

RECENT DEVELOPMENTS IN WORKER'S COMPENSATION LAW

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INTRODUCTION

The Worker's Compensation Act (the "Act")¹ is a compromise between employers and employees. The Act allows an injured worker to recover a percentage of his average weekly wage during disability, compensation for any permanent loss of function, and where the injury is fatal, benefits paid directly to the employee's dependents. The Act also provides for the payment of reasonable medical expenses. At the same time, the Act shields employers from conventional tort liability. This Article surveys the developments in Indiana's Worker's Compensation law between October 1997 and October 1998 and reviews a wide variety of cases and issues affecting Indiana practitioners. Recent cases have addressed such issues as the employee's receipt of temporary total disability, permanent total disability, employer liens, intentional injuries, and the election of remedies. In addition, the 1996 legislative session brought about many significant statutory changes that took effect in 1997.

I. TEMPORARY TOTAL DISABILITY PRECLUDED

Temporary total disability ("TTD") is the payment of benefits during the time when the employee is temporarily unable to engage in his regular job duties.² In *Ballard v. Book Heating & Cooling*,³ the court determined that the employee's receipt of unemployment compensation precluded him from receiving TTD for the same period of time.⁴

In *Ballard*, the employee suffered a compensable injury to his back in August 1995. The employee was later terminated from Book Heating in February 1996. He applied for and began receiving unemployment compensation in March 1996. On March 5, 1996, the employee was placed on medical leave and remained unable to work per doctor's order until August 1996, when he reached the maximum medical improvement ("MMI").⁵ The employee requested that the employer pay TTD benefits from August 1995 to August 1996. The employer argued that it should not be required to pay TTD during the time period wherein

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1. IND. CODE §§ 22-3-1-1 to -3 (1998).

2. *See id.* § 22-3-3-8. TTD is payable at the rate of sixty-six and two-thirds percent of the employee's average weekly wage, not to exceed the statutory maximum in effect at the time of the employee's accident. *See id.*

3. 696 N.E.2d 55 (Ind. Ct. App. 1998).

4. *Id.* at 59.

5. *See id.* at 56.

the employee received unemployment compensation.⁶

Recognizing that this presented an issue of first impression, the Indiana Court of Appeals reviewed opinions from other jurisdictions. The review revealed a split of authority on the issue of whether the receipt of either worker's compensation or unemployment benefits precluded an entitlement to the other.⁷ Focusing on the instant case, the court noted that the purpose of TTD benefits is to compensate the employee for lost earning power due to disability. During the time the employee undergoes treatment, it is relevant whether the employee has the ability to return to work of the same kind or character.⁸ If the employee does not have the ability to return to work of the same kind or character, then the employee is temporarily totally disabled and may be entitled to TTD benefits.⁹ In contrast, the court noted that one may receive unemployment benefits only if one is physically and mentally able to work, available for work, and making an effort to obtain work.¹⁰

The employee in *Ballard* represented to the Unemployment Insurance Division in March 1996 that he was ready, willing, and able to return to work.¹¹ At the same time, the employee represented to the Worker's Compensation Board that he was temporarily totally disabled and unable to return to work.¹² The court held that "[a]lthough our statutes do not expressly prohibit a claimant from receiving both types of benefits, we conclude that our legislature could not have intended for an employee to recover dual benefits under these circumstances."¹³ Accordingly, the employee was precluded from receiving TTD benefits for the same period of time that he received unemployment benefits.

The court recognized that some jurisdictions considering this issue offset the amount of worker's compensation benefits with the amount of unemployment benefits received;¹⁴ however, the court did not engage in such a discussion with regard to Indiana law. Thus, the court took an all or nothing approach. Essentially, practitioners should be aware that if their employee client receives unemployment benefits, such receipt will preclude the award of TTD benefits. Likewise, practitioners representing employers should investigate the possibility that the employee applied for or received unemployment benefits. Presumably, even if the employee merely applied for unemployment benefits without receiving such benefits, the employee would still be precluded from receiving

6. *See id.*

7. *See id.* at 57. The court noted that some states allow recovery of both worker's compensation and unemployment benefits while other states either denied or reduced the amount of worker's compensation benefits by the amount of unemployment benefits received, or vice-versa. *Id.*

8. *See id.* (citing *Covarubias v. Decatur Casting*, 358 N.E.2d 174, 176 (Ind. Ct. App. 1976)).

