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Advanced Worker's Compensation

Indiana Continuing Legal Education Forum (ICLEF)

Advanced Worker's Compensation
July 29-30, 2021
Index

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Indiana Continuing Legal Education Forum (ICLEF)
230 East Ohio Street, Suite 300
Indianapolis, Indiana 46204
Ph: 317-637-9102 // Fax: 317-633-8780 // email: iclef@iclef.org
URL: https://iclef.org

ADVANCED WORKER'S COMPENSATION

July 29-30, 2021

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ADVANCED WORKER'S COMPENSATION

Agenda

July 29, 2021

1:30 P.M. Registration in Conference Center Lobby
- pick up materials and name badges

2:00 P.M. SETTLEMENT ISSUES
- Discussion Led by Roger Finderson

3:30 P.M. Refreshment Break

3:45 P.M. ETHICS
- Discussion Led by Dan Foote

5:15 P.M. Adjourn Day One

5:30 P.M. Hosted Reception

7:30 P.M. Free Time

July 30, 2021

8:00 A.M. Continental Breakfast

8:30 A.M. THIRD PARTY ISSUES
- Discussion Led by Kevin Likes

10:00 A.M. Coffee Break

10:15 A.M. UNSETTLED INDIANA WC ISSUES
- Discussion Led by Brad Varner

11:45 A.M. Break for Lunch or Check Out for those not Extending Their Stay

1:00 P.M. DEATH BENEFITS
- Discussion Led by Aubrey Noltemeyer and Libby Moss

2:30 P.M. Adjourn

ADVANCED WORKER'S COMPENSATION

Faculty

Hon. Linda P. Hamilton - Co-Chair
Chairman
Worker's Compensation Board of Indiana
402 West Washington Street, Room W196
Indianapolis, IN 46204
ph: (317) 232-3811
e-mail: lindahamilton1113@gmail.com

Mr. Richard J. Swanson - Co-Chair
Of Counsel, Macey Swanson Hicks & Sauer
445 North Pennsylvania Street, Suite 401
Indianapolis, IN 46204
ph: (317) 637-2345 Ext. 23
e-mail: rswanson@maceylaw.com

Mr. Roger B. Finderson
Finderson Law LLC
744 East Till Road, Suite 102
Fort Wayne, IN 46825
ph: (260) 420-8600
e-mail: roger.finderson@findersonlaw.com

Hon. Daniel G. Foote
Hearing Member - Worker's Compensation Board of Indiana
Attorney at Law & Registered Civil Mediator
7399 North Shadeland Avenue, Suite 253
Indianapolis, IN 46250
ph: (317) 502-3554
e-mail: footelawoffice@att.net

Mr. Kevin L. Likes
Likes Law Office LLC
129 South Main Street
P.O. Box 960
Auburn, IN 46706
ph: (260) 925-6318
e-mail: kevin@attorneylikes.com

Ms. Libby Valos Moss
Kightlinger & Gray, LLP
One Indiana Square, Suite 300
211 North Pennsylvania Street
Indianapolis, IN 46204
ph: (317) 968-8175
e-mail: lmoss@k-glaw.com

Ms. Aubrey K. Noltemeyer
Kightlinger & Gray, LLP
One Indiana Square, Suite 300
211 North Pennsylvania Street
Indianapolis, IN 46204
ph: (317) 968-8147
e-mail: anoltemeyer@k-glaw.com

Mr. Brad Varner
May Oberfell Lorber
4100 Edison Lakes Parkway, Suite 100
Mishawaka, IN 46545
ph: (574) 243-4100
e-mail: bvarner@maylorber.com

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.

Richard Swanson
Macey Swanson Hicks and Sauer, Indianapolis

Richard J. Swanson is an experienced attorney and litigator in all areas of labor and employment law, including arbitration, NLRB proceedings, and federal court litigation. He frequently represents unions and employees impacted by plant closings, sales and relocations, including proceedings to enforce wage and benefit claims in state, federal, and bankruptcy courts. Mr. Swanson represents injured workers before the Indiana Worker's Compensation Board and is an advocate for worker's compensation reform to improve benefits and procedures under the Indiana Worker's Compensation Act.

EDUCATION
Northwestern University School of Law, J.D., 1980
Providence College, B.A., 1973

BAR ADMISSIONS
State Bar of Indiana
State Bar of Illinois
U.S. District Court for the Southern District of Indiana
U.S. District Court for the Northern District of Indiana
U.S. District Court for the Eastern District of Michigan
U.S. Court of Appeals for the Seventh Circuit
U.S. Supreme Court

PROFESSIONAL MEMBERSHIPS
Indiana State Bar Association
Indianapolis Bar Association
AFL-CIO – Lawyers' Coordinating Committee
American Bar Association
Past Co-Chair, Worker's Compensation Committee, ABA Section of Labor and Employment Law (1988-2002)
American Association for Justice
Federal Legislative Chair, Works Injury Law and Advocacy Group

Roger B. Finderson
Managing Attorney – Founder, Finderson Law LLC, Fort Wayne

Roger Finderson has practiced law in the greater Fort Wayne area his entire career, which began more than 30 years ago. Mr. Finderson is a plaintiff's lawyer, focusing his practice on Personal Injury, Workers Compensation, Social Security Disability and Adoptions. He is admitted to practice in Indiana, and before the U.S. Federal District Court in both the Northern and Southern Districts of Indiana. He earned his undergraduate degree in Computer Science from Brandeis University in 1990, where he played varsity basketball, and his law degree from Indiana University, Bloomington in 1993. Happily married, he and his wife Terra have three children, Delaney, Zaira and D'Artagnan. They reside in Auburn, Indiana.

Roger has spoken at multiple CLE seminars, including for the AAJ Solo and Small Firm Section, Indiana Trial Lawyers Association, and Allen County Bar Association. Areas he has spoken on include the Top 10 Tips for Opening Your New Firm, The Paperless Office, and Client Selection.

DANIEL G. FOOTE

Attorney at Law • Registered Civil Mediator
7399 North Shadeland Avenue Suite 253
Indianapolis, Indiana 46250

FOOTELAWOFFICE@ATT.NET
(317) 502-3554 Phone

Daniel G. Foote, born 1969 in Rockford, Illinois, has practiced law in Indiana for twenty-three years. He completed his undergraduate work at Indiana University with a B.A. in Political Science, a Certificate in Latin American Studies and a minor in Spanish, graduating as a member of the Honors Division and the Mortar Board Senior Honor Society. In 1993, Dan enrolled in the evening division of the Indiana University School of Law. He took a semester with the law faculty at the University of Guanajuato in Mexico. He earned his J.D. and passed the Indiana bar in 1997.

While pursuing his law degree, Dan took a job with the Worker's Compensation Board, where he served as a Policy Analyst for three years. In 1997, Dan began his career as a lawyer at the Indianapolis firm of Locke Reynolds, LLP, where he focused his practice on worker's compensation and occupational disease cases, as well as civil litigation and appeals. In 2005, Dan joined the worker's compensation practice group at Due Doyle Fanning, LLP.

In 2005, Dan was appointed to the Worker's Compensation Board and is currently serving his fourth term as a hearing judge. He hears and decides worker's compensation and occupational disease cases in the northeastern region of Indiana and, together with his fellow Board members, hears administrative appeals at the Board's office in Indianapolis. Dan is accountable to a constituency of employees and their families, large and small employers, insurers, medical providers, lawyers, governmental entities, and Indiana's taxpayers.

Since joining the Board in 2005, Dan has maintained a private practice devoted to business litigation, auto and trucking cases, product liability, juvenile law, appellate matters and alternative dispute resolution. He has tried a number of civil cases and appeared in over forty civil appeals. Dan has argued before the Indiana Court of Appeals and the Indiana Supreme Court. In 2016, Dan completed mediation training is now a Registered Civil Mediator. Dan enjoys public speaking and is a frequent lecturer on a variety of areas of Indiana law.

Kevin L. Likes
Likes Law Office LLC, Auburn

Kevin L. Likes has practiced in the small town of Auburn, Indiana for 37 years, at Likes Law Office, LLC. The Likes office handles personal injury claims, worker compensation claims, criminal defense and family law. Kevin has been a part time public defender for DeKalb County for 20 years and for the last ten years the Chief Deputy Public defender. Besides many administrative worker's compensation hearings, Kevin has tried to conclusion over 140 jury trials, including personal injury, medical malpractice, products liability and all forms of criminal trials. He is married to Karen Likes and they have four children ranging from 30 years of age to 24 years of age.

Libby Valos Moss
Kightlinger & Gray, LLP, Indianapolis

Libby Valos Moss focuses her practice on the defense of employers in administrative proceedings, as well as litigation and counseling, and she represents schools and school systems with regard to assault and Title IX cases. She regularly represents employers before the Indiana Worker's Compensation Board, Equal Employment Opportunity Commission (EEOC), Indiana Civil Rights Commission, as well as in state and federal courts. Libby has authored a number of appeals on worker's compensation matters before the Indiana Court of Appeals and Indiana Supreme Court. As Chair of the firm's Workers' Compensation Practice Group, Libby counsels employers and adjusters on the proper handling of workers' compensation claims within the Indiana Workers' Compensation Act. Libby also counsels clients on avoiding employee discrimination claims as a result of those injuries.

Libby served as the Chair for the Worker's Compensation Committee of the Defense Research Institute (DRI) and on the Board of Directors for the Defense Trial Counsel of Indiana (DTCI). Libby is also a member of the Litigation Counsel of America (LCA), an invitation-only trial lawyer honorary society representing less than one-half of one percent of American lawyers, and she is a member of various legal and professional associations, including the Indianapolis chapter of the Society for Human Resources Management (SHRM) and the Indiana Workers Compensation Institute (IWCI.) Libby was selected for inclusion on the Rising Stars list published in Indiana Super Lawyers Magazine every year from 2010 to 2013, and was named on the Super Lawyer list every year following, 2014 to 2018.

Aubrey K. Noltemeyer
Kightlinger & Gray, LLP, Indianapolis

Aubrey Noltemeyer focuses her law practice on the defense of businesses in employment-related litigation. Aubrey's expertise is in the concentration of litigation before the Indiana Worker's Compensation Board. Aubrey assists employers in worker's compensation disputes including compensability decisions, investigations and all aspects of litigation from discovery and through trial. Aubrey has written and spoken extensively on the Indiana Worker's Compensation Act and its practical application for employers. Further, Aubrey counsels businesses in other worker's compensation employment-related issues such as returning to work, termination and benefit analysis in an effort to help her clients minimize exposure due to employment decisions.

In 2013 and 2014, Aubrey taught employment law classes at Marion University. She covered topics such as Title VII, ADA, and Indiana worker's compensation law in the class "Law in the Modern Workplace." In 2009, Aubrey was named a Leadership in Law "Up and Coming Lawyer" by The Indiana Lawyer. For numerous years since 2009 she has been selected to the Rising Stars list published in Indiana Super Lawyers Magazine.

In 2020 Aubrey was a driving force behind securing the title sponsorship of the annual Indiana Chamber Indiana Worker's Compensation Conference and has secured title sponsorship for the 2021 conference as well. In addition to Indiana Work Comp conferences, she has been selected to speak at the 2021 CLM Workers Compensation and Retail, Restaurant & Hospitality Conference taking place in Chicago. In addition to speaking at statewide conferences Aubrey is frequently asked to contribute or be featured in professional publications. Thomson Reuters Practical Law AUTHORity newsletter featured Aubrey for their final newsletter of 2020 and she will also be contributing to the CLM magazine and webinar series in 2021.

When not at work, Aubrey enjoys spending time with her husband and two young daughters.

Brad Varner
May Oberfell Lorber, Mishawaka

Brad Varner's practice areas are focused on insurance and worker's compensation defense, insurance law, product liability and domestic law. Part of the May Oberfell Lorber team since 1993, the father of three is a member of Indiana State, St. Joseph County and Elkhart Bar Associations. He's tried more than 35 jury trials, is admitted to the U.S. Supreme Court, and is a member of the Defense Research Institute.

PRACTICE AREAS

- Workers Compensation
- Labor & Employment
- Family & Domestic
- Litigation
- Insurance Defense
- Estate Planning

PROFESSIONAL ACHIEVEMENTS

- Successfully represented a major international restaurant chain in an alleged food poisoning case
- Effectively coordinated three experts for the defense of a rear-end collision case, which led to a successful result
- Represents several large corporations in worker's compensation matters

PROFESSIONAL AFFILIATIONS

- Elkhart City Bar Association
- St. Joseph County Bar Association
- Indiana State Bar Association

CIVIC INVOLVEMENT

- St. Joseph County Bar Association
- Board of Directors, Penn Wrestling Club
- Member, Defense Research Institute

ADMISSIONS

- State of Indiana
- United States District Court, Northern and Southern Districts of Indiana
- United States Supreme Court
- United States Court of Appeals, Seventh Circuit

EDUCATION

- B.A. in History from Purdue University, 1983
- J.D. from Valparaiso University School of Law, 1986

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Section One

Settlement Issues – The Variables of the Money

Roger B. Finderson, J.D.

ICLEF 2021 Masters Series Summer Conference

Thursday July 29, 2021 – 2:00 p.m.

Section One

Settlement Issues – The Variables of the Money……..Roger B. Finderson, J.D.

I. CLIENT UNDERSTANDING

A. PLAINTIFF

When the prospective client calls, the question is of the money: will representation of this client improve the position, or will that representation be of marginal use or worse, detrimental? To answer that question plaintiff's counsel looks to the current status of the prospective client's case and the nature of any potential dispute. Those disputes include whether the claim is compensable, appropriate care is being provided, and whether the client is entitled to compensation, TTD, TPD, PTD or PPI. When plaintiffs' counsel receives that call, getting an injured worker to understand the issues of a complicated statute (referring to the Indiana Workers' Compensation Act, "IWCA") can be challenging. Of course, that client understanding is imperative to resolving the case.

The issue of compensability is the threshold question to get a client benefits. Without compensability there really is no point in looking to the benefits that may apply. However, the greater the benefit may be to the client, the more likely it is that having the compensability fight is worthwhile. The risk to a client is the costs associated with presentation of the evidence and the development of the case. The risk to the attorney is the substantial investment in time with a possibility of receiving little or no fee for the expended time and office resources. So, evaluating the compensability issue from a factual basis becomes the focus.

Most compensability disputes arise from a medical standpoint. Is the medical issue something that arises out of and in the course of the employment with the employer, or was it pre-existing? Most plaintiffs rely entirely upon the temporal relationship of symptomology. Getting them to understand that there is more to it than that can be daunting. Obtaining the medical records and showing the difference in writing to them helps and pointing out that their and plaintiff's counsel's opinion is not the ones that matter. It is the medical expert's opinion that matters.

It is surprising how many injured workers struggle with the concept of average weekly wage ("AWW"). Most injured workers are accustomed to understanding pay from an hourly rate standpoint. And, that position is current, not historical. Injured workers also compare gross wages, not net wages, and get the impression that the IWCA is shortchanging them because of the 2/3 of AWW as opposed to full wages. Explaining the implications of taxation on a normal paycheck and the lack of taxes on a TTD check has limited value. The best approach is to show them a pre-injury paycheck and a TTD check. Only when the numbers are truly disparate, will you have an issue. In most cases, it will be very similar. The exception of course is for higher wage earners, that exceed $1,170.00 per week. Those injured workers are truly harmed under the IWCA. Plaintiffs' counsel should obtain the pay records whenever there is a potential compensation dispute.

Indiana being a directed care state causes immediate friction for injured workers. They see nurse case managers ("NCM") attending physician appointments and the conversation often occurring between the NCM and physician without their involvement. Even if that is an erroneous perception, it is the truth to those injured workers. They believe the doctors are being paid by the employer/carrier and therefore has those interests in mind, not the inured workers' care. The concept of the healing train helps injured workers understand better. When you climb aboard the healing train, the conductor and engineer are the employer and the carrier. But, just like a moving train, you do not wish to hop off. Doing so can cost the injured worker money and sometimes, a suspension of benefits for not following through with authorized care. So, ride the train into the station. Then, get off and see where you are. If it is not where you want to be, you may take other transportation (a second opinion).

However, the single most difficult concept to explain to an injured worker is that the IWCA does not provide for pain and suffering. Explaining that to an injured worker at the very beginning of the representation is paramount to getting the understanding necessary to resolve a claim. Rarely, if ever, does the IWCA make an injured worker whole. This is problematic from plaintiffs' perspective because of the notion that the person was injured advancing the cause of the employer, helping them make money. In return, they are not returned to the position they held prior to the work injury. It is human nature to believe that following an injury sustained while benefiting someone else, you should be made whole. The IWCA does not do that and gaining the understanding of a person in pain is challenging.

B. DEFENDANT

Employers and their insurance carriers have a common perception that injured workers are not fully engaged in the recovery process and seek to "milk" the system. That is true at times, but far less than is generally believed. It is important to have the employer understand that injuries occur in an instant, but healing and recuperation take time. The example of an injured professional athlete helps with the demonstration of that process. The professional athlete is highly compensated to play. When they cannot, that compensation is severally limited. Those athletes are incentivized to get back to playing as soon as possible. And still, the recovery from injury takes time, and the athlete can miss an entire season. No one questions them. But for our typical injured worker, the question is frequently raised. Healing is time consuming.

It is extremely helpful for employers and carriers to understand the concept of the aggravation of a pre-existing condition. The fact an injured worker has a pre-existing condition does not preclude access to benefits under the IWCA and is compensable in the event such condition was worsened by an event occurring at work. Employers often will deny claims when the worker has an extensive

medical history, while ignoring the fact that the same worker had done the job well for a considerable period despite the medical history. But for the aggravation, that worker would continue her work.

Human nature is something that cannot be ignored. Surgeons are generally confident individuals who have extensive education and training in repairing the human body through surgical intervention. They are, in the case of a work injury, being paid by WC carriers. Surgeons pay attention to from where the money comes. Given the confidence and the payment, when asked "how bad off is your patient now that you are done with them?" it is unsurprising that the answer is a relatively small PPI. Many employers and their carriers understand this and are willing to discuss resolution of cases without the need to obtain an IME (whether Board appointed or hired by plaintiff). But, when the employer is unwilling to do so, it becomes more difficult to resolve cases. Citing the *AMA Guides* can help push this approach, but at times getting the IME will be necessary.

If resolution of a claim is the goal of the employer/carrier, then understanding the attorney client relationship for the plaintiff is critical. To achieve the settlement, the plaintiff attorney will need the confidence and trust of the injured worker. If a defendant chooses to attempt to separate the client from the attorney, it will undermine all attempts at resolution. The response for plaintiff's counsel in all probability is to try the case. In other words, such tactics will not help achieve resolution of the claim. The single greatest area for such tactic to be deployed by defendants is in disputed or future medical care. Those costs, if plaintiff is successful, are to be paid by the defense. In addition, there is a 10% fee payable to plaintiff's counsel. When a defendant agrees to pay the bills but refuses to pay the fee, it places a wedge between the plaintiff and plaintiff's counsel. It may cause a situation where the client wishes to settle, but the plaintiff attorney is left with the unenviable position of pushing for a hearing or settling without being paid. Not only will this cause a problem in the particular case, but plaintiff's counsel also is unlikely to forget the tactic in future cases, refusing to engage in settlement discussion with that particular defense lawyer, carrier or employer which in turn endangers resolving future claims.

