# IS A LEGISLATIVE COMPROMISE BECOMING STRICT LIABILITY?

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The fundamental principle of the Indiana Worker's Compensation law is that an employer provides specific, statutory benefits to an employee when an injury arises out of and in the course of employment. A series of Indiana Court of Appeals' decisions in early 2017 reflect the court's willingness in some circumstances to move the line of responsibility closer to the employer, thus making employers more strictly liable for statutory compensation and benefits whenever injuries occur in the course of employment. These recent decisions leave many employers asking where the line of responsibility now lies.

## I. Indiana Worker's Compensation Act

The Indiana Worker's Compensation system developed in 1915 as a compromise between employer and employee interests. The foundation of this system is a legal trade-off: employers accept liability for workplace injuries when the statutory elements are met and employees receive specific benefits and compensation.[1]

In 2013, the Indiana Supreme Court recognized this legal compromise and reinforced that the basic policy underlying the Act was to shift the economic burden for *employment-connected injuries* when it interpreted the Act as follows:

> When an injury to a servant is found to be covered by a Worker's Compensation Act, it is uniformly held that the statutory compensation is the sole remedy, and that any recovery against the employer at common law is barred. *It is recognized that the remedy is in the nature of a compromise*, by which the worker is to accept a limited compensation, usually less than the estimate which a jury

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[1] Ben F. Small, Workmen's Compensation Law of Indiana § 1.2, at 4-6 (1950).

> might place on his damages, in return for an extended liability of the employer, and an assurance that he will be paid.[2]

This compromise of the parties' interests represents a deliberate policy choice by the Indiana General Assembly and the foundation of the Indiana Worker's Compensation Act.

The language of the Act must be given such an interpretation as to effect the purpose and intent of the legislature in enacting the Act.[3] Although, the Act is to be liberally construed in favor of the employee, liberal construction does not authorize the Board or court to judicially legislate or interpret the law so that compensation is granted without a specific statutory provision.[4] This principle was recognized in 2006 when the Indiana legislature amended the Act to clarify that the employee has the burden of proving every statutory element in order to be entitled to compensation from the employer (this was in response to judicial interpretation of the Act three years earlier).[5] The amended statutory language makes it clear that there is to be no presumption in favor of the employee with regard to one element of the claim once the employee provides proof of another element.[6] So although the statutory scheme appears to approach strict liability, the employee has the burden to prove a connection between the injury and employment activities and all the required statutory elements.

## II. WHEN DOES AN INJURY ARISE OUT OF EMPLOYMENT?

In order for an employee to be eligible to receive statutory compensation and benefits from the employer, an employee must present credible evidence to prove each statutory element. The employee must have suffered (1) an injury or death (2) by accident (3) arising out of and (4) in the course of (5) employment.[7]

One threshold element of a compensable claim is that the injury *arose out of* employment. The *arising out of* element refers to the origin or cause of the injury.[8] In 2003, the Indiana Supreme Court considered when and to what extent an injury resulting from an unexplained accident occurring in the workplace was compensable under the Indiana Worker's Compensation Act.[9] In that case, the employee, Milledge, twisted her ankle in her em-

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2 Sims v. United States Fid. & Guar. Co., 782 N.E.2d 345, 351-52 (Ind. 2003) (quoting W. PAIGE KEETON, ET AL. PROSSER & KEETON ON THE LAW OF TORTS § 80, at 574 (5th ed., 1984) (emphasis added).

3 Union Hosp. v. S.P. Brown & Co., 11 N.E.2d 520 (Ind. Ct. App. 1937).

4 Federal Cement & Tile Co. v. Pruitt, 146 N.E.2d 557, 560 (Ind. Ct. App. 1957).

5 IND. CODE § 22-3-2-2(a)(2006).

6 *Id.*

7 IND. CODE § 22-3-2-2(a); Wright Tree Serv. v. Hernandez, 907 N.E.2d 183, 186 (Ind. Ct. App. 2009).

8 Kovatch v. A.M. Gen., 679 N.E.2d 940, 943 (Ind. Ct. App. 1997).

9 Milledge v. The Oaks, 784 N.E.2d at 926, 928 (Ind. 2003), *superseded on other grounds by* IND. CODE § 22-3-2-2 (2006).

ployer's parking lot. The Board and the Indiana Court of Appeals denied her claim, finding that although her injury occurred in the course (the time and place) of her employment, she failed to show a causal connection between the injury and the employment, so it did not arise out of the employment as required by Indiana Code § 22-3-2-2(a).