9. *See id.*; *see also* IND. CODE § 22-3-3-8 (1998).

10. *Ballard*, 696 N.E.2d at 57 (citing IND. CODE § 22-4-14-3 (1998)).

11. *Id.*

12. *See id.* at 57-58.

13. *Id.* at 58.

14. *Id.* at 57.

TTD benefits. To find otherwise would appear to be contrary to the court's reasoning in *Ballard*.¹⁵

II. "REASONABLE EMPLOYMENT" IN THE CONTEXT OF A PERMANENT TOTAL DISABILITY CLAIM DEFINED

Permanent total disability ("PTD") is the payment of benefits after the employee's injury has become quiescent and the employee is deemed permanently unable to engage in any reasonable employment.¹⁶ The Act does not define what constitutes "reasonable employment;" however, the Indiana Supreme Court recently addressed the meaning of this term.

In *Walker v. Indiana*,¹⁷ the employee sustained a back injury while at work and, after undergoing surgery, had a twenty-five percent permanent partial impairment ("PPI").¹⁸ Following the surgery, the employee was unable to return to her previous position. She claimed she was unable to return to any reasonable employment and was entitled to PTD benefits.¹⁹ Her employer offered her a highly accommodated, but temporary position as a seamstress under the State's partial disability program, contending that such employment constituted "reasonable employment," precluding the receipt of PTD benefits.²⁰ The employee declined the tendered employment and pursued a PTD claim.

The Indiana Supreme Court held that the tendered employment was not "reasonable employment," stating two reasons in support of its holding.²¹ First, the court noted that "the temporary nature of the employment is in itself sufficient reason to conclude that it cannot constitute reasonable employment such that it defeats a claim of total permanent disability."²² Second, and more importantly, the court held that "work that is highly accommodated to suit the needs and disabilities of a particular claimant cannot defeat a claim of total permanent disability where it is clear that the claimant could not find similar work under normally prevailing market conditions."²³

While in practice an employer may still be able to defeat a PTD claim by showing that it tendered reasonable employment, the employer must now be

15. The court stated that "[t]o suggest that one who was physically and mentally able to work, available for work, and was making an effort to secure full-time work was at the same time totally disabled, would be contrary to law." *Id.* at 58.

16. See IND. CODE § 22-3-3-10 (1998).

17. 694 N.E.2d 258 (Ind. 1998).

18. *Id.* at 263. PPI benefits are payable after the injury is quiescent and the permanent loss of a physical function has been medically assessed. The PPI rating is a rating by degrees assigned to represent the employee's permanent loss of function. Compensation of that loss is determined by the scheduled rate that corresponds to the given PPI rating. See IND. CODE § 22-3-3-10 (1998).

19. See *Walker*, 694 N.E.2d at 264.

20. See *id.*

21. *Id.* at 267.

22. *Id.*

23. *Id.*

prepared to establish that such tendered employment is similar to that employment generally available in the competitive labor market. Further, *Walker* makes it clear that an employee is not required to accept make-work or a highly accommodated job. The employee may, instead, pursue a PTD claim.

In addition, the court in *Walker* stated that after the employee establishes disability or impairment, education, work history and age, and establishes that attempts to find suitable employment have been unsuccessful, then the burden of proving that reasonable employment exists shifts to the employer.²⁴ The court stated:

Shifting the burden of production to the employer under these circumstances is justified because it is much easier for the employer, by virtue of its contact with the labor market, to prove the claimant's employability than it is for the employee to attempt to prove the universal negative of being totally unemployable.²⁵

Essentially, after the employee has proved his limitations and his failed attempts to find employment, he does not then need to prove that no reasonable employment exists. The employer must produce evidence that reasonable employment in fact exists. As a practical matter, the employer likely will have to retain a qualified vocational expert witness to accomplish this task.

III. EMPLOYER LIENS

The Act provides that if an employee's injury or death is caused by someone other than the employer or a co-employee, the injured employee or the employer may maintain a civil action against that party.²⁶ If the employee recovers from a third party, then the employer may receive reimbursement for the amount of compensation benefits and medical expenses paid on behalf of the employee and, accordingly, the employer is no longer responsible for the payment of benefits.²⁷ However, the employer must pay a pro-rata share of litigation costs and expenses and must also pay a statutory fee to the employee's attorney.²⁸ This later provision has sparked much controversy over the past year.

