Stop the Plunder In Bankruptcy Court," contained anti-Semitic remarks. As stated in the Supreme Court's decision, the flyers "called Sellers (without naming them) 'slumlords,' called their attorneys (naming the firm) 'bloodsucking shylocks' who were part of a 'heavily jewish (sic) . . . reorganization cartel,' and made free-ranging disparaging remarks about Jews generally, from the fall of Jericho, through 1925 Berlin, to their alleged involvement in the 9/11 attacks." He continued his offensive behavior during the disciplinary proceeding where he was also pro se. There, he attempted to use discovery to ask for the names of members of the Commission who had Jewish affiliations. The Court found that he violated Rules 3.1, 4.4, and 8.4(g). In imposing a three-year suspension, the court observed his history of unethical litigation practices, his attacks on those involved in the bankruptcy and foreclosure actions and in this disciplinary proceeding, and his virulent bigotry in the disciplinary proceedings. Justice David voted for disbarment. Apparently being pro se in a legal matter qualifies as acting in a "professional capacity" for purposes



"Ethics is knowing the difference between what you have a right to do and what is right to do." Potter Stewart.

of Rule 8.4(g). *Matter of Dempsey,* 986 N.E.2d 816 (Ind. 2013), *pet. reh. denied, pet. for cert denied.*

3. ***Racial.*** Ethical violations over race occur both by an attorney's use of racist language and also by an attorney's accusation that another is a racist.

During a controversy over title to real estate, an attorney for a title company sent an e-mail with the following language:

> "I know you must do your bosses [sic] bidding at his direction, but I am here to tell you that I am neither you [sic] or his nigger. You do not tell me what to do. You ask. If you ever act like that again, it will be the last time I give any thought to your existence and your boss will have to talk to me. Do we understand each other?"

He violated 8.4(g) as the use of the word was not part of legitimate advocacy. He received a 30-day suspension without automatic reinstatement. *Matter of McCarthy*, 938 N.E.2d 698 (Ind. 2010)(Justice Sullivan dissenting as to the severity of the sanction).

In an earlier case, an attorney representing the father in a custody matter referred to the wife's friendship with a "black man" or "black guy." In the related petition for custody, the attorney said of the mother:

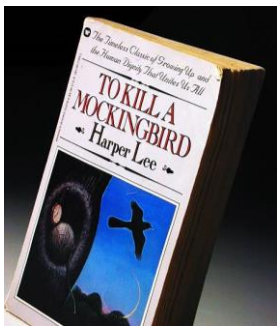
> "The wife continues to associate herself around town in the presence of a black male, and such association is causing and is placing the children in harm's way, as husband has been advised by neighbors of the wife and children. Said black male has resided at the home of the wife and children, for lengthy periods of time, while 'fixing the computer.' The behavior is placing the children in harms way and should be stopped immediately." *Matter of Thomsen,* 837 N.E.2d 1011 (Ind. 2005).

The attorney agreed that she violated Rule 8.4(g) and received a reprimand. The Supreme Court said:

> "Respondent's comments do not meet the standards for good manners and common courtesy, much less the professional behavior we expect from those

> admitted to the bar. Interjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole. . .Respondent's misconduct is a significant violation and cannot be taken lightly. Respondent's comments only serve to fester wounds caused by past discrimination and encourage future intolerance. . .” *Matter of Thomsen,* 837 N.E.2d at 1012.

In a case with facts that predated Indiana’s adoption of Rule 8.4(g), an attorney made groundless allegations that a judge had ruled against her because of her race or gender by imposing sanctions under I.C. § 34-l-32-1(b)(2), now I.C. § 34-52-1-1(b)(2). She made the comments in a press release, in a complaint to the Judicial Qualifications Commission, and to the Indiana Civil Rights Commission. She sued the judge for violations of 42 U.S.C. § 1983. She tried to disqualify the trial judge, claiming that he harbored personal animosity toward her from a case years before. The judge disqualified himself but found that her comments were made for an improper purpose of manipulating the judicial proceedings. The hearing officer in the disciplinary proceeding found that the allegations against the judge were without merit. The attorney made similar accusations against another judge. The attorney violated several rules: Rule 8.2(a), which provided that a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge; Rule 3.1, which provided that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous; Rule 3.3, which provided that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal; and Rule 8.4(d), which precluded a



“The one thing that doesn’t abide by majority rule is a person’s conscience.” Atticus Finch.

lawyer from engaging in conduct that was prejudicial to the administration of justice. She received a 30-day suspension with automatic reinstatement. *Matter of Crenshaw,* 815 N.E.2d 1013 (Ind. 2004).

