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Recent Developments in Workers' Compensation

Ruth C. Vance
Valparaiso University, ruth.vance@valpo.edu

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I. INTRODUCTION

During the last year, workers' compensation has received considerable attention from the courts, the legislature, and the governor's office. The court of appeals issued a controversial decision barring common law claims for sexual harassment under the exclusive remedy provision. Indiana joined the majority of states that make some statutory provision for vocational rehabilitation, by adding a new chapter to the Workers' Compensation Act. In addition, Governor Bayh determined that Indiana's workers' compensation system is in need of reform, and he appointed a task force to make recommendations to the legislature. This Article will review the previous year's major court decisions and legislation, and outline the legislative recommendations of the task force.

II. CASE LAW

A. The Exclusivity Provision

Because Title VII of the Civil Rights Act of 1964 does not allow compensatory or punitive damages to victims of sexual harassment,[1] plaintiffs have looked to alternative claims that, if successful, could provide compensatory and punitive damages for the emotional distress that sexual harassment may cause. Sexual harassment claims may be categorized as either nonphysical sexual discrimination and harassment or physical sexual assault. Alternative claims in the tort areas of assault and battery, invasion of privacy, defamation, interference with an advantageous business relationship, and intentional infliction of emotional distress have been advanced in different jurisdictions with varying success in the face of the exclusivity provision of state workers' compensation acts. The Indiana Court of Appeals recently has held that

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* Assistant Professor of Law, Valparaiso University. I would like to thank Sue Collins, my research assistant, and Terri Graham, my secretary, for their help in producing this Article.

1. 42 U.S.C. §§ 1981 to 2000h-6 (1988).

the exclusivity provision of the Indiana Workers' Compensation Act bars actions for both sexual harassment and sexual assault.[2]

In *Fields v. Cummins Employees Federal Credit Union*,[3] Sue Fields brought an action against both her employer and her supervisor, alleging sexual harassment, assault and battery, intentional infliction of emotional distress, interference with an advantageous business relationship, and negligent retention by the employer. Fields alleged that her supervisor at the credit union told her that he would give her a better performance review if she would go to bed with him, requested repeatedly that she go to bed with him, and stated repeatedly that Fields would be promoted if she would sleep with him. She also alleged that he often touched her on her back, buttocks, and shoulders, and attempted to kiss her. The employer and the supervisor argued that Fields's sole remedy was under the Workers' Compensation Act, and that her tort claims against both her employer and her supervisor were barred by the exclusive remedy provision. The defendants also argued that Title VII and the Indiana Civil Rights Act pre-empted Fields's cause of action. The trial court accepted the defendants' arguments and granted them summary judgment.

On appeal, the Indiana Court of Appeals held that Title VII and the Indiana Civil Rights Act did not pre-empt Fields's cause of action.[4] The appellate court agreed with the trial court that Fields's tort claims against her employer were barred by the exclusive remedy provision of the Workers' Compensation Act, and the court affirmed the award of summary judgment to the employer.[5] However, the court reversed the summary judgment granted in favor of the supervisor, finding that Fields's tort claims against her supervisor were not barred by the exclusive remedy provision.[6]

The court examined the facts and determined that the three statutory jurisdictional prerequisites were met: "(1) personal injury or death by accident; (2) personal injury or death arising out of employment; and (3) personal injury or death arising in the course of employment."[7] The Indiana Supreme Court, in *Evans v. Yankeetown Dock Corp.*,[8]

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2. Arrow Uniform Rental, Inc. v. Suter, 545 N.E.2d 832, 833 (Ind. Ct. App. 1989); Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631, 636 (Ind. Ct. App. 1989).

3. 540 N.E.2d 631.

4. *Id.* at 639-40.

5. *Id.* at 637.

6. *Id.* at 638.

7. *Id.* at 634-35.

8. *Id.* at 633 (citing Evans v. Yankeetown Dock Corp., 491 N.E.2d 969 (Ind. 1986)).

had held that these three elements, which the Workers' Compensation Board uses to determine if there is workers' compensation coverage, should also be used by courts to determine if they have jurisdiction over the plaintiff's lawsuit.[9] If all three prerequisites are met, the exclusive remedy provision of the Workers' Compensation Act precludes any other rights or remedies that an employee might have against her employer for personal injury or death.[10]

Although Fields admitted that the events complained of happened in the course of her employment, she argued that her injuries were not accidental and did not arise out of her employment. Fields asserted that an injury would have to result from a single event to be accidental. The court rejected Fields's argument, and relied on *Hansen v. Von Duprin, Inc.*,[11] in which a supervisor caused a worker mental injuries by repeatedly playing jokes on the worker that took advantage of her fear of guns. The *Fields* court found no distinction between the repeated practical jokes in *Hansen* and the repeated sexual harassment in Fields's situation, and thus found that Fields's injuries were "by accident."[12]

The court of appeals also found that the "personal injury or death arising out of employment" prerequisite was met.[13] The court stated that "[a]n accident arises out of employment if it has its origin in a risk connected with that employment and flowed as a rational consequence from the employment."[14] The court then proceeded to find a causal nexus between the supervisor's acts and Fields's employment.[15] The court reasoned, much as the supreme court did in *Evans*,[16] that Fields's tort claims were based on an employment relationship existing between herself and Cummins.[17] The court stated that Fields therefore could not rely on the causal connection between her injuries and her employment relationship in the tort claim and also deny that the

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9. *Id.* (citing *Evans*, 491 N.E.2d at 973).

10. *Id.* at 633-34.

11. *Id.* at 634 (citing Hansen v. VonDuprin, Inc., 507 N.E.2d 573 (Ind. 1987)).

12. *Id.* at 635.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Evans* was a wrongful death action brought by Evans's personal representative against Evans's employer after an insane coworker shot and killed Evans while he was drinking coffee on the employer's premises right before the start of the shift. 491 N.E.2d 969, 970 (Ind. 1986). The court held that the wrongful death action was barred by the exclusive remedy provision of the Workers' Compensation Act because the claim was based on the existence of the employment relationship and a causal connection between the death and the employment. *Id.* at 976. In other words, Evans's death arose out of his employment. *Id.*

17. *Fields*, 540 N.E.2d at 635.

connection existed for purposes of overcoming the exclusive remedy provision of the Workers' Compensation Act.[18] The court of appeals further found unpersuasive Fields's argument that her employer was responsible under the doctrine of respondeat superior for the acts of her supervisor. The court reasoned that because the supervisor acted on his own initiative and not in the service of his employer, his acts were outside the scope of his employment, and the doctrine of respondeat superior did not apply.[19]

In considering Fields's tort claims against her supervisor, the court of appeals found it necessary to go beyond the three jurisdictional prerequisites to determine if the supervisor could also invoke the exclusive remedy provision. The court relied on *Martin v. Powell*,[20] which found that a coemployee could be immune from suit under the exclusive remedy provision only if the coemployee was acting in the course of employment when the plaintiff suffered compensable injuries.[21] The *Fields* court found that the supervisor's alleged acts could not have been for the employer's benefit.[22] Therefore, the supervisor's acts were not within the scope of his employment and did not arise out of his employment.[23] Consequently, the court of appeals allowed Fields to proceed with her tort claims against her supervisor.

The court of appeals found that the fact that Fields's employer did not pay any medical bills or benefits under the Workers' Compensation Act was irrelevant.[24] Rather, it found that the only relevant inquiry was whether the three statutory jurisdictional prerequisites were present.[25] The court's statement indicates that the use of the same three statutory elements to determine jurisdiction and compensability is problematic. The problem in a sexual harassment situation is that the court can determine that the Workers' Compensation Board has exclusive jurisdiction, but the Board can later decide that the sexual harassment claim is not compensable under the Workers' Compensation Act. In a sexual harassment situation, benefits likely would not be payable because medical attention is unnecessary and earning capacity would

18. *Id.*

19. *Id.* at 636.

20. *Id.* at 637-38 (citing Martin v. Powell, 477 N.E.2d 943 (Ind. Ct. App. 1985)).

21. *Id.* at 637 (citing *Martin*, 477 N.E.2d at 945). The court in *Martin* held that the injured worker could sue her coemployee for injuries she received when he pulled a chair out from under her at work, because during that act of horseplay, he was not acting within the course of his employment. *Martin*, 477 N.E.2d at 945. The *Martin* court seems to have used the term "course of employment" as "scope of employment" is used.

22. *Fields*, 540 N.E.2d at 638.

23. *Id.*

24. *Id.* at 637.

25. *Id.*

not be lost. It seems odd to bar a tort action by holding that workers' compensation is the plaintiff's sole remedy when, in fact, workers' compensation affords the plaintiff no remedy.

Also during this survey period, the Indiana Court of Appeals barred an action for physical sexual assault and battery, and held that workers' compensation afforded the plaintiff her only remedy.[26] In *Arrow Uniform Rental, Inc. v. Suter*,[27] the plaintiff alleged that she was sexually assaulted and battered by three coemployees during a Christmas party held on the employer's premises during regular work hours. Following the precedent set in *Fields*, the court found that the injury happened by accident because the assault and battery were unexpected.[28] Relying on the reasoning in *Fields*, the court held that the injury arose out of the employment and occurred in the course of employment.[29] In this case, the manager was not involved in the alleged assault and battery, and therefore enjoyed the same immunity under the exclusive remedy provision as the employer.

The coverage of workers with mental injuries caused by mental stimulus at the workplace may provide the rationale for using the exclusive remedy provision to bar tort claims for sexual harassment.[30] Many types of workplace stress also can be the basis of harassment or discrimination claims. Accordingly, the possibility of overlap between workers' compensation stress claims and tort claims is great. For example, in addition to the usual three-part analysis that most states use to determine whether an injury is compensable under a workers' compensation act, the Wyoming Supreme Court determined in a sexual harassment suit alleging assault and battery and intentional infliction of emotional distress that the mental injury resulting from the harassment was compensable under the Workers' Compensation Act.[31] Although not mentioned by the Indiana Court of Appeals, a factor leading to the decision to bar the plaintiff's sexual harassment tort claims may have been the compensability of mental injuries caused by mental stimulus.[32] Courts that have held that the exclusive remedy

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26. Arrow Uniform Rental, Inc. v. Suter, 545 N.E.2d 832, 833 (Ind. Ct. App. 1989).

27. 545 N.E.2d 832.

28. *Id.* at 833.

29. *Id.*

30. *See* D. DeCarlo & M. Minkowitz, Workers Compensation Insurance and Law Practice 289-90 (1989).

31. Baker v. Wendy's of Montana, Inc., 687 P.2d 885 (Wyo. 1984) (the court decided that the statutory definition of "injury" included mental injury; therefore, the mental injuries suffered by these victims of sexual harassment would be compensable under the Workers' Compensation Act, and their tort claims were barred).