In particular, practitioners eagerly await the Indiana Supreme Court's decision in *Spangler, Jennings & Daugherty P.C. v. Indiana Insurance Co.*²⁹ In 1997, the Indiana Court of Appeals held that the worker's compensation carrier must contribute a pro-rata share of attorneys fees on the entire amount of future benefits it would have paid if not for the third-party recovery.³⁰ The *Spangler* decision was appealed to the Supreme Court of Indiana and the supreme court

24. *Id.* at 265-66 (citations omitted).

25. *Id.* at 266 (citing *E.R. Moore Co. v. Industrial Comm'n*, 376 N.E.2d 206, 210 (Ill. 1978)).

26. *See* IND. CODE § 22-3-2-13 (1998).

27. *See id.*

28. *See id.*

29. 685 N.E.2d 705 (Ind. Ct. App. 1997), *trans. granted*, 698 N.E.2d 1195 (Ind. 1998).

30. *Id.* at 707.

granted transfer. According to the Act, the lien amount may be diminished by the percentage of the employee's comparative fault.³¹ Thus, under *Spangler*, the employer or worker's compensation carrier may be obligated to pay a sizeable amount of attorney's fee to the employee's attorney and such fee could exceed the amount of the lien altogether. Accordingly, practitioners await the Indiana Supreme Court's decision as it will likely impact the way practitioners view a case where a third party recovery is contemplated.

The Indiana Court of Appeals addressed liens in a different context in *Walkup v. Wabash National Corp.*³² In *Walker*, an employee was injured while driving in the course and scope of his employment. He was injured when struck by Pruett, an uninsured motorist. The employer, who was self-insured, paid worker's compensation benefits directly to the employee in the amount of nearly \$8600. The employee filed a personal injury suit against Pruett and, in November 1994, the employer placed a lien against any recovery he might receive from Pruett pursuant to section 22-3-2-13 of the Indiana Code.³³ The employee also sought recovery from Cincinnati Insurance Company under the employer's uninsured motorist coverage. In 1995, the employee received \$18,000 in general damages under the employer's uninsured motorist coverage. The employer requested reimbursement pursuant to its lien and the employee refused.³⁴

The employee argued that the employer was not entitled to a lien on the settlement because the settlement did not come from Pruett, the third-party tortfeasor. The employer contended that it was entitled to such funds because they were paid on behalf of the third-party tortfeasor.³⁵ The court held that "an award from an uninsured motorist policy paid on behalf of the third party uninsured driver is an award 'out of which the employee might be compensated from the third party.'"³⁶ Thus, the employer's lien was valid under the Act.

The Indiana Supreme Court reversed the court of appeals but, in doing so, agreed that an award from an uninsured motorist policy paid on behalf of the third-party tortfeasor is subject to the employer's lien.³⁷ Specifically, the court noted that "'an employer or worker's compensation carrier is entitled to a lien on [the] proceeds' of 'payments made to an injured employee under a[n] underinsured motorist] policy.'"³⁸

31. This is true even though the amount of benefits received by the employee may not be diminished by the employee's comparative fault. Comparative fault is not an available defense under the Act.

32. 691 N.E.2d 1282 (Ind. Ct. App. 1998), *rev'd*, 702 N.E.2d 713 (Ind. 1998) (discussed below).

33. *Id.* at 1283.

34. *Id.*

35. *Id.* at 1284.

36. *Id.* (quoting IND. CODE § 22-3-2-13 (1998)).

37. *Walkup v. Wabash Nat'l Corp.* 702 N.E.2d 713, 714-15 (Ind. 1998).

38. *Id.* at 714 (quoting *Ansert Mechanical Contractors, Inc. v. Ansert*, 690 N.E.2d 305, 310 (Ind. Ct. App. 1997)).