In *Matter of Atanga*, 636 N.E.2d 1253 (Ind. 1994), the Supreme Court suspended the attorney's license for 30 days with automatic reinstatement.[3] The attorney, a black immigrant from Africa, deliberately failed to attend a proceeding for which the Tippecanoe Superior Court put him in jail. He also made a false statement which he knew was false or with reckless disregard for its truth concerning the qualification or integrity of a judge.

> "Ex parte communication between the prosecution and the court, without notice to opposing counsel of record, should not be done as a matter of course. Jailing an attorney for failure to appear due to a conflict of schedule is also a questionable practice, albeit within the sound discretion of the trial court. And having an attorney appear in jail attire with his client creates a definite suggestion of partiality." *Matter of Atanga*, 636 N.E.2d at 1257.

The attorney recklessly chose to criticize the court in the *Graffiti Times*, a monthly publication having a circulation of between 5,000-10,000 people. He stated that the judge was "ignorant, insecure, and a racist" and was part of the prosecution.

The attorney In *Matter of Epstein,* 87 N.E.3d 470 (Ind. 2017) engaged in illegitimate advocacy by using pejorative terms about another client's race. His client

[3] Justice Shepard dissented to the suspension as being more than the facts warranted. Justice Sullivan wrote a long dissent explaining why the sanction was "grossly disproportionate to the alleged misconduct." The Supreme Court was critical of the treatment of Atanga by the Tippecanoe Superior Court.

secretly recorded their conversations. He violated Rule 8.4(g) and received a suspension without automatic reinstatement.

Judge Rudolph R. Pyle of the Indiana Court of Appeals stated in a concurring opinion in 2017 that attorneys should not use the word “Negro.” Defense counsel used that word to identify his own client. He was motivated to help his client in a criminal trial. The majority found the attorney’s choice of words to be deficient, but Judge Pyle was more expressive and assertive.

> “I concur with my colleagues holding, but I write separately because I believe Middleton's counsel's performance fell below current objective professional norms and also prejudiced Middleton. During voir dire, Middleton's counsel properly explored the issue of race with prospective jurors. However, counsel referred to his absent client as a "Negro." In a sterile environment, this word might not be any more offensive than the next. But, we do not live in a sterile environment. Words have power. Words convey explicit and implicit meanings they have acquired. While many dictionaries may still define the term "Negro" as "a person of black African origin or descent[,]" it is also cross referenced with the vile slur known euphemistically as "the N-word." OXFORD ENGLISH DICTIONARY, http://www.oed.com (last visited November 21, 2016) . . . In the context of a criminal jury trial, counsel's use of the term "Negro" to refer to his client in front of the potential jurors, who would determine whether he was guilty or not, goes far beyond "political correctness.". . . While counsel properly performed many other tasks on behalf of his client, he also prejudiced his client. Before evidence had even been introduced, potential jurors saw and heard Middleton's attorney, the person who was supposed to be his advocate, refer to Middleton in a racially offensive manner. While there is no evidence that counsel intended harm to Middleton, the harm was nonetheless inflicted. Middleton was presented to potential jurors in a racially offensive manner.” *Middleton v. State*, 64 N.E.3d 895, 902-903 (Ind. Ct. App. 2016), *reh. denied*, and affirmed in part at 72 N.E.3d 891 (Ind. 2017).

4. **Heritage and Race**. In a case 26 years ago, the Supreme Court found prosecutorial misconduct by a prosecutor’s closing argument that arguably mocked the defendant’s Indian heritage and race. The Court, however, did not reverse the

conviction. There was substantial evidence of guilt. *Samaniego v. State*, 679 N.E.2d 94 (Ind. Ct. App. 1997).