Evaluating the elements of Indiana Code § 22-3-2-2(a), the Indiana Supreme Court noted that an injury arises out of employment when there is a causal relationship between the injury sustained and the duties or services performed by the injured employee.[10] The required nexus is established when a reasonably prudent person considers the injury to be born out of a risk incidental to the employment or when the facts indicate a connection between the injury and the circumstances under which the employment occurs.[11]

The Indiana Supreme Court explained that risks causing injury or death to an employee are divided into three categories: (1) risks distinctly associated with employment, (2) risks personal to the employee, and (3) risks neither distinctly employment nor distinctly personal in character.[12] Risks distinctly associated with employment are those that are a result of conditions inherent in the work environment.[13] Injuries that are a result of this risk category are usually compensable. Injuries that are a result of risks that are personal to the employee (*i.e.*, those caused by a pre-existing illness or condition unrelated to employment) are not compensable.[14] Injuries that result from the third category of risk, those that are neither distinctly employment nor distinctly personal in character, are considered *neutral risks* and may be compensable.[15]

In 2003, before *Milledge*, the Indiana Supreme Court addressed the risk categories when it evaluated injuries resulting from workplace falls.

> Workplace falls can result from either an employment, personal, or neutral risk, or from a combination thereof. Some falls clearly result from risks personal to the employee; that is, they are caused by a pre-existing illness or condition, unrelated to employment. As a general matter, these "idiopathic" falls are not compensable. In contrast, some falls are "unexplained" in that there is no indica-

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10 *Id.* at 929; Outlaw v. Erbrich Prod. Co., Inc., 742 N.E.2d 526, 530 (Ind. Ct. App. 2001*)*; Indiana Mich. Power Co. v. Roush, 706 N.E.2d 1110, 1113 (Ind. Ct. App. 1999).

11 *Milledge*, 784 N.E.2d at 929; Pavese v. Cleaning Sols, 894 N.E.2d 570, 575 (Ind. Ct. App. 2008); *Outlaw,* 742 N.E.2d at 530.

12 *Milledge,* 784 N.E.2d at 930 (citing 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW 4-1 (2002)); *Kovatch*, 679 N.E. 2d at 943; *Roush*, 706 N.E.2d at 1114.

13 *Milledge*, 784 N.E2d at 930.

14 *Kovatch*, 679 N.E.2d at 943.

15 *Milledge*, 784 N.E.2d at 931; *Kovatch*, 679 N.E.2d at 943.

> tion of causation. Most jurisdictions compensate such falls, classifying them as neutral risks.[16]

The court expanded the third risk category when it determined injuries caused by unexplained accidents are to be classified as neutral risks.[17] Since it determined there was no explanation for what caused Milledge to twist her ankle in the employer's parking lot, it analogized the injury to be an *unexplained* fall and evaluated the injury as a neutral risk.[18] The court then applied a presumption (which was subsequently overruled) to determine whether Milledge carried her burden of proving the causation element of a statutory claim.

Since the *Milledge* decision, injuries occurring from falls within the third risk category have generated much discussion and judicial analysis. Many worker's compensation practitioners were unclear about the status of the court's neutral-risk analysis after the legislature amended Indiana Code § 22-3-2-2(a) in 2006 to clarify that the burden of proof remained on the employee throughout the proceeding. In 2008, the court of appeals confirmed that the statutory amendment overruled the judicial presumption created in *Milledge*.[19] More recently, the court of appeals made it clear that the statutory amendment did not eliminate the neutral-risk doctrine and this risk category could continue to present compensable injuries when the court evaluated workplace falls.[20] Despite the statutory assertion that there is to be no presumption in favor of the employee,[21] the court's recent decisions raise questions about whether applying the neutral-risk principle has the same impact as the overruled presumptions found in the positional-risk analysis.