However, the court reversed based on the specific language of the underinsured motorist policy.³⁹ The policy in question excluded coverage for injuries subject to worker's compensation benefits subject to a lien by the payor of the worker's compensation benefits. Thus, the court concluded that the \$18,000 paid by Cincinnati represented recovery for pain and suffering, a benefit not provided for in the Worker's Compensation Act.⁴⁰ Accordingly, because of the specific policy language, Walkup's payment from Cincinnati was not subject to Wabash's statutory lien under section 22-3-2-13 of the Indiana Code.

IV. EXCLUSIVE REMEDY PROVISION

A. Agee v. Central Soya Co.

The Act provides compensation to the employee for injuries by accident that arise out of and in the course of the employment. The exclusive remedy provision provides that "[t]he rights and remedies granted to an employee subject to [Indiana Code section] 22-3-2 through [Indiana Code section] 22-3-6 . . . shall exclude all other rights and remedies of such employee . . . at common law or otherwise"⁴¹ During the survey period, employees continued to challenge the exclusive remedy provision in several ways.

In *Agee v. Central Soya Co.*,⁴² an employee was injured during an explosion at Central Soya's soybean processing plant. The employee filed a complaint in state court alleging that Central Soya engaged in knowing and intentional conduct, thereby removing his claim from the preview of the Act.⁴³ Central Soya moved to dismiss based on the exclusive remedy provision of the Act. The court stated that "[t]he dispositive issue here, is whether . . . Central Soya had actual knowledge that an injury was certain to occur."⁴⁴ The court considered all of the evidence presented and determined that the evidence fell short of establishing that Central Soya had actual knowledge that an injury was certain to occur.⁴⁵ The court stated:

we do not believe that Central Soya's ignorance of the possibility of an explosion at its plant . . . bring[s] this case within the 'intentional injury' exception of the Act. While the evidence . . . might reveal conduct amounting to gross negligence or even recklessness on the part of Central Soya, it does not establish actual knowledge on Central Soya's part that an injury was certain to occur.⁴⁶

39. *Id.* at 715-16.

40. *Id.* at 716.

41. IND. CODE § 22-3-2-6 (1998).

42. 695 N.E.2d 624 (Ind. Ct. App. 1998).

43. *See id.* at 625.

44. *Id.* at 626.

45. *Id.* at 627.

46. *Id.*

It remains difficult for an employee to establish that his injury was intentional because gross negligence and recklessness do not rise to the level of an intentional act. As the *Agee* opinion reinforces, the employee must establish that the employer had actual knowledge that an injury was certain to occur. However, employers should take steps to prevent repeated injuries to employees due to similar events or circumstances. An injury that occurs once may be an accident, but injuries that occur repeatedly may rise to the level of actual knowledge that an injury is certain to occur.

B. Walters v. Modern Aluminum

In *Walters v. Modern Aluminum*,⁴⁷ Kelly Services and Modern Aluminum were parties to a contract wherein Kelly Services provided temporary workers to Modern Aluminum. Pursuant to the contract, Kelly Services assigned Walters to render services to Modern Aluminum. Walters was injured while operating a belt sander at Modern Aluminum.⁴⁸ Walters filed a complaint against Modern Aluminum in state court and Modern Aluminum moved to dismiss the complaint based on the exclusive remedy provision of the Act.⁴⁹

The court noted that for the purposes of the Act, "it is possible for an employee to be 'in the joint service of two (2) or more employers . . .'"⁵⁰ In determining whether Walters was in the joint service of both Kelly Services and Modern Aluminum, the court reiterated the long standing rule that dual employment is found when "both employers possess a substantial, but not necessarily exclusive, right of power or control over the employee and the means, manner, and method of his performance."⁵¹ The court applied the seven factors previously enunciated by Indiana courts⁵² to conclude that Walters was in the joint employment of both Kelly Services and Modern Aluminum.⁵³ Thus, this case merely shows a continuing trend of the court's willingness to apply the seven-factor test in determining whether an employee is in the "joint service of two or more employers" as contemplated by the Act.

47. 699 N.E.2d 671 (Ind. Ct. App. 1998).

48. *See id.* at 672.

49. *See id.* at 673.

50. *Id.* (quoting IND. CODE § 22-3-3-31 (1998)).

51. *Id.* (citations omitted).