32. Hansen v. VonDuprin, Inc., 507 N.E.2d 573, 576 (Ind. 1987).

provision does not bar sexual harassment tort claims against the employer generally have relied on the strong public policy against sexual harassment in the workplace evidenced by Title VII of the Civil Rights Act of 1964 and various state civil rights laws.[33]

Fields may not foreclose all lawsuits for sexual harassment in the workplace. A suit for sexual harassment against the employer may be brought if the alleged acts were intentional and performed or directed by the employer or its alter ego.[34] In *National Can Corp. v. Jovanovich*,[35] a machinist with a serious back injury alleged that his employer intentionally assigned him heavy labor, despite the employer's knowledge of the back injury, because the employer resented the machinist's filing of grievances and wanted the machinist to resign. Although the court held that the machinist's action failed because he did not prove that the employer had the specific intent to harm him, the court implied that, given the right set of facts, an intentional tort exception to the exclusive remedy provision may be available.[36] The court stated that "it would be a total perversion of the humanitarian purposes of the Act to permit an employer to use the Act as a shelter against liability for an intentional tort."[37] The court also stated that "[i]t must be shown that the actor was the employer, one acting pursuant to employer's direct order or one acting as the alter ego of the corporation."[38] The court in *Fields* did not address this narrow exception expressed in *National Can*; therefore, this exception still appears to be available.

During the 1990 spring session of the Indiana General Assembly, House Bill 1085,[39] coauthored by Representative Robert E. Hayes (D-

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33. *See* Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987); Hart v. National Mortgage & Land Co., 189 Cal. App. 3d 1420, 235 Cal. Rptr. 68 (1987); Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099 (Fla. 1989); Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 505 (1985); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986); Palmer v. Bi-Mart Co., 92 Or. App. 470, 758 P.2d 888 (1988).

34. Shelby v. Truck & Bus Group Div. of Gen. Motors Corp., 533 N.E.2d 1296 (Ind. Ct. App. 1989); National Can Corp. v. Jovanovich, 503 N.E.2d 1224 (Ind. Ct. App. 1987).

35. 503 N.E.2d 1224.

36. *Id.* at 1234.

37. *Id.* at 1232.

38. *Id.* at 1233 n.13.

39. The House Bill reads as follows:

SECTION 1. IC 22-3-2-6 IS AMENDED TO READ AS FOLLOWS:

Sec. 6. The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account

Columbus) and Representative John Thomas (R-Brazil), was introduced to provide additional remedies for employees alleging sexual or racial harassment. This bill would have amended the exclusive remedy provision to provide an exception for claims of sexual or racial harassment. The bill was later amended so that employers may be found liable for sexual or racial harassment only if they participated or acquiesced in the harassment through the conduct of their supervisory or management personnel.[40] The amended bill passed the House on the third reading. House Bill 1085 received a complete overhaul in the Senate and in the conference committee.[41] The conferees agreed on what was essentially

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of such injury or death, except for:

(1) remedies available under IC 16-7-3.6; or

(2) statutory or common law remedies available to an employee alleging sexual or racial harassment that occurs in the course of the employee's employment.

H.B. 1085, 106th Ind. Gen. Assembly, 2d Sess. (1990) (version considered by the House Judiciary Committee).

40. The bill provides the following:

SECTION 1. IC 22-3-2-6 IS AMENDED TO READ AS FOLLOWS:

Sec. 6. The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death, except for:

(1) remedies available under IC 16-7-3.6; or

(2) statutory or common law remedies available to an employee alleging sexual or racial harassment that occurs in the course of the employee's employment.

Employers shall only be held liable for torts related to sexual or racial harassment if the employer participated in, encouraged, condoned or ratified such tortious conduct through the actions or inactions of its supervisory or management personnel.

H.B. 1085, 106th Ind. Gen. Assembly, 2d Sess. (1990) (version passed by the House).

41. The House Bill reads as follows:

SECTION 1. IC 22-9-1-6 IS AMENDED TO READ AS FOLLOWS:

. . . .

(m) If, upon all the evidence, the commission finds a person has engaged in sexual or racial harassment in violation of this chapter, the commission shall cause to be served on the person an order requiring:

(1) the person to cease and desist from the unlawful harassment; and

(2) the person to pay the complainant not more than three hundred percent (300%) of the wages, salary, or commissions the complainant earned, or would have earned had the complainant been working, for each day after notice of the complaint was given, but not to exceed one (1) year, if the commission finds that the complainant notified the person, the commission, or a local commission established by ordinance under section 12.1 of this chapter in writing of the unlawful harassment; and

(3) the person to take further affirmative action as will effectuate the

a civil rights bill that imposed potential liability of three times what the complainant would have earned had the complainant been working each day after notice of the complaint was given.[42] The maximum amount imposed would have been the complainant's earnings for one year.[43] Before it could be voted on by the full House and Senate, the bill went to the House Rules Committee for approval; it died in the

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purposes of this chapter, including the following:

(A) To restore the complainant's losses incurred as a result of the unlawful harassment, as the commission may consider necessary to assure justice, but is limited to wages, salary, or commissions.

(B) To require the posting of notice setting forth the public policy of Indiana concerning civil rights and the respondent's compliance with the policy in places of public accommodations.

(C) To require proof of compliance to be filed by the respondent at periodic intervals.

(D) To require a person who has been found to be in violation of this chapter and who is licensed by a state agency authorized to grant a license to show cause to the licensing agency why the person's license should not be revoked or suspended.

SECTION 2. IC 22-9-1-6.1 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS:

Sec. 6.1. (a) If the commission:

(1) fails to make a determination on a complaint of sexual or racial harassment in violation of this chapter within one hundred eighty (180) days after receiving the complaint; or

(2) finds within one hundred eighty (180) days no probable cause to believe that a person has engaged in sexual or racial harassment in violation of this chapter; the complainant may bring a civil cause of action for the sexual or racial harassment alleged in the complaint filed with the commission.

(b) If subsection (a) applies, the commission shall issue a right to sue letter to the complainant upon the request of the complainant.

(c) A civil cause of action under subsection (a) must be filed not later than ninety (90) days after:

(1) the date of issuance of the right to sue letter by the commission if subsection (a)(1) applies; or

(2) the date of receipt by the complainant of the commission's finding that no probable cause exists to believe that a person has engaged in sexual or racial harassment if subsection (a)(2) applies.

(d) A complainant bringing a successful civil action under subsection (a) is entitled to reasonable attorney's fees.

(e) In a civil action under subsection (a), a complainant is limited to the same remedies that may be ordered by the commission under section 6 of this chapter.

Amended Engrossed H.B. 1085, 106th Ind. Gen. Assembly, 2d Sess. (1990) (unanimously approved conference committee report version that died in the House Rules Committee).

42. *See* text of House Bill 1085, *supra* note 41.

43. *Id.*

committee.[44] Practitioners should watch for additional "anti-*Fields*" bills in the next session of the General Assembly.

B. Retaliatory Discharge In Workers' Compensation Cases

In 1973, the Indiana Supreme Court started a national trend by finding a public policy exception to the firmly entrenched employment-at-will doctrine in the area of workers' compensation. The employment-at-will doctrine provides that an employer may terminate an employee's employment for any reason or no reason at all.[45] The court carved out an exception to the doctrine by holding that firing an employee for exercising the statutory right to file a workers' compensation claim violated public policy.[46] Following Indiana's lead, several other states have recognized a cause of action for retaliatory discharge when an employee is fired for filing a workers' compensation claim.[47] Although other states have created more exceptions to the employment-at-will doctrine,[48] Indiana courts have narrowly construed the public policy exception created in *Frampton v. Central Indiana Gas Co.*[49]

During the last year, the Indiana Court of Appeals has continued to narrowly interpret the public policy exception to the employment-at-will doctrine enunciated in *Frampton*.[50] In *Peru Daily Tribune v.*

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44. *Id.*

45. *See generally* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

46. Frampton v. Central Ind. Gas Co., 260 Ind. 249, 252-53, 297 N.E.2d 425, 428 (1973).

47. *See, e.g.*, Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976).

48. *See* Duldulao v. Saint Mary of Nazareth Hosp. Center, 115 Ill. 2d 482, 505 N.E.2d 314 (1987) (employee handbook created a binding contract, taking employee out of at-will employment); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee fired for informing police of coemployee's criminal activities had action for retaliatory discharge), *appeal denied*, 140 Ill. App. 3d 857, 489 N.E.2d 474 (1986); Russ v. Pension Consultants Co., 182 Ill. App. 3d 769, 538 N.E.2d 693 (1989) (employee fired for refusing to engage in illegal conduct had action for retaliatory discharge); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (employee fired for serving on jury had action for retaliatory discharge).

49. 260 Ind. 249, 297 N.E.2d 425 (1973). After *Frampton*, the Indiana Supreme Court has recognized only two other public policy exceptions to the employment-at-will doctrine. *See* McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390 (Ind. 1988) (an exception to employment-at-will recognized when an employee is terminated for refusing to violate the law); Romack v. Public Serv. Co., 511 N.E.2d 1024 (Ind. 1987) (an exception to employment-at-will recognized when after negotiations an employee relinquishes lifetime employment with one employer so that the employee can take what has been represented as lifetime employment with another employer).

50. *See* Smith v. Electrical Sys. Div. of Bristol Corp., 557 N.E.2d 711 (Ind. Ct. App. 1990); Peru Daily Tribune v. Shuler, 544 N.E.2d 560 (Ind. Ct. App. 1989).

Shuler,[51] Toni Shuler, a part-time newspaper sales representative, fell and hurt her knee at work. The day that Ms. Shuler informed her supervisor that she needed surgery on her knee, he terminated her employment. The supervisor's only reason for terminating Ms. Shuler was that he could not afford to have a salesperson absent. No evidence of unsatisfactory job performance existed. The Indiana Court of Appeals held that sufficient evidence supported the trial court's decision that Shuler had been discharged in retaliation for filing a workers' compensation claim.[52] The court followed the reasoning in *Frampton* that a public policy exception to the general employment-at-will rule exists if the employee is terminated for exercising a statutorily conferred right, in this case, the right to file a workers' compensation claim.[53]

Later in the year, the Indiana Court of Appeals in *Smith v. Electrical System Division of Bristol Corp.* declined to extend the rule established in *Frampton* to cover a situation in which a recipient of workers' compensation benefits was fired because the medical leave was longer than the leave allowed by the company's absence control policy.[54] The court distinguished *Smith* from *Frampton* by noting that the employer in *Smith* did not take retaliatory action when the worker applied for workers' compensation benefits.[55] The court found that the absence control policy was a neutral policy that did not violate the law because it created only an incidental detriment to an injured worker.[56]

The court also considered whether the absence control policy violated Indiana Code section 22-3-2-15, which prohibits an employer from using any device to avoid obligations under the Workers' Compensation Act.[57] The court reasoned that the workers' compensation benefits paid by an employer are economic benefits, and that the benefit of indefinitely maintaining an injured worker's employment status is non-economic.[58] The court concluded that an employer is not obligated to provide this non-economic benefit under the Act, and therefore the absence control policy did not violate the statute.[59] Although the exception created in *Frampton* is still alive and well, *Smith* indicates that the Indiana Court of Appeals is not ready to expand *Frampton*.

