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Part I: Managing An Indiana Worker's Compensation Claim

What happens when an employee is injured at work?

When an employee is injured at work in Indiana, the clock immediately starts ticking:

1. Within 14 days of the injury, the injury must be reported to the Board.
    a. The Employer has 7 days to report the injury to the carrier.
    b. The Insurance Carrier then has 7 days to report the injury to the Board by filing **State Form 34401 – FIRST REPORT OF INJURY OR ILLNESS** (FROI).

- When filing the State Form 34401, there is no need to determine compensability at that time. The form merely indicates that an accident has been reported by the employee.
- It is very important that the FROI be timely filed as no other forms are able to be filed with the board until after the FROI is filed, and there are penalties for untimely submissions.

FILING FROI – STATE FORM 34401

- This form is not located in the forms portal. It is found on a separate area of the website.
    - Print/download FROI form from "forms" section on the left side of the website. http://www.in.gov/wcb/index.htm
    - Complete the form and file through EDI vendor.

- You can confirm the filing using the link on the right side of the Board's website (need SSN# of employee and date of injury)

DETERMINING COMPENSABILITY

- Within 30 days of the employer's knowledge of an injury, a determination must be made as to whether the claim will be accepted as compensable or denied.
- If you are unable to complete your investigation within 30 days, you may ask the Board for additional time in determining compensability by filing:
  - **State Form 48557 – NOTICE OF INABILITY TO DETERMINE LIABILITY/REQUEST FOR ADDITIONAL TIME**
    - Form is filed electronically. You will be given an immediate response from the Board as to whether the additional time is granted (almost always is).
    - Provides the employer with an additional 30 days to investigate to determine whether compensable.
    - You can request additional time more than once.
    - You can also use this for medical-only claims.

DENYING A CLAIM

- If after investigating the claim, it is determined that the claim will be denied, file **State Form 53914 – NOTICE OF DENIAL OF BENEFITS.**
  - Filed electronically, located in forms portal.
  - A penalty is assessed if filed after 30 days of knowledge of injury if no request for additional time was previously filed.
  - For medical-only claims – can file after 30 days of knowledge of claim as long as medical treatment was authorized up until date of denial.

WHEN IN DOUBT ABOUT COMPENSABILITY…

- When in doubt as to whether a claim is compensable, always file State Form 48557 requesting additional time. If a determination still cannot be made after a diligent investigation, file State Form 53914, denying benefits.
- If no denial or request for additional file is made, the Hearing Members have been known to rule that failure to file the denial waives the employer's denial and any right to assert affirmative defenses.
- It is always easier to later accept a claim and pay any back TTD and/or medical benefits.

EMPLOYEE INITIATING CLAIM BEFORE WORKER'S COMPENSATION BOARD

An employee has two options for initiating a claim with the Indiana Worker's Compensation Board:

1. Employee can file **State Form 45442 – REQUEST FOR ASSISTANCE**.
    a. Typically filed by an employee who has not hired an attorney.
    b. The case is assigned an Accident number only, not Cause number.
    c. Informal process—Ombudsman Division tries to resolve dispute by working with the employee and the insurance carrier.
    d. Many times the dispute, (usually over medical care or TTD benefits) can be resolved and an Application is never filed.
    e. However, filing State Form 45442 does not meet the requirements under the Statute of Limitations, which gives the employee 2 years to file an Application for Adjustment of Claim.
2. Employee can file **State Form 29109 – APPLICATION FOR ADJUSTMENT OF CLAIM.**
    a. Can be filed by Employee, with or without attorney
    b. Employee has 2 years from the date of the injury to file the Application for Adjustment of Claim within the statute of limitations.
    c. This starts the formal administrative process
        i. Cause Number is assigned as well as first pre-trial docket setting.
        ii. Immediately refer to defense counsel so that employer's interests can be represented at hearings before the Board.

WHAT HAPPENS AFTER APPLICATION FOR ADJUSTMENT OF CLAIM IS FILED?

1. Case is assigned a Cause number
    a. Case is assigned to a Hearing Member, by venue, county of injury
    b. Most Hearing Members hold periodic pre-trial conferences
2. Discovery proceeds
    a. Informal exchange of information
    b. Interrogatories, Request for Production of Documents
    c. Prior and current injury medical records
    d. Employee, treating physcians, nurse case manager depositions
    e. Vocational assessments/deposition
    f. Surveillance
3. Settlement
4. Mediation
    a. Helpful with claimant control issues
    b. Most practicing attorneys/mediators charge hourly
    c. Board has 5 Employees/certified mediators
        i. Flat fee $350/5 hours; $50/hour thereafter
    d. 70-75% settle