52. The following seven factors were considered:

(1) the right to discharge; (2) the mode of payment; (3) the supplying of the tools or equipment; (4) the belief of the parties in the existence of an employer-employee relationship; (5) the control over the means used in the results reached; (6) the length of the employment; and (7) the establishment of the work boundaries.

Id. at 674 (citing *Fox v. Contract Beverage Packers, Inc.*, 398 N.E.2d 709, 711 (Ind. Ct. App. 1980)). The court further noted that only a majority of the factors need to be present in order to establish an employer-employee relationship. *Id.* at 675 (citing *Davis v. Central Rent-A-Crane, Inc.*, 663 N.E.2d 1177, 1179 (Ind. Ct. App. 1996)).

53. *Id.* at 675.

C. *Coble v. Joseph Motors, Inc.*

Psychological injuries and emotional distress have become hotly contested issues in recent times. In *Coble v. Joseph Motors, Inc.*,⁵⁴ an employee severed the tip of her left index finger in a press machine while working for Joseph Motors. She was immediately taken to the hospital and treated for her injuries. Meanwhile, the tip of her finger was placed in a plastic bag for disposal.⁵⁵ The following day, Coble's fingertip found its way to the desk of the Human Resources Manager, who reportedly displayed the fingertip and made comments to other employees and Coble.⁵⁶ Coble brought an action for intentional infliction of emotional distress and outrageous conduct based on the manager's conduct.⁵⁷ "The trial judge dismissed Coble's claim for lack of subject matter jurisdiction based upon the exclusivity provision of the [Act]" and granted summary judgment in favor of the employer.⁵⁸ Coble appealed this decision.

Most importantly, the Indiana Court of Appeals held that the emotional distress did not constitute a "personal injury" within the meaning of the Act and, therefore, an employee could maintain an action against an employer for intentional infliction of emotional distress.⁵⁹ However, the employee must still show that, as an intentional act, the employer had actual knowledge that an injury was certain to occur. Thus, the court of appeals affirmed the trial court's grant of summary judgment because Coble failed to establish that Joseph Motors, or its alter ego, had knowledge that an injury was certain to occur.⁶⁰

V. ELECTION OF REMEDIES

In *Williams v. Delta Steel Corp.*,⁶¹ an employee was injured while working on a machine designed to roll steel into coils. Shortly thereafter, the employee signed a Form 1043 "Agreement to Compensation of Employee and Employer." The Worker's Compensation Board approved the agreement and the employee began receiving disability benefits accordingly.⁶² The employee then filed a complaint in state court alleging that the employer knew the machine would cause injury and, therefore, the claim was exempt from the Act's exclusive remedy provision because the injury was intentional.⁶³

The court held that the compensation agreement signed by the employee constituted an election of remedies by the employee and that:

54. 695 N.E.2d 129 (Ind. Ct. App. 1998).

55. *See id.* at 131.

56. *See id.*

57. *See id.*

58. *Id.* at 132.

59. *Id.* at 133.

60. *Id.* at 135.

61. 695 N.E.2d 633 (Ind. Ct. App. 1998).

62. *See id.* at 634.

63. *Id.*

by accepting and receiving compensation under the Act, [the employee] concedes that the injury was accidental in nature and that it arose out of and in the course of employment . . . the employee is precluded from repudiating that position by claiming that his injury was not accidental but was instead caused by the employer's intentional acts.⁶⁴

The court further explained that "[t]he election of remedies doctrine naturally flows from the exclusivity provision of the Act"⁶⁵ and that the provision is part of a "quid pro quo,"⁶⁶ wherein "sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts."⁶⁷ The court stated that the employee should not benefit from the advantages of the Act and still be able to avail himself to the common law remedies.⁶⁸ Thus, this decision should, in effect, make the dismissal of a civil action easier where the employee and employer have signed a Form 1043 and had the agreement approved by the Worker's Compensation Board.

VI. LEGISLATIVE AMENDMENTS

The 1996 legislative session brought about many statutory amendments effective in 1997. Some of the more significant changes included: changes to the prosthetic device replacement provisions; the addition of a bad faith provision; changes to the conditions under which TTD benefits may be terminated; and, increased benefits rates. While there were several 1997 legislative proposals, there were no significant legislative changes that became effective in 1998.