5. ***Gay.*** An attorney answered her phone at home. The caller was trying to collect a debt from the attorney's husband. During the conversation, the attorney said she was representing her husband and asked the collector whether he was gay. She violated Rule 8.4(g) and received an agreed public reprimand. *Matter of Kelley***,** 925 N.E.2d 1279 (Ind. 2010).[4]

In *Matter of Halpin*, 53 N.E.3d 405 (Ind. 2015), the attorney for the mother in a paternity case wrote to the father's counsel, "[y]our possibly homophobic, racist, sexist clients should not be using the Courts to further that agenda." This and other conduct violated Rule 8.4(d) and Admission and Discipline Rule 22 by acting in an offensive manner.

6. **Gender.** *In Matter of Usher,* 987 N.E.2d 1080 (Ind. 2013), an attorney was charged with several counts of misconduct. One charge was his violation of Rule 8.4(g) for his disparaging e-mail sent to a woman. The hearing officer found that the Commission had not met its burden of proof. The Supreme Court agreed, concluding that the "evidence supports a finding that the email was motivated by personal anger at Jane Doe in particular rather than by bias or prejudice against women in general." The attorney was suspended for three years on other grounds without automatic reinstatement and with Justice David voting for disbarment.

[4] *Kelley* depended upon a determination of the existence of an attorney-client relationship. If she had not indicated she was representing her husband, she would not have violated Rule 8.4(d).

7. ***Economic Status***. The Court of Appeals found that a trial court violated a tenant's right to a fair trial by its questions and comments that belittled the tenant for living in government-subsidized housing. *Harris v. LIHTC, LP*, 85 N.E.3d 871 (Ind. Ct. App. 2017). See, *In Matter of Campiti*, *supra,* where the attorney received a reprimand for similar remarks.

8. **Reliance On Internet Is A Questionable Defense**. New Jersey has a similar but not identical rule to Indiana's Rule 8.4(g). In 2019, its supreme court reprimanded an attorney who made derogatory remarks about an optometrist of Chinese national origin. The attorney's comments were made in correspondence to the defendant and his attorney in a medical malpractice case. An e-mail to the doctor said: "I have read your letter. The only thing I can suggest is that you are either: delusional, a pathological liar, in denial, a psychopath, or all of the above." A letter to the defendant's counsel said: "I am/was not a student of Chinese culture. So, I did a little research and found that in fact, lying to achieve some business or social aim, and getting away with it, is considered to be a sign of intelligence and social skill among many Chinese." See/25/http://thelinguafranca.wordpress.com/2008/03d o-the-chinese-lie-that-depends/. Also, in the Chinese culture, "lying has become a means to an end." See http ://Ezine Articles. com/1435598." The attorney asserted as a defense that he was relying on experts that he found on the internet. This defense was rejected as both opinions were unsubstantiated. *In re Farmer*, Docket No. DRB 18-276 (N.J. Jan. 15, 2019).

9. **Private communications**. In 2020, the Court of Appeals of Maryland unanimously suspended the licenses for two lawyers for racist, sexist, xenophobic, and

homophobic e-mails which were never intended to be seen by anyone outside the lawyers' circle. Both attorneys were employees of the U.S. Department of Veterans Affairs. One was an administrative law judge. *Attorney Grievance Comm'n v. Markey*, 230 A.3d 942 (2020).

The case involved 10 exchanges which were written over seven years in what they called "the Forum of Hate." The lawyers used their official email accounts. The forum was secretly used to vilify and mock colleagues with veiled references to race, gender, sexual orientation, nationality, and weight. The remarks were made about colleagues, were written during work hours, and were done on employer-provided email accounts.

They violated Maryland's Rule 8.4 which provided that it was misconduct "to engage in conduct that is prejudicial to the administration of justice." To reach the conclusion that the e-mails related to the practice of law, the court concluded that the e-mails would negatively impact the perception of the legal profession in the eyes of a reasonable member of the public. Even though the comments did not specifically pertain to legal work, the court held that "[a] reasonable member of the public would not expect [government lawyers] to conduct themselves in such an unprofessional manner in the workplace." The court found that they were not "purely private" communications because it said that "private" meant unrelated to the practice of law, rather than conduct that was not intended to become publicly known. The Court also found that the same facts supported the conclusion that the two lawyers violated

Maryland's Rule 8.4(e) which is like Indiana's Rule 8.4(g), except that it has a "knowledge" requirement. The court was sending a message to other attorneys.

Conclusion

It is fitting to end with some ethical and civil words. Follow the Golden Rule and have a nice day. Pretty please.

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