5. Hearing held
    a. Hearings are scheduled periodically after pre-trial conferences or by request
    b. Expeditious: stipulate to as much as possible. Evidence heard only on disputed issues
    c. Continuances are common
    d. Emergency hearings on less than the merits of case only in extreme situations
    e. 3-year "stale claim" rule
        i. No continuances granted
        ii. Can become a show cause hearing
        iii. On hold orders if treatment continues
    f. Decision from Single Hearing Member typically runs 90-120 days
    g. "Summer break" – no hearings/pre-trials held July through August
    h. Emergency hearings by motion only
6. Appeal to Full Board
    a. 30 days from date of Decision of Single Hearing Member
    b. Must file Notice of Application for Review by Full Board
    c. Briefs are due 30/10 days before Full Board Hearing
    d. Argument only, no new evidence or testimony
    e. 7 Member Board sits for argument and discussion
7. Appeal to Indiana Court of Appeals
    a. Notice of Appeal due to Court of Appeals 30 days from date of Decision of Full Board
    b. $250.00 filing fee
    c. Court of Appeals typically makes ruling on briefs only.

MEDICAL TREATMENT

- Indiana is unique, in that the employer directs the employee's medical care.
- Employee has no choice of physician.
- If a claim is accepted, medical treatment must be provided until which time the employee reaches maximum medical improvement.
- The treating doctor must provide Permanent Partial Impairment (PPI) rating upon finding of MMI.
- Future medical is not a statutory benefit. However, the Board may award future medical if necessary to reduce or limit impairment; for pain management, for employee to continue working and for daily activities.
- If employee is requested or required to travel outside of the county of employment for treatment, the employer must pay reasonable expense of travel, food and lodging necessary during the travel, but not to exceed the amount paid

at the time of the travel by state to its employees under the state travel policies and procedures.
- If the treatment or travel to and from treatment causes employee to lose time from work, the employer shall reimburse the employee for the loss of wages using the basis of the employee's average weekly wage.
- Don't "Doctor Shop" – be careful in your selection of employee's doctor. If you switch from doctor to doctor, although you are entitled to do so, it will appear that you are doctor shopping.

Use of Nurse Case Manager

- The Board allows the use of Nurse Case Managers (NCM) on claims; however, there are strict rules regarding the NCM role.
- Per Board's Website: a NCM may be involved in a claim to schedule appointments, help facilitate care suggested by the medical provider, and to report back to the employer and/or carrier. However, a NCM should not express opinions, to either the injured worker or the medical provider, regarding an injured worker's course of medical care or otherwise attempt to influence the process. Additionally, a claims adjuster should not attempt to direct the care provided to an injured worker by the authorized treating doctor.

WHAT IF EMPLOYEE IS UNABLE TO WORK DUE TO WORK INJURY?

Temporary Total Disability Benefits

- Calculated using 2/3 of employee's average weekly wage. Average weekly wage is calculated using the 52 weeks of wages prior to claimant's injury.
- The maximum amount of TTD that is paid is 500 weeks.
- The current minimum and maximum AWW $75.00/$1,170.00 and TTD rates $50.00/$780.00.
- TTD is payable on 8th day of disability. First 7 days is payable only if disability lasts longer than 21 days.
- Usually paid weekly, but can be paid by bi-weekly or monthly with Board approval.

State Form 1043 – AGREEMENT TO COMPENSATION OF EMPLOYEE/EMPLOYER

- Sets forth Employee's AWW and TTD rate and payment schedule for payment of TTD/TPD benefits.
    - File electronically for compliance copy only.
    - Hard copies are to be mailed in for filing with PPI and PTD agreements and for TTD agreements with plaintiff's signature.

    - Send a copy of the form to the Employee 15 days after first installment of TTD is due; send with the TTD payment.
    - Must be filed for each reinstatement and each type of payment of TTD/TPD.
- Can also be used to settle claim for PPI benefits only.
    - This is not a full and final settlement. Plaintiff will have 2 years to reopen claim for increased PPI or change of condition.
    - Back date the PPI payment to DOI to shorten the 2 year statute of limitations.
    - Must also submit State Form 53913 – EMPLOYEE WAIVER OF EXAMINATION.
    - For 0% PPI – No State Form 1043 is required 0% PPI and no payment is being made to the employee. When 0% PPI is obtained and no settlement is paid, can close the file.
        - If 0% PPI, can still have a compromise settlement on a Section 15 Agreement to avoid reopening of claim for additional treatment.
            - Must be drafted by defense counsel.