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51. 544 N.E.2d 560 (Ind. Ct. App. 1989).
52. *Id.* at 564.
53. *Id.* at 563.
54. *Smith*, 557 N.E.2d at 712-13.
55. *Id.* at 713.
56. *Id.* at 712-13.
57. *Id.* at 713.
58. *Id.*
59. *Id.*

C. *Mental Stimulus - Mental Injury Accidents*

In contrast to the narrow approach that the Indiana Court of Appeals has taken in creating exceptions to the employment-at-will doctrine, Indiana courts have liberally granted workers' compensation coverage to employees who suffer mental injuries brought about by mental stimuli. In 1987, the Indiana Supreme Court ruled that the same standard should be used in both mental and physical injury cases to determine if the injury arose out of the employment.[60] In *Hansen v. Von Duprin*, the court found that the employee could recover workers' compensation for mental injury caused when her supervisor intentionally preyed on her fear of guns by repeatedly harassing her with such acts as firing a cap gun and jabbing her in the ribs from behind as if holding a gun.[61]

In determining if the three requirements for compensability were met, the court found that whether the injury is mental or physical, the injury must be causally connected with the employment to meet the "arising out of the employment" requirement.[62] The court reasoned that requiring mental injuries to result from greater stress than the usual day-to-day stress of employment would be a step back to the original definition of "by accident" as an "untoward or unexpected event."[63] This definition of accident was rejected in *Evans v. Yankeetown Dock Corp.* and replaced with "unexpected injury or death."[64] The problem with this reasoning is that in *Hansen*, the court focused on the causation or the "arising out of the employment" requirement, and not the "by accident" requirement that the *Evans* court considered when it discussed the "untoward or unexpected event" notion.[65] The *Hansen* court followed the *Evans* court's lead in rejecting the "unusual or unexpected event" definition of "by accident," and also rejected the "unusualness" test for determining causation.[66] However, the court neglected to set out a definite test for causation, probably because the causation issue was easy to resolve in *Hansen*.[67]

Relying on *Hansen* as precedent, the court of appeals in *North Clark Community Hospital v. Goines*[68] found that the Workers' Com-

60. Hansen v. Von Duprin, 507 N.E.2d 573, 576 (Ind. 1987).
61. *Id.* at 577.
62. *Id.* at 576.
63. *Id.*
64. *Id.* at 575 (citing Evans v. Yankeetown Dock Corp., 491 N.E.2d 969 (Ind. 1986)).
65. *See* Spengler, Hansen v. Von Duprin: *Have the Floodgates Opened to Workmen's Compensation Claims?*, 21 IND. L. REV. 453, 458 (1988).
66. *Id.* at 459.
67. *Id.*; *Hansen*, 507 N.E.2d at 575.
68. 545 N.E.2d 30 (Ind. Ct. App. 1989).

pensation Act provided coverage when a third party caused a sudden mental stimulus that was not directed at the employee.[69] In *North Clark Community Hospital*, a nurse's aide took the vital signs of a female patient whose husband was visiting her. After leaving the room, the nurse's aide heard two gunshots. She correctly assumed that the patient's husband had shot the patient and then shot himself. The nurse's aide suffered depression from hearing the shooting. The court had no difficulty in finding that two of the compensability requirements were met: the injury occurred "by accident" and "in the course of employment."[70]

The court then focused on whether a causal connection existed between the injury and the employment so that the injury would meet the third requirement of "arising out of the employment." The court followed *Hansen* by ruling that a mental injury did not require a different standard from a physical injury in proving causation.[71] The court stated that a causal connection would exist if "the accident arises out of a risk which a reasonably prudent person might comprehend as incidental to the employment at the time of entering into it, or when the facts show an incidental connection between the conditions under which [the] employee works and the injury."[72] The court held that because of the circumstances surrounding the accident, the aide's risk and resulting injury were incidentally related to the employment.[73]

The hospital argued that a causal connection between the depression and the employment could not be shown because the stimulus was not directed at the employee. The court refused to require any additional causation requirements for recovery for mental injuries.[74] The court analogized this case to third party assault cases, which use an "increased risk" test to determine causal connection, and which yield the same result on compensability.[75] The risk actually incurred by the nurse's aide and the risk of assault by a third party not connected to the employment fall into the category of neutral risks. A majority of courts finds accidents resulting from neutral risks compensable if the risk was increased because of the employment.[76] The court found that the aide's job exposed her to increased contact with the public in the form of

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69. *Id.* at 32.
70. *Id.* at 31.
71. *Id.*
72. *Id.* (quoting Lasear, Inc. v. Anderson, 99 Ind. App. 428, 434, 192 N.E. 762, 765 (1934)).
73. *Id.* at 32.
74. *Id.* at 31.
75. *Id.* at 31-32.
76. *See* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 11.11 (1990).

patients and visitors; therefore, an analogy between the present case and third party assault cases would not change the result.[77] Even though the court demonstrated how the increased risk test would apply, its decision was based on the risk being incidental to the employment.[78] Using this test is consistent with the test that does not add requirements for causation in mental injury cases. Through *North Clark Community Hospital*, Indiana moves one step closer to enunciating an explicit causation standard in mental injury cases.

D. Employer's Obligation to Indemnify Third-Party Tortfeasors

During the survey period, the court of appeals decided that an employer can agree to indemnify a third party for an employee's injuries caused by the employer's negligence.[79] In *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*,[80] J.A. House, Inc. served as the general contractor on an air conditioning project at an Indianapolis Power & Light (IPL) station. Brad Snodgrass, Inc. was one of House's subcontractors. The contract between House and Snodgrass contained an indemnity provision stating that Snodgrass would indemnify House and IPL for bodily injury and property damage due to Snodgrass's work. IPL's job specifications also included a similar indemnity provision. One of Snodgrass's employees was injured on the job and brought a negligence suit against IPL and House.[81] IPL and House filed a third-party complaint against Snodgrass, relying on the indemnity provision in the contract and on common law theories of indemnity to recover for liability imposed on them for the worker's injuries attributable to Snodgrass's negligence.[82] IPL and House appealed the trial court's grant of summary judgment to Snodgrass.[83]

The negligence action against IPL and House required the court to address how Indiana's Comparative Fault Act affects third-party complaints for indemnification. The court noted that, taken together, the Workers' Compensation Act and the Comparative Fault Act excluded the employer from liability.[84] The exclusive remedy provision of the Workers' Compensation Act prevented the injured worker from suing the employer for negligence,[85] and the Comparative Fault Act

77. *North Clark Community Hosp.*, 545 N.E.2d at 32.

78. *Id.*

79. Indianapolis Power & Light Co. v. Brad Snodgrass, Inc., 548 N.E.2d 1197, 1200-01 (Ind. Ct. App. 1990).

80. *Id.*

81. *Id.* at 1197.

82. *Id.*

83. *Id.*

84. *Id.* at 1198.

85. *Id.* (citing IND. CODE § 22-3-2-6 (1988)).

excluded the employer from the apportionment of fault process.[86] Thus, under the Comparative Fault Act, all the fault, including that of an immune employer, had to be allocated among the plaintiff, the defendant, and any nonparty, which by definition does not include the employer.[87]

The court found that any vicarious liability of IPL and House resulted from the apportionment process under the Comparative Fault Act and not from the doctrine of respondeat superior, which Snodgrass had relied on in its motion for summary judgment.[88] Indeed, Snodgrass could not be included in the apportionment of fault under Indiana's Comparative Fault Act.[89] Therefore, the court found that IPL and House could be held vicariously liable for Snodgrass's negligence.[90] The court further held that because Snodgrass had agreed to indemnify IPL and House for any vicarious liability due to its negligence, the portion of Snodgrass's fault had to be determined.[91] The court reversed the trial court's decision and remanded the case for a determination of the amount of Snodgrass's vicarious liability.[92]

E. Employer's Right to Reimbursement from a Third-Party Tortfeasor

In *Calvary Temple Church, Inc. v. Paino*,[93] the court of appeals explored the issue of employer reimbursement rights when the injured worker and a third party reach an agreement that does not meet the definition of a settlement under Indiana Code section 22-3-2-13. The court also found that the employer is obligated to pay its pro rata share of the injured worker's attorney fees.[94]

In *Calvary Temple*, the injured worker received temporary total disability in accordance with an agreement filed with the Workers' Compensation Board. The employer's insurer agreed to pay permanent partial impairment to the injured worker on March 18, 1988. The injured worker then sued a third-party tortfeasor and reached an agreement with him on May 3, 1988.[95] The agreement did not mention the

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86. *Id.* (citing IND. CODE § 34-4-33-2(a) (1988)).
87. *Id.* at 1198-99.
88. *Id.* at 1199.
89. *Id.* at 1200.
90. *Id.*
91. *Id.*
92. *Id.* at 1201. This decision was appealed to the Indiana Supreme Court, and oral argument was heard September 19, 1990. At the time of this writing, the decision had not been released.
93. 555 N.E.2d 190 (Ind. Ct. App. 1990).
94. *Id.* at 194.
95. *Id.* at 192.

injured worker's employer or its insurer, nor was the agreement signed by them. The trial court did not dismiss the lawsuit or enter a lien protecting the insurer's reimbursement rights.[96] A single hearing member found the employer liable for the injured worker's medical expenses and permanent partial impairment because the injured party's agreement with the third-party tortfeasor was not technically a settlement as defined by Indiana Code section 22-3-2-13.[97] The full board affirmed the award.[98]

On appeal, the court found that the employer was liable for medical expenses and permanent partial impairment before the injured worker entered into the agreement with the third party.[99] Because the Workers' Compensation Board ordered that the employer be reimbursed from any final settlement between the injured worker and the third party, the court found it unnecessary to determine whether the agreement was a settlement as defined by Indiana Code section 22-3-2-13.[100]

The court also affirmed a settled rule that the employer is obligated to pay its pro rata share of the injured worker's costs and expenses in asserting the third-party claim.[101] The employer benefits not only by being reimbursed by the third party, but also by having liability for future compensation payments terminated. Therefore, the pro rata share of attorney fees should be based on the amount of benefits already paid and the amount remaining to be paid minus the costs and expenses of bringing the claim.[102] Additionally, the court found that the Workers' Compensation Board acted within its authority in awarding interest on the judgment.[103]

F. Statute of Limitations

The only case concerning the statute of limitations decided during the survey period was *R.L. Jeffries Trucking Co. v. Cain*.[104] *Jeffries Trucking* involved a worker who was severely injured in a truck accident that occurred as he made a delivery for his employer. One of the worker's injuries required amputation of his left leg at the hip. Over time, the injured worker developed debilitating muscle spasms and boils at the amputation site. Within two months of the accident, the worker entered into a Form 12 agreement with the employer's insurer to pay

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 193-94.
100. *Id.*
101. *Id.* at 194.
102. *Id.*
103. *Id.* at 195.
104. 545 N.E.2d 582 (Ind. Ct. App. 1989).

workers' compensation benefits; the agreement was approved by the Workers' Compensation Board. More than two years after the accident but less than two years after the last payment under the original award, the injured worker filed a Form 14, requesting review of the agreement based on a change in conditions.[105] The form alleged permanent total disability and permanent partial impairment. The employer moved to dismiss, arguing that the injured worker's application was barred by the statute of limitations because the application was filed more than two years after the date of the accident.[106] The single hearing officer denied the employer's motion to dismiss, and the full Board affirmed.[107] The employer appealed the award of permanent total disability and all past and future medical expenses allowed by statute.[108]