In essence, there must be an agreement of the minds for any resolution. A defense lawyer and a plaintiff's lawyer could often resolve claims easily if left to themselves. But that is not our system. It requires our clients' cooperation. But more importantly, it requires their understanding.

II. WHEN IS IT NOT ABOUT THE MONEY

In a word: Rarely. But when it is not about the money, it is always about final recovery. The client wants to be healed and does not want any money. To be fair, this occurs very infrequently, but it does occur. In these cases, you need to be conscious of the true motives of this injured worker. They want their life back. From

a practitioner's perspective, that is beyond our control. But we can push the care and be sure every avenue is pursued and explored.

Historically, there was a truism. When they say it's not about the money, it's about the money. But time has revealed there are folks that value health over money. Maybe that is how it should be, but our society is so money driven, that we find it only on occasion. When we do find it, it is worthy of our attention and how to make it happen. Unfortunately, it is not always possible. But until all doctors are consulted, all procedures attempted, and all care provided we should not give up on the injured worker. In fact, pushing settlement on such a person will backfire. Unless you can provide a settlement fund that will pay for all of that care and then some, the injured worker will not settle.

About 70% of all money spent in Indiana on workers' compensation claims is for medical care. Defendants and their carriers are acutely aware of this and will provide care, but not unlimited care. In the rare case where the health and welfare of the injured worker is more valuable to the worker than the money, defendants should strongly consider changing tactics and allowing more care, perhaps even diverting reserves from compensation to medical care. Despite the lowering of potential fees, most plaintiff's counsel will be more satisfied with a healthy recovery of this injured worker than having a large settlement.

Some may be skeptical of this injured worker, believing instead that the person seeks to leverage a bigger settlement through seeking more medical care (see prior "truism"). Here is where both sides of the bar need to believe in and rely on one another. Experienced plaintiffs counsel knows the difference between the "pie in the sky" and genuine article. Good relationships between plaintiff and defense counsel are critical to resolving this type of case.

III. PERMANENT PARTIAL IMPAIRMENT

Many cases surround the value of a permanent injury. It is the one benefit that actually improves an injured workers' financial condition. Medical expenses are paid to facilities and doctors. TTD and TPD are replacement wages and designed to keep the injured worker in the same position as before the injury. The PPI compensation goes straight to the injured workers' bottom line. So, it is the one area that makes up some ground against having no compensation for pain and suffering. This understanding is critical to a successful resolution of a claim.

Obtaining a correct PPI rating is more art, then science. Each doctor has a different way of reaching an opinion on PPI, despite all doctors having access to materials such as the *AMA Guides*. It would be very helpful for the doctors to understand the IWCA and its application, but that is not always possible. Given the dynamics, obtaining more than one PPI is helpful to achieve a more realistic picture of an injured workers' condition. In certain circumstances, the Board can appoint physicians to conduct

IMEs. A plaintiff can hire a physician to do one. And even the defense occasionally hires a second opinion for an IME. Regardless of method or source, the multiple opinions can help clarify an injured worker's permanent condition.

Having multiple opinions should not be a default mode, as the time and resources needed to conduct them can become obstacles to the resolution of some cases. But they do provide clarity which should be welcomed by both sides.

As lawyers, we advocate for our client. We seek to highlight our strengths and minimize our weaknesses. In the battle for PPI position, we often are willing to "split the difference" and find a midpoint for the PPI resolution. That is perfectly sensible when you have opinions based upon the evidence and are rationally based. But sometimes an opinion will lack reasonableness. That does not mean it should not be considered, rather given less weight. This occurs when the PPI rating is given earlier with physician assumptions about how the patient will recover in the future. It also happens when a physician relies more on memory than the records themselves. In either case, the opinion is subject to challenge and renders it less persuasive.

IV. PERMANENT TOTAL DISABILITY

The maximum compensation afforded by the IWCA is in cases of PTD. It is therefore the most fought battleground. A PTD claim should occur when the injured worker has suffered an injury resulting in significant permanent impairment. The injured worker would have an inability to return to her employment, and have difficulty finding alternative employment because of education, experience and age. In such cases, obtaining a vocational assessment for a vocational expert is imperative.

In such cases, injured workers are not as interested in the weekly benefits as in a lump sum payout. It affords them an opportunity to reforge, to some extent, their life. When the battle rages around PTD, counsel should be aware there is significant benefits to both sides to find a resolution that involves a single lump sum payment. Be mindful however, that the second injury fund ("SIF") is implicated, and any resolution should carefully consider whether it forecloses an injured workers' later application to the fund, or whether it should be left open for them to make that application. Keep in mind that the approval of the settlement agreement will not trigger access to the SIF. It simply will either preserve the right to apply for benefits or extinguish the right. Our ALJ single hearing members likely do not have the authority to bind the SIF through the approval of a settlement agreement. Crafting the language of the settlement agreement should take that into consideration.

Many severally injured individuals also need public benefits that may be restricted by an asset income test, like Medicaid. Setting up a special needs trust ("SNT") is required to protect those benefits. No resolution of PTD benefits should be finalized without examining the issue. A SNT can be a pooled public trust, or privately established. Each has benefits, such as cost (private more costly) and final

distribution upon death (public has a portion added to the public trust instead of decedent's estate). Using a private SNT is more likely the larger the settlement fund.

Using what is called spread language is also imperative when other benefits are implicated, even when they are entitlements such as Social Security Disability Insurance ("SSDI") benefits. Spread language uses the Social Security Administration's Actuarial Life Table to determine the life expectancy of the injured worker, spreading the net benefit (after fees and expenses are deducted) over the remaining life of the injured worker (in terms of $$$/week). *See* POMS DI 52150.065 Complex Lump Sum (LS) Awards and Settlements and Social Security Administration's Actuarial Life Table (found at https://www.ssa.gov/oact/STATS/table4c6.html). This is necessary because the Social Security Administration will use the 80% rule to offset SSDI benefits should a recipient receive more than 80% of pre disability earnings between all sources. Any income test will be helped using spread language.

As a rule of thumb, use spread language whenever the client applies for SSD benefits, may apply for SSD benefits, is over the age of 50.

V. MEDICAL CARE

Medical care can be the most challenging aspect of any workers' compensation case. Immediately following a compensable work injury, medical care is provided and relatively few issues arise. But as the case progresses, the issues become larger. These issues are often the most confusing aspects of a work injury case.

A question to ask before resolving any case is whether more care is reasonable and necessary. In doing so, determining the type of care is important. Curative care is designed to treat the underlying cause and to help the injured make a recovery. Palliative care is designed to treat the symptoms and allow the injured worker to have a more comfortable life. Both types of care are paid by the employer/carrier provided the care is reasonable, necessary and directly related to the work injury.

An issue that arises frequently is concerning the future curative knee, shoulder or hip replacement. A physician may recommend that it is necessary, but that the patient is too young to presently have the surgery. Or an arthroplasty is performed, and the patient is advised that at some point in the future, the joint will again need replacing. Plaintiffs understandably want this to be paid. Defendants might argue that the procedure is speculative and not certain to occur because the injured worker dies before it is time, chooses not to have the procedure, or simply turns out to not need it. Both positions are reasonable, and worthy of compromise.

Whenever considering future care, regardless of the curative or palliative nature, a Medicare Set-Aside (MSA) account should be considered. Medicare will not allow the employer to shift the burden of paying for medical care to it. Doing so can severely hurt an injured worker in terms of all medical care in the future, as Medicare may refuse coverage for a failure to take its interest into consideration when settling the workers' compensation case. Medicare designates responsibility over the secondary payor act to the Centers for Medicare and Medicaid Services ("CMS"). CMS has an approval of an MSA standard that will review and approve MSAs if the settlement is $25,000.00 or more for Medicare eligible individuals, or $250,000.00 for those who may become Medicare eligible within the next 30 months. *See* Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide, ver. 3.2, October 5, 2020 (found at https://www.cms.gov/files/document/wcmsa-reference-guide-version-32.pdf). It is recommended to take advantage of CMS approval whenever appropriate, as it is very hard for Medicare to suggest a CMS approved MSA was inadequate to protect its interests. Do not forget to submit a Board approved agreement with MSA to CMS following the approval by the Board. This is the binding act.

Not all medical care is covered by Medicare. So, when looking at an MSA, that is only half the battle. A second account for future medical care should be established for the non-Medicare covered medical expenses. MSA vendors are focused on the MSA, and unless asked, will not provide the non-Medicare covered medical expenses projections. In order for the injured worker to receive the full benefit of the settlement, these future medical expenses must also be considered.

Whether an MSA or non-Medicare covered medical expense account, it is advisable to have it professionally administered. As attorneys, we have an idea about what is covered and what is not but have no idea what appropriate reimbursement rates should be. Imagine the injured work trying to figure out what is covered by Medicare, what is not, and how much should be paid. It is unrealistic to believe that it will be done properly. For plaintiff's counsel, setting up a self-administered account is asking for repeated calls with questions we cannot answer in the future. It is also possible that under pressure, an injured worker will use the funds for something other than medical care, ruining the Medicare protection the account was stablished for in the first place.

Section Two

CURRENT ISSUES IN ETHICS AND PROFESSIONAL CONDUCT

IN

WORKER'S COMPENSATION PRACTICE

Discussion Facilitated by Daniel G. Foote

Indiana Continuing Legal Education Forum

Thursday, July 29, 2021

Section Two

Current Issues in Ethics and Professional Conduct in Worker's Compensation Practice……..Daniel G. Foote

I. ETHICS AND MEDIATION OF WORKER'S COMPENSATION DISPUTES

A. Growth of Mediation in Worker's Compensation Disputes

While statistical information is difficult to gather, the use of mediation to resolve Indiana worker's compensation disputes has expanded dramatically since the late 1990s and early 2000s. It would be fair to say that mediators are retained in a meaningful, if not substantial, percentage of disputed worker's compensation cases. In general, Indiana law favors the negotiated resolution of disputes, and a substantial number of worker's compensation disputes have always been resolved by way of agreements and stipulations, or by way of compromise agreements under Ind. Code § 22-3-2-15.

The availability of numerous lawyers skilled in mediation and with longstanding in experience in worker's compensation matters offers numerous possible advantages to litigants:

- May expedite resolution of disputes over multiple legal and factual issues
- The process is less confrontational may help preserve employment relationships
- Allows discussion of the issues outside the context of a formal hearing
- May save the parties substantial expert medical and litigation expenses
- Offers certainty to the parties
- Avoids the uncertainty and investment in time and expense of potential appeals

In fact, the use of mediation in certain cases may be the most professional and ethical path a lawyer can recommend to a Plaintiff or Defendant. The use of mediation to resolve difficult disputes may even provide ethical protection to lawyers where potential professional or ethical challenges would arise in continuing litigation through hearing and appeal.

B. What Procedural and Ethical Rules Apply to Mediation of Worker's Compensation Cases? Are There any Rules at All?

While the Board's statute contemplates that its own staff may offer mediation services, the Board is *not* authorized by statute to order parties to engage in mediation. Ind. Code § 22-3-4-4.5 provides

> Mediation. (a) In addition to any other method available to the board to resolve a claim for compensation under [the Act] the board may, *with the consent of all parties*, mediate the claim using a mediator certified by the Indiana Continuing Legal Education Forum. *The board may not order the mediation of a claim without the consent of all parties*.

Unlike most Indiana State and Federal Courts of civil jurisdiction that deal with personal injury cases, the Board has not adopted a mediation requirement as a condition precedent to setting a final hearing date. Other than the statute permitting the Board itself to

mediate disputes, the General Assembly has not imposed any additional authority regarding mediation, nor has the Board itself adopted rules regarding mediation. For example, there is no requirement that a person serving as a mediator (other than a member of the Board's staff) be certified by ICLEF or be a Registered Civil Mediator. There is no explicit requirement even that a person serving as a mediator be admitted to practice law in Indiana or before the Board.

So, while lawyers and even mediators might *presume* their work is guided by the Indiana Rules of Alternative Dispute Resolution (the "ADR Rules"), that may not be the case. Indeed, the ADR Rules are promulgated by the judicial branch, and by their own terms, are applicable to Indiana *courts* – not to administrative agencies. ADR Rule 1.4 provides

> Rule 1.4. Application of Alternative Dispute Resolution. These rules shall apply in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal, and Probate Courts in the state.

Likewise, the Indiana Administrative Orders and Procedures Act (the "AOPA") contains an entire chapter applicable to Mediation (*See* Ind. Code § 4-21.5-3.5-1 to Ind. Code § 4-21.5-3.5-27). The AOPA itself specifically exempts the Worker's Compensation Board from its coverage. Ind. Code § 4-21.5-2-4(a)(6). But, the AOPA also provides that an agency that is exempt "may adopt rules consistent with this chapter for the use of mediation to resolve proceedings." Ind. Code § 4-21.5-3.5-1(b).

If applicable to administrative disputes, either the civil ADR Rules or the provisions of the AOPA would provide both obligations and protection to parties and mediators, (i.e. confidentiality, immunity of the mediator, etc.) there is no clear guidance for mediation in worker's compensation cases. For example, the ADR Rule 1.5 affords immunity to mediators in civil injury disputes:

> Rule 1.5. Immunity for Persons Acting Under This Rule. A registered or court approved mediator … shall … have immunity in the same manner and to the same extent as a judge in the State of Indiana.

The AOPA provides similar statutory immunity to mediators. Ind. Code § 4-21.5-3.5-4.

Indiana ADR Rule 2 goes on to govern the mediation of civil cases. ADR Rule 2 addresses the qualifications of a mediator (*See* ADR Rule 2.5), Mediation Procedure, including attendance of representatives with authority and mediation reports to the tribunal (*See* ADR Rule 2.7), Sanctions for failure to comply with the Rules, (*See* ADR Rule 2.10), and Confidentiality and Admissibility of statements made during mediation sessions (*See* ADR Rule 2.11). Arguably, unless the parties to a worker's compensation agreement so agree, none of these obligations and protections apply in the mediation of worker's compensation disputes.

C. How Should Lawyers and Mediators Keep the Board Advised?

Under the Act, the Board has no authority to order mediation. Instead, it simply has a statutory mandate to hold an administrative hearing and issue a written order. Where the parties have a dispute under the Act, they may apply to the Board for a determination. Ind. Code § 22-3-4-5(a). At that point, the Act provides that the Board "shall set the date of hearing, which shall be early as practicable …. All disputes arising under [the Act], if not settled by the agreement of the parties interested therein, with the approval of the board, shall be determined by the board." Ind. Code § 22-3-4-5(b).

These days, worker's compensation disputes are generally complicated not only by the facts and legal issues arising under the Act, but by any number of collateral issues (medical bills, provider fee claims, group health and ERISA liens, public liens, child support issues, group disability payments, etc. etc.) Given such headaches, a hearing before the Board may truly be the last thing either party to a worker's compensation case really wants.

At the same time, the Board has a statutory mandate to resolve those issues within its jurisdiction, and the Board members are accountable to the administrative branch to keep their dockets moving towards resolution within reasonable time frames. In civil cases, mediation is generally mandated, deadlines for completion of mediation are established, and the mediators themselves are *required* to notify the court in writing of their selection. Mediators are also required to report to the court regarding the result of mediation. Absent any Board rules on the subject, and absent applicability of the ADR Rules themselves, none of these steps typically occur in worker's compensation cases.

Thus, in cases in which mediation may be desirable, it is humbly suggested plans be made early in the litigation process. Board members may not be amenable to granting continuances in cases that have been pending for periods approaching or exceeding three (3) years. Furthermore, an announcement to the Board that a matter should be continued because the parties "are planning to mediate" may not be sufficient where the parties have not formally agreed to mediation or have not yet agreed to the selection of a mediator.

NOTE: Under the Indiana Rules of Professional Conduct, a lawyer shall act with reasonable diligence and promptness in representing a client. Ind. Rule of Prof. Conduct 1.4. It stands to reason that expressing a sudden desire to mediate a dispute should not be employed as a means by which to continue a worker's compensation hearing. Furthermore, Rule 3.2 provides that a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client. Comment to Rule 3.2 further explains that "Dilatory practices bring the administration of justice into disrepute."

D. ADR Rule 2, Mediation Procedure in General, and the Role of the Mediator

The ADR Rules spell out the bare-bones outlines of mediation procedure in a way designed to facilitate resolutions and to protect the parties, mediators and lawyers involved in the process. ADR Rule 2 also touches on a number of professional and ethical obligations

owed by mediators. For example, ADR Rule 2.7 addresses the following guidelines that warrant consideration in the context of worker's compensation matters:

Attendance. First, attendance at mediation, or lack of attendance by interested persons, frequently hinders the mediation process, and may give rise to complaints that the procedure is unfair or is being abused to delay progress in litigation. Under the ADR Rules, the mediator *shall* advise the parties of all persons whose presence at mediation might facilitate settlement. ADR Rule 2.7(A)(1). At the discretion of the mediator, non-parties (who may be helpful, and at times may not) *may* be present. ADR Rule 2.7(B)(1). However, "all parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals *shall* be present at each mediation conference to facilitate settlement of a dispute unless excused by the court." ADR Rule 2.7(B)(2).

Role of the Mediator. Second, the ADR Rules, as well as the Indiana Rules of Professional Conduct, address the professional role and conduct of the mediator. In so doing, the Rules attempt to preserve the integrity of the legal process. In mediations governed by the ADR Rules, mediators are to refrain from giving advice, opining on ultimate outcomes, or advising persons to accept a given offer of settlement. For example, the Rules provide that a mediator *shall* inform the parties that the mediator:

(a) is not providing legal advice,

(b) does not represent either party,

(c) cannot determine how the court would apply the law or rule in the parties' case, or what the outcome of the case would be if the dispute were to go before the court, and

(d) not advise any party what that party should do in the specific case, nor whether a party should accept an offer.

ADR Rule 2.7(A). In addition, note that the Indiana Rules of Professional Conduct require a lawyer serving as a mediator to disclose to "unrepresented parties" that the lawyer does not represent them, and to explain the distinction between the lawyer's role as a neutral versus that of an advocate. *See* Indiana Rule of Professional Conduct 2.4(b).

Termination and Declination of Mediation. Third, the ADR Rules provide, *inter alia*, that a mediator *shall* terminate or decline mediation whenever the mediator believes the following:

(a) the mediation process would harm or prejudice one of the parties,

(b) the ability *or willingness* of any party to participate in mediation is so lacking that a reasonable agreement is unlikely, and

(c) there is bias or conflict of interest on the part of the mediator.