SETTLEMENT AGREEMENTS

- Board will not approve unless drafted by Defense Counsel.
    - Stipulated Agreement – for claims where compensability is accepted.
        - No other issues to resolve.
        - Use when no attempt to terminate employee's right to re-open the case.
        - Sets forth the issues, stipulation of facts, satisfaction of employer obligations.
    - *Compromise Agreement – Section 15 Agreement* – most commonly used.
        - Dispute liability.
        - Terminates all benefits- full and final.
        - Employee waives right to reopen unless mutual mistake, fraud, trickery or duress.
        - *Recommend using Section 15 Agreements to settle cases as it closes out case forever.*

If Employee Returns to Work or Reaches MMI, Can I Just Simply Terminate TTD/TPD?

- In order to properly terminate TTD/TPD benefits, file **State Form 38911 – REPORT OF TEMPORARY TOTAL DISABILITY/TEMPORARY PARTIAL DISABILITY.**
- Must file electronically.

- **Triggers the Board IME Process**
    - Plaintiff must electronically file disagreement with termination within 7 days or the Board must receive the disagreement by mail within 7 days.
    - Plaintiff would request Board IME if he/she does not agree with MMI status or ability to return to work.
- If reducing TTD to TPD, or terminating due to MMI or light duty availability, must attach the medical report indicating the Employee's change in work status.
- **Unilateral Termination – no advance notice required to cut off benefits:**
    - Employee has returned to any employment.
    - Employee has died.
    - Employee has received 500 weeks of benefits.
    - Employee has been unable/unavailable for work for reasons unrelated to the work injury.
- **Need Advance Notice to Terminate Benefits:**
    - Release to light duty work and work is available (has not yet started working).
    - At MMI and released to return to work, full duty (not yet returned to work).
    - Must pay 4 additional days of TTD if 38911 mailed to employee, 2 days if personal service.

Board IME

- The only IME available per the Worker's Compensation Act is the Board IME and this is different from an IME in Illinois. In Illinois, an IME is a second opinion by a physician of the employer's choosing. In Indiana, since the employer directs medical care, requesting a second opinion is often seen as doctor shopping.
- There are a two different sections in the Act regarding IMEs:
- Ind. Code § 22-3-4-11 (NOT FREQUENTLY USED)
    - Upon Application by either party or the Board's own motion, an IME will be scheduled by the Board. (usually for employees who cannot afford own examinations)
        - A reasonable physician fee, traveling expenses are paid by the State.
        - Used where the employee is never taken off work so a State Form 38911 was never filed.
        - 2 weeks of TTD is NOT owed under this section.
- *IC 22-3-3-7(c)* (MOST COMMONLY USED)
    - Only addresses MMI and whether additional treatment is needed for accepted body parts. Does not address PPI.

- When TTD is terminated, using State Form 38911, the employee has 7 days after the receipt of 38911 to notify the Board in writing of his/her disagreement and request for an IME.
- If the employee does not notify Board within 7 days, it is okay to terminate TTD and the Board IME will likely be denied by the Board.
- If the employee does notify the Board of disagreement within 7 days, ombudsmen has 10 days to resolve the disagreement and begin the Board IME process.
    - Board asks Plaintiff for details on medical issue, body part and specialty requested for the IME physician.
    - Ombudsmen contacts the parties to see if a doctor can be agreed upon, otherwise doctor will be chosen by Board.
- Cost of the examination is the responsibility of the employer.
- Employer is responsible for sending all medical records with basic, objective cover letter to IME doctor with fees prior to the examination.
    - IME letter very different than in Illinois. Questions are posed by Board and improper for employer to pose questions for the doctor to address. Letter simply states that records are enclosed regarding the employee.
- Employee is to bring all x-rays and films.
    - If the IME finds that plaintiff is not at MMI, the 2 week advance covers the first two weeks of additional disability – dating back to the termination of TTD.
    - If the employee is at MMI, the two weeks of TTD benefits are taken as a credit at the time of settlement. (From PPI amount.)
- If Employer disagrees with the finding of the IME doctor, has 15 days to object to the IME, which typically results in a hearing.
    - NW Indiana Hearing Member highly disfavors these objections.
    - *Steven M. Bush v Robinson Engineering & Oil, Co. Inc.,* 93A02-1508-EX-1299 (2016) - The Court of Appeals ruled that the Board is not required to follow treatment recommendations of an independent medical examiner over a treating doctor.

Permanent Partial Impairment Ratings (PPI)

- When the treating doctor finds that a plaintiff is at MMI, they are to give a PPI rating.
- They are to use the *AMA Guides to Permanent Impairment*, but the Act does not specify that they use any particular version; however, it is preferred that they use the 6th Edition, as this edition tends to be more favorable to the employer, producing lower ratings than the 5th edition.

- Indiana does not use the plaintiff's average weekly for calculating PPI. PPI has set values per degree. (All employees are on the same level.)
    - Ex: For injuries from 7/1/16, 1-10 degrees are worth $1,750.00 per degree.
    - Hennessy & Roach, P.C., has a Rate Card located in materials provided.
- Overpayments of TTD can be used to offset PPI settlement.
- Shoulder and Hip injuries must be calculated as whole person.