The employer raised two significant issues on appeal: 1) whether an employer can be bound by a Form 12 agreement entered into by the injured worker and the employer's insurer when the employer was not a party to the agreement, and 2) whether the statute of limitations barred the injured worker's Form 14 application for permanent total disability and permanent partial impairment.[109] Addressing the first issue, the employer argued that it could contest the injured worker's status as an employee because the employer was not a party to the Form 12 agreement.[110] In reaching its decision, the court of appeals relied on a Georgia case in which the court held that the insurer is the alter ego of its insured.[111] The Indiana court noted that both Georgia and Indiana statutorily define "employer" to include the employer's insurer.[112] The court held that in the absence of mistake, fraud, or duress, the employer could not escape the admission of liability created by the Board's approval of the Form 12 agreement.[113]

The statute of limitations issue required the court to determine which statute governed. The employer relied on Indiana Code section 22-3-3-3, which requires a claim for injuries resulting directly from the accident to be filed within two years of the accident.[114] The injured worker argued for the application of Indiana Code section 22-3-3-27,

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105. *Id.* at 583.
106. *Id.*
107. *Id.*
108. *Id.* at 585.
109. *Id.* at 586.
110. *Id.*
111. *Id.* (citing Tuck v. Fidelity & Casualty Co. of N.Y., 131 Ga. App. 807, 207 S.E.2d 210 (1974)).
112. *Id.* at 586-87 (comparing GA. CODE ANN. § 114-101 (Supp. 1990) and IND. CODE § 22-3-6-1 (Supp. 1990)).
113. *Id.*
114. *Id.* at 588.

which requires a claimant whose condition changes to file for a modification of an award within two years of the last payment made under the original award.[115] The court stated that if the accident had directly caused the injured worker's condition, his claim would be barred; but if his condition had resulted from the original injuries, his claim would be considered timely filed under Indiana Code section 22-3-3-27.[116]

Although the injured worker claimed permanent total disability and permanent partial impairment, the Board characterized its award as one for only permanent total disability.[117] The court noted that the Board's finding that the muscle spasms and boils had developed at the amputation site supported the conclusion that the permanent disability resulted from the amputation and not the accident.[118] Because no case law existed that distinguished direct harm from resulting harm in the disability area, the court examined decisions distinguishing the types of harm in the area of impairment. The court cited cases holding that Indiana Code section 22-3-3-27 controls in cases of impairment not directly caused by the accident, and decided that the reasoning should be extended to cover disability not directly caused by the accident.[119] In support of the extension, the court pointed to Form 14, which includes a change in disability as one of the reasons for a review.[120] The court also noted that the application of Indiana Code section 22-3-3-27 was consistent with the humanitarian purposes of the Workers' Compensation Act.[121]

G. Credit

During the survey period, the court of appeals decided that the state should be entitled to a credit for Public Law 35 salary benefits paid against an award for permanent total disability.[122] In *Indiana v. Doody*, a totally disabled state worker had received his full salary from the state for one year pursuant to Indiana Code section 4-15-2-6.[123] The board then awarded him $166 per week for the period of permanent total disability, 500 weeks, beginning at the date of the accident. The

115. *Id.*
116. *Id.*
117. *Id.* at 588-89.
118. *Id.* at 588.
119. *Id.* at 589.
120. *Id.*
121. *Id.*
122. Indiana v. Doody, 556 N.E.2d 1357, 1360-61 (Ind. Ct. App. 1990).
123. Formerly IND. CODE § 4-15-2-5(b) (West 1981) (repealed in 1982). Although Indiana Code § 4-15-2-5(b) was deleted, Indiana Code § 22-3-3-23(b) (West 1990) continues to refer to it, presumably through an oversight in the amendment process.

disabled worker requested a judgment on the award because the state refused to pay permanent total disability benefits for the year that he received the full salary.[124]

The court noted that both Indiana Code section 22-3-3-8 and section 22-3-3-10(b) provide for the payment of total permanent disability benefits.[125] The Board did not specify under which statute the award was being made. This omission was confusing because section 22-3-3-23(b) provides for a credit against payments made under section 8, but does not provide for a credit for payments made under section 10.[126] By looking at the dollar figures of the award, the court was able to determine that the total permanent disability payments were made under section 8, entitling the state to a credit for the Public Law 35 salary benefits.[127] In allowing the credit, the court noted that Indiana Code section 22-3-3-23(b) only refers to a credit for temporary total disability, but the court assumed that the omission of total permanent disability was a clerical error because another clerical error existed in reference to an Indiana Code section 4-15-2-5(b) citation.[128] Further, the court did not believe that the legislature would decide to allow a credit for section 8 temporary total disability benefits, disallow a deduction for section 10 benefits, and not decide whether to allow a credit or deduction for section 8 total permanent disability benefits.[129]

In a footnote, the court criticized the third district court's interpretation of Indiana Code section 22-3-3-23(a) and (b) in *Indiana State Highway Department v. Robertson*.[130] The first district in *Doody* suggested that the third district had used section 23(a) and section 23(b) interchangeably, without making a distinction between the deductions mentioned in section 23(a) and section 23(b) and the credit mentioned

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124. *Doody*, 556 N.E.2d at 1359.

125. *Id.* at 1360.

126. *Id.* Indiana Code § 22-3-3-23(b) (1988) reads as follows:

(b) Payments to state employees under the terms of IC 4-15-2-5(b) shall be taken as a credit by the state against payments of compensation for temporary total disability during the time period in which the employee is eligible for compensation under both IC 4-15-2-5(b) and section 8 of this chapter. After a state employee is ineligible for payments under IC 4-15-2-5(b) and if he is still eligible for payments for temporary total disability under section 8 of this chapter, any payments for temporary total disability shall be deducted from the amount of compensation payable under section 10 of this chapter. Payments to state employees under the terms of IC 4-15-2-5(b) may not be deducted from compensation payable under section 10 of this chapter.

127. *Doody*, 556 N.E.2d at 1360.

128. *Id.* at 1361 n.6.

129. *Id.*

130. *Id.* at 1361 n.7 (discussing *Robertson*, 482 N.E.2d 495 (Ind. Ct. App. 1985)).

in section 23(b).[131] The *Robertson* court had held that providing a Public Law 35 salary to a state worker did not remove the matter from the Workers' Compensation Act or its exclusive remedy provision because such removal would make Indiana Code section 22-3-3-23(a) unnecessary.[132] Because section 23(a) is general and section 23(b) specifically refers to Public Law 35 salary benefits, the *Robertson* court must have used section 23(b) in its analysis. The confusion the court is experiencing in interpreting Indiana Code section 22-3-3-23 should signal the legislature that this statute needs clarification.

H. Occupational Disease

Some states have interpreted their workers' compensation acts to cover occupational disease, while others have created separate occupational disease statutes.[133] In 1937, Indiana enacted a separate Occupational Diseases Act[134] because its Workers' Compensation Act had not been interpreted broadly enough to cover workers who had contracted occupational diseases. Although the public policy behind both the Workers' Compensation Act and the Occupational Diseases Act is the same, each act has its own definitions and procedures.[135] Because of the similarities between the two acts and because the Occupational Diseases Act has generated little case law, courts have sometimes looked to workers' compensation statutes and case law to interpret occupational disease statutory provisions.[136] Both the Indiana Supreme Court and the Seventh Circuit faced questions about Indiana's Occupational Diseases Act during this survey period.

1. *Definition of Disability.*—The Indiana Supreme Court in *Spaulding v. International Bakers Services, Inc.*[137] interpreted the definitions of "disablement" and "disability" in the Occupational Diseases Act.[138] The two plaintiffs suffered compensable occupational diseases and filed claims for total permanent disability with the Workers' Compensation Board. The court of appeals found that the workers' compensation standard should not be used in an occupational disease case to assess

131. *Id.*

132. *Robertson*, 482 N.E.2d at 498.

133. 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41.10 (1985).

134. IND. CODE §§ 22-3-7-2 to -38 (1988).

135. *See* IND. CODE §§ 22-3-7-10 and 22-3-6-1 (1988).

136. Buford v. American Tel. & Tel. Co., 881 F.2d 432, 434-35 (7th Cir. 1989) (used workers' compensation cases to make decision); Spalding v. International Bakers Servs., Inc., 550 N.E.2d 307, 308 (1990) (administrative law judge on case used workers' compensation standard to assess total permanent disability claim).

137. 550 N.E.2d 307 (Ind. 1990).

138. *See* IND. CODE § 22-3-7-9(e) (1988).

total permanent disability, and that the applicable standard was found in the Occupational Diseases Act definitions of "disability" and "disablement."[139]

The supreme court granted transfer to determine how the definition of those terms in the Occupational Diseases Act should be applied to assess total permanent disability.[140] The supreme court found the definition of "disability" as the state of being "disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation or equal wages in other suitable employment."[141] The supreme court found that this definition does not indicate whether disability should also be defined in levels of severity.[142] After reviewing other portions of the Act providing for temporary total disability, temporary partial disability, and total permanent disability, the court determined that reading the definition of "disability" as the inability to earn *full* wages would render the different benefits for different levels of disability unnecessary.[143] Therefore, the court found that the definition of a disability as a loss of wage-earning capacity also includes aspects of severity and duration that are not mentioned in subsection 9(e).[144] The court further stated that to obtain total disability, the claimants must show that they were permanently unable to earn any wages at their last jobs or in any "other suitable employment."[145]

In comparing the Occupational Diseases Act definition of "disability" to the definition under the Workers' Compensation Act, the court noted that under the Workers' Compensation Act, disability refers to the capacity to work, while under the Occupational Diseases Act disability refers to the capacity to earn wages.[146] The court also noted that although the standards were quite similar, circumstances may occur in which different results would be reached using the two standards.[147]

2. Exclusivity Provision.—In a case of first impression, the Seventh Circuit determined whether the Indiana Supreme Court would find an intentional act exception to the exclusive remedy provision of the Occupational Diseases Act.[148] In *Buford v. American Telephone & Telegraph*

139. *Spaulding*, 550 N.E.2d at 308.
140. *Id.*
141. *Id.* at 309 (citing IND. CODE § 22-3-7-9(e) (1988)).
142. *Id.* at 310.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. Buford v. American Tel. & Tel. Co., 881 F.2d 432 (7th Cir. 1989).

