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Indiana Workmen's Compensation Act: Accidents Arising Out of and In the Course of the Employment

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Notes

Indiana Workmen's Compensation Act: Accidents Arising Out of and In the Course of the Employment

The Indiana Workmen's Compensation Act requires that to receive compensation, an employee must suffer "personal injury or death by accident arising out of and in the course of the employment."[1] Two elements of this requirement have proven most troublesome for the Indiana courts: determining whether there has been an "accident," and whether the accident arises out of the employment, that is, whether there is a causal nexus between the accident and the employment.[2] Current Indiana case law manifests two distinct tests for determining whether a compensable accident has occurred: the unexpected event theory and the unexpected result theory.[3] This note proposes that courts apply the unexpected result

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[1] The relevant provision of the Indiana Workmen's Compensation Act states: "[E]very employer and every employee, except as herein stated, shall be required to comply with the provisions of this law, 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." IND. CODE § 22-3-2-2 (1976). Thus, the Workmen's Compensation Act was designed to provide the exclusive remedy for employees who suffer work-related injuries.

Also, it should be noted that the phrase "accident arising out of and in the course of the employment" was created to abrogate the use of common-law tort principles in the context of the employment relationship. The court in Stainbrook v. Johnson Co. Farm Bureau, 125 Ind. App. 487, 491, 122 N.E.2d 884, 887 (1954) (en banc) stated:

> The basic principle of the Compensation Act is based upon the proposition that the common-law rule of liability for personal injuries incident to the operation of industrial enterprises based upon negligence of the employer with its defenses of contributory negligence and assumption of risk is inapplicable to modern conditions of employment.

Accord, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

[2] For a comprehensive discussion of the varying interpretations of "accident" which arose from the Indiana Supreme Court decision in United States Steel Corp. v. Dykes, 238 Ind. 599, 154 N.E.2d 111 (1958), see Note, *The Meaning of the Term "Accident" in the Indiana Workmen's Compensation Act*, 13 VAL. L. REV. 535 (1979).

[3] In defining the unexpected event our courts have utilized two theories: the *unexpected cause* and the *unexpected result.* Under the *unexpected cause* theory an 'accident' cannot occur in the absence of some kind of increased risk or hazard, e.g., a fall, slip, trip, unusual exertion, malfunction of machine, break, collision, etc., which causes an injury. Under the *unexpected result* theory an 'accident' may occur where everything preceding the injury was normal, and only the injury itself was unexpected, e.g., where a worker bends over, stoops, turns, lifts something, etc., which activity is part of his every day work duties, and yet, . . . he is unexpectedly injured.

Ellis v. Hubbell Metals, Inc., ___ Ind. App. ___, ___, 366 N.E.2d 207, 211-12 (1977) (footnotes omitted) (emphasis in the original).

theory as the appropriate test of whether an accident has occurred. Adoption of the unexpected result theory would place primary emphasis on identifying the causal nexus between the accident and the employment. An analysis of factually complex cases, such as where an injury aggravates a pre-existing condition or where cumulative accidents produce an injury, will demonstrate that the causation issue focuses on criteria more relevant to the ultimate question of whether the employer should compensate the employee. Finally, it will be proposed that a logical consequence of emphasizing the causation factor would be to apportion liability in pre-existing condition cases.[4]

ELEMENTS OF A PRIMA FACIE CASE

The Indiana Workmen's Compensation Act provision requiring personal injury to be "by accident arising out of and in the course of the employment," discloses four distinct components.[5] First, an injury must have been sustained by the employee.[6] Second, the injury must be "by accident"—a phrase subject to numerous inter-

[4] IND. CODE § 22-3-3-12 (1976).

> If an employee has sustained a permanent injury either in another employment, or from other cause or causes than the employment in which he received a subsequent permanent injury by accident, such as specified in section 31 [22-3-3-10], he shall be entitled to compensation for the subsequent permanent injury in the same amount as if the previous injury had not occurred: Provided, however, That *if the permanent injury for which compensation is claimed, results only in the aggravation or increase of a previously sustained permanent injury or physical condition, regardless of the source or cause of such previously sustained injury or physical condition, the board shall determine the extent of the previously sustained permanent injury or physical condition,* as well as the extent of the aggravation or increase resulting from the subsequent permanent injury, *and shall award compensation only for that part of such injury, or physical condition resulting from the subsequent permanent injury.*

Id. (emphasis added).