CALCULATING PPI

For DOI 7/1/16:

Wrist = hand below elbow 40°

15% PPI= .15 x 40°= 6°

6° x $1,750 = $10,500.00

Ankle = foot below knee 35°

35% PPI = .35 x 35°= 12.25°

1-10° = 10° x $1,750.00= $17,500.00

+ 11 - 12.25° = 2.25° x $1,952.00= $ 4,392.00

$21,892.00

Knee = leg above knee 45°

56% PPI = .56 x 45°= 25.2°

1-10° = 10° x $1,7500.00 = $17,500.00

+ 11-25.2 (15.2 °) x $1,952.00 = $29,670.40

$47,170.40

Shoulder = whole body 100°

20% PPI =.20 x 100°= 20°

10° x $1,750.00 = $17,500.00

+ 10 x$1,952.00= $19,520.00

$37,020.00

CALCULATING AVERAGE WEEKLY WAGE

- Calculated using the 52 weeks of wages prior to the date of injury.
- Overtime and tips are included, fringe benefits are not included.
- TTD rate is 66 & 2/3% of employee's AWW.
- There are minimum and maximum AWW/TTD rates for date of loss.
    - Currently (As of 7/1/16):
        - Minimum AWW/TTD: $75.00/$50.00
        - Maximum AWW/TTD: $1,170.00/$780.00
- What if employee works two jobs, do you use both wages to calculate AWW?
    - Dual employment- "similar" or "same grade" of employment – use both wages.
        - Job 1: Waitress, Job 2: Sever - use both wages.

- Job 1: Secretary, Job 2: Bartender – do not use both wages.
- Job 1: Nurse's Aide, Job 2: Sales Clerk – do not use both wages

PERMANENT TOTAL DISABILITY (PTD) – IC 22-3-3-10

- Employee is unable to resume reasonable employment for remainder of his/her life.
- Determined by physical and mental fitness, availability for suitable work (age, education, training, physical impairment).
- Requires vocational experts on both sides.
- Pay 500 weeks of TTD at TTD rate.
- Maximum Award: $390,000.00
- Minimum Award: $25,000.00
- Cannot receive a combination of PPI and PTD.

What if an Employee Dies as a Result of Work Related Injury?

- Funeral/burial expense allotment – up to $7,500.00.
- Employer must pay all medical associated with the injury/death.
- Maximum payout to dependents is 500 weeks at TTD rate.
    - Can be made in weekly payments to dependents or lump sum.
- Dependents are classified in statute in Section 22-3-3-18 and 22-3-3-19.
- **STATE FORM 18875 – AGREEMENT TO COMPENSATION BETWEEN THE DEPENDENTS OF DECEASED EMPLOYEE AND EMPLOYER**
    - This form is used for accepted death cases when payments are being paid out weekly, not in a lump sum.
    - Use this instead of State Form 1043.
    - Benefit of weekly installments:
        - If surviving spouse is receiving weekly payments, if he/she remarries before expiration of weekly benefits, a lump sum settlement equal to the smaller of 104 weeks of compensation or the remainder of the compensation period is due. (Could potentially pay less.)
- For a lump sum settlement, contact defense counsel to draft contract.

Second Injury Fund Ind. Code § 22-3-3-13

- Encourages employment of partially disabled employee.
- Previously totally deprived of use of eye, hand, foot or entire limb then subsequently hired and sustains a new injury resulting in permanent total disability.
- The last employer is only responsible for benefits associated with the second injury. Benefits are calculated as if there were no preexisting injury.

    - Balance of PTD claim is paid by the Second Injury Fund.
    - The employee receives 150 weeks of benefits at TTD rate in 6 week intervals.
- Second Injury Fund also pays for the repair/replacement of prosthetics.
- Every carrier/self-insured employer is required to contribute an assessed amount based on premium amounts and indemnity payments.
- Employee who was permanently and totally disabled by employer #1 can apply for Second Injury Fund benefits when 500 weeks of benefits have been received and they are still PTD.

WHAT IF CLAIM CANNOT BE SETTLED?

Hearing

- If a claim cannot be settled, the case will be set for hearing before the Hearing Member in the assigned venue.
- Hearings are typically pretty short, with the parties stipulating to all agreed facts prior to the hearing. Evidence is only heard on the disputed issues.
- After hearing, typically receive decision within 90-120 days.

Appeal of Hearing Member's Decision

- 30 days from the receipt of the Decision of the Single Hearing member, must file Notice of Application for Review by Full Board.
- Briefs are due 30 days/10 days before Full Board Hearing.
- Argument only, no new evidence or testimony to be presented.
- 7 Member Board sits for argument and discussion (including hearing member who heard and decided case).