Co., the plaintiff was exposed to benzene in her position as a lab technician. The company doctor diagnosed the plaintiff as suffering from chronic leukopenia, but did not inform her as to her condition. The plaintiff alleged that she contracted chronic leukopenia because of her working conditions and that despite her employer's knowledge that she was being exposed to benzene and other carcinogens, she was not provided with the proper safety equipment.[149] Moreover, she alleged that her employer had concealed the danger and the doctor's diagnosis from her.[150] The court ruled that the trial court correctly found that the plaintiff's chronic leukopenia was compensable under the Occupational Diseases Act.[151]

Because the Indiana Supreme Court had never decided whether the exclusive remedy provision of the Occupational Diseases Act had any exceptions, the Seventh Circuit referred to workers' compensation cases regarding that issue. The court noted that the intentional tort exception first recognized in *National Can Corp. v. Jovanovich*[152] and then further limited in *House v. D.P.T., Inc.*[153] applied only in cases involving violent crime.[154] Relying on *Evans v. Yankeetown Dock Corp.*,[155] the court analyzed the language of the Workers' Compensation Act and the Occupational Diseases Act defining compensable injuries and diseases. The court noted that there was no language in the Occupational Diseases Act similar to the workers' compensation requirement that the injury occur "by accident."[156] In some states, the "by accident" requirement is the basis for recognizing an exception for an intentional tort.[157] However, in *Evans*, the court defined "by accident" as an unexpected injury or death, which indicates that the character of the tort is unimportant.[158] Therefore, no distinction on which to base an exception to the exclusivity provision exists. The Seventh Circuit followed the *Evans* court's reasoning that once all the statutory prerequisites were met for jurisdiction under the Workers' Compensation Board, no common law causes of action would be recognized.[159] Thus, the Seventh Circuit refused to recognize an intentional tort exception to the exclusivity provision in the Indiana Occupational Diseases Act.[160]

149. *Id.* at 433.
150. *Id.*
151. *Id.* at 434.
152. *Id.* (citing *National Can Corp.*, 503 N.E.2d 1224 (1987)).
153. *Id.* (citing *House*, 519 N.E.2d 1274 (Ind. Ct. App. 1988)).
154. *Id.*
155. *Id.* at 435 (citing *Evans*, 491 N.E.2d 969 (Ind. 1986)).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 436.

III. Statutes and Regulations

A. Statutory Changes

As the major statutory change during the survey period,[161] the legislature added a chapter on vocational rehabilitation to the Workers'

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161. The following are additional legislative changes affecting Indiana Workers' Compensation:

Ind. Code §§ 22-3-2-2, 22-3-7-2 (Supp. 1990). These statutes generally exempt municipal firefighters and police officers from coverage under both the Workers' Compensation Act and the Occupational Diseases Act. A provision was added under both acts to protect those police officers and firefighters when the common council has elected to procure insurance to insure the employees for medical benefits. The provision states that if the medical benefits provided under the insurance policy terminate before the employee is fully recovered, then the common council must continue the benefits until the employee no longer needs them.

Ind. Code §§ 36-8-12-8(a), (b), (e) (Supp. 1990). Subsections (a) and (b) raised the insurance policy coverage requirement from $40,000 to $60,000, which would be payable to the beneficiary or estate of a voluntary firefighter who dies from a work-related injury or to the volunteer firefighter who becomes totally and permanently disabled from an on-the-job injury for a continuous period of at least 260 weeks. Subsection (e), which addresses the liability coverage of volunteer firefighters, adds a sentence stating that a voluntary firefighter is not liable for punitive damages for any act performed within the scope of the firefighter's duties. *Id.*

Ind. Code § 36-8-12-10(a) (Supp. 1990). The chapter of the Code on volunteer fire companies added coverage under the Workers' Compensation Act and the Occupational Diseases Act for a volunteer who works for an ambulance company. Coverage was also expanded from medical treatment to include burial expenses as provided in the Workers' Compensation Act and the Occupational Diseases Act. *Id.*

Ind. Code §§ 22-3-3-19, 22-3-7-13 (Supp. 1990). Two changes were made to the presumptive dependency statutes in the Workers' Compensation Act and the Occupational Diseases Act. The age of presumptive dependency was raised from eighteen to twenty-one. The other provision that was changed had required husbands, but not wives, to prove that they were physically and financially incapable of self-support in order to be a presumptive dependent. That provision had been ruled unconstitutional in K-Mart Corp. v. Novak, 521 N.E.2d 1346 (Ind. Ct. App. 1988), and was changed to treat husbands the same as wives.

Ind. Code § 22-3-3-29 (Supp. 1990). Language in the statute pertaining to the rights and privileges of an employee or dependent under a guardianship was changed from "mentally incompetent or a minor" to "under guardianship." The amendment also changed the permissive language of the guardian's right to claim and exercise any right or privilege of the employee or dependent to mandatory language. *Id.*

Ind. Code §§ 22-3-5-5(a), (d) (Supp. 1990). Before this amendment to the insurance chapter of the Workers' Compensation Act, the Workers' Compensation Board approved all insurance policy forms. The amendment requires that insurance policy forms now be approved by the Department of Insurance. Before the amendment, subsection (d) required that if an insurer failed or refused to pay a final award or judgment or refused to comply with the Workers' Compensation Act, the approval of the insurance policy form was revoked, and the form had to be resubmitted to the Workers' Compensation Board. The

Compensation Act.[162] Although most states provide for some sort of vocational rehabilitation in their statutes, there is no commonly accepted definition of vocational rehabilitation.[163] States and commentators fashion

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amendment provides that the Workers' Compensation Board will not accept any further proofs of insurance until the insurance company complies with the final award, the judgment, or the Workers' Compensation Act. *Id.*

IND. CODE §§ 27-7-2-1.1 to -38 (Supp. 1990). The workers' compensation chapter of the insurance code was overhauled to change the rate-making process for workers' compensation insurance policies to promote competitive pricing. The purpose of the change was to lower the cost of insurance and make the premiums reflect market conditions. *Id.*

162. Indiana Code § 22-3-12 was added to the Indiana Code as a new chapter to read as follows:

Chapter 12. Vocational Rehabilitation

Sec. 1. An injured employee, who as a result of an injury or occupational disease is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment.

Sec. 2. When any compensable injury requires the filing of a first report of injury by an employer, the employer's worker's compensation insurance carrier or the self-insured employer shall forward a copy of the report to the central office of the department of human services office of vocational rehabilitation at the earlier of the following occurrences:

(1) When the compensable injury has resulted in temporary total disability of longer than twenty-one (21) days.

(2) When it appears that the compensable injury may be of such a nature as to permanently prevent the injured employee from returning to the injured employee's previous employment.

Sec. 3. Upon receipt of a report of injury under section 2 of this chapter, the office of vocational rehabilitation shall immediately send a copy of the report to the local office of vocational rehabilitation located nearest to the injured employee's home.

Sec. 4. (a) The local office of vocational rehabilitation shall, upon receipt of the report of injury, immediately provide the injured employee with a written explanation of:

(1) the rehabilitation services that are available to the injured employee; and

(2) the method by which the injured employee may make application for those services.

(b) The office of vocational rehabilitation shall determine the eligibility of the injured employee for rehabilitation services and, where appropriate, develop an individualized rehabilitation plan for the employee.

(c) The office of vocational rehabilitation shall implement the rehabilitation plan. After completion of the rehabilitation program, the office of vocational rehabilitation shall provide job placement services to the rehabilitated employee.

Sec. 5. Nothing contained in this chapter shall be construed to affect an injured employee's status regarding any benefit provided under IC 22-3-2 through IC 22-3-7.

IND. CODE § 22-3-12 (Supp. 1990).

163. *See generally*, Note, *Vocational Rehabilitation for the Industrially Injured Worker*, 28 U. FLA. L. REV. 101, 102 (1975).

definitions responsive to their own philosophic goals. For example, one state defines vocational rehabilitation as "[a]ssisting in the return of an injured worker to gainful employment at a justifiable cost, within a reasonable time after he is injured, or contracts an occupational disease."[164] Another state defines vocational rehabilitation in terms of its purpose "to return the injured employee to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability."[165] The International Association of Industrial Accident Boards and Commissions, in its model program, defines vocational rehabilitation as "the restoration of an occupationally disabled employee to his/her optimum physical, mental, vocational, and economic usefulness."[166] A common thread in the above definitions is that they focus on the subjective goals of vocational rehabilitation rather than objectively setting forth the process for vocationally rehabilitating the occupationally disabled employee. Indiana's new statute states that its goal is "to restore the employee to useful employment,"[167] but does not define the term "useful employment." Similar to other state statutes, Indiana's statute focuses on a subjective goal.

In 1972, the National Commission on State Workmen's Compensation Laws issued a report that included eighty-four recommendations for improving workers' compensation systems.[168] Of the eighty-four recommendations, twelve concerned rehabilitation.[169] The commission con-

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164. INTERNATIONAL ASS'N OF INDUS. ACCIDENT BDS. & COMM'NS, AN OVERVIEW OF VOCATIONAL REHABILITATION IN WORKERS' COMPENSATION 5 (1984) (citing NEV. ADMIN. CODE ch 616, § 8 (1987)).

165. MINN. STAT. ANN. § 176-102 (West 1990).

166. INTERNATIONAL ASS'N OF INDUS. ACCIDENT BDS. & COMM'NS, AN ANALYSIS OF WORKERS' COMPENSATION REHABILITATION LAWS AND PROGRAMS OF THE MEMBER JURISDICTIONS 10 (1987) [hereinafter LAWS AND PROGRAMS].

167. IND. CODE § 22-3-12-1 (Supp. 1990).

168. *See generally* REPORT OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS (1972).

169. The following are the twelve recommendations concerning rehabilitation:

> R4.1 We recommend that the worker be permitted the initial selection of his physician, either from among all licensed physicians in the State or from a panel of physicians selected or approved by the workmen's compensation agency.
>
> R4.2 We recommend there be no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment.
>
> R4.3 We recommend that the workmen's compensation agency have discretion to determine the appropriate medical and rehabilitation services in each case. There should be no arbitrary limits by regulation or statute on the types of medical services or licensed health care facilities which can be authorized by the agency.

cluded that "[i]n general, workmen's compensation is not doing an effective job of assuring that workers with work-related disabilities [are] helped to recover lost abilities and to return to their previous jobs, or, where this is impossible, to learn substitute skills."[170]

In response to the commission report, the majority of states established vocational rehabilitation programs. In 1976, only twenty-seven states had some type of rehabilitation program.[171] The January 1990 analysis of workers' compensation laws prepared and published by the United States Chamber of Commerce lists South Carolina as the only state without a specific statutory provision regarding vocational rehabilitation.[172]

Moreover, the Indiana Legislative Services Agency's Sunset Audit of the Industrial Board (now the Workers' Compensation Board) recommended the addition of a vocational rehabilitation program to the

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R4.4 We recommend that the right to medical and physical rehabilitation benefits not terminate by the mere passage of time.

R4.5 We recommend that each workmen's compensation agency establish a medical-rehabilitation division, with authority to effectively supervise medical care and rehabilitation services.

R4.6 We recommend that every employer or carrier acting as employer's agent be required to cooperate with the medical-rehabilitation division in every instance when an employee may need rehabilitation services.

R4.7 We recommend that the medical-rehabilitation division be given the specific responsibility of assuring that every worker who could benefit from vocational rehabilitation services be offered those services.

R4.8 We also recommend that the employer pay all costs of vocational rehabilitation necessary to return a worker to suitable employment and authorized by the workmen's compensation agency.

R4.9 We recommend that the workmen's compensation agency be authorized to provide special maintenance benefits for a worker during the period of his rehabilitation. The maintenance benefits would be in addition to the worker's other benefits.

R4.10 We recommend that each State establish a second injury fund with broad coverage of pre-existing impairments.

R4.11 We recommend that the second injury fund be financed by charges against all carriers, State funds, and self-insuring employers in proportion to the benefits paid by each, or by appropriations from general revenue, or by both sources.

R4.12 We recommend that workmen's compensation agencies publicize second injury funds to employees and employers and interpret eligibility requirements for the funds liberally in order to encourage employment of the physically handicapped.

Id. at 79-84.

170. *Id.* at 81.