Confidentiality of the Mediation Process. Fourth, the ADR Rules specifically confirm that mediation sessions are *confidential* and limit the admissibility of discussions held during mediation. While practitioners may assume that the mediation process is confidential, in the absence of applicable rules, mediators and worker's compensation practitioners may be well-advised to incorporate the ADR Rules into retainer agreements prior to any mediation session. With regard to confidentiality, the ADR Rules provide as follows:

> (1) Mediation sessions shall be confidential and closed to all persons other than the parties of record, their legal representatives, and persons invited or permitted *by the mediator*.
>
> (2) The confidentiality of mediation may not be waived.
>
> (3) *A mediator shall not be subject to process* requiring the disclosure of any matter occurring during the mediation except in a separate matter as required by law.
>
> (4) This Rule shall not prohibit the disclosure of information authorized or required by law.

See ADR Rule 2.11(A). With regard to admissibility of discussions held during mediation sessions, the Rule provides:

> (1) Mediation shall be regarded as settlement negotiations governed by Indiana Evidence Rule 408.
>
> (2) Evidence discoverable outside of mediation shall not be excluded merely because it was discussed or presented in the course of mediation.

ADR Rule 2.11(B).

E. Are Mediation Agreements Enforceable in Worker's Compensation Cases?

In general, a legally-enforceable contract may come into existence as soon as two parties shake hands on a deal. In others, the contract becomes enforceable when the agreement is summed up in writing and signed by all those who wish to be bound. In the context of worker's compensation cases, however, a mediation agreement is only half the story. Absent a statute or rule permitting the Board to order mediation and enforce written mediation agreements, there is no ironclad guarantee that a mediation agreement will "stick." Finally, the ADR Rules provide that a written mediation agreement itself "shall be filed with the court only by agreement of the parties." See ADR Rule 2.7(E)(2). But, in the event of breach of a

mediation agreement, a court of civil jurisdiction may, upon motion and hearing, impose sanctions, "including entry of judgment on the agreement." ADR Rule 2.7(E)(3).

In contrast to civil proceedings, the Board has no mediation rule, and it may be argued that the ADR Rules themselves have no application in worker's compensation procedure. Instead, the statutory mandate of the Board is limited to approving certain agreements to compensation (*See* Ind. Code § 22-3-4-4), holding hearings and issuing written decisions on disputes (*See* Ind. Code § 22-3-4-5) and considering compromise agreements for approval (See Ind. Code § 22-3-2-15). Only after the issuance of a board approval or order does the adjudication become enforceable. *See* Ind. Code § 22-3-4-9.

With regard to agreements for the payment of compensation, Ind. Code § 22-3-4-4 provides

> If … the employer and the injured employee or his dependents reach an agreement in regard to compensation under [the Act], a memorandum of the agreement in the form prescribed by the worker's compensation board shall be filed with the board; *otherwise such agreement shall be voidable by the employee or his dependent*. *If approved by the board, thereupon the memorandum shall for all purposes be enforceable by court decree as specified in section 9 of this chapter*. *Such agreement shall be approved by said board only when the terms conform to the provisions* of [the Act].

[emphasis added]. And, while civil courts hearing personal injury cases might have the authority to enforce a written mediation agreement, the Act places the Board in the position more akin to that of a probate court, requiring it to review any agreement for compliance with the Act. Ind. Code 22-3-2-15(a) provides

> (a) No contract, agreement (written or implied), rule, or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by [the Act]. However, nothing in [the Act] shall be construed as preventing the parties to claims under [the Act] from entering into voluntary agreements in settlement thereof, *but no agreement by an employee or his dependents to waive his rights under [the Act] shall be valid nor shall any agreement of settlement or compromise of any dispute or claim for compensation under [the Act] be valid until approved by a member of the board*, nor shall a member of the worker's compensation board approve any settlement which is not in accordance with the rights of the parties as given in [the Act]….

So, while the issue of enforceability is perhaps open to debate, the Board may have no clear authority permitting hearing members to give effect to the terms of an agreement to pay compensation or to enter into a compromise settlement. As such, a writing between the parties outside the confines of the Board's statutory authority to approve compensation agreements or approve Section 15 agreements, no matter how detailed or desirable, may be unenforceable.

F. ADR Rule 7 – Conduct and Discipline for Persons Conducting ADR

In addition to outlining the qualifications for mediators and the procedural obligations and protections for Mediation outlined in ADR Rule 2, the ADR Rules also contain an entire section – ADR Rule 7 devoted to *Conduct and Discipline for Persons Conduction ADR*. Note that the AOPA, as discussed above, addresses some professional and ethical concerns, but does not contain a provision equivalent to ADR Rule 7. Again, absent a specific adoption of the ADR Rules in the context of administrative disputes, the question arises: What obligations and protections govern the conduct of mediators? Consider the following provisions of ADR Rule 7:

ADR Rule 7.1. *Accountability and Discipline.* A person who serves with leave of court or registers with the Commission pursuant to ADR Rule 2.3 consents to the jurisdiction of the Indiana Supreme Court Disciplinary Commission in the enforcement of these standards ….

ADR Rule 7.2. *Competence.* A neutral shall decline appointment, request technical assistance, or withdraw from a dispute beyond the neutral's competence.

ADR Rule 7.3. *Disclosure and Other Communications:*

- A neutral shall advise that the neutral does not represent any of the parties. (*See* ADR Rule 7.3(A)(5).

- A neutral shall disclose any past, present or known future professional, business, or personal relationship with any party, insurer, or attorney involved in the process, and any other circumstances bearing on the perception of the neutral's impartiality. (*See* ADR Rule 7.3(A)(6).

- A neutral shall advise the parties that any agreement signed constitutes evidence that may be introduced in litigation and disclose the extent and limitations of the process. (*See* ADR Rule 7.3(A)(8 – 9).

- A neutral may not misrepresent any material fact or circumstance, *nor promise a specific result* or imply partiality. *See* ADR Rule 7.3(B).

- A neutral shall preserve the confidentiality of all proceedings, except where otherwise provided. *See* ADR Rule 7.3(C).

ADR Rule 7.4(D). A neutral shall avoid the appearance of impropriety.

ADR Rule 7.5(A – C). A neutral shall not coerce any party, shall withdraw whenever a proposed resolution is "unconscionable", and shall not make any substantive decision for any party.

G. Mediation – Ethical and Professional Issues for Discussion

1. Applicable Rules and Standards

- What rules, if any, apply to mediators in worker's compensation cases? Does the worker's compensation bar even need any rules regarding Mediation?

- Are mediators in worker's compensation cases "subject to discipline" under ADR Rule 7? Does it matter if the mediator "registers with the Commission" as a mediator?

- Do mediators in worker's compensation matters enjoy the "immunity" promised to civil mediators by the ADR Rules and other statutes? Why or why not? Does it matter if the mediator is a non-lawyer, a lawyer, or a Registered Mediator? How might a judicial authority resolve any potential claims against a mediator?

- How can mediators protect themselves? What provisions belong in a mediator's engagement agreement? Should a mediator ever engage in a matter without a written engagement agreement?

- What rules *should* apply to mediation in worker's compensation cases? May the parties agree in writing to abide by all, or some of, the Rules contained in the ADR Rules or the AOPA? Will a written agreement to abide by the Rules be given at least partial effect if something goes wrong?

2. Mediation and the Worker's Compensation Board

- May a Member of the Board suggest or encourage mediation? May a lawyer advise a reluctant client that the Board is ordering mediation, even if the Board has not done so?

- How should the Board treat motions to order mediation?

- Might oral agreements to settle enforceable before the Board under any circumstances? Are written agreements to settle, including mediation agreements, enforceable before the Board? If so, under what circumstances?

- What representations regarding the potential enforceability/unenforceability of mediated agreements in worker's compensation cases may be made by a lawyer to a client? May a lawyer advise a Plaintiff or Defendant that abiding by a

signed mediation agreement is optional? Is a lawyer obligated to advise a client that a signed mediation agreement is contingent on Board approval?

- What representations regarding the potential enforceability/unenforceability of mediated agreements be made by mediators to lawyers, unrepresented individuals, and other participants at mediation?

- May a party or lawyer disclose – or may the Board hear – evidence regarding the outlines of a settlement purportedly reached at mediation where the Agreement has not been reduced to a signed agreement, stipulation or Section 15 Compromise?

3. Mediator Conduct During and After the Mediation Session

- What can worker's compensation mediators do to preserve the integrity of the worker's compensation process at large?

- May, or should, a mediator in a worker's compensation case opine as to the potential outcome of the case if tried before the Board? How might a mediator's comment on the potential outcome be ethically different than the same representation made to a client by a lawyer?

- May a mediator opine as to the proclivities of an individual Board member, or the chances of a given outcome before the Full Worker's Compensation Board?

- May a mediator propose solutions other than an exchange of consideration for a Section 15 Agreement, or provide documents, pleadings or direction to mediation participants?

- May a mediator refute statements made by a lawyer or a party to the Worker's Compensation Board, i.e. "We mediated this case and the mediator said …." Must the mediator maintain silence even if representation made by the lawyer or party to the Board is patently false?

- Under ADR Rule 7.5, how far may a mediator go in "pounding on" a party to move towards a resolution? At what point does the mediation process become coercive so as to require termination of the session?

- What if a party says "I'm too stressed to go on"? Does that mean stop right there, or it is it more a question of seeing if the party can be "rehabilitated" to competence? People say many things at mediation that they do not mean

literally, and not everyone communicates in the same way. It may be that someone feels coerced by their own lawyer, but they are quiet and submissive. Is the mediator participating in the "coercion" by continuing to mediate? Is it coercion or an uncomfortable reality of the process?

- What statements may mediators make to non-parties, such as lienholders? How far may the mediator go in making representations to non-parties? Consider the applicability, if any, of Rule 4.1 regarding Truthfulness in Statements to Others:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person.

II. ETHICAL ISSUES IN WORKER'S COMPENSATION LITIGATION

A. Future Medical Treatment, Lump Sum Settlements and Attorney Fees

- What professional and/or ethical concerns arise with respect to advising clients to pursue or settle claims for future medical treatment?

- What professional and ethical constraints exist with respect to awards of future medical expenses?

- Under what circumstances may a lawyer legally and ethically collect a fee on future medical lump sums or on ongoing medical treatment? *See* Ind. Code § 22-3-1-4 regarding calculation of attorney fees, but *see also* Indiana Rule of Professional Conduct 1.5:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal ….

B. Submission of Stipulated Evidence to the Board – Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) *make a false statement of fact* or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

[Comment 2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process ....

C. The Board's Settlement Checklist and Contents of Settlement Agreements

- May the parties stipulate to conclusions of law?

- Under what circumstances may "hold harmless/indemnification" provisions be included in Section 15 Agreements? Are they necessary? Are they enforceable? Do they mislead employees? Do they provide Defendants with a false sense of security? Should Plaintiff's attorneys sign off on "hold harmless/indemnification" agreements?

- Should the Board approve settlement agreements that contain such clauses?

- To what extent may the parties include issues or disputes in a Settlement Agreement over which the Board would not have statutory authority to rule if a Hearing were held?

- To what extent, if any, may a settlement purport to bind a third party, except via legal implication?

- To what extent, if any, should general language regarding release of "all claims, known or unknown" be used in settlement agreements?

- In what cases may payments to minor children ethically be made in a lump sum, or paid out of an annuity? *See* Indiana Rule of Professional Conduct 1.14 – Client With Diminished Capacity.

D. Ethics of Discovery of Medical Records and Admissibility at Hearing

It is well-established in both Indiana injury law, and in worker's compensation matters, that a person putting his or her physical or mental condition at issue may be subject to extensive discovery of past medical records. For injuries that may be superimposed on pre-existing weaknesses or conditions, extensive discovery of past and current medical records may be expected. And, even for compensable injuries, where there is a claim for ongoing disability or impairment, discovery of ongoing medical records or other potentially-disabling accidents or conditions may likewise be expected. In some cases, however, a compensable injury is discrete, and it is suggested that extensive written and medical discovery may become abusive if it leads seems tailored to obstruct, delay, intimidate, or place a chilling effect on an employee's ability to bring a worker's compensation claim.

The Indiana Worker's Compensation Board has adopted Rules 26 – 37 of the Indiana Rules of Trial Procedure with respect to discovery. In essence, this means parties enjoy wide discretion to pursue discovery into any matter that is "reasonably calculated to lead to the discovery of admissible evidence." *See* Ind. Tr. R. 26(B)(1). In many cases, especially in those involving *pro se* employees, the Board sees Defendants file Motions to Compel medical discovery. Where there may be discoverable information, the Board may be inclined to permit or compel discovery.

At the same time, where discovery becomes burdensome, there are provisions of the Rules at the disposal of Plaintiff's counsel. These tools include typical discovery objections related to the issue of relevance, i.e. asserting that the discovery propounded is *not* reasonably calculated to lead to the discovery of admissible evidence and is instead unduly burdensome. There are cases in which highly personal, embarrassing or ruinous information may be completely unrelated to the issues in a worker's compensation case, and in such cases, Plaintiff's counsel may have the ethical obligation to oppose such discovery via objection or Motion to Quash.

Finally, while the scope of discovery is necessarily broad, the fact that medical records are discovered does *not* mean they are admissible at hearing or should automatically be offered into evidence before the Board. It is suggested that while Defense and Plaintiff effectively represent their clients, they also endeavor to tailor discovery, or object to discovery, based on the facts of the case at hand. It is further suggested that in cases in which counsel can agree that certain medical or other records have no probative value in a worker's compensation case that they be removed from the stack of medical charts otherwise made part of the Board's evidentiary record.

E. Death Cases – Competently Protecting Dependents AND Defendants

Recently, a handful of cases have arisen in which parties have run into complications when attempting to pay out death benefits, especially in cases in which minor children have lost a parent. These matters have included competing claims for benefits among spouses and guardians and the identification of additional children after the occurrence of a fatal accident. In addition, in all compensable cases involving fatalities and minor children, counsel on both sides have an obligation to ensure that benefits are paid according to the provisions of the Act, and a lump sum settlement, even with the agreement of the employer, may not be approved by the Board.

In adjusting a fatal worker's compensation claim, an employer and its counsel should work to identify every single dependent as defined by the Indiana Worker's Compensation Act. If the employer fails to do so and settles a claim with a group of children, only to find out the decedent employee had additional children, it may be exposed to additional liability – and the applicable limitations period may remain open for years when minor children are involved. Indeed, Ind. Code § 22-3-3-30 provides "No limitation of time provided in [the Act] shall run against any person who is mentally incompetent or a minor so long as he has no guardian or trustee." Thus, for defense counsel, every claim involving a work-related fatality involves a careful review of the Indiana Code, followed by a search for all statutory dependents, especially children. Consider, for example, the language of Ind. Code § 22-3-3-19 with respect to children:

> (a) The following persons are conclusively presumed to be wholly dependent for support upon a deceased employee and shall constitute the class known as presumptive dependents in section 18 of this chapter:
>
> ….
>
> (3) An unmarried child under the age of twenty-one (21) years upon the parent with whom the child is living at the time of the death of such parent.
>
> (4) An unmarried child under twenty-one (21) years upon the parent with whom the child may not be living at the time of the death of such

parent, but upon whom, at such time, the laws of the state impose the obligation to support such child.

(5) A child over the age of twenty-one (21) years who has never been married and who is either physically or mentally incapacitated from earning the child's own support, upon a parent upon whom the laws of the state impose the obligation of the support of such unmarried child.

(6) A child over the age of twenty-one (21) years who has never been married and who at the time of the death of the parent is keeping house for and living with such parent and is not otherwise gainfully employed.

(b) As used in this section, *the term "child" includes stepchildren, legally adopted children, posthumous children, and acknowledged children born out of wedlock. The term "parent" includes stepparents and parents by adoption*.

(c) The dependency of a child under subsections (a)(3) and (a)(4) shall terminate when the child attains the age of twenty-one (21).

(d) The dependency of any person as a presumptive dependent shall terminate upon the marriage of such dependent subsequent to the death of the employee, and such dependency shall not be reinstated by divorce. However, for deaths from injuries occurring on and after July 1, 1977, a surviving spouse who is a presumptive dependent and who is the only surviving dependent of the deceased employee is entitled to receive, upon remarriage before the expiration of the maximum statutory compensation period, a lump sum settlement equal to the smaller of one hundred four (104) weeks of compensation or the compensation for the remainder of the maximum statutory compensation period.

(e) The dependency of any child under subsection (a)(6) shall be terminated at such time as such dependent becomes gainfully employed or marries.

Cases involving multiple children may also provide a professional and ethical headache for Plaintiff's counsel. Counsel may be contacted and immediately retained by a decedent's spouse, but there may be competing claims among other relatives with respect to offspring from other marriages and relationships.

In such cases, counsel must consider the professional obligations owed to the parent and that parent's children, but also to other competing relatives and children, not to mention the duty of candor owed to the Board regarding the existence of any competing claims. And, it goes without saying – Rule 1.1 of the Indiana Rules of Professional Conduct requires that a lawyer handling disputed or competing claims for death benefits under the act be competent. As the Rule provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

F. Dealing with Unrepresented Plaintiffs and Defendants (or worse yet, Employees who are also the Employer)

Rule 4.3. Dealing with Unrepresented Persons

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person ….

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

In the case of persons who are *both* the Employee and the Insured Employer, representation can be truly tricky. Ind. Code § 22-3-6-1(a) defines the employer as a person

or entity that uses "the services of another for pay." The same section goes on to provide "If the employer is insured, the term includes the employer's insurer, so far as applicable." While Indiana worker's compensation insurance policies would presumably entitle insurance carriers to defend the policy language in such cases, these matters frequently raise interesting issues of factual proof for hearing. More importantly, they raise questions as to who between the employer/employee and the insurer gets to authorize or direct medical treatment, and as to who is required to fulfill the other "affirmative obligations" imposed by the Act.

III. ETHICS OF APPEARANCES AND MOTIONS TO WITHDRAW

A. What Standards Apply to Appearances and Withdrawals?

Under the Indiana Rules of Professional Conduct, there are at least three (3) ways to terminate a representation before a legal matter is included. These include a) discharge of the attorney by the client, b) mandatory withdrawal by the lawyer, and c) optional withdrawal by the lawyer. In practice before some civil courts, local rules sometimes provide that appearances of counsel must be entered "without reservation" or "without limitation." In other words, once a lawyer formally signs on to a representation, the lawyer is "all in" and should be aware that it may not be easy to withdraw if the case turns out to be a lemon. First, courts may not be inclined to grant a motion to withdraw, and second, the Rules of Professional Conduct limit the circumstances and manner in which a lawyer may withdraw.

Other than the considerations imposed by Rules of Professional Conduct, the Worker's Compensation Act does not specifically address standards for ruling on Motions to Withdraw, although lawyers typically rely on guidance both from applicable professional rules and the practices employed before civil courts. In civil cases, withdrawal of representation is governed by the Trial Rule 3.1(H). That Rule provides, in relevant part, as follows:

> (H) Withdrawal of Representation. An attorney representing a party may file a motion to withdraw representation of the party upon a showing that the attorney has sent written notice of intent to withdraw to the party at least ten (10) days before filing a motion to withdraw representation, and either:
>
> > (1) the terms and conditions of the attorney's agreement with the party regarding the scope of the representation have been satisfied, or
> >
> > (2) withdrawal is required by Professional Conduct Rule 1.16(a), or is otherwise permitted by Professional Conduct Rule 1.16(b).
>
> An attorney filing a motion to withdraw from representation *shall certify the last known address and telephone number of the party*, subject to the confidentiality provisions of Sections (A)(8) and (D) above, *and shall attach to the motion a copy of the notice of intent to withdraw that was sent to the party*.
>
> A motion for withdrawal of representation *shall be granted by the court unless the court specifically finds that withdrawal is not reasonable or consistent with the efficient administration of justice*.