Appeal to Indiana Court of Appeals

- Notice of Appeal due to the Court of Appeals 30 days from date of Decision of the Full Board.
- $250.00 filing fee.
- If Employer appeals and loses, original award is increased by 5% and up to 10% by court order.

SUBROGATION IN 3RD PARTY CLAIMS – IC 22-3-2-13

- The employer or its worker's compensation insurer are entitled to be reimbursed to the extent of worker's compensation indemnity and medical benefits paid to the employee from the proceeds of any recovery made by the employee in a

third-party tort action, whether by judgment or settlement. The question of whether and to what extent the worker's compensation carrier is entitled to reimbursement of a lien usually arises when the employee seeks to negotiate a settlement of the claim with the third party tortfeasor. The determination of how much the lien should be reduced requires consideration of the following factors:

  - Attorneys Fees and Pro-Rata Costs – Under IC 22-3-2-13, the employee's attorney is entitled to receive 25% of any settlement entered into prior to suit being filed and 1/3 of any recovery made after suit has been filed. The worker's compensation carrier is obligated to pay its pro-rata share of expenses incurred by the employee in asserting the 3rd party claim. This obligation arises only after the case has been settled or judgment has been entered and paid.
  - Lien Reduction Under the Comparative Fault Act – Per IC 34-51-2-19, if a subrogation claim or other lien that arose out of the payment of medical expenses or other benefits exists in respect to a claim for personal injuries or death and the claimant's recovery is diminished by comparative fault or by reasons of the uncollectability of the full value of the claim for personal injuries or death resulting from limited liability insurance or from any other cause; the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished. The party holding the lien shall bear a pro-rata share of the claimant's attorneys' fees and litigation expenses.

- Any settlement entered into by the employee with a third party must be approved by the employer and/or worker's compensation insurer. The failure to obtain consent can result in an inadvertent termination of the employee's worker's compensation benefits and/or the inability to seek a reduction of the worker's compensation lien.
- If employee does not bring third-party suit, employer/carrier are entitled to bring suit against the third-party tortfeasor. Our office has experience with filing and handling this type of actions.

PART II: DEFENDING CLAIMS

Compensability in Indiana

Employers must pay the compensation and benefits provided under the Act when the following four elements of a worker's compensation claim are met (Ind. Code §22-3-2-2). If the employer/carrier denies a worker's compensation claim and the dispute is heard by the Board, the employee has the burden of proving each of the elements.

1. personal injury or death;

2. by accident;

3. arising out of the employment; and

4. in the course of employment.

In our experience, the Hearing Members in Indiana tend to take a very liberal approach toward compensability, finding most cases compensable. However, in Indiana, permanency awards tend to be much lower than surrounding states (I.e. Illinois), as the value of the case is set by the PPI rating and PPI values, rather than a subjective award by the Hearing Member and the employee's average weekly wage.

Exclusive Remedy

In Indiana, worker's compensation is the employee's "exclusive remedy" against the employer where there is personal injury or death by accident arising out of and in the course of employment.

By Accident

When it is the unexpected consequence of the usual exertion or exposure of the particular employee's job. Evans v. Yankeetown Dock Corp., 491 N.E.2d 969 (Ind. 1986).

An unexpected event (employee falls and breaks arm) and an unexpected result (employee gradually develops and overuse syndrome) are both considered an unexpected injury.

Where everything external to the employee is normal, but unexpected pain or physical symptoms occur, the employee has had an accident.

Carpal Tunnel Syndrome resulting from repetitive day to day motions required on the job is compensable. *Duvall v. ICI Americas*, 621 N.E.2d 1122 (Ind. Ct. App 1993).

NOT AN ACCIDENT:

After first day on the new job, employee complains he is sore. This is NOT an UNEXPECTED result. The Board said that simple muscle soreness was to be expected after a first day at a new job. *Eastham v. Whirlpool Corp*., 524 N.E.2d 23 (Ind. Ct. App. 1988).

What if an Employee has a pre-existing condition that makes him/her more susceptible to injury?

- If there is a causal link to an injury sustained on the job, even if a preexisting condition contributed to an injury, the employee is entitled to recover for the full extent of the injury, including an aggravation or triggering of a preexisting injury,

causally connected with the employment. *Wright Tree Service v. Hernandez*, 907 N.E.2d 183 (Ind.Ct.App. 2009).

- BUT where evidence establishes that an employee, by virtue of a pre-existing condition, can expect a natural progression of symptoms, a claim cannot be said to have occurred "by accident" because they are expected. In this situation there may also lack sufficient causal connection between the injury and the employment.