The court generally defined neutral risks to be risks that were of no particular employment or personal risk where there was no indication of causation, such as when an employee was found unconscious on the floor.[22] In 1997, the court cautioned that "very few falls are truly unexplained."[23] Nonetheless, since the 2003 *Milledge* decision, the court has begun to apply the neutral-risk principle to situations that are explained and have clearly

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16 *Milledge,* 784 N.E2d at 931 (citing *Kovatch*, 679 N.E.2d at 943).

17 *Id.* at 933-34.

18 *Id.* at 930.

19 Pavese v. Cleaning Solutions, 894 N.E.2d 570, 576 (Ind. Ct. App. 2008).

20 A Plus Home Health Care, Inc. v. Miecznikowski, 983 N.E.2d 140, 143-44 (Ind. Ct. App. 2012); Kindred Nursing Ctr., Ltd. P'ship v. Davis, 982 N.E.2d 485, *unpub.* (Ind. Ct. App. 2013).

21 IND. CODE § 22-3-2-2 revision in 2006 added: "The burden of proof is on the employee. The proof by the employee of an element of a claim does not create a presumption in favor of the employee with regarding to another element of the claim."

22 *Kovatch*, 679 N.E.2d at 943; *Pavese*, 894 N.E.2d at 576.

23 *Kovatch*, 679 N.E.2d at 943.

identifiable causes, thus blurring the lines between the *arising out of* and *in the course of* statutory requirements.

### A. *A PLUS HOME HEALTH CARE, INC. V. MEICZNIKOWSKI*[24]

In 2012, the court addressed a situation in which a home healthcare nurse injured her arm and hand when she lost her footing and fell on the sidewalk. The incident occurred while she was on her way back inside a patient's house after retrieving medical equipment from her car.[25] The single hearing member determined that Nurse Miecznikowski's injuries did not arise out of her employment, finding that her own description of the cause of her fall (she lost her footing) indicated that it was of a personal nature. The full Board disagreed, concluding that her fall was a *neutral risk* and, therefore, compensable. The court of appeals affirmed the full Board decision and found that the nurse met her burden of proof when she testified that the fall was not the result of a personal risk and she had no mental illness or condition.[26] In this instance, the court concluded that since there was no evidence of a personal risk, it must be an unexplained accident, or a neutral risk. The court further determined that she met her burden of proving a neutral risk when she testified that she lost her footing, which caused the fall.[27] It dismissed the employer's argument that walking was not an increased risk associated with her employment; it was a risk to which the public was subjected, which would generally not be compensable. Perhaps the nurse being a traveling employee persuaded the court to determine, in that instance, that walking was incidental to her employment, since the cause of the fall was not unknown.

### B. *KINDRED NURSING CENTER, LTD. PARTNERSHIP V. DAVIS*[28]

A short time after issuing its decision in *A Plus Home Health Care Inc*., in an unpublished decision, the court again addressed a claim involving a workplace fall and determined that the injury arose out of employment.[29] The employer, a long-term care facility, required its charge nurses to wear scrubs and rubber-soled shoes with a back. The single hearing member determined that the injury, caused by a fall when Nurse Davis tied her shoe, was an act incidental to her employment, or at the very least, the accident presented a neutral risk and was compensable.[30] As with *A Plus Home Health Care Inc.*, the cause of the nurse's fall was not unknown.

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[24] *A Plus Home Health Care*, 983 N.E.2d at 140.

[25] *Id.*

[26] *Id.* at 144.

[27] *Id.*

[28] Kindred Nursing Ctr., Ltd. P'ship v. Davis, 982 N.E.2d 485, *unpub.* (Ind. Ct. App. 2013).

