Annual Survey of Massachusetts Law

Volume 1961 Article 20

1-1-1961

Chapter 17: Workmen's Compensation

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CHAPTER 17

Workmen's Compensation

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A. Court Decisions

§17.1. Arising out of and in the course of employment. In *Collins' Case*,[1] an employee of the forestry department of the city of Quincy was requested by his foreman to make a delivery of coal to a house owned by the department's superintendent. While carrying baskets of coal down a slope to the rear of the house, the employee suffered a fatal coronary thrombosis. The reviewing board, in reversing a denial of compensation by the single member, found that the delivery of coal was within the purview of G.L., c. 152, §26, as amended through Acts of 1955, c. 174, §5, which extends compensation coverage to injuries sustained during the performance of work not in the usual course of employment but pursuant to an order of the employer or a superintendent. The board also found that, on the basis of expert testimony, the death was causally related to the employment.

On appeal to the Supreme Judicial Court, the decree of the board was affirmed. The city argued that the application of Section 26 to municipal employees would illegally divert public funds for a private purpose. The Court, squarely meeting this contention, pointed out that the city, when it elected to accept the compensation act, became bound by the entire act, including Section 26. The purpose of the extension of coverage in Section 26 was to shield employees faced with an unhappy choice between losing compensation protection and losing employment.[2] The injustice of requiring such a choice is well illustrated by *Van Deusen's Case*,[3] which was decided before the statute was amended. There a farm employee injured while sawing wood at the home of his foreman's father was denied compensation because he was not engaged in his usual work at the time of the injury, even though he had been ordered to saw the wood. The amendment was surely not designed to authorize supervisors to utilize employees for personal errands. As the Court in *Collins' Case* rightly observes: "The beneficent purpose of the statute should not be permitted to

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§17.1. [1] 342 Mass. 389, 173 N.E.2d 641 (1961).
[2] See 1 Larson, Workmen's Compensation §27.40 (1952).
[3] 253 Mass. 420, 149 N.E. 125 (1925).

fail because of the possibility of abuse of authority by those in public supervisory positions." [4]

Simmons' Case[5] involved a hotel chambermaid whose job required her to buy, wear, and maintain uniforms. While on her way home from work carrying two bags of uniforms (her own and some belonging to other employees) which she was going to launder, she fell on the street and was injured. The reviewing board found against the employee, and the Superior Court entered a decree denying compensation. On appeal to the Supreme Judicial Court, the decree was affirmed.

The Court held that the street risk clause[6] was applicable, but that the employee, when injured, was not engaged in her employer's business. The cleaning of uniforms was likened to the laundering of any clothes worn to work by an employee. The opinion distinguished *Sylvia's Case,*[7] in which compensation was awarded for injuries sustained by an employee while using the employer's laundry to wash clothes soiled in the course of employment.

§17.2. Awards. In *Lauble's Case,*[1] an employee suffered work-connected first, second, and third degree burns over much of her body. Subsequent skin grafting was only partially successful, and the treating physicians were forced to penetrate deeper and deeper into the burned flesh in an attempt to reach satisfactory tissue for grafting. The employee's hip and knee were burned, and while the employee was in the hospital, her legs were bandaged. If the grafting on the legs had been successful, there would have remained second-class skin and some loose motion. Two weeks after the accident, the employee died. Her brother and sister, as dependents, brought a claim for compensation under G.L., c. 152, §36A, which gives to dependents the right under Section 36 to the specific benefits to which a deceased worker had become entitled at the time of "the happening of the event upon which the employee bases his claim." A treating physician testified that the deceased had never reached "medical end result," but that in his opinion, had the grafting been successful, the injured employee would have suffered complete disability and the loss of motion would have been total.

The Supreme Judicial Court affirmed the reviewing board's award of $2000 for the functional loss of each leg, and $2500 for disfigurement. The defense had been raised that the dependents' rights to compensation under Section 36 are determined as of that point in time when the medical end result of the injuries is admitted or can be conclusively proven. The Court held that the test is the same as that applied to living claimants, and is a question of fact based upon

4 342 Mass. 389, 391, 173 N.E.2d 641, 643 (1961).
5 341 Mass. 319, 169 N.E.2d 742 (1960).
6 G.L., c. 152, §26, as amended.
7 298 Mass. 27, 9 N.E.2d 412 (1937).