In addition to statewide Rules, withdrawals may be further governed by Local Rules. For example, the Marion County Local Rules provide as follows:

LR49-TR3.1-201. Withdrawal of Appearance

All withdrawals of appearances shall be in writing and by leave of Court.

Permission to withdraw shall be given *only after the withdrawing attorney has given his client ten days written notice of his intention to withdraw*, has filed a copy of such with the Court; and has provided the Court with the party's last known address; or upon a simultaneous entering of appearance by new counsel for said client.

The letter of withdrawal shall explain to the client that *failure to secure new counsel may result in dismissal of the client's case or a default judgment may be entered against him*, whichever is appropriate, and *other pertinent information such as trial setting date or any other hearing date*.

The Court will not grant a request for withdrawal of appearance unless the same has been filed with the Court at least ten days prior to trial date, except for good cause shown.

Finally, all withdrawals, presumably including those by lawyers practicing before the Worker's Compensation Board, are governed the ethical and professional standards set forth at Rule 1.16 of the Indiana Rules of Professional Conduct, which provides as follows:

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished *without material adverse effect on the interests of the client*;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) *the client fails substantially to fulfill an obligation to the lawyer* regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) *the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client*; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

The Comment to Rule 1.16 provides additional explanation:

[1] *A lawyer should not accept representation in a matter unless* it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A *lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law*. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] *When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority*. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. *The lawyer's statement that professional*

considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] *A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests*. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

B. Ethical and Professional Issues for Discussion

- What commitment does an appearance before the Board entail? Should appearances by made for the duration of a dispute, with the exception of instances in which withdrawal is mandated by discharge or by the Rules of Professional Conduct?

- May a lawyer appear on behalf of numerous claimants, evaluate the cases, and then withdraw from those matters in which no substantial recovery is foreseen?

- What circumstances should be present before a lawyer files a Motion to Withdraw Appearance?

- Should the Board require evidence of service of a "Notice of Intent to Withdraw" before considering a Motion to Withdraw? Is evidence of service by regular U.S. Mail acceptable? By Certified Mail? By E-mail? Text message?

- What basic information should Notices of Intent to Withdraw and Motions to Withdraw contain?

- What type of information should Notices of Intent to Withdraw and Motions to Withdraw *not* contain?

- Under what circumstances may/should a Board Member deny a Motion to Withdraw?

- What limits, if any, might prevent a lawyer from pursuing payment of fees or costs after the attorney withdraws? How should the Board deal with attorney fee liens? Consider Indiana Rule of Professional Conduct 1.5; also Ind. Code § 22-3-1-4 (schedule of attorney fees); Ind. Code § 22-3-4-12 (Board's authority to approve professional fees).

Section Three

Third Party Issues

Kevin L. Likes
Likes Law Office LLC
Auburn, Indiana

Section Three

Third Party Issues…….. Kevin L. Likes

Introduction:

There are times when an injured employee presents a possible third-party claim for additional compensation. An employee may have other claims such as social security/disability, American Disability Act claims and Title 7 claims but those are not covered specifically under the thirty-party claim statute. The beginning analysis arises from a review of Indiana Code Section 22-3-2-13.

Indiana Code Title 22. Labor and Safety § 22-3-2-13

Sec. 13 . (a) Whenever an injury or death, for which compensation is payable under chapters 2 through 6 of this article shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or the injured employee's dependents, in case of death, may commence legal proceedings against the other person to recover damages notwithstanding the employer's or the employer's compensation insurance carrier's payment of or liability to pay compensation under chapters 2 through 6 of this article. In that case, however, if the action against the other person is brought by the injured employee or the injured employee's dependents and judgment is obtained and paid, and accepted or settlement is made with the other person, either with or without suit, then from the amount received by the employee or dependents there shall be paid to the employer or the employer's compensation insurance carrier, subject to its paying its pro-rata share of the reasonable and necessary costs and expenses of asserting the third party claim, the amount of compensation paid to the employee or dependents, plus the services and products and burial expenses paid by the employer or the employer's compensation insurance carrier and the liability of

the employer or the employer's compensation insurance carrier to pay further compensation or other expenses shall thereupon terminate, whether or not one (1) or all of the dependents are entitled to share in the proceeds of the settlement or recovery and whether or not one (1) or all of the dependents could have maintained the action or claim for wrongful death.

(b) In the event the injured employee or the employee's dependents, not having received compensation or services and products or death benefits from the employer or the employer's compensation insurance carrier, shall procure a judgment against the other party for injury or death, which judgment is paid, or if settlement is made with the other person either with or without suit, then the employer or the employer's compensation insurance carrier shall have no liability for payment of compensation or for payment of services and products or death benefits whatsoever, whether or not one (1) or all of the dependents are entitled to share in the proceeds of settlement or recovery and whether or not one (1) or all of the dependents could have maintained the action or claim for wrongful death.

(c) In the event any injured employee, or in the event of the employee's death, the employee's dependents, shall procure a final judgment against the other person other than by agreement, and the judgment is for a lesser sum than the amount for which the employer or the employer's compensation insurance carrier is liable for compensation and for services and products, as of the date the judgment becomes final, then the employee, or in the event of the employee's death, the employee's dependents, shall have the option of either collecting the judgment and repaying the employer or the employer's compensation insurance carrier for compensation previously drawn, if any,

and repaying the employer or the employer's compensation insurance carrier for services and products previously paid, if any, and of repaying the employer or the employer's compensation insurance carrier the burial benefits paid, if any, or of assigning all rights under the judgment to the employer or the employer's compensation insurance carrier and thereafter receiving all compensation and services and products, to which the employee or in the event of the employee's death, which the employee's dependents would be entitled if there had been no action brought against the other party.

(d) If the injured employee or the employee's dependents shall agree to receive compensation from the employer or the employer's compensation insurance carrier or to accept from the employer or the employer's compensation insurance carrier, by loan or otherwise, any payment on account of the compensation, or institute proceedings to recover the same, the employer or the employer's compensation insurance carrier shall have a lien upon any settlement award, judgment or fund out of which the employee might be compensated from the third party.

(e) The employee, or in the event of the employee's death, the employee's dependents, shall institute legal proceedings against the other person for damages, within two (2) years after the cause of action accrues. If, after the proceeding is commenced, it is dismissed, the employer or the employer's compensation insurance carrier, having paid compensation or having become liable therefor, may collect in their own name, or in the name of the injured employee, or, in case of death, in the name of the employee's dependents, from the other person in whom legal liability for damages exists, the compensation paid or payable to the injured employee, or the employee's dependents,

plus services and products, and burial expenses paid by the employer or the employer's compensation insurance carrier or for which they have become liable. The employer or the employer's compensation insurance carrier may commence an action at law for collection against the other person in whom legal liability for damages exists, not later than one (1) year from the date the action so commenced has been dismissed, notwithstanding the provisions of any statute of limitations to the contrary.

(f) If the employee, or, in the event of the employee's death, the employee's dependents, shall fail to institute legal proceedings against the other person for damages within two (2) years after the cause of action accrues, the employer or the employer's compensation insurance carrier, having paid compensation, or having been liable therefor, may collect in their own name or in the name of the injured employee, or in the case of the employee's death, in the name of the employee's dependents, from the other person in whom legal liability for damage exists, the compensation paid or payable to the injured employee, or to the employee's dependents, plus the services and products, and burial expenses, paid by them, or for which they have become liable, and the employer or the employer's compensation insurance carrier may commence an action at law for collection against the other person in whom legal liability exists, at any time within one (1) year from the date of the expiration of the two (2) years when the action accrued to the injured employee, or, in the event of the employee's death, to the employee's dependents, notwithstanding the provisions of any statute of limitations to the contrary.

(g) In actions brought by the employee or the employee's dependents, the employee or the employee's dependents shall, within thirty (30) days after the action is filed, notify the employer or the employer's compensation insurance carrier by personal service or

registered mail, of the action and the name of the court in which such suit is brought, filing proof thereof in the action.

(h) The employer or the employer's compensation insurance carrier shall pay its pro rata share of all costs and reasonably necessary expenses in connection with asserting the third party claim, action or suit, including but not limited to cost of depositions and witness fees, and to the attorney at law selected by the employee or the employee's dependents, a fee of twenty-five percent (25%), if collected without suit, of the amount of benefits actually repaid after the expenses and costs in connection with the third party claim have been deducted therefrom, and a fee of thirty-three and one-third percent (33 1/3 %), if collected with suit, of the amount of benefits actually repaid after deduction of costs and reasonably necessary expenses in connection with the third party claim action or suit. The employer may, within ninety (90) days after receipt of notice of suit from the employee or the employee's dependents, join in the action upon the employer's motion so that all orders of court after hearing and judgment shall be made for the employer's protection. An employer or the employer's compensation insurance carrier may waive its right to reimbursement under this section and, as a result of the waiver, not have to pay the pro-rata share of costs and expenses.

(i) No release or settlement of claim for damages by reason of injury or death, and no satisfaction of judgment in the proceedings, shall be valid without the written consent of both employer or the employer's compensation insurance carrier and employee or the employee's dependents, except in the case of the employer or the employer's compensation insurance carrier, consent shall not be required where the employer or

the employer's compensation insurance carrier has been fully indemnified or protected by court order.

Who is a third-party?

Section (a) provides some guidance indicating that there must be liability created in another "person" other than the employer and that entity cannot be in the same employee. This is also read in conjunction with the exclusivity provision of IC 22-3-2-6, that provides that workers compensation is the exclusive remedy to employees covered under I.C. 22-3-2, including the employee's personal representative, next of kin, and dependents.

In the same employee:

In the simplest sense in the same employee would have an injury arising from a negligent act by a fellow employee. Those claims are clearly barred by the exclusivity provision and section (a) of 22-3-2-13, that bar claims against the employer and fellow employees. More difficulty issues come from injuries caused by an employee of a subsidiary or parent company and dual employment cases.

In dual employment situations, they generally arise from use of temporary staffing companies. IC 23-3-6-1 states that both the lessor and lessee of employees are considered joint employers of the employees. In 2018 the Court of Appeals discussed the dual employee situation involving a staffing agency. *Walls v. Markley Enterprises*, 116 N.E.3d 479 (Ind. App. 2018)

At the time of the injury, Ms. Walls was working for a temporary staffing agency when she suffered the injury at Markley Enterprises, Inc. The staffing agency was Bridge Staffing Inc. The injury occurred in Elkhart County. Ms. Walls got her hand caught in a press and suffered some injuries to her hand and the loss of a finger, Ms. Walls claimed that she could not be a dual employee because she was not a leased employee when you look at the agreement existing between the staffing agency and Markley. She argued that staffing company being an independent contractor to Markley had only assigned her to work at this various location.

The Court went on to note that the term "leased" is not defined in the Work Comp Act and such the Court went out to look for other definitions of leased. They even went so far as to look at Black's Law Dictionary to define the term "leased". The Court went on to find that the terms really are illusionary and simply said that the word "assigned" in any type of staffing contract was nothing more than an acknowledgement that is where the employee will be placed to work. It does nothing to transfer the actual arrangement that exists between the staffing agency and the employer. Consequently, she was barred because of the exclusivity provision and not having a right under worker's compensation act to bring an independent cause of action. In a footnote number 5, the Court specifically went on that it would not use the 7-factor test used to determine independent contractor status. *Hale v. Kemp*, 579 N.E.2nd 630 (Ind.1991).

It seems clear that temporary employees through a staffing agency are going to be in the same employee as the company where they are assigned to work.

And yet we have *Wishard Memorial Hospital v. Kerr*, 846 N.E.2d 1083, (Ind. App. 2006) Here, Kerr was an employee of CareStaff, Inc. a temp. agency suppling skilled

nurses to health care providers such as Wishard Hospital. Kerr ended a shift of work and while leaving Wishard slipped on the floor and fell. She then filed suit against Wishard. Wishard moved to dismiss the suit claiming it was barred by the exclusivity provision of the Act. The court went on the use the seven-factor test to determine whether a dual employment existed rather than looking at the contract. The court went on to do an extensive review of the seven-factor test and discussed the language of the contract between CareStaff and Wishard, which I think is critical because the contract defined the employer as CareStaff. Interesting, this case has been cited 24 times for support of various issues in other cases.

An additional case that discussed this matter is *Hunter Construction Group vs. Garrett* 964 N.E2d 222 (Ind.2012). In these types of cases there are generally two hurdles to climb, the first is whether the claim is barred by exclusivity and if so, does a "duty" exist to protect the injured employee.

The *Hunter* Construction case has been sited 23 times for various propositions. In this case we had an employee of a contractor who was injured in a workplace accident, and he wants to file a claim against the general contractor, for failing to maintain a safe working environment. The accident happened during the construction of Lucas Oil Stadium in Indianapolis. Once getting by any worker's compensation exclusivity claim the court went on discuss the various duty issues. Specifically, there is only two times that you have such a third-party claim against the safety manager and this case says it has to be included in their contract that they're going to assume that duty or they have voluntarily undertaken that duty and have performed it negligently.

That leads to more difficult cases and that deals with cases arising from subsidiary parent company/subcontractor-general contractor claims.

Generally, my experience has been that these cases have arisen at construction sites. An interesting case is *Hall v. Dallman Contractors, LLC. Shook* 994 N.E.2d 1220 (Ind.App. 2013). In *Hall*, you have the issue of who is a subsidiary of a parent company. Hall was an employee of AT&T Ameritech Home Services. She subsequently fell on the sidewalk adjacent to the building where she worked and filed various third-party claims. One against AT&T property management. Obviously, property management moved to dismiss the case indicating that her employer was a subsidiary of property management, and her claim was barred under the act. Potentially that they were joint employers of Hall. The Court went on to examine the complex corporate structure that existed between the property management portion of AT&T and the services portion where Hall worked. Eventually they found that with the designated evidence that the colloquial names for the various did not establish that they were one in the same corporate entity. The parent company only owed a little more than 8% of the other. Of course, the defense argued that they were also joint employers under the act. Here The Court made the analysis of what is and is not a subsidiary since the act does not define "subsidiary." The Court went on to say that just because they were affiliated companies, it does not establish that they are subsidiaries to each other and therefore joint employers. The court focus on the corporate structure.

There is one interesting thing which happens to deal with consortium claims which is a claim that arises in many regular personal injury claims.

You have the spouse filing the consortium claim, claiming that they have lost the love and affection and duties of their injured spouse, and you file to get the additional damages. I think it is clear that consortium claims are derivative claims arising from the injured party's case. There is one case that has been sited or various propositions over 20 times. *Nelson v. Denkins* 598 N.E.2d 558 (Ind.App.1992) The Court specifically found that the exclusivity provision of Section 6 abrogated the spouse's claim against the employer. The claim is completely derivative.

Pitfalls in settling the third-party claim.

The notification to the employer/employer's insurance carrier is set out in the statute. It allows the employer to intervene in the underlying third-party claim but even if the employer does not intervene, the employer is statutorily protected by the lien provision. I find that the interplay comes up primarily when trying to settle the case and especially during mediation. My experience has not been very good with getting any type of pre-mediation agreement from the employer on reducing the lien. I tried to put together formulas, tried to convince them in advance that there are liability issues and get an agreement that they reduced the claim in advance and generally it falls on deaf ears. My assumption is that the carrier really wants to know how much the underlying third-party claim will settle for to consider their reduction. I have in mediation been able to have an agreement that when I resolve the workers compensation claim that the carrier/employer will waive their right to any third-party claim proceeds as part of just the overall agreement in the workers compensation case, which is done frankly to get the case settled.

I would be interested in knowing anyone else's experience in this area and any techniques they might have to get some sort of formal agreement in advance of the mediation. Mediation is the in all be all for the Judges in my area, and every personal injury case is sent to mediation. Most of the time when I get to mediation, the employer clearly has not intervened in the case so now I am trying to schedule an additional party to be present at the mediation and they usually want to participate by phone. Many times, the people participating by phone do not have the necessary authority to make an instantaneous decision and as you know in personal injury mediation cases the benefit of mediation is the ability to get instantaneous resolutions of your case. So, I generally have to look at two things, that is the interplay between the comparative fault statute and the ability to reduce liens and claims under the statute and adjust the formula for how much of the lien needs to be repaid to the workers compensation insurance carrier.

Indiana Code 22-3-2-13 creates a lien in favor of the employer against any judgement or settlement from a third-party to the extent to the amount of the payments that have been made to the employer. Obviously, the purpose of the statute is to make the employer and its carrier whole and to prevent a double recovery from the employer. *Walkup v. Wabash National Corporation*, 702 N.E.2d 713 (Ind.1998). I rarely have a situation where the third-party claim is resolved in a fashion where the recovery is less than the amount that the injured employee is going to receive under the worker's compensation claim generally because of timing, I usually do not get the third-party claim resolved until after the workers compensation case is resolved. I can see it might come up in a catastrophic case but in my experience, I usually have the comp. case done before resolving the third-party claim.

Section Four

Unsettled Areas of Worker's Compensation Law

Brad Varner
May Oberfell Lorber
Mishawaka, Indiana

Section Four

Unsettled Areas of Worker's Compensation Law…….. Brad Varner

UNSETTLED AREAS OF WORKER'S COMPENSATION LAW

I. STATUTE OF LIMITATIONS

A. Historical Perspective

Prior to 1947, the statue on limitations of actions read as follows, in part: "The right to compensation under this act shall be forever barred unless within two (2) years *after the injury*, ... a claim for compensation thereunder shall be filed with the industrial board."

- **Statute of Limitations During Wartime**

- The claim of dependents of employee killed at work that was filed more than five (5) years after the employee's death.

- The Court of Appeals found that the dependents were considered alien enemies until the war [WW1] with their country (the kingdom of the Serbs, Croats, and Slovenes) had been declared at an end by a joint resolution of the United States Congress.

- The dependents commenced their case within the said statutory period because it was filed within 2 years from the time their status as alien enemies had terminated.

- War may suspend the statute of limitations.

Inland Steel Company v. Jelenovic, 150 N.E. 391 (Ind.App. 1926)

- **Injury Date v. Accident Date**

- Employee injured his knee in 1944 but continued working. The injury was not immediately disabling until 1947.

- The statute of limitations law had changed in 1947 indicating that, "The right to compensation under this act shall be forever barred unless within two (2) years after *the occurrence of the accident*, . . . a claim for compensation thereunder shall be filed with industrial board."

- Prior to 1947, the Court of Appeals had consistently held that when the disablement or compensable injury does not occur simultaneously with the

accident producing it, a claim for compensation filed within 2 years after the resulting injury develops or becomes apparent is timely filed.