[29] *Id.*

[30] *Id.*

The full Board affirmed and determined the act was incidental to employment because the employer required a specific type of shoes and it benefitted from employees walking around the facility in firmly secured shoes.[31] It further determined that it was likely that the nurse's shoes became untied because she was on her feet walking throughout the day and that tying her shoes would be required to complete her job duties.[32] Again, the cause of the fall was not unknown. She fell when she put her foot down after tying her shoe. The Board appeared to find an employment benefit since it determined she was in the course of her employment (a separate statutory element for a compensable claim). The court affirmed the Board's decision that the injury was caused by a risk incidental to her employment (tying her shoe) and rejected the employer's argument that the injuries were due to a personal risk because she had no pre-existing condition or illness.[33] Therefore, it appears employers may be found liable for nearly any event that occurs within the course of employment (during a time and place of employment), if the employee has no pre-existing condition or illness. Has the court effectively eliminated the neutral-risk category by finding a benefit to the employer?

In these 2012 cases, the court determined that the injuries were caused by neutral risks even though neither fall was unexplained (with no indication of causation) or idiopathic (due to an unknown cause). In both cases, the court identified an incidental benefit to the employer in order to support the decision to assign liability to the employer. Understandably, these decisions left employers wondering if they would be held strictly liable for any injury that occurred within the *course of employment* (a separate statutory element) if the employee proves there was no pre-existing illness or condition that presented a distinctly personal risk for the injury. Does the impact of these conclusions create a now-defunct presumption triggered by the neutral-risk doctrine, which the legislature clarified should not exist?

### C. *MCBRIDE V. MIDWEST ESTATE BUYERS, LLC*[34]

In June 2017, the court evaluated another workplace fall and addressed the level of proof an employee needed to present to carry her burden of proving an injury arose out of her employment. In this case, McBride, a jewelry store employee, was preparing her lunch when a customer walked into the store. As she walked toward the customer, the zippers on her boots hooked together; this caused her to fall. Unlike the nurse in *A Plus Home Health Care Inc.,* the store employee was not required to wear specific clothing or footwear.

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31 *Id.*

32 *Id*.

33 *Id.*

34 93A02-1612-EX-2920, 2017 WL 2492774, *unpub*. (Ind. Ct. App. June 9, 2017), *trans. denied*, — N.E. 3d — (Ind. Nov. 9, 2017).

The Board, in a well-reasoned decision, determined that the fall was a result of a personal risk: her injuries were caused by her personal selection of footwear. The Board concluded, therefore, that McBride did not meet her burden of showing her injury arose out of her employment.

The court disagreed and reversed the Board's interpretation of the statutory requirements of the Act.[35] The court concluded there was a causal nexus between the fall and the employment, thus finding the jewelry store liable for statutory compensation and benefits. In its decision, the court renamed the risks within the third category of risk to be "intermediate risks"—those that lie between distinctly personal risks or distinctly employment-related risks.[36] It concluded risks in this category may be a combination of employment and personal risk elements or a lesser degree of either element.[37] The court concluded that the fall was *not* a personal risk because it was not a result of a pre-existing illness or condition. The court further distinguished the facts from *Pavese v. Cleaning Solutions* (in which the court determined that the employee failed to meet her burden of proof with a fall caused by an unexplained syncopal episode, a personal risk).[38]

Although the court admitted the employee's injury was a result of a personal choice of attire, it found the employer required her "to wear some form of footwear" and she "tried to look stylish for work."[39] The court admitted the connection was slim; however, it found this work connection was a sufficient nexus to determine the fall fell into the third risk category. The court strained to find an employment benefit in order to place the risk into the third "intermediate" risk category and determine the jewelry store was liable for statutory compensation and benefits under these circumstances.[40] Is the impact of this decision similar to the presumptions established under the defunct positional-risk doctrine?

Again, employers are left to wonder whether they will be held liable for any injury that occurs within the course of employment, thus eliminating an employee's burden of proving the *arising out of* element of a claim. This interpretation of the Act may have been appropriate at the Act's inception during the Industrial Revolution, when employees were frequently unable to prevail against employers who asserted employees assumed the risk of injuries; however, in light of federal and state workplace safety regulations, is it appropriate to continue to hold employers responsible for virtually all employee injuries?