Plaintiff suffered from a rare hip disease and his injury was a result of that pre-existing condition. The claimant offered no testimony that the injury was due to his work. Not compensable. *Wicker v. Community Media Group*, 717 N.E.2d 596 (Ind. Ct. App. 1999).

Death case from a fall from a brain cell stroke. The claimant fell from a loading platform with no witnesses. There was evidence that plaintiff suffered a brain cell stroke and there was no recovery. *Hill v. Bethlehem Steel*, 690 N.E.2d 1191 (Ind. Ct. App. 1997).

Plaintiff choked while working. Board said that the mere fact that the plaintiff was in the course of employment at the time of the injury was not sufficient to support an award as risk of chocking is not a "neutral risk." *Smith v. Bob Evans Farms*, 754 N.E.2d 18 (Ind. Ct. App. 2001).

Arising Out of the Course of Employment

Risks Incidental to Employment:

1. Risks distinctly associated with employment
    a. Generally covered under WCA
2. Risks personal to claimant
    a. Caused by a pre-existing illness or condition unrelated to the employment are NOT compensable
3. Risks neither distinctly related to employment nor distinctly personal in character
    a. Generally covered under WCA

Test: The causal connection between the work and the accident must generally be such that a reasonably prudent person would comprehend the injury as incidental to the work undertaken.

Positional Risk Test – An injury arises out of the employment if it would not have occurred "but for" the fact hat the conditions and obligations of the employment placed the claimant in the position where he was injured." If the "in the course of employment" element is met, there is a rebuttable presumption that the injury "arises out of" the employment. The burden is on the employer to demonstrate that the injury was actually

the result of a cause personal to the claimant. Although the positional risk test has been abandoned, in practice, a heavy, unofficial burden still falls on the employer.

Example 1: Claimant worked at nursing home and parked her car in nursing home parking lot. After exiting her car, she twisted her ankle. Court held that: (1) claimant's ankle injuries resulted from neutral risk, and thus were presumed to have arisen out of her employment and were compensable, and (2) an injury resulting from an unexplained accident falls under the category of a neutral risk, for which the positional risk doctrine applies. *Milledge v. The Oaks*, 784 N.E.2d 926 (Ind. 2003).

Example 2: Plaintiff injured his knee after exiting his truck. He turned toward his truck to verify he had the necessary information to call in to the dispatcher and injured his knee. No evidence that the injury was personal to him. Court held that claimant's injury was a "neutral risk" and he enjoys a rebuttable presumption that the injury arose out of the course of his employment. *Holland v. Midwest Coast Lines*, 789 N.E.2d 512 (Ind. Ct. App. 2012).

Example 3: Claimant worked at a restaurant and was injured at her place of employment when she had gone to get something to eat before a work-related meeting. Board applied the positional risk test and held that injury incurred as a result of her employment. *Curry v. D.A.L.L. Anointed, Inc*., 966 N.E.2d 91 (Ind. Ct. App. 2012).

Example 4: The 12th floor of an office building caught fire and fireman found claimant's body in the stairwell between the 10th and 11th floors. It was concluded that the Claimant, a security guard, died of a heart attack. Court concluded that claimant's death was compensable. Despite fact that plaintiff suffered from preexisting heart condition, the expert medical opinions which stated that stress, such as a fire could be fatal and the coroner's repot that attributed his death to responding to the fire, the Court held that the claimant's death did arise out of the course of his employment. *Bertoch v. NBD Corp*., 813 N.E.2d 1159 (Ind. 2004).

Example 5: Nurse put foot on a chair to tie her shoe, fell. Rejected personal risk, found compensable. *Davis v. Kindred Nursing Center*, 982 N.E.2d 485 (Ind. Ct. App. 2013).

Specific Factual Situations

Intervening Event

- A Claimant who sought private treatment with a doctor of choice found reasonable under circumstances, any added disability or death resulting from the private treatment is compensable. *Joseph E. Seagram & Sons, Inc. v. Willis,* 401 N.E.2d 87 (1980).

- Claimant's job required him to lift heavy steel plates. Injured lifting a steel plate. Four years later, while lifting his infant child at home, he felt a sharp pain and something pop in his back. Doctor opined that his work injury and repeated lifting and bending while working for employer contributed to his injury or that the injury was related to his work activities. *Four Star Fabricators, Inc. v. Barrett*, 638 N.E.2d 792 (1994).

To and From Employment

- Employees who work at same location everyday – commute is NOT in course of employment.
- Employees who must travel to remote location to fulfill duties of employment – commute IS in course of employment.
- Employer provides transportation to and from work – commute IS in course of employment.

On-Call Employees

- Employee responding to special call to come into work – IS in course of employment.
- Employee injured returning from lunch off employer's premises without a special call – is NOT in course of employment.