- Even though the employee filed the application in 1948 more than 2 years after the occurrence of the accident, but within 2 years of the injury, the employee fell under the old statute of limitations, despite the employer's arguments to the contrary.

Railway Express Agency v. Harrington, 88 N.E.2d 175 (Ind.App. 1949)

➢ **Current Limitation For Filing a Claim - I.C. 22-3-3-3 & 22-3-3-27**

- **I.C. 22-3-3-3** reads in pertinent part: *"The statute of limitations for filing a claim, in pertinent part, reads the right to compensation . . . . . shall be forever barred unless within two (2) years after the occurrence of the accident, or if death results therefrom, within two (2) years after such death, a claim for compensation thereunder shall be filed with the worker's compensation board."*

- I.C. 22-3-3-3 must be read in combination with **I.C. 22-3-3-27(a) & (c)**, which reads in pertinent part: (a) *The power and jurisdiction of the worker's compensation board over each case shall be continuing and from time to time it may, upon its own motion or upon the application of either party, on account of a change in conditions, make such modification or change in the award . . . . ."; . . . .* (c) *"The board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after their expiration of two (2) years from the last day for which compensation was paid."*

➢ **Injury Date v. Accident Date II**

- An employee alleged a disability from accident that occurred on January 6, 1959, but which injury did not manifest itself until September 8, 1963.

- The employee filed his application on September 7, 1965.

- The Court of Appeals found that the claim was barred by the statute of limitations because the claim was not filed within 2 years after the occurrence of the accident.

Huffman v. State Sign Co., 251 N.E.2d 489 (Ind.App. 1969)

➢ **Fraud Tolls Statute of Limitations**

- Employee alleged that he had been fraudulently induced into forgoing the filing of an application for modification under I.C. 22-3-3-27.

- Even though this was a civil action filed in a state trial court, the court decided the board had authority to determine whether there had in fact been fraud.

- If fraud is found, the 2-year statute of limitations would be deemed tolled at the moment the fraud was perpetuated.

- The court held that where a party alleges that he/she has been fraudulently induced into forgoing the filing of an application, ... the Board has the authority to determine whether it has in fact been fraud, and if such fraud is found, the 2-year statute of limitations shall toll at the moment the fraud was perpetuated.

Gayheart v. Newnam Foundry Company, 393 N.E.2d 163 (Ind. 1979)

➢ **Filing Must Be Within Two Years from Date of Last Compensation**

- An employee who was injured in May 1974 filed his application in December 1976.

- Employer paid TTD until July 1975. Thus, the filing of the application was timely based upon the reliance upon I.C. 22-3-3-27.

Coachmen Industries, Inc v. Yoder, 422 N.E.2d 384 (Ind.App. 1981)

➢ **No Request for Hearing Required**

- Employee was injured in 1974 and received TTD from January 1975 to August 1977.

- Employee files application in January 1981 with the employee contending the 2-year statute never started to run because of the employer's noncompliance with I.C. 22-3-4-5 that required that it request a hearing in order to change or modify an award.

- Despite the employee's award of TTD that did not specify when the payments would end, I.C. 22-3-3-27 clearly and unequivocally prohibited the Board or any party from making any modification after the expiration of 2 years from the last date from which compensation was paid.

  Overshiner v. Indiana State Highway Commission, 488 N.E.2d 1245 (Ind.App. 1983)

➢ **The Injury "Manifesto"**

- Employee injured his shoulder, was told there were no serious injuries, and returned to work.

- For the next several years, the employee continued to feel pain and discomfort and his shoulder condition worsened.

- The employee filed an application which was denied, and on an appeal, the employee continued the claim should have been considered timely because it was filed within the statute of limitation after the injured became manifested.

- While sympathetic with the employee, and even stating the rule was unfair to the employee, the court found that I.C. 22-3-3-3 required the claim to be filed within 2 years of the accident without regard to weather the injury had become manifested or disabled.

- At the time of this decision in 1989, the court noted that Indiana was among the minority of jurisdictions that required filing within the time limitation of the accident, and not the time limitation of the injury. The employee argued it was unfair to require a claimant to file a claim before he is aware he had a debilitating injury.

Ingram v. Land-Air Transp. Company, 537 N.E.2d 532 (Ind.App. 1989)

- **Journey's Account Statute**

- I.C. 34-1-2-8 is the Journey's Account Statue serves to resuscitate actions that have otherwise expired under a statute of limitations and preserves only a "new action" that may be "a continuation of the first."
- Employee filed a civil suit for work related injuries claiming intentional injury, which summary judgment was granted for the employer due to lack of evidence suggesting an intentional tort.
- Seven years after the injury, the employee filed a worker's compensation claim with the Board which was dismissed under I.C. 22-3-3-3 stating that the claim had to be filed within two (2) years of the date of an accident.
- The employee's argument that the Journey's Account Statue preserved his claim was rejected as not being a new action because it was not an action presented before a court, nor was it a continuation of the first action because the two claims were substantively different.

Cox v. American Aggregates Corp, 684 N.E.2d 193 (Ind. 1997)

- **Minor Statue of Limitations**

- An employee who is injured under the age of 18 is considered a minor and has two (2) years from the date the employee turns 18 to file a claim. Thus, an employee who is a minor at the time of his injury has until age 20 to file a claim.

Memorial Hospital v. Szuba, 705 N.E.2d 519 (Ind.App. 1999)

- **Defining Last Date Compensation is Deemed Paid**

- Pursuant to I.C. 22-3-3-27(c), an employee filed an application more than one (1) year after the last date "for which" compensation was paid, even though it was filed within one (1) year after the date "on which" the employee received compensation. (At the time of this case, there was a one (1) year statute of limitations under I.C. 22-3-3-27(c), which was later changed to a two (2) year statute of limitations.)

- The application had to be filed within 1 year (now 2 years) after the date "for which" compensation was payable.

Prentoski v. Five Star Painting, Inc. 837 N.E.2d 972 (Ind. 2005)

- **How The SOL Works When an Employee Receives Full Pay v. TTD**

- Employee injured his knee in January 2000. Employee did not receive TTD, but instead received his full pay under the employer's sick leave policy, although he would have been entitled to TTD benefits for being off of work.

- Employee filed his application in September 2002.

- Employee contended the statute of limitations did not apply to him because he did not receive TTD benefits and was only seeking medical benefits.

- The Court determined the latest that the employee could have filed his application under any interpretation of statute of limitations would have been March 9, 2002, since that was the last date for which he received his full pay.

Eads v. Perry Township Fire Department, 817 N.E.2d 263 (Ind.App. 2004)

- **Permanency of Injury**

- Employee began having bilateral wrist problems in February 1995 and then an accident report was generated on November 27, 1995.

- Employer provided medical treatment from February 21, 1996, through December 11, 1997.

- Employer provided surgery on September 30, 1996, and employee received TTD from September 24, 1996, through October 2, 1996, in the total amount of $272.91.

- Employee returned to work for a period of time and began experiencing difficulties again in January 1997.

- Because of continuing problems with her wrist, the employee was unable to continue working for the employer and was terminated shortly after August 27, 1997.

- Employee received unemployment compensation from September 27, 1997, through March 3, 1998.

- On October 22, 1998, the employee filed her application.

- Employer contended that the last date the application could have been filed was October 2, 1998, which was two (2) years from the last date she received TTD.

- Employee contended statute of limitations should relate back to when the permanency of the injury was discernible, which she contended was the date of Dr. Baltera's report of March 13, 1997, which was the first suggestion of permanency of her injuries.

- The court of appeals determined that the board correctly concluded that the employee had until October 2, 1998, to file an application.

Luz v. Hart Schaffner & Marx, 777 N.E.2d 1230 (Ind.App. 2002)

➢ **Occupational Disease Statute of Limitations**

- I.C. 22-3-7-9(f) reads, in pertinent part: ". . . no compensation shall be payable for or on account of any occupational diseases unless disablement as defined in subsection (e), occurs within two (2) years after the last date of the last exposure to the hazards of the disease. . . ."

➢ **Provider Fee Claims Statute of Limitations**

- I.C. 22-3-3-5(d) reads, in pertinent part: ". . . . After June 30, 2011, a medical service provider must file an application for adjustment of a claim for a medical service provider's fee with the board not later than two (2) years after the receipt of an initial written communication from the employer, the employer's insurance carrier, if any, or an agent acting on behalf of the employer after the medical service provider submits a bill for services or products. . . ."

B. Questions

- Pursuant to I.C. 22-3-3-7(a), what constitutes a "change in conditions" that may warrant the filing of an application?

    - A change from medical treatment to MMI?
    - Termination of TTD?
    - Moving employee from one job department to another?
    - Worsening of an employee's medical condition?
    - Change of work uniform colors?
    - Change from being TTD to TPD?
    - Change from being permanently partially impaired to PTD?
    - A change from medically quiescence to active treatment?

- Is the filing of a SF 1043 regarding verification of the payment of TTD when TTD is ending required to be signed by the employee in order to make it effective (and thus start the ticking of the clock on the statute of limitations)?

II. COVID-19 VACCINATION INJURIES

A. Could an Employer Be Liable Under Worker's Compensation for COVID-19 Vaccination Injuries Where the Employer Mandated or Urged Employees to Vaccinate?

While there exists no case law specifically regarding COVID-19 vaccinations in Indiana or other states that we could find, courts in multiple jurisdictions have determined that injuries caused by other types of vaccinations can be compensable under worker's compensation.

- **Missouri - *Lampkin v. Harzfeld's*, 407 S.W.2d 894, 898 (Mo. 1966)**

    - The inoculation for influenza was, of course, not an accident. But, the event of the reaction was unforeseen and unexpected, and it was a sudden and violent occurrence which produced objective symptoms of an injury. The occurrence falls precisely within the statutory definition of the word "accident."

- When the inoculation is occasioned by the particular conditions of employment, or where the employer requires the inoculation, or where there is a combination of strong urging by the employer and mutual benefit, then an injury resulting from inoculation arises out of and in the course of employment.

- "Other [state] courts have uniformly held that reactions and infections resulting from vaccinations and inoculations constitute an accident within the meaning of the Workmen's Compensation laws. See Lee v. Wentworth Manufacturing Company, 240 S.C. 165, 125 S.E.2d 7; Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421, 188 N.E. 870; Neudeck v. Ford Motor Co., 249 Mich. 690, 229 N.W. 438; Freedman v. Spicer Mfg. Corp., 97 N.J.L. 325, 116 A. 427; Sanders v. Children's Aid Society, 238 App.Div. 746, 265 N.Y.S. 698, Affm'd. 262 N.Y. 655, 188 N.E. 107; Texas Employers' Ins. Ass'n v. Mitchell, Tex.Civ.App., 27 S.W.2d 600; Alewine v. Tobin Quarries, 206 S.C. 103, 33 S.E.2d 81; Smith v. Brown Paper Mill Co., La.App., 152 So. 700; Suniland Toys and Juvenile Furniture, Inc. v. Karns, Fla., 148 So.2d 523."

- "We have neither found nor been cited to a Missouri case involving either an infection or an unexpected reaction from a vaccination or an inoculation, but the issue has arisen in other states. See the annotation at 69 A.L.R. 963, and the cases there cited, including Freedman v. Spicer Mfg. Corp., 97 N.J.L. 325, 116 A. 427; Neudeck v. Ford Motor Co., 249 Mich. 690, 229 N.W. 438; and Texas Employers' Ins. Ass'n v. Mitchell, Tex.Civ.App., 27 S.W.2d 600. See also Lee v. Wentworth Manufacturing Co., supra; Spicer Mfg. Co. v. Tucker, supra; Sanders v. Children's Aid Society, supra; Alewine v. Tobin Quarries, supra; Smith v. Brown Paper Mill Co., supra; Suniland Toys and Juvenile Furniture, Inc. v. Karns, supra. See also Larson's Workmen's Compensation Law § 27.32 and Schneider on Workmen's Compensation, Vol. 7, § 1674, p. 358, and 99 C.J.S. Workmen's Compensation, § 256, p. 885."

- All of the above-mentioned authorities are to the effect that when the inoculation is occasioned by the particular conditions of employment, or where the employer requires the inoculation, or where there is a combination of strong urging by the employer and mutual benefit, then an injury resulting from inoculation arises out of and in the course of employment.

- **Delaware - *E.I. DuPont de Nemours & Co. v. Faupel*, 859 A.2d 1042, 1053 (Del. Super. Ct. 2004)**

  - Barbara Faupel's injury, Guillain-Barré Syndrome/chronic inflammatory demyelinating polyneuropathy, resulted from an influenza vaccination administered to her by her employer and was found to be within the course and scope of her employment and therefore compensable under the Workers' Compensation Act.

  - DuPont informed employees about the vaccination program through flyers, bulk e-mail messages, and posters some of which encouraged people to get the flu shot "while supplies last."

  - Faupel testified that there were posters announcing the vaccination program posted at eye level by the restrooms, in the photocopier room, in her department, by the elevators and going "in and out of the work area."

  - One company-wide e-mail read:
    - *FLU SHOT SCHEDULE!!!!*

    Flu shots will be given at the Chestnut Run Medical Clinic located in Bldg. 700 on the following days and times:

    Friday, October 26, 9:00am to 11:00 am, and 1:30pm to 3:00pm

    Monday, October 29, 9:00am to 11:00am and 1:30pm to 3:00pm.

    Future flu shot dates will be announced based on our supply of vaccine.

  - DuPont had offered the flu vaccinations every year to employees who wished to receive the vaccination. There were no incentives or requirements that employees receive the vaccination and the program was provided as a convenience to employees.

  - Faupel testified that she decided to receive the flu vaccination in October 2001 because:
    - She felt that in her new position she needed to be "on the job" for her boss; and
    - Her family doctor suggested that she get a flu vaccination because of her age and because she was also caring for her elderly parents.

- The Court held that a flu vaccination, resulting in injury, "may be covered [by the Workers' Compensation Act] if there is a combination of strong urging by the employer and some element of mutual benefit in the form of lessened absenteeism and improved employee relations."

- The [Delaware] IAB had stated that "[w]hen the inoculation is not thus strongly tied to the employment ..., it may still be covered if there is a combination of strong urging by the employer and some element of mutual benefit in the form of lessened absenteeism and improved employee relations."

➢ **Florida - *Monette v. Manatee Mem'l Hosp.*, 579 So. 2d 195, 197 (Fla. Dist. Ct. App. 1991)**

- Monette filed a claim for temporary total disability benefits and medical benefits for a left arm injury she suffered due to a serious reaction to a flu shot, specifically, the injuries immobilized her shoulder, and ultimately developed into adhesive capsulitis or frozen shoulder syndrome.

- Monette testified that she had always worked in hospitals, and regularly took a flu shot for her own protection and for the protection of patients. Prior to the instant incident, claimant had never experienced a reaction to a flu shot.

- A memorandum notice was circulated annually to all departments at Manatee Memorial Hospital announcing the availability of free flu shots to hospital employees since 1988.

- The hospital health services manager testified that free flu vaccinations were made available to hospital employees because such programs were recommended by the National Advisory Council, and particularly so for persons in high-risk categories. The health services manager conceded that Monette was in a high-risk category. The shot was administered by the hospital.

- The court reversed the compensation claims judge by stating the circumstances of this case indicate that the allergic reaction Monette experienced flowed as a natural consequence of her employment.

- In other words, by virtue of her employment in a hospital setting, Monette recognized her responsibility to protect patients from exposure to flu and availed herself of the opportunity to avoid contracting flu.

- Based on the undisputed facts existing in this case, the court concluded the judge of compensation claims was obligated to find the claim compensable.

B. So, how will the authorities look on COVID-19 vaccination injuries if any are litigated?

In evaluating whether COVID-19 vaccination requirements may be treated differently than other vaccination requirements, it is worth noting the guidance and changes to guidance from OSHA.

- On April 20, 2021, OSHA, under its Coronavirus Frequently Asked Questions (https://web.archive.org/web/20210420171154/https://www.osha.gov/coronavirus/faqs), issued the following guidance for the first time about recording adverse reactions:

  - "For adverse reactions in general:

    - In general, an adverse reaction to the COVID-19 vaccine is recordable if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid).

  - For adverse reactions that occur when employees receive a COVID-19 vaccine mandated by their employer:

    - If you require your employees to be vaccinated as a condition of employment (i.e., for work-related reasons), then any adverse reaction to the COVID-19 vaccine is work-related. The adverse reaction is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 CFR 1904.7.

  - For adverse reactions that occur when employers do not require the vaccine, but the employer recommends that employees receive the vaccine and may provide it to them or make arrangements for them to receive it offsite:

    - Not required to report. Although adverse reactions to *recommended* COVID-19 vaccines may be *recordable* under 29 CFR 1904.4(a) if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR

1904.7, OSHA is exercising its enforcement discretion to only require the recording of adverse effects to *required* vaccines at this time. Therefore, you do not need to record adverse effects from COVID-19 vaccines that you *recommend*, but do not require.

- Note that for this discretion to apply, the vaccine must be truly voluntary. For example, an employee's choice to accept or reject the vaccine cannot affect their performance rating or professional advancement. An employee who chooses not to receive the vaccine cannot suffer any repercussions from this choice. If employees are not free to choose whether or not to receive the vaccine without fearing adverse action, then the vaccine is not merely "recommended" and employers should consult the above FAQ regarding COVID-19 vaccines that are a condition of employment.

- Note also that the exercise of this discretion is intended only to provide clarity to the public regarding OSHA's expectations as to the recording of adverse effects during the health emergency; it does not change any of employers' other responsibilities under OSHA's recordkeeping regulations or any of OSHA's interpretations of those regulations.

- Finally, note that this answer applies to a variety of scenarios where employers recommend, but do not require vaccines, including where the employer makes the COVID-19 vaccine available to employees at work, where the employer makes arrangements for employees to receive the vaccine at an offsite location (e.g., pharmacy, hospital, local health department, etc.), and where the employer offer the vaccine as part of a voluntary health and wellness program at my workplace. In other words, the method by which employees might receive a recommended vaccine does not matter for the sake of this question."

- But, as of May 21, 2021, OSHA, under its Coronavirus Frequently Asked Questions (https://web.archive.org/web/20210522120008/https:/www.osha.gov/coronavirus/faqs#vaccine), changed course and issued the following in regard to whether adverse reactions are recordable on the OSHA recordkeeping log, and made no distinction as to whether it is reportable if mandated by the employer or is simply recommended by the employer:

    - "DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022. We will reevaluate the agency's position at that time to determine the best course of action moving forward."

- While there exists some data pointing towards employer COVID-19 vaccination requirements being treated uniquely, the past judicial history and general industry consensus is that most states' worker's compensation frameworks will allow compensation for injuries received from vaccinations. However, as has been the case from the beginning with COVID-19, everything is in flux. Just like anything else, there are differences of opinions as whether injuries from COVID-19 vaccines may be deemed work-related. Below are links to articles that may be of some assistance.