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35 *Id.*

36 *Id.*

37 *Id.*

38 Pavese v. Cleaning Solutions, 894 N.E.2d 570, 573 (Ind. Ct. App. 2008).

39 *McBride*, 2017 WL 2492774 *trans. denied*, — N.E.3d — (Ind. Nov. 9, 2017).

40 *Id.*

## III. WHEN IS AN EMPLOYEE ENTITLED TO RECEIVE TEMPORARY TOTAL DISABILITY?

The court revealed the same inclination to draw the line of responsibility closer to the employer a few months before the *McBride* decision when it interpreted another statutory provision assessing an employee's right to temporary total disability.

After a compensable workplace injury, once an employee begins receiving temporary total disability (TTD) benefits, those TTD benefits may not be terminated except under specific, statutorily allowable circumstances.[41] Indiana Code § 22-3-3-7(c)(5) provides that TTD benefits may be terminated if "an employee is unable or unavailable to work for reasons unrelated to a compensable injury." The breadth of the provision for TTD termination due to employee unavailability is a subject of much debate in the worker's compensation practice area. This issue recently came to center stage in the Indiana Court of Appeals in *Masterbrand Cabinets v. Waid*[42] when an employee was terminated for cause (violence and anger issues) after suffering a compensable workplace injury. In its March 2017 decision, the court addressed whether an employee's personal conduct made him unavailable for work and, thus, ineligible for statutory compensation. The court concluded the employee should not be denied TTD benefits as a consequence of his actions after he was unavailable for temporary modified work because he was terminated for cause from his job due to violence and anger issues.[43] Instead, it found his employer responsible for statutory compensation to the employee for several weeks.

### A. *MASTERBRAND CABINETS V. WAID*[44]

During his one-year employment, Waid, a production associate, was "coached" on several occasions regarding anger issues. Several weeks after Waid injured his back, he sought treatment for increased pain. The authorized treating physician returned him to full duty work, a decision with which Waid disagreed. When Waid returned to work, he entered into a verbal altercation with his supervisor regarding his back complaints and his lack of work restrictions. During this argument, the employee threw an icepack, nearly striking another employee, and cursed at his supervisor. Masterbrand Cabinets terminated Waid's employment one week later based on this misconduct.

One day before Masterbrand Cabinets terminated Waid's employment, the authorized treating physician placed him on work restrictions. Three weeks later, that physician removed the work restrictions, declared him to

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41 IND. CODE § 22-3-3-7(c)(2016).

42 72 N.E.3d 986 (Ind. Ct. App. Mar. 30, 2017).

43 *Id.*

44 *Id.*

be at maximum medical improvement (MMI) and gave him a three percent whole-person impairment rating. A Board-ordered independent medical examination physician subsequently determined Waid could return to sedentary work.

The single hearing member determined Waid was entitled to TTD benefits beginning the day after he returned to work, engaged in the verbal altercation with his supervisor, and was suspended (and ultimately terminated). In its appeal, the employer argued that the employment termination for cause was the reason for Waid's inability to work, *not* his workplace injury. Waid argued he was entitled to benefits pursuant to Indiana Code § 22-3-3-7(a) because he did not have the ability to return to work of the same kind or character as a result of his work injury. The court found the Board properly awarded TTD.[45]

The Indiana Court of Appeals noted that the issues presented required the court to interpret the Act. The court began its analysis by looking at the purpose of the Act.

> The purpose of awarding temporary total disability payments under the Indiana Worker's Compensation Act is to compensate an employee for a loss of earning power because of an accidental injury arising out, and in the course of his or her employment. (citing *Cavazos v. Midwest Gen. Metals Corp*., 783 N.E.2d 1233 (Ind. Ct. App. 2003). If the injured worker does not have the ability to return to work of the same kind or character during the treatment period for the injury, the worker is temporarily totally disabled and may be entitled to benefits. Once the injury has reached a permanent and quiescent state, however, the treatment period ends, and the extent of the permanent injury is assessed for compensation purposes. Thus, once the injury has stabilized to a permanent and quiescent state, temporary disability ceases, and the extent of permanent injury resulting in a degree of impairment or total disability is determined.[46]

The court noted Indiana Code § 22-3-3-7(c) was not technically applicable to the case because that statutory section applies to the *termination* of TTD benefits. This appeal concerned Waid's *entitlement* to benefits, not the termination of benefits.