[5] See B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA (1950), for a general treatise on this subject.

[6] This is a basic evidentiary issue, common also to tort law, which turns on the facts of each case. Certainly the most essential aspect of a workmen's compensation claim, and usually the least troublesome, is offering probative evidence regarding damage. However, one aspect of an injury which still presents problems to the courts occurs when the claimant seeks compensation for mental injury. The basic rule was enunciated in E.I. DuPont De Nemours & Co. v. Green, 116 Ind. App. 283, 287, 63 N.E.2d 547, 548 (1945):

> [W]hen a purely mental condition known as a neurosis is shown by competent evidence to be the direct result of a physical injury sustained by an employee arising out of and in the course of the employment and which neurosis, through functional disturbances of the nervous system, disables the employee from working at his former occupation, he has suffered a compensable injury under the terms of the Indiana Workmen's Compensation Act.

pretations.[7] The third aspect of this provision is the requirement that the accident arise from the employment. This presents perhaps the most elusive issue, and can be best characterized as a problem of causation. Finally, it must also be demonstrated that the injury was sustained in the course of employment.[8] While the words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, the words "in the course of" refer to the time, place and circumstances under which the accident occurs. All four elements must be proved before the Industrial Board[9] in order for a claimant to be entitled to compensation.[10]

The plaintiff's burden of proof is somewhat mitigated, however, because these statutory requirements are subject to a rule of liberal construction.[11] In keeping with the purposes of workmen's compensation, the Indiana courts have consistently emphasized that they are required to interpret liberally the provisions of the Workmen's Compensation Act.[12] The courts, however, also recognize that the Act does not contemplate that the employer be liable for all injuries occurring at the place of employment. The most recent decision by the Indiana Supreme Court stated that "[i]t is not sufficient to merely show that a claimant worked for the employer during the period of his life in which his disability arose."[13]

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[7] "The meaning assigned to the word 'accident,' as used in compensation acts, must be distinguished from its meaning as used in accident insurance policies." Indian Creek Coal & Mining Co. v. Calvert, 68 Ind. App. 474, 483, 119 N.E. 519, 522 (1918). "[T]he word 'accident' as used in accident policies, 'should be given its ordinary and usual signification as being an event that takes place without one's foresight or explanation.' " Schmid v. Indiana Travelers' Accident Ass'n, 42 Ind. App. 483, 495, 85 N.E. 1032, 1037 (1908) (quoting Supreme Council of the Order of Chosen Friends v. Garrigus, 104 Ind. 133, 140, 3 N.E. 818, 822 (1885)).

[8] The Indiana standard with respect to whether an injury occurs within the course of employment, was succinctly expressed in Laesar v. Anderson, 99 Ind. App. 428, 434, 192 N.E. 762, 765 (1934) (quoting Jeffries v. Pitman-Moore Co., 83 Ind. App. 159, 161, 147 N.E. 919, 920 (1925)). The court stated that the accident must take place "within the period of employment, at a place where the employee may reasonably be, and while he is fulfilling the duties of his employment, or is engaged in doing something incidental to it."

[9] The Industrial Board consists of seven members, appointed by the Governor, not more than four of whom shall belong to the same political party. The chairman must be an attorney of recognized qualifications. IND. CODE § 22-3-1-1 (1976) specifies the terms and duties of the Industrial Board.

[10] The Workmen's Compensation claimant must prove his case "by evidence of probative value, free from conjecture, surmise, or mere guess . . . ." B.P.O. Elks, #209 v. Sponholtz, 144 Ind. App. 150, 156, 244 N.E.2d 923, 926 (1969).

[11] Frampton v. Central Ind. Gas Co., 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973).