171. LAWS AND PROGRAMS, *supra* note 166, at 14.

172. UNITED STATES CHAMBER OF COMMERCE, HISTORY OF WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY, 1990 ANALYSIS OF WORKERS' COMPENSATION LAWS 28-29.

Workers' Compensation Act.[173] Presumably in response to the Sunset Audit, the Indiana legislature considered vocational rehabilitation for the first time in the 1988 spring session.[174] Although the reform activity during that session focused on increasing workers' compensation and occupational disease benefits, vocational rehabilitation was also an important issue.[175] Senate Bill 402, essentially a benefits bill, was amended to include a relatively comprehensive vocational rehabilitation provision.[176]

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173. The Sunset Audit stated:

> Effective rehabilitation programs, both physical and vocational, not only help workers regain their pre-injury physical and income earning capabilities, but can also help hold down workers' compensation costs over the long run. The purpose of rehabilitation services is to minimize the losses which occur as a result of an industrial accident. Rehabilitation can be considered as part of medical care and has the same basic purpose as medical care — to cure and relieve the employee from the effects of the injury. The idea is to provide those services which will speed the return of the worker to his job. The positive by-product of effective rehabilitation is that the system is not overloaded with costly numbers of permanently injured workers (either partially or totally).

OFFICE OF FISCAL REVIEW, IND. LEGIS. SERVS. AGENCY, 6 SUNSET AUDIT ON INDUSTRIAL BOARD AND WORKERS' COMPENSATION SYSTEM 91 (1987); *see also* IND. CODE § 4-26-3-25 to -25.7 (1988) (section requires that certain state agencies including the Industrial Board and the Workers' Compensation System be systematically reviewed to determine whether they should be continued, and to examine the organizational characteristics that enhance or hinder efficiency and effectiveness).

174. *See generally* SUBJECT INDEX TO HOUSE AND SENATE JOURNALS, 1988 SESSION (of the twenty-three bills indexed under Workmen's Compensation, five of those bills focused on increases in the benefits scheme) [hereinafter INDEX]; *see also* Gary Post Tribune, Nov. 15, 1987, Business Section.

175. INDEX, *supra* note 174. Representative Boatwright offered the vocational rehabilitation amendment to Senate Bill 402 on February 5, 1988, and it passed on a roll call vote of 68 yeas to 28 nays. INDIANA HOUSE JOURNAL, 1988 SESSION at 424 [hereinafter HOUSE].

176. The vocational rehabilitation provision of Senate Bill 402 reads as follows:

> SECTION 1. IC 22-3-3-4.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS: Sec. 4.5(a) An injured employee who, as a result of an injury, is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services, including retraining and job placement, necessary to restore the employee to useful employment. The cost of the vocational rehabilitation shall be paid by the employer.
>
> (b) If vocational rehabilitation services are not voluntarily offered and accepted, a member, on the member's own motion or upon application of the employee, carrier, or employer, after affording the parties an opportunity to be heard, may refer the employee to a facility approved by the industrial board for evaluation of the need for, and kind of service, treatment, or training necessary and appropriate to render the employee fit for a remunerative occupation. Upon receipt of the report of the facility, a member may order that the services and treatment recommended in the report be provided at the expense of the employer.

The amended bill passed the House of Representatives, but the Senate dissented from the House amendments on vocational rehabilitation, which were subsequently stripped from the bill in conference committee.[177] The benefits element of Senate Bill 402 became Public Law 95.[178] Although vocational rehabilitation did not survive the conference committee, it remained alive as an issue worthy of study, assigned to the Interim Study Committee on Insurance Issues.[179]

In the fall of 1988, the Interim Study Committee on Insurance Issues Subcommittee on Vocational Rehabilitation held three meetings.[180] By consensus, the committee approved two recommendations on vocational rehabilitation:

1. The General Assembly should examine mandating the compilation of certain statistical data by the Worker's Compensation Board.
2. The General Assembly should impose a requirement that worker's compensation recipients be informed by either the employer, the worker's compensation carrier, or the Workers' Compensation Board that vocational rehabilitation services are available through the Office of Vocational Rehabilitation of the Indiana Department of Human Services. The notice

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(c) A member may order that any employee participating in vocational rehabilitation is entitled to receive additional payments for transportation or for any extra and necessary expense during the period arising out of the employee's program of vocational rehabilitation.

(d) Vocational rehabilitation training, treatment, or service may not extend for more than fifty-two (52) weeks. However, a member, after review, may extend the period for up to fifty-two (52) additional weeks.

(e) If there is an unjustifiable refusal to accept rehabilitation after a decision of a member, the member shall order a loss or reduction of compensation in an amount determined by the member for each week of the period of refusal, except for specific compensation payable under section 10 of this chapter.

(f) If a dispute arises between the parties concerning application of this section, any of the parties may apply for a hearing before the industrial board.

HOUSE, *supra* note 175, at 423.

177. *See* INDIANA CHAMBER OF COMMERCE, LEGISLATIVE REPORT (Mar. 3, 1988) (provisions removed from Senate Bill 402 and opposed by the Indiana Chamber of Commerce included "mandatory vocational rehabilitation of up to 104 weeks").

178. *See* SENATE JOURNAL, 1988 SESSION at 525 [hereinafter SENATE] (information provided through contact with the Indiana Legislative Services Bureau); HOUSE, *supra* note 175, at 645.

179. MINUTES OF THE VOCATIONAL REHAB. SUBCOMM. OF THE INTERIM STUDY COMM. ON INS. ISSUES, INDIANA HOUSE OF REPRESENTATIVES, September 20, 1988.

180. The subcommittee meetings were held Sept. 20, 1988, Sept. 27, 1988, and Oct. 18, 1988.

shall be given in writing, on a form devised by the Workers' Compensation Board.[181]

In the 1989 spring session of the General Assembly, companion vocational rehabilitation bills were introduced in the House and Senate.[182] Reform recommendations that had been rejected by the Interim Study Committee provided the basis for Senate Bill 543. It was authored by Senator Bushemi, and its companion House Bill 1385 was introduced by Representative Boatwright.[183] Like the earlier proposed amendment to Senate Bill 402, this bill also specified when an injured worker is entitled to vocational rehabilitation, how to determine if the rehabilitation

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181. MINUTES OF THE INTERIM STUDY COMM. ON INS. ISSUES, INDIANA HOUSE OF REPRESENTATIVES, Oct. 18, 1988.

182. *See* H.R. 1385, 106th Leg., 2d Sess., Indiana (1989); S. 543, 106th Leg., 2d Sess., Indiana (1989).

183. Proposed S. 543 and H.R. 1385 provided:

SECTION 1. IC 22-3-12 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 12. Vocational Rehabilitation

Sec. 1. An injured employee who, as a result of an injury or occupational disease, is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment. The cost of the vocational rehabilitation shall be paid by the employer.

Sec. 2. (a) The vocational rehabilitation division is established within the worker's compensation board.

(b) The board shall employ a director and the vocational rehabilitation counselors necessary to provide the screening and identification of potential vocational rehabilitation recipients under this chapter.

Sec. 3. (a) The board shall determine, at the earliest time possible, whether a recipient of worker's compensation or occupational diseases benefits is eligible for vocational rehabilitation services under this chapter.

(b) The determination of eligibility for vocational rehabilitation services and of awards for additional benefits under section 4 of this chapter may be made by any of the following:

(1) A member of the worker's compensation board.

(2) The full worker's compensation board.

(3) The director of the vocational rehabilitation division.

Sec. 4. Vocational rehabilitation benefits under this chapter may be awarded for up to fifty-two (52) weeks. Benefits may be awarded for more than fifty-two (52) weeks as determined necessary by any of the individuals listed in section (3)(b) of this chapter.

Sec. 5. (a) The vocational rehabilitation division shall certify providers qualified to provide vocational rehabilitation services under this chapter. The division shall maintain a list of certified providers.

(b) Providers certified under this section may be either public sector or private sector providers.

H.R. 1385, 106th Leg., 2d Sess., Indiana (1989); S. 543, 106th Leg., 2d Sess., Indiana (1989).

goal has been reached, and who is to pay the cost.[184] Senate Bill 543 went beyond the Senate Bill 402 amendments in clearly placing the control and direction of vocational rehabilitation with the Workers' Compensation Board by establishing a vocational rehabilitation division within the Board.[185] The bill also authorized the hiring of additional staff, provided a framework for determining eligibility, and required certification of providers of vocational rehabilitation services.[186] Like the Senate Bill 402 amendment, this bill contained a fifty-two-week limit for vocational rehabilitation benefits.[187]

House Bill 1385, the companion to Senate Bill 543, died without a hearing in the last days of the session. Representatives opposed to workers' compensation reform failed to attend the remaining meetings, depriving the committee of the quorum needed to conduct business.[188]

Senate Bill 543 was referred to the Standing Pensions and Labor Committee, where the bill was held by the chairman until late in the session.[189] Interest groups took the same position relative to proposed Senate Bill 543 as they had taken relative to the vocational rehabilitation amendment to Senate Bill 402 during the 1988 session.[190] The Indiana Trial Lawyers' Association, providers of rehabilitation services, individual labor organizations, and employee interest groups supported the proposed vocational rehabilitation bill.[191] The Indiana Manufacturers Association and the Indiana Chamber of Commerce, consistent with their testimony before the Vocational Rehabilitation Subcommittee, would only support referral of injured workers to the existing federal/state program with no obligation on employers to pay for the vocational rehabilitation.[192]

Senator Bushemi was forced to cut significant parts of his proposed bill and to accept a simple referral mechanism, or Senate Bill 543 and vocational rehabilitation would have died in committee like the companion House Bill 1385.[193] After consulting supporters of workers' compensation

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184. *See supra* notes 176 & 183.

185. *Id.*

186. *See supra* note 183.

187. *See supra* notes 176 & 183.

188. Telephone conversations with the Honorable John Bushemi, Indiana State Senator (Aug. 3, 1989, and Nov. 6, 1989) [hereinafter Telephone Conversations]; *see also* INDIANA STATE AFL-CIO, 89 STATE OFFICE SCOOPS No. 5 (Feb. 16, 1989) (copy on file at the Indiana Law Review office).

189. Telephone conversations, *supra* note 188.

190. *Id.*

191. *Id. See also* AFL-CIO, LEGISLATIVE AGENDA FOR 1989 (unpublished manuscript) (on file at the Indiana Law Review office).

192. Telephone conversations, *supra* note 188.

193. *Id.*; *see also* INDIANA STATE AFL-CIO, STATE HOUSE LEGISLATIVE WRAP-UP at 1 (Oct. 1989).

reform, he decided that a simple referral or notice provision would be at least a first step in a long-term reform effort.[194] A stripped-down Senate Bill 543 proceeded through the legislative process to become Chapter 12 of Indiana's Workers' Compensation Act.[195] Had Senate Bill 543 been enacted into law as proposed, Indiana would have had a solid foundation for a comprehensive vocational rehabilitation program. Instead, the legislative process of compromise yielded statutory provisions that are vague and lacking in administrative direction.

B. Policy Issues In Implementing Vocational Rehabilitation In A Workers' Compensation System

1. Goals and Obligations of Vocational Rehabilitation.—A comprehensive vocational rehabilitation scheme must have a clearly stated and objectively measurable goal. The goal provides the basis for key policy decisions, such as who should be eligible to receive vocational rehabilitation benefits, what types of services should be provided, and who should administer vocational rehabilitation.