To fully understand the *Masterbrand* decision, one must understand the court's decision in an earlier opinion addressing TTD entitlement.[47] Borgman voluntarily terminated her employment with Sugar Creek Animal Hospital for personal reasons several months after she sustained a compen-

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[45] *Id.* at 995.

[46] *Id.* at 992.

[47] Borgman v. Sugar Creek Animal Hosp.,782 N.E.2d 993 (Ind. Ct. App. 2002).

sable work injury. A month later, she sought medical treatment for injuries she claimed were related to the fall, which she sustained *before* her voluntary termination. Sugar Creek denied Borgman's request for TTD benefits, and the Board ultimately concluded she was entitled to TTD benefits only for a six-week period, beginning when she left her employment and ending when a physician released her to return to sedentary work. She appealed, arguing she was entitled to an additional six weeks of TTD benefits (also for days *after* she voluntarily resigned). The court of appeals disagreed (and limited her to only six weeks of post-resignation TTD benefits), but also observed as follows:

> [b]ecause Borgman voluntarily terminated her employment with Sugar Creek due to reasons unrelated to her work injury, Sugar Creek did not have a duty to offer her work according to medical restrictions or to remit TPD benefits to her. Thus, the Board properly determined that Borgman was unavailable for reasons that were not related to her work injury. [Indiana Code] 22-3-3-7(c)(5), which provides that TTD benefits "may not be terminated by the employer unless the employee is unable or unavailable to work for reasons unrelated to the compensable injury" commands such a result in this instance.[48]

Masterbrand Cabinets cited the *Borgman* decision in support of an employer's right to terminate TTD benefits when the employee leaves employment. The court stated that Masterbrand was "reading too much into *Borgman*" and concluded "we cannot say that *Borgman* bars an employee who has been voluntarily or involuntarily terminated from later receiving TTD benefits."[49]

The court affirmed the Board's decision (upholding the payment of TTD benefits *after* Waid was terminated for cause) and made several points. First, the court determined that if an employee is terminated for cause after sustaining a compensable injury entitling him to TTD benefits, the employer cannot terminate those benefits on the basis that an employee's termination of employment makes him "unavailable to work for reasons unrelated to compensable injury" pursuant to Indiana Code § 22-3-3-7(c)(5).[50]

Second, the court found that *even if* Indiana Code § 22-3-3-7(c)(5) were applicable, the statute would not result in the denial of Waid's benefits.[51] The statute allows the termination of benefits where the employee is unavailable or unable to work for reasons unrelated to the injury. The statute

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48 *Id.* at 997.

49 *Masterbrand Cabinets,* 72 N.E.3d at 994.

50 *Id.*

51 *Id.*

does *not* require the work be for the same employer as when the employee was injured.

The court next addressed a factual dynamic of this case, namely that the employee was terminated *before* the start of TTD benefits. The court found Waid's entitlement to TTD was not precluded simply because the employee was terminated from employment before TTD benefits could be started.[52] The court concluded Waid's termination for misconduct did not prevent him from receiving TTD benefits from his employer as a result of his on-the-job injury.[53]

The *Masterbrand* decision, combined with the court's subsequent decision in *McBride,* seems to reflect the court's unwillingness to fully weigh an employee's responsibility for intentional actions, while finding employers seemingly strictly liable for statutory compensation and benefits.

## IV. Conclusion

Read together, these decisions illustrate the court's willingness to interpret the Act in a way that is most beneficial to employees and more detrimental to employers. The recent decisions leave employers with uncertainty about where liability lies and appear to excuse employees from responsibility for their own actions. Is the new statutory norm to hold employers strictly liable for injuries that occur within the course of employment even if the injury or unavailability for work is due to the employee's own action or decision? We will need to wait to see if the court continues to develop this interpretation of the Act or if the legislature steps in again to clarify the statutory provisions. Stay tuned.

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[52] *Id.* at 995.

[53] *Id.*