Ingress and Egress

- Time required to enter into and exit the place of employment is within the course of employment.
- Injury in company parking lot = in the course of employment.
- Reasonable period of time before and after appointed work hours – in the course of employment.
- Prolonged presence upon employer's premises that is not reasonably related to requirements of employment – not in the course of employment.
    - Bartender gets off work but stays after shift to have a few drinks and gets in fight – NOT in the course of employment.

Recreational Activites/Exercise

- If attendance is required or substantially encouraged by employer = compensable.
- Voluntary attendance or only incidentally encouraged by employer = not in course of employment.

Personal Comfort and Convenience

- Actions undertaken for employee's personal comfort and convenience, such as eating lunch on premises or obtaining a drink at a remote location approved by employer are in the course of employment.
- But if employer has facilities such as lunchroom that it makes available to employees for their comfort and convenience, and employee chooses not to use those facilities (i.e. eats lunch off premises), injury may not be considered in course of employment.
- Ex.: Employee injured while crossing railroad tracks to get a drink. Employer did not have drinks on premises and knew employees crossed tracks to get drinks. Injury compensable.
- However, if employer had drinks on their premises and employee chose to get a drink elsewhere, would not likely be in course of employment.

Deviation from Duties or Route

- If employment purpose has been abandoned, it is NOT in course of employment.
- Deviation from employment for personal reasons, even though driving company car, is NOT in course of employment.
- If employee deviates from employment, and deviation ends and employee returns to expected course of conduct when injured, it IS in the course of employment.

Affirmative Defenses

- **Tend to be disfavored by Board,**
- **Burden of establishing all elements of the affirmative defense on the employer.**
- **Employee's misconduct must be proximate cause of the injury.**

The employer may utilize the following defenses where the employee's injury or death is:

1) *due to* the employee's knowingly self-inflicted injury,
2) *due to* intoxication,
3) *due to* the commission of an offense (not including traffic infractions),
4) *due to* a *knowing* failure to use a safety appliance,
5) *due to* a *knowing* failure to obey a *reasonable written or printed* safety rule which has been posted in a conspicuous position in the place of work, or
6) *due to* a *knowing* failure to perform any statutory duty.

In asserting these defenses, the employer has the *burden of proving* that the misconduct *caused* the employee's injuries. To assert a defense for failure to use a

safety device, to follow a reasonable safety rule, or to perform a statutory duty, the employer must prove that the failure was *knowing.* Ind. Code §22-3-2-8.

INTOXICATION DEFENSE

Intoxication is one of the affirmative defenses recognized by the Indiana Worker's Compensation Board. Affirmative defenses tend to be disfavored by the Board and the burden is on the employer to establish all of the elements of the affirmative defense.

In order to correctly use the intoxication defense the employer must:

1. Show that the employee was intoxicated at the time of the injury, and
2. Show that the intoxication was the proximately caused the injury.

Therefore, a positive drug test alone will not provide a defense to a worker's compensation claim. Once the employer determines through a drug test that the employee was intoxicated at the time of the incident, the employer must then prove that the intoxication was the **proximate cause** of the injury.

- EXAMPLE A: An employee arrives at a job which involves driving a delivery truck. The employee has just consumed a large quantity of alcohol and realizes that he is very drunk. While making deliveries, the employee blacks out and his truck runs off the road. Several tests revealed that the employee's blood alcohol content was well above the legal limit, and the employee admitted that his intoxication caused him to black out. The employee applies for worker's compensation benefits. Can argue that no compensation is payable because the employee's injuries were due to his intoxication.
- EXAMPLE B: The same employee arrives at the same job after consuming a large quantity of alcohol. Before the employee can get into his truck, he is severely injured by merchandise which falls from warehouse shelves. The employer notices a strong smell of alcohol and the employee admits he was drunk at the time of the accident. In this example, the employer will be unable to use the employee's intoxication as a defense to a worker's compensation claim because the intoxication did not cause the employee to be injured by falling merchandise.

Willfulness is not required in order to assert the intoxication defense.

Intoxication Case Law

***Jones ex rel. Jones v. Pillow Express Delivery, Inc.,* 908 N.E.2d 1211 (Ind. Ct. App. 2009).** The issue raised was whether an employee's use of prescription medication in accordance with a physician's instructions can create an intoxication defense to worker's compensation coverage under Indiana Code § 22-3-2-8. The Court concluded

the definition of “intoxication” as used in § 22-3-2-8 includes intoxication by a prescription medication.