    - https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-workers-compensation-vaccine.aspx
    - https://theonebrief.com/building-an-employee-vaccination-program-start-here/
    - https://news.bloomberglaw.com/daily-labor-report/workers-compensation-can-soothe-some-covid-vaccine-fears

III. TTD v. UNEMPLOYMENT BENEFITS

A. Indiana Law

- **I.C. 22-4-14-3(b)** reads in pertinent part: "An unemployed individual shall be eligible to receive benefits with respect to any week only if the individual:

  (1) is physically and mentally able to work;

  (2) is available for work;

  (3) is found by the department to be making an effort to secure full-time work;. ."

- In regard to TTD, **I.C. 22-3-3-7(a)** reads in pertinent part: "Compensation shall be allowed on account of injuries producing only temporary total disability to work or temporary partial disability to work . . .."

- **Indiana's Seminal Case on TTD v. Unemployment Compensation - *Ballard v. Book Heating & Cooling, Inc.,* 696 N.E.2d 55 (1998)**

  - Issue was whether Ballard was entitled to TTD while simultaneously receiving unemployment compensation.

  - Ballard reached MMI, received a PPI rating and was terminated; thereafter, he applied for and received unemployment benefits (UE).

  - Thereafter, treatment resumed, and Ballard was placed on medical leave and was awarded TTD benefits after a hearing; however, the Hearing Member also found that Ballard was not entitled to TTD for the same period of time in which he received UE, and the Full Board agreed.

  - On appeal, Ballard contends that, although a determination was made declaring him "physically and mentally able to work" as defined in I.C. 22-4-14-3, he should not be precluded from also receiving TTD.

  - The court determined that the purpose of awarding TTD is to compensate an employee for a loss of earning power because of an accidental injury arising out of, and in the course of, his or her employment. During the period of time that a claimant undergoes treatment for an injury, it is relevant whether the injured workman has the ability to return to work of the same kind or character.

- "If the injured worker does not have the ability to return to work of the same kind or character during the treatment period, he is temporarily totally disabled and may be entitled to benefits. In contrast, I.C. 22-4-14-3 provides that an unemployed individual is only eligible to receive unemployment compensation if he or she is physically and mentally able to work, is available for work and is found by the agency to be making an effort to secure full-time work."

- "Although our statutes do not expressly prohibit a claimant from receiving both types of benefits, we conclude that our legislature could not have intended for an employee to recover dual benefits under these circumstances. To suggest that one who was physically and mentally able to work, available for work, and was making an effort to secure full-time work was at the same time totally disabled, would be contrary to law."

- Thus, the Court of Appeals found that the Board properly determined that Ballard was not entitled to receive temporary total disability benefits for the same period of time that he drew unemployment benefits.

B. Questions

- Some states allow awards of both TTD (benefits) and unemployment benefits simultaneously. Should Indiana do this?

- If so, how should this be structured?

    - Offsets?
    - If offset, which benefit should be administered first: TTD or UE?

- Should we encourage the legislature to remedy this?

IV. NOTICE OF INTENT TO SUBMIT MEDICAL REPORTS

When either a plaintiff or defendant obtains a medical report from a treating doctor they wish to submit to the Board as evidence, is it proper to file a Notice of Intent to Submit Medical Report with the Board and include a copy of the medical report prior to hearing?

- The controlling statute on this is I.C. 22-3-3-6, primarily subsections (c) – (g).
    - Does the statute mention anything about filing a medical report with the Board?
    - If so, where?
    - If not, how (or why) did this practice become common place?

- I.C. 22-3-3-6(c) deals with medical reports secured by the employer and I.C. 22-3-3-6(d) deals with medical reports secured by the employee.

- Both reports from the employer and the employee must be tendered to the other not later than 30 days before the time the case is set for hearing.

- I.C. 22-3-3-6(e) sets forth the requirements of any report proffered by either side as requiring the following information:

  (1) The history of the injury, or claimed injury, as given by the patient.
  (2) The diagnosis of the physician or surgeon concerning the patient's physical or mental condition.
  (3) The opinion of the physician or surgeon concerning the causal relationship, if any, between the injury and the patient's physical or mental condition, including the physician's or surgeon's reasons for the opinion.
  (4) The opinion of the physician or surgeon concerning whether the injury or claimed injury resulted in a disability or impairment and, if so, the opinion of the physician or surgeon concerning the extent of the disability or impairment and the reasons for the opinion.
  (5) The original signature of the physician or surgeon.
  Notwithstanding any hearsay objection, the worker's compensation board shall admit into evidence a statement that meets the requirements of this subsection unless the statement is ruled inadmissible on other grounds.

- I.C. 22-3-3-6(f) states that delivery to the attorney or agent of either the employer or employee constitutes delivery to the employer or employee.

- I.C. 22-3-3-6(g) sets forth how a party may object to a report on the basis of the contents of (e) above:

  > Any party may object to a statement on the basis that the statement does not meet the requirements of subsection (e). The objecting party must give written

notice to the party providing the statement and specify the basis for the objection. Notice of the objection must be given no later than twenty (20) days before the hearing. Failure to object as provided in this subsection precludes any further objection as to the adequacy of the statement under subsection (e).

- However, it appears that objections could be made for other reasons at the time of the hearing.

V. THE POSITIONAL RISK DOCTRINE

A. Brief History Lesson

- In regard to the causal connection necessary to show that an accidental injury arises out of employment, the nexus is established when a reasonably prudent person considers the injury to be born out of a risk incidental to the employment, or when the facts indicate a connection between the injury and the circumstances under which the employment occurs. A connection is established when the accident arises out of a *risk which a reasonably prudent person might comprehend as incidental to the work*.

- *Risks incidental to employment* fall into three categories: (1) risks distinctly associated with employment, (2) risks personal to the claimant, and (3) risks of neither distinctly employment nor distinctly personal in character, in other words, "neutral risks."

- Risks that fall within categories 1 and 3 are generally covered under the Act, but risks personal to the claimant in category 2 are not compensable.

- Those risks in categories 1 and 2 are simple: category 1 risks are intuitively covered, and category 2 risks are clearly not covered. It is the risks in category 3 that gave rise to the Positional Risk Doctrine ("PRD").

- Under the PRD, 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 the claimant was injured. This *but for* reasoning is the foundation of the PRD, under which if the "in the course of" employment element is met, then there is a rebuttable presumption that the injury "arises out of" employment.

- Thus, the burden was on the employer to demonstrate that the injury was actually the result of a cause personal to the claimant.

- The above explanation of the PRD basically explains the case of *Milledge v. The Oaks*, 784 N.E.2d 926 (Ind. 2003). There, the Supreme Court of Indiana adopted the PRD. By adopting the PRD, the Supreme Court refused to place employees in the position of attempting to prove a negative and instead shifted the burden of proof to employers when

the employee has shown that her injury occurred in the course of employment and was the result of a neutral risk.

- Then, in 2006, the Indiana General Assembly amended I.C. 22-3-2-2(a) to place the burden of proof on the employees throughout the worker's compensation proceedings. It added two sentences to the statute (*in italics*):

    - Every employer and every employee, except as stated in IC 22-3-2 through IC 22-3-6, shall comply with the provisions of IC 22-3-2 through IC 22-3-6 respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby. *The burden of proof is on the employee. The proof by the employee of an element of a claim does not create a presumption in favor of the employee with regard to another element of the claim.*

- In *Pavese v. Cleaning Solutions*, 894 N.E.2d 570 (Ind.App. 2008), the Court of Appeals stated that the 2006 amendment to I.C. 22-3-2-2(a) effectively overruled *Milledge's* 2003 PRD by placing the burden of proof on employees throughout the worker's compensation proceedings as it determined that the language of the amendment was clear.

- Pavese conceded that the amendment said what it said. Instead, she challenged that the statute as amended is unconstitutional because it denied her due course of law pursuant to Article I, Section 12 of the Indiana Constitution, which provides, in pertinent part: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."

- Other than quoting this provision of the Indiana Constitution and alleging that it prevented her from due process of law and placed on her a burden that she could not meet (i.e., proving a negative), Pavese presented no analysis whatsoever of this issue. The court held that the burden is on the party challenging the constitutionality of the statute, and all doubts are resolved against that party. By presenting no analysis, the court found that Pavese waived this issue and did not meet her burden of proving that the amendment was unconstitutional.

- So, where does this leave us now?

B. Questions

- Is the amendment to I.C. 22-3-2-2(a) unconstitutional?

- Is there anyway around this amendment short of legislative action?

- Or is this just a solid, constitutionally sound amendment that is here to stay until the legislature decides to change it?

Section Five

Death Benefits Under the Worker's Compensation Act

Libby Valos Moss
Aubrey K. Noltemeyer
Philip G. Rizzo
Kightlinger & Gray LLP
Indianapolis, Indiana

Section Five

Understanding Death Benefits Claims
Under the Worker's Compensation Act……...Libby Valos Moss
Aubrey K. Noltemeyer
Philip G. Rizzo

INTRODUCTION

In worker's compensation practice, death claims comprise immensely important and stressful cases for deceased employees' dependents, as well as employers and insurance carriers. When a death occurs, dependents face the difficulty of losing a family member while questions loom as to how they will support themselves and their families going forward. At the same time, employers and insurance carriers face exposure not ordinarily seen in other claims. The Worker's Compensation Board is then tasked with ensuring claim outcomes that are just and in accordance with the Worker's Compensation Act. Although the provisions of the Act are to be liberally construed so as to effectuate the humane purposes of the Act, in death claims, it is necessary to be aware of the requirements of the Act and the guidance provided over the Courts' decades of interpretation of the Act.

While every possible death claim scenario cannot be covered in one article, this article focuses on pertinent portions of the Act, and their corresponding court decisions, from injury to compensability determination to benefits paid to dependents.

I. REPORTING AND NOTICE PROCEDURES

A. Employer and Insurance Carrier's Reporting Obligations

Within 7 days after the employer's knowledge of a work accident (either actual, alleged, or reported by the deceased employee's dependents) or knowledge of any injury causing the need for medical care beyond first aid or death, the employer must report the occurrence or injury to its insurance carrier. I.C. § 22-3-4-13(a). The insurance carrier must file a First Report of Injury to the Worker's Compensation Board ("Board") through the Board's electronic data interchange not later than 7 days after receipt of the injury report from the employer or 14 days after the employer's knowledge of the injury, whichever comes first. I.C. § 22-3-4-13(a).

If an employer or its insurance carrier cannot determine compensability within 30 days, the employer or insurance carrier may request an additional 30 days to investigate the claim by filing a State Form 48557 Notice of Inability to Determine Liability/Request for Additional Time with the Board. If an employer or insurance carrier denies a claim, a Notice of Denial of Benefits must be filed. I.C. § 22-3-3-7(c).

B. Deceased Employee's Dependents' Notice Obligations

Unless the employer has actual knowledge of the occurrence of an injury or death, the deceased employee's dependents must provide written notice of the injury or death as soon as practicable. I.C. § 22-3-3-1.

C. Time for Requesting an Autopsy

Pursuant to I.C. § 22-3-3-6(h), an employer may require an autopsy of the deceased employee. The employer's request for an autopsy must be made "at a reasonable time." I.C. § 22-3-3-6(h), *Delaware Machinery & Tool Co. v. Yates*, 301 N.E.2d 857 (Ind.Ct.App. 1973). In order to meet the requirement that an autopsy be requested at a reasonable time, it is best for the employer in a death claim to request an autopsy as soon as possible as the Courts have generally held that autopsy requests after interment are unreasonable. *See Id.*

II. **DETERMINATION OF COMPENSABILITY**

The Indiana Worker's Compensation Act provides for compensation for injury or death by accident arising out of and in the course of employment. I.C. § 22–3–2–2. The claimant bears the burden of proving the right to compensation. I.C. § 22–3–2–2. The issue of whether an employee's injury or death arose out of and in the course of his or her employment is a question of fact to be determined by the Board. *Indiana Michigan Power Co. v. Roush*, 706 N.E.2d 1110, 1113 (Ind.Ct.App. 1999).

A. Death Arising Out Of and In the Course of Employment

The statutory phrase "injury or death by accident" means "unexpected injury or death" and does not require an unusual event precipitating the death. *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969, 974 (Ind.1986).

An accidental injury "arises out of" employment when a causal nexus exists between the injury sustained and the duties or services performed by the injured employee. *Roush* at 1113. An accident occurs "in the course of employment" when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is fulfilling the duties of employment or while engaged in doing something incidental thereto. *Milledge v. Oaks*, 784 N.E.2d 926, 929 (Ind. 2003).

The majority of death compensability disputes the Courts have analyzed primarily related to the issue of whether the death "arose out of the employment." The "in the course of employment" requirement for compensability is generally not at issue in claims regarding incidents that occurred at work and during work hours. However, the Courts have provided direction for unusual circumstances in cases where accidents occurred of the work premises, as well as in cases where accidents occurred after work hours, but on the work premises.

In *Olinger Const. Co. v. Mosbey*, a construction employee, Moseby, was staying in a motel room in Lawrenceburg, Indiana, about 150 miles from his home in Dale, Indiana. Moseby was at the motel because his employment with Olinger required him to be in Lawrenceburg at the site of bridge and road construction being done by Olinger. One night during Moseby's stay at the motel, a disgruntled coworker, who had recently been fired, came to Moseby's motel room and murdered him. The Court found Moseby's death compensable, and specifically regarding the "in the course of employment" requirement, the Court held "the Board's findings that Mosbey's

work required him to be away from his home (i. e., Mosbey was a traveling employee) and that the injury resulting in his death occurred in a motel room where he was staying due to his employment support its conclusion Mosbey died from an accident…in the course of his employment." 427 N.E.2d 910 (Ind.Ct.App. 1981).

In coming to its decision, the *Moseby* Court cited, among other cases, *Business Systems v. Gilfillen*. The *Gilfillen* Court noted, "The traveling man's employment is probably more inclusive than that of any other workman. Since it is his employment which requires him to be away from home, he is generally held to be within the course of his employment from the time he embarks until he returns to his home or place of business, as long as his absence is work-caused. During the time when he is away, there is a continuity of service whether he is actively engaged in representing his employer or whether he is attending to his own incidental needs occasioned by his travel. His personal needs are incidents to his work in such cases. Nor is the course of employment confined to daytime injuries. Compensation was allowed for the death of a truck driver due to asphyxiation in a tourist camp at night. It was allowed in another case for injuries sustained by an insurance adjuster when he fell on a sidewalk leading from a train station to his hotel." 92 N.E.2d 868 (Ind.Ct.App. 1950) (quoting B. Small, Workmen's Compensation Law in Indiana, § 7.4).

In some cases, deaths occurring after hours at an employee's workplace can be compensable. In *Weldy v. Kline*, for example, the Court of Appeals held that when a hotel employee drowned in the hotel pool at an after-hours work party, the "in the course of employment" requirement was satisfied because the employer's stated purpose of the party was

to generate goodwill among employees, the employer encouraged attendance, and the food, activities, and location were provided by employer. 616 N.E.2d 398 (Ind.Ct.App. 1993).[1]

However, not all after-hours incidents on the work premises resulting in death to an employee meet the "in the course of employment" requirement. In *Lona v. Sosa,* for example, the deceased employee, Sosa, a bartender, remained at the bar two and a half hours after his shift ended, drank until he became inebriated, got into an argument with the bar manager, and was then shot and killed by the bar manager. The Court held, "there was no work-related reason for Sosa to remain on his employer's premises for two and one-half (2 1/2) hours after he finished his work; the only reasonable inference to be drawn from the evidence is that he remained for his own personal reasons….The evidence prohibits the drawing of any reasonable inference that Sosa's death arose in the course of his employment." 420 N.E.2d 890 (Ind.Ct.App. 1981).

In the context of death claims, cases analyzing the "arises out of employment" requirement for compensability are far more common than those analyzing the "in the course of employment" requirement. *Bertoch v. NBD Corp,* a 2004 Supreme Court case, is the seminal case for the "arises out of employment" requirement. In *Bertoch v. NBD Corp,* a fire occurred at the building for which Bertoch, a security guard, was on duty. In response to a fire alarm, the fire department arrived at the building. The fire department discovered Bertoch's body inside the building along with an engaged "fire pull station" and a displaced but unused fire extinguisher; the fire department discovered the fire was confined to an elevator switching panel and had "self-extinguished." The coroner determined that Bertoch died of a heart attack due to "severe

[1] Kline's dependents did not ultimately recover benefits under the Worker's Compensation Act due to a finding, on remand, that Kline was engaged in horseplay at the time of his death. *See Weldy v. Kline*, 652 N.E.2d 107 (Ind.Ct.App. 1995).

coronary atherosclerotic heart disease due to circumstances in action of fire." Bertoch's widow claimed benefits under the Act for Bertoch's death. 813 N.E.2d 1159 (Ind. 2004).

The Hearing Member found the circumstantial evidence showed Bertoch was "climbing the stairs to investigate and possibly extinguish the fire" and "was attempting to prevent it from causing damage to the building." The Hearing Member further found from Bertoch's widow's medical expert's testimony that the fire "produced a 'psychological shock, which required unusual physical exertion beyond his routine employment.'" The Hearing Member found Bertoch's work duties therefore caused his heart attack and held the death was compensable; the employer appealed. However, the Board and Court of Appeals reversed the Hearing Member's award and concluded that Bertoch's death did not arise out of his employment. *Id.*

On appeal, the Supreme Court held Bertoch's injury arose out of his employment because, even though responding to a fire was not necessarily within Bertoch's job duties, his action of responding to the fire benefited his employer and was an action a reasonable person would take under the circumstances.[2] The Court held that Bertoch's injury also arose out of his employment because his responding to the fire constituted an action that benefited the employer.[3] *Id.*

The Court held that although Bertoch had preexisting heart disease, his heart attack arose out of his employment since the work incident was a "triggering event" to his heart attack. Specifically, the fire was found to be a triggering event to the heart attack, and precedent has

[2] An employee remains within the scope of his employment when he does something that a reasonable person would do or would be expected to do under the circumstances. *Prater v. Ind. Briquetting Corp.*, 251 N.E.2d 810, 813 (Ind. 1969).

[3] An action that directly or indirectly advances an employer's interest or is for the mutual benefit of the employer and employee may be incidental to and arise in the course of employment. *Ind. & Mich. Elec. Co. v. Morgan*, 494 N.E.2d 991, 994 (Ind.Ct.App.1986).

long held "[e]ven if a preexisting condition contributed to the injury, the employee is entitled to recover for the full extent of the injury, including an aggravation or triggering of a pre-existing injury, causally connected with the employment." Further, the Court reasoned that the fire at work was a sufficient "causal link" to the heart attack to consider the heart attack an injury that arose out of Bertoch's employment. *Id.*

Regarding the standard for when an injury or death is an "accident" under the Act, the *Bertoch* Court emphasized that the Board and Courts must not conflate the "unexpected injury or death" standard with an analysis of whether the event was "unusual." The Supreme Court in *Bertoch* noted that the Hearing Member, Board, and Court of Appeals incorrectly focused on whether the event was unusual instead of the correct standard of whether the event was unexpected. *Id.*

The case *Wright Tree Service v. Hernandez* was decided under similar principles; the Board found that an employee's heart attack at home was "triggered" by a wood chipper injury earlier that day. 907 N.E.2d 183 (Ind.Ct.App. 2009).