[12] Motor Dispatch, Inc. v. Snodgrass, 157 Ind. App. 591, 594, 301 N.E.2d 251, 253 (1973), *rev'd & remanded on other grounds*, ___ Ind. ___, 362 N.E.2d 489 (1977); Haskell & Barker Car Co. v. Brown, 67 Ind. App. 178, 188, 117 N.E. 555, 558 (1917).

[13] Calhoun v. Hillenbrand Indus., Inc., ___ Ind. ___, ___, 381 N.E.2d 1242, 1244 (1978) (two justices dissenting).

INJURIES WHICH AGGRAVATE PRE-EXISTING CONDITIONS

The problems courts face in determining whether an accident arises from the employment are particularly acute in cases where a pre-existing disease or condition has been found. Pursuant to the statute, the courts must decide whether the injury occurred by accident, and if a sufficient causal connection exists between the employment and the accident.

The Indiana Supreme Court in *United States Steel Corp. v. Dykes* dealt with the latter issue, causation, while denying compensation to the employee.[14] *Dykes* involved an employee who suffered a heart attack after a short walk from the water cooler. There was evidence of a pre-existing disease, but no evidence of aggravation due to unusual exertion, since the work that day was slower than normal. The court framed the issue in terms of whether the decedent's heart failure was caused by an increase in the work load, or a decrease in the heart's ability to meet unchanged demands of employment.[15] This emphasized the causal relationship between injury and employment, as required by the statutory phrase "arising out of the employment."[16] Compensation was denied because evidence demonstrated that the employment was not the cause of decedent's fatal heart attack. To be compensable, the accident must arise from the employment; a causal relationship must exist between the accident and the employment. The court stressed that the Workmen's Compensation Act was not enacted to compensate employees for injuries caused by the normal wear of living.[17]

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[14] 238 Ind. 599, 154 N.E.2d 111 (1958).

[15] Is the evidence competent to show that decedent died as a result of an accident arising out of and in the course of his employment or that there was a causal connection between his heart attack and his employment?

The causal question here is: Was the inability of decedent's heart to meet the demands, i.e., the 'coronary insufficiency,' caused by a change, i.e., an increase in the work load beyond the heart's ability to function, or by a decrease in the heart's ability to meet an unchanged demand. The 'cause' is that which has changed, not that which remains constant.

Id. at 607-08, 154 N.E.2d at 116.

[16] The Indiana Supreme Court quoted extensively from the *Medical Trial Technique Quarterly*, where Dr. Alan Moritz writes: "If the event stipulated is clearly unusual and if it was followed immediately by heart failure, the relationship may be reasonably clear." *Id.* at 612 n.3, 154 N.E.2d at 118 n.3.

[17] Under the evidence in this case decedent's fatal heart attack might have happened while he was working, driving his car, sitting or even sleeping. It happened while he was working at his usual occupation; and in such event, it could be said that his heart failed because it could not handle the load then demanded of it.

Id. at 611, 154 N.E.2d at 118.

While emphasizing the causation issue, the court in *Dykes* avoided the opportunity to address the issue of whether a heart attack, without stimulus from an external event, fell within the statutory definition of an accident. The supreme court's emphasis on causation, however, does not mean that workmen's compensation law should disregard the statutory term "accident," by denying it independent meaning. Two divergent theories have been developed by the Indiana courts to interpret the term: the unexpected event theory and the unexpected result theory.[18] The unexpected event theory, articulated in *Haskell & Barker Car Co. v. Brown,* defines an accident as "any unlooked for mishap or untoward event not expected or designed."[19] The two elements of the unexpected event theory are the unforeseeability or unexpectedness of the event, and a sudden event or occurrence. In contrast, the unexpected result theory defines an accident as an unexpected result or consequence unintended by the employee.[20] Thus, under the unexpected result theory an accident occurs where only the injury itself was unexpected.