***Dane Trucking v. Elkins*, 529 N.E.2d 117 (Ind. Ct. App. 1988).** The facts are as follows: after 6:30 P.M. and prior to 8:00 P.M. the plaintiff drank approximately 2.5 16oz beers. At approximately 8:00 P.M. the plaintiff was stopped for speeding and was not cited or questioned concerning any alcohol consumption. It was found that the rest of his third 16oz beer was finished by approximately 9:00 P.M. and that the accident in question occurred at approximately 9:20 P.M. At approximately 11:17 P.M. the plaintiff's blood was drawn and tested for blood alcohol content and it was determined that plaintiff’s BAC was .17% The machine used to test claimant’s BAC tested the blood alcohol content of serum and not whole blood.

Through expert testimony, it was determined that at the time of the accident (2 hours prior to drug test), plaintiff’s BAC would have been between .07-.08%. The Court considered that when the plaintiff was pulled over for speeding at 8:00, the officer did not question or test regarding alcohol consumption. The Court found that there was no evidence that the plaintiff was not in control of his bodily functions such that the jerking of the wheel was some form of involuntary alcohol induced action. It was further found that the act of jerking the wheel while shifting positions to see out the mirror is an act that could have occurred, notwithstanding the plaintiff's alcohol consumption, through mere mistake or inadvertence and that the defendant had failed to carry their burden of proof that the consumption of alcohol proximately caused the truck accident. The plaintiff was entitled to worker’s compensation benefits.

Takeaway – even in an instance where there is a positive drug test, an expert is necessary to establish that the claimant was intoxicated at the time of injury/accident.

***NAPA/General Automotive Parts v. Whitcomb,* 481 N.E.2d 1335, (Ind. Ct. App. 1985).** The Court of Appeals held that Industrial Board's finding that decedent was intoxicated, at time of fatal automobile accident, with blood alcohol level which represented prima facie evidence of intoxication for purpose of proving offense of driving while intoxicated did not, standing alone, mandate denial of compensation, unless defendant satisfied its burden of proving that the death was due to or proximately caused by his intoxication or commission of an offense.

Horseplay

- NOT COMPENSABLE if the employee engages in horseplay and is injured when the employer did not acquiesce to the behavior.
- Involuntary target of horseplay – in the course of employment.
- An employee engaging in horseplay but stops and returns to his employment and is later injured – in the course of employment.

Assaults

- Aggressor is not in the course of employment but innocent victim of assault is in the course of employment.

Is Carpal Tunnel Syndrome A Compensable Injury?

- Repetitive Trauma injuries such as Carpal Tunnel Syndrome may be compensable in Indiana, if they can be medically shown to arise out of and in the course of employment.
- Carpal Tunnel Syndrome resulting from repetitive day to day motions required on the job is compensable. *Duvall v. ICI Americas*, 621 N.E.2d 1122 (Ind. Ct. App 1993).
- It is important to look at each CTS claim carefully. Ask the employer for a job description/duties that the employee would perform during a typical work day. If the nature of the job does not involve day to day repetitive motion, there may be a basis for a denial. It's possible that working with vibrating tools or on an assembly line that requires prolonged or repetitive flexing of the wrist could cause CTS.
- When a claim for CTS arises, look for other personal issues that could cause carpal tunnel.
- **Medical Opinion is Crucial!!** Lay testimony from an injured worker is not sufficient for showing causation for CTS. If no medical opinion linking CTS to work, deny claim!
    - Bus driver who sought workers' compensation benefits for CTS was required to present expert testimony on the cause of his carpal tunnel syndrome; there were many possible causes of carpal tunnel syndrome, and the bus driver had a prior history of hand numbness, which could have been linked to his exposure to Agent Orange in Vietnam. *Muncie Indiana Transit Authority v. Smith,* 743 N.E.2d 1214 (Ind. Ct. App. 2001).

AVOIDING BAD FAITH CLAIMS

- The Board has exclusive jurisdiction for claims of bad faith in worker's compensation matters.
- Applies to an employer, carrier or TPA.
- Bad faith claims can be made for lack of diligence, bad faith, or committed an independent tort in adjusting or settling claim for worker's compensation.
- Awards range from $500-$20,000.00.
    - Depends on the degree of culpability and actual damages sustained.
- Attorney fees can be awarded in addition to bad faith up to 1/3 amount of the bad faith award.

- High burden of proof. Must be more than just bad judgment or negligence. Requires conscious wrongdoing because a dishonest or immoral purpose, ill will state of mind.
- Bad faith can include:
    - Unfounded refusal to pay benefits
    - Unfounded delay in paying benefits
    - Deceiving employee regarding benefits
    - Exercising unfair advantage/pressure in settling claim
    - Good faith dispute must be found
- Lack of diligence:
    - Does not require conscious wrongdoing
    - Failure to exercise attention and care of a prudent person
    - Negligence
    - Board will look at the reasonableness of investigation, communications between parties and reasonableness of determination of liability
        - Document investigation, communication
        - Avoid unnecessary delay in treatment and payment of benefits