In the case *Jablonski v. Inland Steel Co.,* the Court of Appeals addressed the issue of an employee's heart attack death at work when there was no evidence of a "triggering event" as seen in *Bertoch*. Specifically, the employee, Jablonski worked as an Operations Clerk, which was a position that "did not involve any physical labor; rather, it was a desk assignment that entailed collecting data." While at his desk, Jablonski experienced difficulty breathing and chest pains. A co-employee notified the employer's medical department and Inland sent its paramedics to respond to Jablonski; the Inland paramedics transported Jablonski to the hospital. In the ambulance, en route to the hospital, Jablonski's heart began beating rapidly and then he became unconscious and stopped breathing. Despite the EMT's revival attempts, Jablonski was

pronounced dead on arrival at the hospital. It was found that Jablonski had suffered a heart attack. 575 N.E.2d 1039 (Ind.Ct.App. 1991).

Upon a claim for death benefits, Jablonski's widow presented evidence at hearing that Jablonski had no prior history of heart conditions, as well as an expert opinion that Inland's paramedics were negligent for several reasons such as by "the failure to immediately establish an I.V." and the stopping of the ambulance when Jablonski's heart began beating rapidly. The Board denied Jablonski's widow's claim. *Id.*

On appeal, the Court held, "The entire episode in this case occurred on Inland Steel Company property and began while [Jablonski] was seated at his desk, during normal working hours, and while [Jablonski] was performing his appointed duties. The statutory requirement of 'in the course of employment' has been satisfied." *Id.*

However, regarding the "arising out of the employment" test, the Court held, "[Jablonski's widow's expert's] testimony does not inescapably lead to a conclusion that [Jablonski's] death was causally connected to [Jablonski's] employment. In proving that causal link the Jablonskis must demonstrate that [Jablonski's] heart failure was either preceded by some untoward[4] or unexpected incident, or resulted from the aggravation of a previously deteriorated heart or blood vessel. The mere showing that [Jablonski] was performing his usual everyday tasks when he suffered the fatal heart attack does not establish a right to worker's compensation benefits unless there was some event or happening beyond mere employment… Here the Board

[4] It should be noted that pursuant to *Bertoch*, which came 13 years after *Jablonski*, whether the accident was "untoward" is not the legal standard for work accidents. "The issue is merely whether the injury itself was unexpected." *Bertoch* at 1162.

determined there was no causal connection between [Jablonski's] death and [Jablonski's] employment. The record supports that determination." *Id.*

When handling death claims, in the "arising out of employment" analysis, it is important to consider whether the death was caused by a risk personal to the employee as risks personal to the employee are not compensable. Risks causing injury or death to an employee may be divided into three categories: 1) risks distinctly associated with the employment; 2) risks personal to the claimant; and 3) "neutral" risks which have no particular employment or personal character. *Rogers v. Bethlehem Steel Corp.,* 655 N.E.2d 73 (Ind.Ct.App. 1995).

In *Rogers*, the deceased employee, Rogers, was known to carry large sums of money; Rogers was not required to carry money at his job. At work, Rogers' coworker, whom Rogers previously loaned money to, robbed and murdered him. The Board found that Rogers' coworker had told another person in the days prior to the incident that he was going to "bust [Rogers] in his head." The Board held the death claim was not compensable and the Court of Appeals affirmed, holding "The evidence is sufficient to support the Board's conclusion that [Rogers'] death resulted from a risk personal to himself, i.e., the carrying and loaning of large sums of money, and it did not arise out of his employment with Bethlehem Steel." *Id*.

In *Indiana Michigan Power Co. v. Roush*, the Court held that an employee's death from choking on a sandwich at work was not compensable. The Court held, "Roush's habit of putting a large amount of food in his mouth at one time and attempting to swallow it whole was a personal risk to which he would have been exposed each time he ate, whether that act occurred at work, at home or at a restaurant. Nothing about Roush's employment increased his risk of choking or was causally connected to it." 706 N.E.2d 1110 (Ind.Ct.App. 1999).

B. Compensability of Death Claims for Deaths Occurring an Extended Period of Time After the Accident

In death claims, the employee's death does not necessarily need to occur at the time of the work accident in order for the death to be considered compensable. In *Delaware Machinery & Tool Co. v. Yates*, for example, the employee, Yates, suffered an injury at work that required a hernia repair surgery. Five months after the work accident, Yates underwent "routine" hernia repair surgery and subsequently died of a heart attack the following morning. The Board awarded benefits to Yates' widow and the Court affirmed, holding:

> The medical evidence upon which employer relies gives rise to a possible inference that decedent's arterial condition was such that prior to surgery he was susceptible to an occlusion and therefore to myocardial infarction. It further supports an inference that had decedent not undergone surgery, he might have suffered the occlusion and infarction from shoveling snow or for that matter might have died in his sleep. The fact remains, however, that he did undergo surgery; that there was evidence that such surgical strain probably occasioned the particular occlusion which led to decedent's death. That evidence is enough to establish the causal relationship found by the Board. 351 N.E.2d 67 (Ind.Ct.App. 1976).

In the case *Indiana State Police v. Wiessing*, Wiessing, a police officer, suffered post-traumatic stress disorder after he shot and killed a suspect who attempted to take Wiessing's gun during an arrest in 1994. Six years later, Wiessing committed suicide. When Wiessing's dependents claimed death benefits under the Act, the Board found the 1994 incident caused Wiessing to suffer PTSD and that Wiessing's suicide resulted from his PTSD. The Board awarded benefits to Wiessing's dependents and the Court of Appeals affirmed. The Court held there was sufficient evidence for the Board to find that the 1994 incident proximately caused Wiessing's PTSD and that his PTSD resulted in his suicide. It should also be noted that the Court held the "self-inflicted" injury affirmative defense did not apply since the Board found

"[b]ecause Trooper Wiessing's suicide resulted from this condition, it is not considered to be a self-inflicted injury under Indiana Code 22–3–2–8." 836 N.E.2d 1038 (Ind.Ct.App. 2005).

C. Autopsies

Under the same statute that requires an injured employee to submit to a medical examination by a qualified physician of the employer's choosing, the employer in a claim for death benefits has the right to require an autopsy at the employer's expense. I.C. § 22-3-3-6(h).

If the Board orders an autopsy and such autopsy is refused by the surviving spouse or next of kin, then benefits owed or potentially owed on account of such death can be suspended during such refusal. In the event of such refusal, the surviving spouse or dependent must be served with a State Form 54217 Notice of Suspension of Compensation and/or Benefits, which sets forth the consequences of the refusal. I.C. § 22-3-3-6(h).

Pursuant to I.C. § 22-3-3-6(h), no autopsy, except one performed by or on the authority or order of the coroner in the discharge of the coroner's duties, shall be held in any case by any person, without notice first being given to the surviving spouse or next of kin, if they reside in Indiana or their whereabouts can reasonably be ascertained, of the time and place thereof, and reasonable time and opportunity given such surviving spouse or next of kin to have a representative or representatives present to witness same. However, if such notice is not given, all evidence obtained by such autopsy shall be suppressed on motion duly made to the worker's compensation board. I.C. § 22-3-3-6(h).

Case law holds that an employer's right to an autopsy in a death claim is not absolute. An employer seeking an autopsy must prove to the Board (1) that a demand for an autopsy to be performed at reasonable time and place was made, and (2) that an autopsy is necessary.

Delaware Machinery & Tool Co. v. Yates, 301 N.E.2d 857 (Ind.Ct.App. 1973). The Courts have generally held that requests for autopsies are not reasonable after internment has taken place (*See McDermid v. Pearson Co.*, 21 N.E.2d 80 (Ind.Ct.App. 1939)) and when the request for an autopsy was made months after the employee's death (*See Id., Newburgh v. Jones*, 58 N.E.2d 938 (Ind.Ct.App. 1945)). Regarding the requirement that an autopsy be necessary under I.C. § 22-3-3-6(h), when there is sufficient credible evidence to establish that a work injury proximately caused the employee's death, an autopsy is considered unnecessary. *Delaware Machinery & Tool Co. v. Yates*, 351 N.E.2d 67 (Ind.Ct.App. 1976).

III. **DEPENDENTS' STEPS FOR DISPUTING A CLAIM DENIAL**

In order to dispute an employer's denial of benefits, a deceased employee's dependents must file an Application for Adjustment of Claim within 2 years of the employee's death. I.C. § 22-3-3-3.

In the event an employee dies of a work injury after the employee has filed an Application for Adjustment of Claim, that was pending at the time of death, there is no provision in the Worker's Compensation Act holding that the employee's dependents are required to file a new Application for Adjustment of Claim in order to prosecute the deceased employee's previously filed pending Application.

Further, Rule 631 of the Indiana Administrative Code, as adopted by the Board, provides "All persons should be joined as plaintiffs in whom any right to any relief, arising out of the same transaction, is alleged to exist." 631 IAC 1-1-6. Therefore, it appears that the best practice for dependents, in cases of a deceased employee, is to include in the application and pleadings the names of all persons claiming to be dependents under the Act.

IV. **BENEFITS OWED TO DEPENDENTS IN COMPENSABLE DEATH CLAIMS**

A. Amount of Benefits Owed

In the event of a compensable death resulting from a work injury, the deceased employee's dependents, as determined by the Act, are entitled to weekly compensation in the amount of 66 2/3% of the deceased employee's average weekly wage (up to $780 per week), as defined by I.C. § 22-3-3-22, until the compensation paid, when added to the compensation already paid to the deceased employee equals 500 weeks. I.C. § 22-3-3-17. The employer must additionally pay the deceased employee's burial expenses in an amount of up to $10,000. I.C. § 22-3-3-21. Burial expenses paid on a deceased employee's behalf are not included when computing 500 weeks' worth of compensation owed to the dependents under I.C. § 22-3-3-22. *Rayburn v. Johnson*, 505 N.E.2d 478, 482 (Ind.Ct.App. 1987).

B. Persons to Whom Death Benefits are Owed

There are 3 classes of dependents under the Act, which include presumptive dependents, total dependents in fact, and partial dependents in fact. I.C. § 22-3-3-18(a).

1. Presumptive Dependents

Presumptive dependents are entitled to compensation to the complete exclusion of total dependents in fact and partial dependents in fact, and are entitled to such compensation in equal shares. I.C. § 22-3-3-18(b).

Under I.C. § 22-3-3-19(a), presumptive dependents include the following persons:

i. A wife upon a husband with whom she is living at the time of his death, or upon whom the laws of the state impose the obligation of her support at such time. Pursuant to I.C. § 22-3-3-19(d), for deaths occurring from injuries prior to July 1, 1977, if the surviving spouse remarries, dependency terminates and is not

reinstated by divorce. Pursuant to I.C. § 22-3-3-19(d), for deaths occurring on and after July 1, 1977, a surviving spouse who is a presumptive dependent and who is the only surviving dependent of the deceased employee is entitled to receive, upon remarriage before the expiration of the maximum statutory compensation period, a lump sum settlement equal to the smaller of 104 weeks of compensation or the compensation for the remainder of the statutory compensation period.

ii. A husband upon his wife with whom he is living at the time of her death. Pursuant to I.C. § 22-3-3-19(d), for deaths occurring from injuries prior to July 1, 1977, if the surviving spouse remarries, dependency terminates and is not reinstated by divorce. Pursuant to I.C. § 22-3-3-19(d), for deaths occurring on and after July 1, 1977, a surviving spouse who is a presumptive dependent and who is the only surviving dependent of the deceased employee is entitled to receive, upon remarriage before the expiration of the maximum statutory compensation period, a lump sum settlement equal to the smaller of 104 weeks of compensation or the compensation for the remainder of the statutory compensation period.

iii. An unmarried child under 21 years of age upon the parent with whom the child is living at the time of the death of such parent; however, pursuant to I.C. § 22-3-3-19(c), the dependency of these children terminates when the child reaches age 21. Pursuant to I.C. § 22-3-3-19(d), if a child marries after the death of the employee and subsequently divorces, dependency is not reinstated.

iv. An unmarried child under 21 years of age upon the parent with whom the child may not be living at the time of such parent's death, but upon whom, at such time, the laws of the state impose the obligation to support such child; however,

pursuant to I.C. § 22-3-3-19(c), the dependency of these children terminates when the child reaches age 21. Pursuant to I.C. § 22-3-3-19(d), if a child marries after the death of the employee and subsequently divorces, dependency is not reinstated.

v. A child over the age of 21 who has never been married and who is physically or mentally incapacitated from earning the child's own support, upon a parent upon whom the laws of the state impose the obligation of the support of such unmarried child.

vi. A child over the age of 21 who has never been married and who at the time of the death of the parent is keeping house for and living with such parent and is not otherwise gainfully employed. However, pursuant to I.C. § 22-3-3-19(e), the dependency terminates at when the dependent becomes gainfully employed or marries.

The term "child" under the Act includes stepchildren, legally adopted children, posthumous children, and acknowledged children born out of wedlock. The term "parent" includes stepparents and parents by adoption. I.C. § 22-3-3-19(b).

2. Total Dependents in Fact and Partial Dependents in Fact

If there are no presumptive dependents, then total dependents in fact, if any, are entitled to compensation. In other words, total dependents in fact, if any, are not entitled to any compensation if presumptive dependents exist. Total dependents in fact are entitled to compensation to the complete exclusion of partial dependents in fact. If more than one total dependent in fact exists, each total dependent in fact is entitled to compensation in equal shares.

The question of total dependency shall be determined at the time of death of the employee. I.C. § 22-3-3-18(c).

If there are no presumptive dependents and no total dependents in fact, then partial dependents in fact, if any, are entitled to compensation. In other words, partial dependents in fact, if any, are not entitled to any compensation if presumptive dependents or total dependents in fact exist. The weekly compensation to persons partially dependent in fact shall be in the same proportion to the weekly compensation of persons wholly dependent as the average amount contributed weekly by the deceased to such partial dependent in fact bears to his average weekly wages at the time of the occurrence of the accident. The question of partial dependency in fact shall be determined as of the time of the occurrence of the accident. I.C. § 22-3-3-18(d).

Dependents in fact include only persons related to the deceased employee by blood or by marriage, except an unmarried child under 18 years of age. Any person who is actually totally or partially dependent upon the deceased employee is entitled to compensation as a dependent in fact. The right to compensation of any person totally or partially dependent in fact shall be terminated by the marriage of such dependent subsequent to the death of the employee and such dependency shall not be reinstated by divorce. I.C. § 22-3-3-20.

Dependency in fact is not defined in the Act; however, instead whether a person is a dependent in fact is a question of fact to be determined by the Worker's Compensation Board. *Barker v. Reynolds*, 179 N.E. 396, 397 (Ind.Ct.App. 1932). Persons claiming to be dependents in fact have the burden of proving they are dependents. *DeArmond v. Myers Gravel & Sand Corp.*, 231 N.E.2d 864, 866 (Ind.Ct.App. 1967).

Whether a claimant is a dependent in fact is determined on a case by case basis. Courts have listed indicia of dependency as (1) an obligation of the deceased employee to support the claimant, (2) the fact the deceased employee made contributions to the claimant, (3) the claimant relied on the deceased employee's continuing contributions, and (4) "the existence of some reasonable grounds as a basis for probability of their continuance or of a renewal thereof if interrupted." *Id.* (Citing *In re Carroll*, 116 N.E. 844, 846 (Ind.Ct.App. 1917)).

Cases involving parents and siblings claiming to be dependents in fact comprise the majority of precedent from the Indiana Courts relating to dependents in fact. In *Parke County Rural Electric Membership Corp. v. Goodin*, the parents of the deceased employee, their son, relied on their son's paychecks to support the family since the father was in poor health and the mother had been using the son's paycheck to purchases "necessities in the home." The Court found the parents were partial dependents in fact. 44 N.E.2d 198 (Ind.Ct.App. 1942).

In *Blue Ribbon Pie Kitchens v. Long*, although the parents of the deceased employee, their son, could afford their "obligations," even in a "severe economy," their son provided his parents a portion of his paychecks to purchase "incidentals." The Court held the parents were partial dependents in fact because without their son's support, their "standard of living [would be] substantially reduced." Importantly, the Court held, "Dependency, as used in the Worker's Compensation Act, is not restricted to the payment of a sum sufficient to provide dependents with the bare necessities of life, but may include keeping the family and home in a condition and with surroundings suitable to their station in life." 103 N.E.2d 205 (Ind. 1952).

In *King v. Illinois Steel Corp.*, the deceased employee provided his sister a "substantial" portion of his earnings to pay for her utility bills, taxes, groceries, and medical bills. The sister was married, but her husband could not work due to illness. The Court held the deceased

employee's sister was a partial dependent in fact. 176 N.E. 161 (Ind.Ct.App. 1931). In *Rhoden v. Smith & Decker Electric Co.,* the deceased employee provided his sister clothing so his sister could dress "as well as the other students" at school as well as money for vacations. The Court held the deceased employee's contributions to his sister were "gifts" and held the sister was not a dependent under the Act. 23 N.E.2d 306 (Ind.Ct.App. 1939).

There are minimal cases in which Indiana Courts analyzed extended relatives claiming benefits as dependents in fact; however, extended relatives of a deceased employee can be awarded compensation as dependents in fact should the extended relatives have evidence to support a finding that they were dependents in fact. *See In re Lanman,* 117 N.E. 42 (Ind.Ct.App. 1917).

When there are multiple partial dependents in fact and a dependent gets married, which terminates his or her dependency, the compensation shares to the remaining dependents are not redistributed. *Hymera Coal Co. v. Houpt,* 147 N.E. 813 (Ind.Ct.App. 1925).

3. Paternity Determinations for Purposes of Entitlement to Death Benefits

When paternity is disputed or unclear for purposes of determining whether a person is a child or blood relative of the deceased employee, the "Board is empowered to decide [the issue of a child's paternity] pursuant to the discharge of its administrative duties" even when there has been no judicial determination of the issue of paternity in a paternity proceeding. *Goins v. Lott,* 435 N.E.2d 1002 (Ind.Ct.App. 1982).

The Court provided further direction in *First Student, Inc. v. Estate of Meece* in holding, "the standard of proof for the factual determination of paternity in a worker's compensation claim is effectively the same as that used under the paternity statutes. The standard of proof under the

paternity statutes requires some corroboration of the mother's testimony, i.e. circumstances suggesting a probability of paternity." 849 N.E.2d 1156 (Ind.Ct.App. 2006).