A. Prosthetic Device Amendments

When a compensable injury resulted in the amputation of a body part, the enucleation of an eye or the loss of natural teeth, prior to 1997, an employer was responsible for providing an artificial member, braces or prosthodontics.⁶⁹ Employers were previously responsible for replacement or repair of such devices if the replacement or repair was due to medical necessity.⁷⁰ Section 22-3-3-4(e) of the Indiana Code now provides that the employer will no longer be responsible for the cost of replacement or repair but only for the cost of furnishing the initial device. Instead, the replacement or repair of such devices will be paid out of the Second Injury Fund, and the employee may replace or repair such devices for

64. *Id.* at 635.

65. *Id.* at 636.

66. *Id.*

67. *Id.* (quoting 6 ARTHUR LARSON, LARSON'S WORKER'S COMPENSATION LAW § 65.20, at 12-1 to 12-12 (1997)).

68. *Id.* at 637.

69. *See* IND. CODE § 22-3-3-4(e) (1974) (amended 1979).

70. *See id.*

medical necessity and for normal wear and tear.⁷¹

B. Addition of the Bad Faith Provision

The Act now provides the employee a means of recovery for bad faith. Indiana Code section 22-3-4-12.1 gives the Worker's Compensation Board exclusive jurisdiction to adjudicate whether an employer, a worker's compensation administrator or a worker's compensation insurance carrier "has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling the claim for compensation."⁷² An employee may recover between \$500 and \$20,000, "depending upon the degree of culpability and the actual damages sustained."⁷³ This provision also provides for payment of attorney's fees not to exceed one-third of the amount of the award.⁷⁴

To date, there have been no published opinions construing the definition of "lack of diligence" or "bad faith" under the new provision. However, in practice, practitioners have seen an increase in the number of Applications for Adjustment Claim⁷⁵ that now allege "bad faith" pursuant to this statute. For example, failure to investigate, failure to complete forms as required by the Act, failure to provide medical treatment and failure to obtain a PPI rating are all acts that have been alleged to constitute "bad faith." Time will tell whether these and other acts constitute bad faith or lack of diligence under the Act and practitioners look forward with interest to the court's interpretation of these terms.

C. Termination of TTD Amendment

The legislature added language to the third condition under which TTD benefits may be terminated, stating "the employee has refused to undergo a medical examination under section [six] of this chapter or has refused to accept suitable employment under section [eleven] of this chapter."⁷⁶

In practice, an employer terminating benefits for the employee's failure to accept suitable employment should do so with caution. Prior to the termination of benefits, the employer should file a Report of Claim Status, state form 38911, indicating its reason for the benefit termination. In addition, it is wise to send a written letter to the employee explaining that a light duty position is available within the employee's restrictions and that failure to report for said position will result in a benefits termination. In practice, it is important that any letter sent regarding benefits termination be as detailed and specific as possible.

71. *Id.* § 22-3-3-4(e) (1998). *See also* IND. CODE § 22-3-3-4(f) (1998). This section was added to provide that employers must also replace or repair artificial members, braces, implants, eyeglasses, prosthodontics, or other medically prescribed devices that are destroyed or damaged in a compensable accident after June 30, 1997. *Id.*

72. IND. CODE § 22-3-4-12.1 (1998).

73. *Id.* § 22-3-4-12.1(b).

74. *Id.* § 22-3-4-12.1(d).

75. The Application for Adjustment of Claim is state form 29109 filed by the plaintiff.

76. *Id.* § 22-3-3-7(c)(3).

D. Increased Benefit Rates

The legislature increased compensation per degree for PPI⁷⁷ and provided for annual increases in the average weekly wage.⁷⁸ The legislature capped any combination of TTD, TPD, and PTD compensation at 500 weeks,⁷⁹ thus overturning the decision in *Lowell Health Care Center v. Jordan*.⁸⁰ This provision also establishes a minimum of \$75,000 for awards that include PTD.⁸¹

CONCLUSION

The courts have continued to address many important issues during this survey period and practitioners look forward with interest to the changes the following year will bring.

77. *See id.* § 22-3-3-10(d)(4).

78. *See id.* § 22-3-3-10(e).

79. *See id.* § 22-3-3-32.

80. 641 N.E.2d 675 (Ind. Ct. App. 1994).

81. IND. CODE § 22-3-3-32 (1998).