The Indiana Supreme Court explicitly adopted the unexpected event theory in *Calhoun v. Hillenbrand Industries, Inc.*[21] The claimant in *Calhoun* was engaged in the normal labor of lifting boxes when she started to feel pain in her back. The Industrial Board refused compensation on the grounds that no accident occurred, since "there was no specific time or incident that could be pointed to that would cause the pain in plaintiff's back."[22] The supreme

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[18] Neither theory encompasses the notion that an accident must be an unintentional event. In the workmen's compensation context, "[a]n injury may be the result of accidental means, though the act involving the accident was intentional." General Am. Tank Car Corp. v. Weirick, 77 Ind. App. 242, 245, 133 N.E. 391, 392 (1921). This approach protects the employee where his acts are done intentionally in the course of employment, but where he does not foresee or comprehend the possible adverse consequences.

[19] 67 Ind. App. 178, 187, 117 N.E. 555, 557 (1917).

[20] An important precedent for the unexpected result theory was Indian Creek Coal & Mining Co. v. Calvert, 68 Ind. App. 474, 492, 119 N.E. 519, 524 (1918). The court stated:

> It is no longer required that the causes external to the plaintiff himself, which contribute to bring about the injury, shall be in anyway unusual; it is enough that the causes, themselves known and usual, should produce a result which on a particular occasion is neither designed nor expected. The test as to whether an injury is unexpected and so if received on a single occasion occurs 'by accident' is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing.

Id. at 492, 119 N.E.2d at 524 (quoting Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts,* 25 HARV. L. REV. 328, 340 (1912)).

[21] "It is well settled under our law that in order to show an accident there must be some untoward or unexpected event." ___ Ind. ___, ___, 381 N.E.2d 1242, 1244 (1978) (two justices dissenting).

[22] *Id.* at ___, 381 N.E.2d at 1243.

court upheld the decision of the Industrial Board as the trier of fact,[23] and reversed the court of appeals' conclusion that the back injury "was attributable to the gradual wear and tear from bending and lifting during the performance of her normal work duties, and manifested itself on the day the pain commenced."[24]

However, adoption of the unexpected event theory in *Calhoun* is inconsistent with the supreme court's prior decision in *United States Steel Corp. v. Dykes*.[25] Under the unexpected event theory, an accident never occurred in *Dykes*: since the heart attack manifested itself while the claimant was walking back from the water cooler, it is impossible to point to an external event which would qualify as an accident. It follows that if there were no accident, the case could have been summarily dismissed because the claimant failed to prove a necessary element of the statute; the court need never have reached the causation question of whether the accident arose from the employment. The only plausible explanation of the *Dykes* decision, therefore, is that the court considered aggravation of a pre-existing condition an unexpected event. The *Dykes* court, in distinguishing compensable cases from the case with which it was presented, stated that "[i]n each of the [compensable] instances the fatal heart attack was preceded by some type of untoward or unexpected incident, or there was evidence of the aggravation of a previously deteriorated heart or blood vessel."[26] Thus, the court implies that aggravation is an alternative to an unexpected event and is an additional definition of accident. Aggravation leading to injury can occur over extended periods of time, however, so this alternative definition is inconsistent with the court's recent pronouncement in *Calhoun* that there must be a specific incident. Moreover, the aggravation requirement pertains to the issue of causation; it calls for a determination of whether the employment or the pre-existing condition is responsible for the injury. This is not to

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[23] The standard for review of an Industrial Board decision was pronounced in Martinez v. Taylor Forge & Pipe Works, ___ Ind. App. ___, 368 N.E.2d 1176 (1977).

> This court in reviewing a decision of the Industrial Board will only consider that evidence which supports the decision and reasonable inferences therefrom. The court cannot weigh the evidence or determine the credibility of witnesses. On appeal from a negative decision, appellants must show that the decision was contrary to law by showing that the evidence was without conflict, that it would lead to but one conclusion, and that the Industrial Board reached the opposite conclusion.

Id. at ___, 368 N.E.2d at 1177-78.

[24] Calhoun v. Hillenbrand Indus., Inc., ___ Ind. App. ___, ___, 374 N.E.2d 54, 56, *rev'd*, 381 N.E.2d 1242 (1978).