The 1989 vocational rehabilitation amendment to the Indiana workers' compensation law fails to establish a clearly stated and objectively measurable goal.[196] The new statute provides that the goal of vocational rehabilitation is "to restore the employee to useful employment."[197] Yet, the term "useful employment" is not defined and therefore invites litigation. The statute offers no guidance as to whether the goal is to return the worker to or near the worker's pre-injury earning capacity, or whether a minimum wage position or a sheltered workshop position constitutes "useful employment."

Indiana's vocational rehabilitation statute places the entire burden of managing vocational rehabilitation on the federal/state program. However, the goals of vocational rehabilitation in the context of workers' compensation differ fundamentally from the goals established by the federal regulations that control federal/state vocational rehabilitation programs.[198] The goal of rehabilitation within the workers' compensation context is the prompt return of the worker to gainful employment, while the goal of rehabilitation within the federal/state vocational rehabilitation program — the Indiana Office of Vocational Rehabilitation — is a much

194. Telephone conversations, *supra* note 188.

195. IND. CODE § 22-3-12 (Supp. 1990); *see* text of statute, *supra* note 162.

196. *See generally* IND. CODE §§ 22-3-12-1 to -5 (Supp. 1990).

197. *Id.* § 22-3-12-1.

198. LAWS AND PROGRAMS, *supra* note 166, at 12 (citing the REPORT OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS).

broader mandate, the maximization of human potential.[199] Efforts to maximize the human potential of an injured worker are beyond the purpose and scope of the workers' compensation system.

These differing goals raise issues concerning whether the goals of the Workers' Compensation Act or the goals of the federal/state program will control an injured worker's eligibility for vocational rehabilitation and will control the content of the program.

2. Who Should Receive Vocational Rehabilitation?—Not every worker who has been injured on the job is entitled to vocational rehabilitation benefits.[200] To be entitled to rehabilitation benefits, an injured worker must be left with a disability that brings the worker within the eligibility criteria established either by statute or by administrative rule. In Indiana, an inability to perform work for which the employee has previous training or experience qualifies the employee for vocational rehabilitation under the Workers' Compensation Act.[201] Without statutory definition or administrative clarification, the eligibility criteria in the vocational rehabilitation provision are problematic. Does the "work for which the employee has previous training or experience" refer to the injured employee's customary occupation, or to *any* previous gainful occupation? Courts in jurisdictions with similar entitlement criteria have held that such work does not mean all work for which an injured employee may have had previous training or experience, but rather the employee's customary occupation.[202] To avoid litigation over the eligibility criteria, Indiana should promulgate a clarifying statutory definition or an administrative rule.

Indiana Code section 22-3-12-4(b) states that "[t]he office of vocational rehabilitation shall determine the eligibility of the injured employee for rehabilitation services . . . ."[203] This provision raises a question about which agency's eligibility criteria are controlling. Will the Office of Vocational Rehabilitation make use of each agency's eligibility criteria, or will the eligibility criteria in the workers' compensation statute be ignored? The lack of legislative guidance on coordinating the workers' compensation system and the federal/state program, each with its individual goals and distinct eligibility criteria, threatens the administrative viability of the vocational rehabilitation provisions.

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199. *Id.* at 12-13.

200. Annotation, *Workers' Compensation: Vocational Rehabilitation Statutes*, 67 A.L.R. 4TH 612, 625 (1989).

201. IND. CODE § 22-3-12-1 (Supp. 1990).

The statute reads that "[a]n injured employee, who as a result of an injury or occupational disease is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment." *Id.*

202. Annotation, *supra* note 200, at 641-47.

203. IND. CODE § 22-3-12-4(b) (Supp. 1990).

3. What Types of Services Should Be Available?—Once eligibility is determined, the next step, according to Indiana Code section 22-3-12-4(b), requires the Office of Vocational Rehabilitation to "develop an individualized rehabilitation plan for the employee."[204] An individualized rehabilitation plan is a projected combination of services designed to achieve a specific goal.[205]

Federal/state programs are client-centered: the client selects an educational objective, and the agency then determines whether the objective is feasible, given the client's capability.[206] If the agency finds that the educational objective is feasible, the agency formulates a plan and supportive services designed to help the client reach the educational goal.[207] For example, if a client and the agency agree that a college degree is necessary to reach the client's career objective, the agency will supply college tuition and related expenses even though a less costly plan could return the client to work.[208]

Under workers' compensation rehabilitation programs, the statutory goal is to expediently return the employee to gainful employment, usually under a scheme of priorities.[209] A plan designed to meet this goal would require different services than a plan designed to meet the federal/state program goal of maximizing human potential.

4. Who Should Pay for Vocational Rehabilitation?—Workers' compensation benefits, a recognized cost of doing business, should not be shifted from the employer to the general public. Rehabilitation services are an inherent part of the workers' compensation system — a system based on the exchange of common law rights between employees and employers and governed by the same rationale — this cost of production

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204. *Id.*

205. OFFICE OF VOCATIONAL REHAB., IND. DEP'T OF HUMAN SERVS., WHAT YOU SHOULD KNOW ABOUT VOCATIONAL REHABILITATION at 3-4.

206. *Id.*

207. *Id.*

208. *Id.*

209. *See* Letter from Robert J. Robinson to Professor Ruth C. Vance (Oct. 14, 1988) (discussion of priorities under Montana Vocational Rehabilitation Procedures and attached memorandum); *see, e.g.*, J. LEWIS, THE ILLINOIS WORKERS' COMPENSATION SYSTEM: A REPORT TO THE GOVERNOR, at 69 (1989) (This report discusses the findings of a study of the Illinois workers' compensation system. The study analyzed the role of workers' compensation in general and has a specific chapter that reviews medical and vocational rehabilitation services); *see also* Niss, *No Litigation Allowed: Maine Rehabilitation Statute Revised*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Sept./Oct., 1989, at 17-18; Address by Douglas K. Langham, Workers' Compensation Conference at Storrs, Connecticut (May 1, 1987) (Speaker Langham's presentation concerned worker rehabilitation in Michigan. A copy of the speech is on file at the Indiana Law Review office). Most statutes do not have specific priority listings, but use administrative procedures to determine proper priority status.

should be borne by the industry and the consumers of its goods.

The National Commission on State Workmen's Compensation Laws recommended that "the employer pay all costs of vocational rehabilitation necessary to return a worker to suitable employment and authorized by the workmen's compensation agency."[210] The 1977 report of the President's Inter-Departmental Workers' Compensation Task Force also recommended that:

> The carrier/employer have the primary responsibility for developing and implementing a physical and/or vocational rehabilitation plan for any claimant whose prospect for re-employment and return to former earning capacity would thereby be significantly improved. The carrier/employer should be fully liable for all rehabilitation costs, including maintenance and necessary travel expenses.[211]

Not only is the employer responsibility for vocational rehabilitation consistent with the underlying philosophy of workers' compensation, foundation studies and organizations within the workers' compensation system recommend it.[212]

In response to these and other concerns regarding the implementation and administration of Indiana's new vocational rehabilitation statute, Governor Evan Bayh called a conference on vocational rehabilitation for September 29, 1989.[213] This conference was the first step in providing an educational forum to discuss alternative methods of providing vocational rehabilitation services to Indiana citizens injured in the workplace. In issuing his call for a conference on vocational rehabilitation, Governor Bayh questioned whether a taxpayer-supported system is best. The Governor also recognized the need for Indiana to decide on an administrative structure to supervise vocational rehabilitation, monitor plans, collect data, and resolve disputes. As Indiana's statute stands, there is no monitoring of vocational rehabilitation services and, therefore, no method of enforcing the notice provision. Also, the statute provides no guidance on resolving disputes arising under vocational rehabilitation. Further, the statute lacks a mandate to collect data, which is necessary to study the system's cost and efficiency.

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210. LAWS AND PROGRAMS, *supra* note 166, at 17 (citing the REPORT OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS).

211. *Id.* at 15 (citing the 1977 REPORT OF THE PRESIDENT'S INTER-DEPARTMENTAL WORKERS' COMPENSATION TASK FORCE).

212. *Id.*

213. Letter from Governor Evan Bayh (Aug. 29, 1989) (issuing vocational rehabilitation conference call).

If the legislature and the Workers' Compensation Board do not address these issues, the Indiana courts will have to provide answers on a piecemeal basis. Employees and employers will be forced to resort to the uncertain, time-consuming, and costly litigation process — the very problem that the workers' compensation system was originally designed to avoid.

C. Workers' Compensation Board Administrative Rule Proposal

During the survey period, the Workers' Compensation Board proposed a rule concerning administrative hearing procedures for the termination of temporary partial or temporary total disability benefits.[214] Under the current rule, the employer or its insurer may unilaterally terminate temporary partial or temporary total disability benefits without first conducting a hearing.[215] The proposal would provide for a pre-termination hearing.[216] The proposed rule requires the employer to notify the employee and file an Application for Adjustment of Claim with the Workers' Compensation Board before the employer terminates temporary benefits. The employee could request a hearing before a single board member within thirty days of receiving the employer's application. The employer would have a right to appeal an adverse decision to the full Board, but the employer would have to pay benefits during the pendency of the appeal. The employee would also have the right to appeal an adverse decision to the full Board, but benefits would be suspended during the pendency of an employee's appeal. The proposed rule further provides that terminating temporary benefits without following this procedure constitutes prima facie evidence of bad faith as defined in Indiana Code section 22-3-4-12, and the employer would have to pay the employee's attorney fees.[217]

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214. 13 Ind. Reg. 1541-1542 (May 1, 1990) (proposal to amend IND. ADMIN. CODE tit. 631, r. 1-1-27).

215. IND. ADMIN. CODE tit. 632, r. 1-1-27 (Supp. 1990).

216. 13 Ind. Reg. 1541 (May 1, 1990) (proposed IND. ADMIN. CODE tit. 631, r. 1-1-27(b)).

217. The proposed rule reads as follows:

> (a) No employer may terminate temporary partial/total disability benefits being paid to an employee except upon advance written notice to the employee. This advance written notice from an employer must be accomplished by the filing of a worker's compensation board's Application for Adjustment of Claim with the worker's compensation board, accompanied by a detailed explanation for the proposed termination of benefits, all relevant medical reports, and all other documentation that the employer relies upon to justify the proposed termination of benefits, with a copy to be served on the employee.

A public hearing was held on the proposed rule on June 26, 1990. The Workers' Compensation Board is withholding action on the proposed rule pending the recommendations of a governor-appointed task force

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(b) If the employee disagrees with the employer's proposed termination of temporary partial/total disability benefits, the employee may within thirty (30) days after receipt of the employer's Application for Adjustment of Claim submit a request for a hearing with the board. If the employee's request has been made within the allotted time period, temporary partial/total disability benefits may not be terminated until a determination has been made after opportunity for evidentiary hearing that termination of benefits was warranted on the basis of medical evidence or testimony presented. This hearing shall not be held earlier than seventy-five (75) days after the employee's filing of a request for hearing unless the parties would so agree or in the absence of such agreement then for good cause. Such hearing shall be held before a single member of the board or other such person authorized by the board to hear and decide the case. A full record shall be made of the proceedings.