4. Tools the Board May Use for Administration of Benefit Payments

   i. Guardianships and Trustees

      a. Under the Act, for dependents under age 18, benefit payments exceeding $100 must be paid to a trustee, guardian, or parent. I.C. § 22-3-3-28 provides, "Whenever the aggregate payments of compensation, due to any person under eighteen (18) years of age, exceed one hundred dollars ($100), the payment thereof shall be made to a trustee, appointed by the circuit or superior court, or to a duly qualified guardian, or to a parent upon the order of the worker's compensation board. The payment of compensation, due to any person eighteen (18) years of age or over, may be made directly to such person." The statute appears to allow the Board discretion to order the payments be sent to a guardian, if for example, the Board decides a guardian would be more appropriate than a parent for receiving payment of the child's funds.

      b. Further, I.C. § 22-3-3-29 provides, "If any injured employee or a dependent is under guardianship at the time when any right or privilege accrues to the employee or dependent under IC 22-3-2, IC 22-3-3, IC 22-3-4, IC 22-3-5, or IC 22-3-6, the employee or dependent's guardian shall claim and exercise the right or privilege of the employee or dependent."

   ii. Lump Sum Payment of Death Benefits

a. In unusual cases, upon the agreement of the employer and the employee's dependents, and the insurance carrier, and the approval of the Board, compensation may be redeemed, in whole or in part, by the cash payment, in a lump sum, of the commutable value of the installments to be redeemed. I.C. § 22-3-3-25(a). In all such cases, the commutable value of the future unpaid installments of compensation shall be the present value thereof, at the rate of 3% interest, compounded annually. I.C. § 22-3-3-25(c).

b. "Whenever the [Board] deems it expedient," the lump sum payment may be administered by a trustee for the benefit of the person entitled to the payment in the manner authorized by the court that appointed the trustee. I.C. § 22-3-3-26.

iii. Times of Payment Set by Board

a. Although the Act, under I.C. § 22-3-3-17, requires that death benefits be paid to the dependents weekly, "When so provided in the compensation agreement or in the award of the [Board], compensation may be paid semimonthly, or monthly, instead of weekly." I.C. § 22-3-3-24.

5. Section 15 Settlements

Pursuant to I.C. § 22-3-2-15, when it is disputed whether an employee's death was work related, the deceased employee's dependents can enter into compromise, or "Section 15," settlements. Regarding minor dependents, the Act holds, "A minor dependent, by parent or legal guardian, may compromise disputes and may enter into a compromise settlement agreement, and

upon approval by a member of the worker's compensation board, the settlement agreement shall have the same force and effect as though the minor had been an adult." I.C. § 22-3-2-15.

V. **TERMINATION OF BENEFITS IN COMPENSABLE DEATH CLAIMS**

Dependency is determined at the date of death of worker. I.C. § 22-3-3-18. When a condition occurs that extinguishes a person's dependency under the Act (e.g. the deceased employee's child marries or turns 21), the employer can terminate benefits to the dependent; and the dependent can never again recover benefits under the Act.

The case *Reeve v. Georgia-Pacific* is instructive. In *Reeve v. Georgia-Pacific*, the employee killed in a work accident left behind a wife, Dorothy, and six children; the youngest child was a son, Allen. Dorothy eventually remarried and the employer terminated her benefits after she had received the value of 104 weeks of compensation pursuant to I.C. § 22-3-3-19(d). Allen turned 18 and the employer terminated his benefits (under the previous version of the statute, presumptive dependency ended at age 18). Dorothy petitioned the Board for Allen to be provided benefits as a dependent in fact. The Hearing Member granted Dorothy's request, but the full Board reversed since Allen had turned 18 and the Act does not allow for redetermination of a person's dependency status after dependency has been terminated. The Court of Appeals agreed with the full Board and held, "Dorothy argues that pursuant to [the Act], Allen was a dependent-in-fact, as well as a presumptive dependent, and he is entitled to receive compensation after the age of 18. We disagree. Dependency is determined at the date of death of the employee. Once the right to dependent's benefits is established, payments are thereafter terminated if the conditions enumerated in the statute occur. Those conditions are absolute and there is no provision in the

statute for a redetermination of actual dependency." 510 N.E.2d 1378 (Ind.Ct.App. 1987). However, the Court reversed the Board on other, unusual grounds.[5]

Regarding redistribution of benefits, when a condition occurs that extinguishes the dependency of a presumptive dependent or a total dependent in fact, the benefits are redistributed. Further, when a presumptive dependent or total dependent in fact dies, the benefits are redistributed among the surviving dependents rather than through the laws of succession. *See Smith v. Highway Commission* where an employee killed in a work accident left behind a wife, a child of his wife, and an illegitimate child. The illegitimate child died shortly after the employee's death. The Court held the worker's compensation benefits were required to redistribute to the employee's wife and the child of his wife. 134 N.E. 225 (Ind.Ct.App. 1922).

See also Studebaker Corp. v. Anderson where the Court held, "Where there are two or more wholly dependent, the death of one before the termination of the maximum compensation period does not relieve the employer from the payment of the full amount of death benefits awarded, if any one of such dependents survive, until such period is ended. The total death benefit ascertained is the measure of the employer's liability." 183 N.E. 408 (Ind.Ct.App. 1932).

In cases of partial dependents in fact, when a condition occurs that extinguishes a person's dependency, the benefits are not redistributed among the remaining dependents. *Hymera Coal Co. v. Houpt*, 147 N.E. 813 (Ind.Ct.App. 1925), *Consolidated Perry Corp. v. Moore*, 249 N.E.2d 524 (Ind.Ct.App. 1969).

[5] Although the Court of Appeals held redetermination of dependency is not allowed, the Court reversed the Board's denial of ongoing benefits under the doctrine of promissory estoppel since it was found that Dorothy relied on the mistaken statement from the claims adjuster that "if Allen continues to go to school and you can provide proof that he is not gainfully employed, he will continue to receive the benefit."

VI. **BENEFITS OWED WHEN EMPLOYEE DIES UNRELATED TO WORK INJURY**

When an employee without any dependents dies from a cause unrelated to the work injury at a time when the employee has outstanding worker's compensation benefits, such as the value of a permanent partial impairment rating, the employer has no further obligation to pay benefits. *See Federal Cement & Tile Co. v. Pruitt* where the Court held:

> Our review of the Workmen's Compensation Act fails to disclose any provision for the survival of an action for compensation benefits in those cases where the employee leaves no dependents…We find no provision that any compensation due, or which may be collectible, shall belong or be paid to the personal representative, estate or heirs of a deceased employee, without dependents….The Workmen's Compensation Act, as our courts have many times said, is given a liberal construction in favor of the employee, to carry out the humane purposes of the Workmen's Compensation Act, but such construction does not authorize the Industrial Board or this court to judicially legislate or interpret the law so that compensation will be granted without specific statutory provision therefor. 146 N.E.2d 557 (Ind.Ct.App. 1957).

When dependents exist and an employee dies from a cause unrelated to the work injury at a time when the employee has outstanding worker's compensation benefits, then the employee's dependents can claim the outstanding benefits. For work injuries occurring after April 1, 1951, presumptive dependents are owed the outstanding benefits up to a maximum amount of the value of 500 weeks of temporary total disability ("TTD") benefits; and if there are no presumptive dependents, then dependents in fact are owed the outstanding benefits up to a maximum amount of the value of 350 weeks of TTD benefits. I.C. § 22-3-3-16.

CONCLUSION

Handling and litigating a death claim in front of the Worker's Compensation Board is a fluid process for all involved. Although the death claims provisions of the Worker's Compensation Act include many complexities not seen in other areas of law, attorneys owe it to

their clients to be knowledgeable about the Act and its complexities in order to provide the best possible representation.

2021 ICLEF Masters Series
Advanced Worker's Compensation

Death Benefits Under the Indiana Worker's Compensation Act

LIBBY V. MOSS AND AUBREY K. NOLTEMEYER

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Compensability of Death Claims

- The Act provides for compensation of injury or death by accident arising out of and in the course of employment. I.C. § 22–3–2–2.
- The claimant bears the burden of proving the right to compensation. I.C. § 22–3–2–2.
- The issue of whether an employee's injury or death arose out of and in the course of his or her employment is a question of fact to be determined by the Board. *Indiana Michigan Power Co. v. Roush,* 706 N.E.2d 1110, 1113 (Ind.Ct.App. 1999).

In the Course of Employment

- An accident occurs “in the course of employment” when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is fulfilling the duties of employment or while engaged in doing something incidental thereto. *Milledge v. Oaks,* 784 N.E.2d 926, 929 (Ind. 2003).

Arising Out of Employment

- An accidental injury "arises out of" employment when a causal nexus exists between the injury sustained and the duties or services performed by the injured employee. *Indiana Michigan Power Co. v. Roush,* 706 N.E.2d 1110, 1113 (Ind.Ct.App. 1999).
- A "triggering event" is necessary to establish a causal link between the employee's death and the employee's employment. *Bertoch v. NBD Corp.,* 813 N.E.2d 1159 (Ind. 2004).
- Injury or death caused by risks personal to the employee are not compensable. *Indiana Michigan Power Co. v. Roush,* 706 N.E.2d 1110, 1113 (Ind.Ct.App. 1999).

Reporting and Notice Obligations – Employee's Dependents

- Unless the employer has actual knowledge of an injury or death, the deceased employee's dependents must provide the employer written notice of the injury or death as soon as practicable.

Reporting and Notice Obligations – Employer

- Employer must report the injury to its worker's compensation insurance carrier within 7 days.
- Insurance carrier must file a First Report of Injury with the Board within 7 days of receipt of the injury report from the employer.
- If an employee dies from a work injury that has already been reported to the Board through a First Report of Injury, an additional First Report of Injury is not necessary.

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Determination of Compensability – Employer's Investigation

- An employer or employer's insurance carrier has 30 days from the date of the employer's knowledge of the injury to determine compensability.
- An employer or employer's insurance carrier may request an additional 30 days to investigate by filing a Form 48557.
- If an employer denies a claim, it must file a Form 53914 Notice of Denial of Benefits.
- An employer may request an autopsy in its compensability investigation. If the surviving spouse or dependents refuse, the employer must prove to the Board (1) that a demand for an autopsy to be performed at reasonable time and place was made, and (2) that an autopsy is necessary.

Dependents Disputing Denial of Benefits

- Dependents must file a Form 29109 Application for Adjustment of Claim within 2 years of the employee's death.

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Amount of Benefits Owed for Death Caused by a Work Injury

- The deceased employee's dependents, as determined by the Act, are entitled to weekly compensation in the amount of 66 2/3% of the deceased employee's average weekly wage (the TTD rate) at a maximum of $780.00 per week until the compensation paid, when added to the compensation already paid to the deceased employee equals 500 weeks (for a maximum of $390,000.00).
- The employer is obligated to pay burial expenses up to $10,000 (burial expenses are not included in the 500 weeks' worth of compensation owed to the employee/dependents).

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Who are a Deceased Employee's "Dependents" Under the Act?

- Three Classes:
  - Presumptive Dependents
  - Total Dependents in Fact
  - Partial Dependents

Presumptive Dependents

- Presumptive dependents share benefits equally to the complete exclusions of total dependents in fact and partial dependents in fact.
- Include:
  - Deceased employee's wife or husband (who is living with deceased employee at time of death)
  - Unmarried children under 21 who lived with the parent at the time of the parent's death
  - Children over 21 who have never been married and are physically or mentally incapacitated from earning their own support
  - Children over 21 who have never been married and who at the time of the death of the parent are keeping house for and living with such parent and is not otherwise gainfully employed

Presumptive Dependents: Children and Parents Defined

- A “child” includes stepchildren, legally adopted children, posthumous children, and acknowledged children born out of wedlock.
- The term “parent” includes stepparents and parents by adoption.

Presumptive Dependents – Amount of Compensation Illustration

- Husband dies in a work accident. He leaves behind Wife, Daughter, who is exactly 20 years and 50 weeks old, and Son, who is 5 years old. Wife, Daughter, and Son lived with Dad at the time of his work accident. No worker's compensation benefits have yet been paid.
- Assuming Dad's TTD rate is $780.00 per week, how much are Wife, Daughter, and Son owed?

ANSWER

- Total death benefits could be $390,000. ($780 x 500 weeks = $390,000)
- Daughter may be entitled to only her share of 2 weeks of benefits as she turns 21 in 2 weeks.
- The remaining benefits are owed to Wife and Son.

Dependents in Fact

- Dependents in fact include persons related to the deceased employee by blood or by marriage, except an unmarried child under 18 years of age. Any person who is actually totally or partially dependent upon the deceased employee is entitled to compensation as a dependent in fact.
- The right to compensation of any person totally or partially dependent in fact shall be terminated by the marriage of such dependent subsequent to the death of the employee and such dependency shall not be reinstated by divorce. I.C. § 22-3-3-20.
- Examples: Parent, Sibling, Niece/Nephew, Cousin

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Determination of Dependents in Fact

- Whether a claimant is a dependent in fact is determined on a case by case basis.
- Indicia of dependency- (1) an obligation of the deceased employee to support the claimant, (2) the fact the deceased employee made contributions to the claimant, (3) the claimant relied on the deceased employee's continuing contributions, and (4) "the existence of some reasonable grounds as a basis for probability of their continuance or of a renewal thereof if interrupted." *DeArmond v. Myers Gravel & Sand Corp.,* 231 N.E.2d 864, 866 (Ind.Ct.App. 1967).
- The Board is tasked with finding whether contributions from the deceased employee were looked to, or depended and relied on, in whole or in part, by the family for means of reasonable support. Rhoden v. Smith & Decker Electric Co., 23 N.E.2d 306 (Ind.Ct.App. 1939) (citing In re Carroll, 116 N.E. 844 (Ind.Ct.App. 1917).

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Total Dependents in Fact

- If there are no presumptive dependents, then total dependents in fact, if any, are entitled to compensation. (In other words, total dependents in fact, if any, are not entitled to any compensation if presumptive dependents exist.)
- Total dependents in fact are entitled to compensation to the complete exclusion of partial dependents in fact. If more than 1 total dependent in fact exists, each total dependent in fact is entitled to compensation in equal shares.

Dependency in Fact Illustrations

- A sister was a dependent in fact when her brother (deceased employee) provided her a “substantial” portion of his earnings for her bills and groceries. *King v. Illinois Steel Corp.*, 176 N.E. 161 (Ind.Ct.App. 1931).
- Parents were dependents in fact when their son (deceased employee) provided them a portion of his paycheck for “incidentals” to substantially improve their “standard of living.” *Blue Ribbon Pie Kitchens v. Long,* 103 N.E.2d 205 (Ind. 1952).

Partial Dependents

- If there are no presumptive dependents and no total dependents in fact, then partial dependents in fact, if any, are entitled to compensation
- The weekly compensation to persons partially dependent in fact shall be in the same proportion to the weekly compensation of persons wholly dependent as the average amount contributed weekly by the deceased to such partial dependent in fact bears to his average weekly wages at the time of the occurrence of the accident. I.C. § 23-3-3-18.
- Examples: Parent, Sibling, Niece/Nephew, Cousin

Partial Dependents

- A partial dependent is a person who “looked to, or depended and relied on [the deceased employee]…in part…for means of reasonable support.” *Rhoden v. Smith & Decker Electric Co.*, 23 N.E.2d 306 (Ind.Ct.App. 1939) (citing *In re Carroll*, 116 N.E. 844 (Ind.Ct.App. 1917).
- Case by case basis- the Board is tasked with finding whether a person claiming to be a dependent relied on the deceased employee for reasonable support

Partial Dependents

- *See Rhoden v. Smith & Decker Electric Co.,* 23 N.E.2d 306 (Ind.Ct.App. 1939).
  - Prior to the employee's death, he provided his father weekly payments for bills and groceries- The father was found to be a partial dependent.
  - Prior to the employee's death, he bought his sister clothes so she could dress as nicely as her classmates and he gave her money for vacations- The sister was not found to be a partial dependent.

Partial Dependents – No Redistribution

- When there are multiple partial dependents in fact and a condition occurs that ends a partial dependency (e.g. dependent gets married or dies), the compensation shares to the remaining dependents is not redistributed. *See Hymera Coal Co. v. Houpt,* 147 N.E. 813 (Ind.Ct.App. 1925).

No Redistribution for Partial Dependents- Illustration

- 3 partial dependents, Mary, Susan, and Steve, are awarded death benefits in proportions of 60%, 20%, and 20%, respectively. Mary gets married, terminating her dependency. Susan and Steve's benefits payments will not increase.
- The policy behind no redistribution for partial dependents is that redistributing Mary's benefits to Susan and Steve may cause them to receive benefits payments that exceed the amount of money they actually received from the deceased employee. *See Hymera.*

Lump Sum Payment of Death Benefits

- Upon the agreement of the employer, the employee's dependents, the insurance carrier, and with the approval of the Board, compensation may be redeemed, in whole or in part, by the cash payment, in a lump sum, of the commutable value of the installments to be redeemed. I.C. § 22-3-3-25(a).
- In all such cases, the commutable value of the future unpaid installments of compensation shall be the present value thereof, at the rate of 3% interest, compounded annually. I.C. § 22-3-3-25(c).

Guardianships and Trustees

- The Board has the discretion to order a dependent's benefits be paid to a guardian or trustee. See I.C. § 22-3-3-28.
- If a dependent is already under a guardianship at the time benefits are to be paid, the dependent's benefits shall be paid to the guardian. See I.C. § 22-3-3-29.

Trustee for Administration of a Lump Sum Payment

- Whenever the Board deems it expedient, any lump sum paid, pursuant to I.C. § 22-3-3-25, can be paid by the employer to some suitable person or corporation appointed by the circuit or superior court, as trustee, to administer the same for the benefit of the person entitled thereto, in the manner authorized by the court appointing such trustee.
- The receipt of such trustee for the amount so paid shall discharge the employer or anyone else who is liable therefor. I.C. § 22-3-3-26.

Termination of Benefits

- When an event occurs that extinguishes a person's dependency under the Act (e.g. the deceased employee's child marries or turns 21), the employer can terminate benefits to that dependent.
- When a person's dependency is terminated, the person can no longer recover benefits. See *Reeve v. Georgia Pacific,* 510 N.E.2d 1378 (Ind.Ct.App. 1987), I.C. § 22-3-3-18.
- Per I.C. § 22-3-3-18, dependency is only to be determined at the time of the employee's death. There is no redetermination of dependency that can make a person a dependent again after his or her dependency has been extinguished.

Benefits Owed When No Dependents Exist

- When an employee without dependents dies with outstanding benefits to be paid, the employer has no further obligation to pay benefits. See *Federal Cement & Tile Co. v. Pruitt,* 146 N.E.2d 557 (Ind.Ct.App. 1957).

Benefits Owed When Employee's Death is Delayed

- Presumptive dependents are entitled to the outstanding benefits up to the value of 500 weeks of TTD benefits.
- Dependents in fact are entitled to the outstanding benefits up to the value of 350 weeks of TTD benefits.

Benefits Owed When Employee Dies Unrelated to Work Injury

- When an employee with dependents dies with outstanding benefits to be paid, for work injuries occurring after April 1, 1951, then the employee's dependents can claim the outstanding benefits. I.C. § 22-3-3-16.

Q & A

Libby Valos Moss

T: 317-968-8175

E: Lmoss@k-glaw.com

Kightlinger & Gray Law Firm Worker's Compensation

Aubrey K. Noltemeyer

T: 317-968-8147

E: Anoltemeyer@k-glaw.com