[25] 238 Ind. 599, 154 N.E.2d 111 (1958).

contend that aggravation of a pre-existing injury not be considered compensable, but rather that aggravation is merely probative of causation, and under the unexpected event theory is not a logical substitute for the accident requirement.

While the present position of the Indiana Supreme Court liberalizes the accident requirement for employees with pre-existing injuries, it also produces the anomaly that healthy employees are subject to a narrower definition of accident. A healthy employee must prove a specific external event, whereas the employee with a pre-existing condition has a lesser burden since the aggravation standard is broader. Aggravation can occur through an increased work load or extreme exertion. If an employee with a pre-existing heart condition had a heart attack while returning from the water cooler, he need only prove that his work load was increased on the day in question to satisfy the accident requirement. The previously healthy employee under the same circumstances may not be able to meet the accident requirement since there is no specific unexpected event or incident.

The court's analysis in *Dykes* is more consistent with the unexpected result theory. This approach would characterize the heart attack as an accident, because it is a result or consequence unintended by the employee. Under the unexpected result theory, an accident may occur where events preceding the injury were foreseeable, and only the injury itself was unexpected. The question then is whether the accident arose out of the employment.[27]

Where a pre-existing condition or disease occurs, proving aggravation of the injury would be crucial in obtaining compensation under the unexpected result test. Thus, while the court has explicitly adopted the unexpected event theory in *Calhoun,* the aggravation requirement where pre-existing conditions are present, set forth in *Dykes,* is a significant departure. Since in the case of a pre-existing

[26] United States Steel Corp. v. Dykes, 238 Ind. 599, 611, 154 N.E.2d 111, 117 (1958). The cases cited by the court as properly compensable reveal authority for its position that "an occurrence, which merely hastens an existing disease to its final culmination, will be deemed an accident within the meaning of the Workmen's Compensation Act . . . ." Utilities Coal Co. v. Herr, 76 Ind. App. 312, 315, 132 N.E. 262, 263 (1921). *Accord,* E. Rauh & Sons Fertilizer Co. v. Adkins, 126 Ind. App. 251, 129 N.E.2d 358 (1958), where the court supported the view that aggravation is the crucial factor and ignored the issue of whether the aggravation was the result of normal work duties, or an accidental or unexpected event.

[27] The court in Ellis v. Hubbell Metals, Inc., ___ Ind. App. ___, ___, 366 N.E.2d 207, 212 (1977), adopted the unexpected result theory as "more in keeping with the humanitarian purposes that underlie the Workmen's Compensation Act . . . ." The court further held that "a worker may be awarded compensation when a preexisting condition is aggravated by an accident which occurs during the performance of his regular work duties." *Id.* at ___, 366 N.E.2d at 211.

injury the court broadened the accident definition to focus on the causation issue, it is inequitable to require the healthy employee to surmount a more difficult definitional hurdle.

Seemingly persuasive arguments can be made against the unexpected result theory. It has been observed that under the unexpected result theory "any pre-existing illness the symptoms of which were manifest during the working hours of the day would have to be considered as arising 'out of' and 'in the course of' employment,"[28] rendering the finding of cause a nullity. The better view, however, is that the unexpected result theory is relevant only to whether there is an accident, and does not pre-empt the causation issue embedded in the "arising out of the employment" requirement.

The case of *Martinez v. Taylor Forge & Pipe Works* shows that the unexpected result test need not subsume the causation question.[29] In *Martinez,* the issue was whether noise-induced hearing loss is compensable under the Indiana Workmen's Compensation Act. Analyzing the case under the unexpected result theory, the court held that even though a high level of noise existed at the plant, the employees did not suffer an "accident" within the meaning of the Workmen's Compensation Act. The court noted that "the claimants suffered neither unexpected nor unforeseen hearing loss from their normal work activities."[30] Quoting extensively from the Industrial Board's findings (based on the parties' stipulations of fact) the court emphasized that members of the general public suffer noise-induced hearing loss caused by noise exposure away from their places of employment. Additionally, employees' hearing loss could be a consequence of old age. The court, holding the employer not liable, could not distinguish hearing loss caused by normal wear of everyday living from loss caused by employment. *Martinez* thus demonstrates that the unexpected result theory does not render the causation issue meaningless. On the contrary, the court still requires that an accident, as defined by the unexpected result theory, arise from the employment.