(c) All such proceedings or medical reports shall be admissible so long as the same have been exchanged between the parties at least five (5) days before the hearing and so long as the medical opinions reasonably comply with the spirit of IC 22-3-3-6(e), which sets forth the type of information which should generally be set forth within a medical report. The admissibility of such medical reports shall only be permitted for proceedings of this type and nature concerning the cessation of temporary partial/total disability benefits.

(d) If the decision of the individual member is adverse to the employer, the employer may appeal to the full board, but temporary partial/total disability benefits must continue during the pendency of the appeal. If the decision is adverse to the employee, benefits may be suspended, but the employee may within twenty (20) days following the receipt of the decision appeal to the full board. In the event an appeal is taken, then the full board shall review the record of proceedings before the single worker's compensation board member to determine whether the decision to permit the termination of benefits presented. Such full board review shall be initially scheduled at the next regularly scheduled full board session that has been scheduled at least thirty (30) days in advance of the filing of the appeal to the full board. In the event that the appeal is filed within the thirty (30) day period prior to the next full board's regularly scheduled session, then that appeal shall be scheduled for the subsequent regularly scheduled full board session.

(e) The termination of temporary partial/total disability benefits without the proper notice as set forth in this section will be prima facie evidence of bad faith as defined in IC 22-3-4-12, and the employer shall be liable for the employee's attorney fees. The assessment of these attorney's fees shall be made by the board pursuant to the procedures set forth in IC 22-3-4-12.

(f) [The employer or such employer's insurance carrier shall file with the] worker's compensation [board a memorandum prescribed by the] worker's compensation [board showing payments made, the date of the employee's return to work, the date of cessation and reason for termination of the payments, and any other fact or facts pertaining to the cessation of said payments of compensation and serve upon the employee or his dependents a copy thereof.]

Id. (the bracketed sections represent nonamended portions of the rule).

charged with making recommendations to reform Indiana's workers' compensation system.[218] Task force recommendations for using independent medical examiners in case of dispute, or recommendations for granting the employee the right to choose the physician, if passed into law by the legislature, could satisfy the oversight and due process concerns of injured workers. If the legislature addresses these concerns, the Workers' Compensation Board will probably find no need to enact its proposed rule.

IV. Governor's Task Force on Workers' Compensation and Occupational Disease Law Reform

In his 1990 State of the State Address, Governor Bayh said that Indiana's Workers' Compensation Act, which was originally passed in 1929, is in desperate need of in-depth analysis and reform.[219] The Governor then proposed a task force to study the current law and make recommendations.[220]

In June, Governor Bayh appointed six members to the task force; the task force is made up of three representatives of labor and three representatives of management.[221] Rogelio Dominguez, Chair of the Workers' Compensation Board, was appointed Chair of the task force. To provide technical guidance, John H. Lewis was hired as a consultant to the task force. Lewis served as General Counsel to the National Commission on State Workers' Compensation Laws. He has also been hired as a consultant to several other governors and state legislatures to analyze state workers' compensation systems and to make recommendations. Most recently, Governor Thompson hired Lewis to analyze and to recommend changes in the Illinois workers' compensation system. Governor Bayh also appointed twenty-six people to a resource panel to assist the task force. The members of the resource panel included representatives of business, labor, the legal profession, the medical profession, and academia.

The resource panel was divided into five sub-committees: agency infrastructure and data management, cost, self-insurance, medical care

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218. *See infra* note 220 and accompanying text.

219. E. Bayh, The 1990 State of the State Address and The Bayh/O'Bannon 1990 Legislative Program (Jan. 9, 1990) (unpublished).

220. *Id.*

221. The task force members are Charles Deppert, Indianapolis, President of Indiana State AFL-CIO; Scott Miller, South Bend, President and CEO of Burkhart Advertising, Inc.; William Osos, Danville, Director, Region 3 UAW; James Robinson, Lanesville, Chairman and Secretary of Ace Manufacture, Inc. and Chairman of Stem Wood, Inc.; James Rogers, Carmel, Chairman and CEO of PSI Energy, Inc.; and Michael Sullivan, Indianapolis, Business Manager of Sheet Metal Workers Local 20.

and physical rehabilitation, and compliance and safety initiatives. The subcommittees analyzed Indiana's workers' compensation system in their designated areas, and reported their findings and recommendations to the consultant. The consultant used the subcommittees' findings and recommendations in preparing the report that he presented to Governor Bayh in December 1990.

Lewis's extensive report dealt with many areas of Indiana's workers' compensation system, including administration, medical care, temporary and permanent disability benefits, benefit delivery, occupational disease, and methods of insurance. Lewis fully discussed each area by relating the historical background, comparing Indiana's system to other states' systems, and suggesting alternatives for improving Indiana's system to make it efficient, cost-effective, and responsive to the needs of both employees and employers. Of all the areas needing reform in Indiana's workers' compensation system, Lewis focused on three as essential: medical care, benefit levels, and administration.

The overriding concern in the area of medical care is the choice of the treating physician. Currently, the employer has the statutory right to choose the injured employee's physician. According to Lewis's surveys of workers' compensation recipients, the statute does not have a significant impact on how the physician is actually chosen.[222] In many instances, the emergency room physician becomes the treating physician.[223] Lewis concluded that although medical costs are not significantly affected by the method of choosing the treating physician, the dispute resolution process is affected.[224] An advantage in the dispute resolution process belongs to the party controlling the choice of physician because the treating physician's opinion, presumed to be favorable to the party choosing the physician, probably will be accorded great evidentiary weight.[225] Furthermore, if the employer chooses the physician, the employee likely will be forced to pay for an outside expert opinion in the event of a dispute.[226] Lewis recommended that an option to change physicians be granted to the party who does not have the initial choice, with the added option of immediate recourse to the Workers' Compensation Board.[227]

Other medical care issues concerned cost and dispute resolution. Lewis noted that Indiana's medical costs historically have been low, but

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222. J. LEWIS, MAJOR ISSUES IN THE INDIANA WORKER'S COMPENSATION SYSTEM REPORT TO THE GOVERNOR, at 29 (Dec. 1990).

223. *Id.*

224. *Id.* at 30.

225. *Id.* at 30-31.

226. *Id.* at 31.

227. *Id.* at 35.

that that may be because of the low number of serious injuries in Indiana.[228] To contain medical costs, Lewis offered the possibilities of the state instituting a fee schedule or of the insurers monitoring medical costs.[229] Additionally, Lewis suggested that claimants should be protected against lawsuits brought by medical providers to recover unpaid bills associated with workers' compensation injuries by only allowing lawsuits against the employer and insurer.[230] Lewis also recommended the use of independent medical examiners in disputes involving medical issues to reduce the delay and the cost of each party hiring its own experts.[231]

Lewis addressed both temporary total disability benefits and permanent disability benefits in his report. The report stated that temporary disability benefits, which help to replace income lost during the healing process, are limited to a maximum weekly benefit of $294, which is 71% of the state's average weekly wage.[232] This maximum weekly benefit is one of the lowest in the country.[233] The National Council on Compensation Insurance reported that increasing the weekly benefit maximum to $401 would increase employers' insurance premiums approximately 1.6%.[234] Lewis noted that although many states' maximum weekly benefits fluctuate according to the state average weekly wage so that legislative action to change benefit levels is unnecessary, fixing a dollar amount for the maximum weekly benefits allows the legislature to control costs.[235]

As in most states, Indiana's permanent impairment cases represent a small portion of all cases, but the permanent impairment cases account for most of the benefits paid.[236] Even so, Indiana's maximum weekly benefit for permanent impairments of $120 is less than half of the benefit paid in several other states.[237] Because raising Indiana's maximum weekly benefit to equal the benefits paid in most of the other states would increase insurance premiums at least 14%, Lewis recommended giving greater benefits to those with more serious impairments who are likely to suffer a greater wage loss.[238] The insurance premium increase to raise the benefit level of an injured worker with a 25% impairment from $15,000 to $20,000 would be 7.1%.[239]

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228. *Id.* at 34.
229. *Id.* at 36-37.
230. *Id.* at 37.
231. *Id.* at 37-38.
232. *Id.* at 44.
233. *Id.* at 43, 49.
234. *Id.* at 50.
235. *Id.* at 50-51.
236. *Id.* at 53.
237. *Id.* at 59.
238. *Id.* at 61-62.
239. *Id.* at 62.

The Workers' Compensation Board administers Indiana's workers' compensation laws on an annual budget of approximately $985,000, which is about 10% of the national average.[240] The Board collects minimal data and has no computer system that permits meaningful access to the data. Data access is important to understanding and solving problems in any workers' compensation system.[241] Lewis recommended the purchase of hardware and software with the capabilities of networking with other agencies and receiving electronic reports of insurance carriers.[242] Lewis estimated that such a system would require an initial investment of $1,000,000 and annual maintenance of $300,000.[243]

Lewis also discussed the existing controversy over the ability of the employer or its insurer to unilaterally terminate temporary benefits without first conducting a hearing.[244] Lewis then suggested several alternatives that would accomplish the same purpose as holding a full board hearing before terminating benefits.[245]

Most of the recommendations in Lewis's report to Governor Bayh were incorporated into legislation introduced in the House this spring in the form of House Bill 1517. House Bill 1517 proposes twenty changes to Indiana's workers' compensation and occupational disease statutes; due to the bill's length, it is not reproduced in the footnotes. The House Labor Committee held a hearing on House Bill 1517 on January 28, 1991, and passed out the bill by a vote of six-two on February 7, 1991.[246]

On March 28, the Senate Pensions and Labor Committee made several amendments to House Bill 1517.[247] Major changes included removing the employee choice of physician, extending the phase-in of the increase in temporary total disability benefits from three years to four years, lowering the benefit level increases for permanent impairment awards, shortening the length of payment of temporary total disability benefits from thirty days to fourteen days during a dispute, requiring the party requesting an independent medical examination to pay the cost, and removing the proposed self-insurance advisory board and self-insurance guarantee fund.[248] Even though House Bill 1517 was based on the compromise reached by representatives of both labor and manage-

240. *Id.* at 24.
241. *Id.*
242. *Id.* at 23.
243. *Id.* at 24.
244. *Id.* at 75.
245. *Id.* at 76.
246. INDIANA CHAMBER OF COMMERCE, 6 LEGISLATIVE REPORT, at 1 (Feb. 15, 1991).
247. INDIANA CHAMBER OF COMMERCE, 12 LEGISLATIVE REPORT, at 1 (Mar. 29, 1991).
248. *Id.*

ment, it appears that the bill is not receiving wide support in the legislature and that reform of Indiana's workers' compensation system will be piecemeal because of the political process.

V. Conclusion

Both the court decisions and the content of the vocational rehabilitation statute indicate that Indiana is maintaining a conservative position regarding workers' compensation. The task force's organized method of studying the workers' compensation system has yielded proposed legislation that will reform Indiana's system to be responsive to the needs of management and labor. The courts' and legislature's historically conservative stance may change if the 1991 General Assembly enacts the task force's reform recommendations. Nevertheless, the General Assembly will maintain a crucial role in shaping the future direction of Indiana's workers' compensation law.