CUMULATIVE ACCIDENTS

The concept of "cumulative accidents" presents a further difficulty the courts have had in developing a sound interpretation of the

[28] *Id.* at ___, 366 N.E.2d at 215 (Hoffman, J., dissenting).
[29] ___ Ind. App. ___, 368 N.E.2d 1176 (1977).
[30] *Id.* at ___, 368 N.E.2d at 1178.

statutory provision "accidents arising out of and in the course of the employment." The phrase "cumulative accidents" refers to situations where one specific event or occurrence cannot be labeled the sole cause of the injury: it is the cumulative effect of many events, loosely termed accidents, that produces the harm. This problem is portrayed in *American Maize Products Co. v. Nichiporchnik,*[31] where a repetition of relatively slight blows from an air hammer over a ten year period culminated in a disability. The court viewed the effect of the series of blows as unintended and unexpected, holding that "it is not necessary that the accident occur at any particular or specific time."[32] In essence, the court allowed a series of events to fall within the statutory term "accident." This case provided the foundation for the unexpected result theory, which focuses on the unforeseeability of the injury to the employee. By finding a direct causal connection between the work-related cause and the injury, the court labeled the injury an accident.

However, the Supreme Court of Indiana in *Calhoun,* while adopting the unexpected event theory, indicated that it agreed with the conclusion in *American Maize.*[33] The *Calhoun* court stated that "[t]he *American Maize* court found that under those circumstances, the claimant was not bound to show the resultant injury and damage was due to one particular blow which produced the particular injury."[34] By allowing compensation for a condition appearing after ten years of repeated minor blows to the hand, it is unlikely that the court actually found an untoward or unexpected event. It is more likely that the causation issue so heavily favored the plaintiff that the court felt the unforeseeable consequences of a work-related incident occurring over ten years were sufficient proof of an accident. This becomes evident when comparing the fact situation in *Calhoun* with *American Maize.* The question which immediately presents itself is why bending to lift boxes could not also accumulate to produce an accident. The cases can be reconciled, however, on the ground that back problems can be caused by a variety of sources, whereas the unique nature of the plaintiff's disabled hand could not easily result from normal living.

Thus, the problem of "cumulative accidents" demonstrates another serious flaw in the unexpected event theory. The validity of the unexpected event theory as the proper interpretation of

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[31] 108 Ind. App. 502, 29 N.E.2d 801 (1940).

[32] *Id.* at 511, 29 N.E.2d at 805.

[33] Calhoun v. Hillenbrand Indus., Inc., ___ Ind. ___, ___, 381 N.E.2d 1242, 1244 (1978) (two justices dissenting).

[34] *Id.* at ___, 381 N.E.2d at 1244.

"accident" loses credibility when the requirement of a specific event is liberalized to include a series of events which occurred over ten years before the injury to the employee. Requiring that an accident be characterized in terms of a specific event clutters the law with distinctions more illusory than real. The issue ought to be whether the injury was an unexpected result of employment. There must be a distinct and undeniable causal connection between the injury and employment, an issue more susceptible to proof since expert testimony can aid the court in determining whether the necessary causal connection exists. While the primary advantage of the unexpected event theory is the evidentiary value of requiring one distinct, external event, the employee can easily fabricate the event by describing the harm as occurring after a slip, twist, fall or blow. The Indiana Supreme Court's departures from the requirement of an unexpected event (*e.g.*, aggravation in the case of a pre-existing condition) and permitting the accumulation of many accidents over time, endorse the recognition that this theory should not be adhered to by the courts as the conclusive test of whether an accident has occurred.

Analysis of existing case law demonstrates that the unexpected result theory should be adopted by the courts as the definition of accident; nevertheless, the Indiana Supreme Court has adopted the unexpected event theory, and workmen's compensation cases must be approached in light of this recognition. Significantly, however, the supreme court has retreated from its requirement of a specific external event in two situations. Where no single event has been found to cause the injury, but instead an accumulation of events, the court has granted compensation. This liberalizing approach reflects an appreciation of the important counterbalancing role causation should play in favor of the employee; that is, where the causal nexus is clearly established, the court minimizes the requirement of an accident. The court also retreats from the unexpected event theory where aggravation of a pre-existing injury is found. Here again, the court limits the role of accident criteria, and focuses on the importance of causation.

APPORTIONMENT: A PROPOSAL

Carried to its logical conclusion, emphasis on the causation issue compels apportionment of liability in pre-existing condition cases. The Indiana Workmen's Compensation Apportionment Statute provides that a subsequent employment injury which increases or aggravates a previously sustained permanent injury or physical con-

dition be compensable only for that part of the injury or condition resulting from the subsequent injury.[35] The purpose of the Apportionment Statute, according to the Indiana Supreme Court, is to "remove one of the major barriers against the employment of the physically handicapped by dealing more fairly with the employer of such persons."[36] This approach is a notable departure from the law as it existed prior to 1945.[37] Before the present amendment was enacted in 1945, "the sum total of the prior conditions and the increase or aggravation thereof by a subsequent injury was compensable."[38] No longer is an employer required to pay compensation a second time for the same impairment, or pay compensation for an impairment wholly unrelated to the present employment.

According to the majority view in Indiana, however, the statute applies only to a claimant already suffering an impairment or disability, as distinguished from "the exacerbation or aggravation of a pre-existing, but non-impairing and non-disabling condition of the body."[39] With respect to employees' physical conditions rendering them more susceptible to injury, the employer still must fully compensate for the injury. Thus, the employer must take his employees as he finds them. This leads to results such as that in *Goodman v. Olin Matheison Chemical Corp.*,[40] where the court reversed the Industrial Board's findings that of the plaintiff's present total impairment, thirty percent was caused by the accidental injury, and the remaining seventy percent was related to an arthritis condition which pre-existed the accident.[41] The court in *Goodman* stated unequivocally that a subsequent impairment or disability should not be apportioned between the accident and the pre-existing condition.[42]

The interpretation and application of the Apportionment Statute should be reconsidered in light of the causation analysis. The dissenting opinion in *Goodman* observed that "the majority have ignored the words 'previously sustained permanent injury or *physical condition*' in the apportionment statute."[43] Thus, the view that pre-existing conditions should be apportioned finds direct support in the statute. This position recognizes that the complex factual issue of

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[35] See note 3 *supra.*

[36] Kinzie v. General Tire & Rubber Co., 235 Ind. 592, 600, 134 N.E.2d 212, 216 (1956).

[37] Moore v. Staton, 120 Ind. App. 339, 341, 92 N.E.2d 564, 565 (1950).

[38] *Id.*

[39] Goodman v. Olin Matheison Chem. Corp., ___ Ind. App. ___, ___, 367 N.E.2d 1140, 1144 (1977).

[40] *Id.*

[41] *Id.* at ___, 367 N.E.2d at 1142-43 (quoting from the certified findings and award).

[42] *Id.* at ___, 367 N.E.2d at 1143.

[43] *Id.* at ___, 367 N.E.2d at 1146 (Buchanan, J., dissenting).

causation can be decided equitably where compensation in the law is not "all or nothing."[44]

This approach should not apply where the pre-existing condition has no causal connection with the injury caused by the employment accident.[45] However, in cases such as *Goodman,* the Industrial Board should be able to apportion liability where the total disability cannot be attributed to the accidental injury, "but rather comes from conditions that . . . were totally unrelated to [the] accidental injury, excepting insofar as [it] . . . may have lead [*sic*], in part, to [the employee's] present total disability from following any gainful employment."[46] While mathematical certainty is impossible, the Industrial Board nevertheless should have the authority to

[44] Recent federal laws prohibiting employers which receive federal financial assistance from discriminating against the handicapped, further support use of the Indiana Apportionment Statute where claimants have pre-existing conditions: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794 (1976).

Regulations and standards propounded by the Department of Health, Education, and Welfare pursuant to the federal statute have been recognized by the Seventh Circuit in Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977). The court in *Lloyd* stated: "HEW is given the responsibility of establishing standards for who are 'handicapped individuals' and for determining what are discriminatory practices . . . ." *Id.* at 1281.

The federal statute has also broadened the definition of the term "handicapped person." The court in *Lloyd* noted that "one of the principal purposes of the 1974 Rehabilitation Act Amendments was to include within Section 504 individuals who may have been unintentionally excluded from its protection by the original definition of handicapped individuals which over-emphasized employability." *Id.* at 1285 n.25. Consequently, "handicapped person" now means any person who has a record of an impairment, or is regarded as having such an impairment. 45 C.F.R. § 84.3(j) (1977). Physical or mental impairment has been loosely defined as any physiological or mental disorder or condition. 45 C.F.R. § 84.3(j)(2) (1977). Thus, the Department states that a person falls within the statute if he has a physical or mental impairment that does not substantially limit major life activities, but that is treated by the employer as constituting such limitation, and on the basis of that determination the employer denies employment. 45 C.F.R. § 84.3(j)(2)(iv) (1977).

The federal rehabilitation statute can have an adverse effect on Indiana Workmen's Compensation law. When an employer refuses to hire an individual with no present disability, but a long medical history of prior back problems and a present back condition which does not impair his ability to work, under the existing interpretation of the Apportionment Statute the applicant suffers from no apportionable disability. If, however, the applicant is a handicapped person within the federal statute, and the employer receives federal financial assistance, employment cannot be denied. When an employer is legally bound to hire a particular employee with a known increased potential for injury, it is unjust to require that an employee must be taken as the employer finds him.

[45] This approach would not reverse the line of reasoning exemplified in Noble County Highway Dep't v. Sorgenfrei, 163 Ind. App. 81, 321 N.E.2d 766 (1975), where an employee's latent leukemia condition was not a causal factor in the accident. Apportionment is proper, however, where the condition contributes as a cause of the accident itself. *See also* Parks v. Sheller-Globe Corp., ___ Ind. App. ___, 380 N.E.2d 110 (1978).

[46] ___ Ind. App. ___, 367 N.E.2d at 1142-43 (quoting the Board's findings).

make this determination on the basis of expert testimony. This would aid employees with physical conditions and handicaps by increasing employment opportunities, and would also be consistent with recent federal laws prohibiting employers receiving federal financial assistance from discriminating against the handicapped.[47] Employers would be less wary of hiring those with a greater potential for injury if they could be confident of a fair and equitable compensation settlement.

CONCLUSION

The unexpected event theory has not provided the answer to the interpretative problems surrounding application of the phrase "accidents arising out of the employment" in Indiana workmen's compensation law. Judge Buchanan, in a dissenting opinion in *Inland Steel Co. v. Almodavar,* aptly describes the unsettled state of the law with respect to this issue when he states:

> "Accident" as a word of art in Workmen's Compensation law has become as mysterious as the Loch Ness monster . . . and awaits the attention of the Supreme Court or the Legislature.[48]

The adoption of the unexpected result test as the definition of accident would shift the emphasis away from a semantic dispute and focus instead on the underlying causation issues: the determination of whether an accident arises out of the employment should be based on an analysis of whether the employment caused the injury. This approach would assist the courts when facing the problem of cumulative accidents, where no one event can be singled out as the cause of the injury. In addition, apportionment provides a solution to the problem cases where a causal connection between employment and the injury is not clearly established, as exemplified by cases involving pre-existing conditions. Utilization of the unexpected result theory, coupled with emphasis on causation and expansion of the scope of apportionment, benefits both the employer and employee by basing compensation on the causation issue, which is susceptible to proof. The unexpected result theory is thus preferable to the unexpected event theory which hinges on illusory, definitional criteria.

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[47] *See* note 42, *supra.*

[48] Inland Steel Co. v. Almodovar, ___ Ind. App. ___, ___, 361 N.E.2d 181, 189 (1977).