§17.2. 1 341 Mass. 520, 170 N.E.2d 720 (1960).

future state of health and bodily function. Rights to specific compensation are calculated as of the happening of the event upon which the claim is based. This holds true whether the claim is being brought by a living employee or the dependents of a deceased employee. In *Lauble's Case* the Court found that there was sufficient medical testimony, based on probabilities, that the deceased had sustained a complete loss of use of her legs.

§17.3. Employers and employees: Inclusions and exclusions. In *Ryder's Case,*[1] the claimant was one of three trustees and also one of two beneficiaries under a realty trust which bought land and built homes on speculation. Under the terms of the trust, the trustees had full control over the trust assets, and had full power to carry on any necessary business operations "as if said Trust estate and property were their own absolute estate." [2] The beneficiaries also had broad powers under the provisions of the trust. The claimant worked for the trust as a carpenter under the direction of his son, who was also a trustee, and received a weekly wage of $50. He sustained a back injury which arose out of and in the course of his employment by the trust, and sought workmen's compensation. The Workmen's Compensation Act defines employee as "every person in the service of another under contract of hire, express or implied." [3]

The Supreme Judicial Court affirmed a decree of the reviewing board denying compensation. Since the claimant's powers as both trustee and beneficiary were almost identical to those he would have had as a partner, the Court treated the realty trust as a partnership. The entity theory, which regards the partnership as an entity apart from its members, was rejected in favor of an approach considering the partnership to be no more than an aggregate of individuals, and the Court followed the majority of jurisdictions[4] which hold that since a working partner is not a "person in the service of another," he cannot be an employee for compensation purposes.

The crucial issue in this area has been aptly described as "a conflict between the conceptualism of the common law and the realities of modern social legislation." [5] In this case of first impression in Massachusetts, the Court chose to follow "the conceptualism of the common law." It is interesting to compare this position with the approach of the Michigan Supreme Court in *Gottlieb v. Arrow Door Co.*,[6] a recent decision affirming an award of compensation to a claimant who was the sole incorporator, sole shareholder, president, and treasurer of a corporation. He was injured while cutting wood in the service of his company. Emphasizing that the aim of the compensation

§17.3. [1] 341 Mass. 661, 171 N.E.2d 475 (1961), also noted in §5.5 *supra.*
[2] 341 Mass. at 663, 171 N.E.2d at 476.
[3] G.L., c. 152, §1(4).
[4] See 1 Larson, Workmen's Compensation §54.30 (1952).
[5] Kramer v. Charlevoix Beach Hotel, 342 Mich. 715, 723, 71 N.W.2d 226, 229 (1955) (Smith, J., concurring).
[6] 110 N.W.2d 767 (Mich. 1961).

laws is to protect all those who work in industry and to shift the burden of industrial injuries from the victim to the enterprise, the Court applied the entity theory and held that the claimant was in the service of another. It should be noted that the actual holding in *Gottlieb* rested upon a provision in the compensation act[7] expressly including working partners within the statutory definition of "employee." Perhaps direct statutory language is the most effective solution to the problem. However, both Oklahoma and Louisiana have accomplished this result by judicial decision.[8]

One other aspect of *Ryder's Case* merits comment. The carrier had issued to the trust a policy of workmen's compensation, the premiums of which were based on the estimated wages of the claimant and his son. The Court noted that no question had been presented as to whether the carrier was estopped to deny its liability, and therefore no decision could be rendered on this point. In a case involving an analogous fact situation, the Rhode Island Supreme Court held that the carrier was under a duty to inform the claimant that he was not covered, and thus the employing corporation was estopped to deny compensation coverage.[9]

§17.4. Defenses. Although the elimination of the common law defenses of contributory fault and assumption of the risk is basic to the structure of workmen's compensation, many acts, including the Massachusetts statute,[1] provide that the employee will be denied compensation for injuries caused by his own serious and willful misconduct. Two decisions during the 1961 SURVEY year involved this defense.

In *Vaz's Case*,[2] the claimant, a rope machine operator, was assigned to work the 11:00 P.M. to 7:00 A.M. shift for the first time in his twenty-two years on the job. On his first night, he used the elevator to go from the second floor, where he worked, to the basement smoking room during the designated relief period. On his return, the elevator became stuck between floors. For three or four minutes his cries for help went unheeded, and he was faced with the gloomy prospect of staying in the elevator for three hours until the next shift came to work. In an attempt to escape, he climbed over the four-foot wall of the elevator, crawled through the window in the rear wall of the elevator shaft, and, suspending himself from the window ledge, dropped to the ground. Both his heels were fractured in the fall.

A sign posted in the elevator stated: "No one except elevator operator is allowed to run car and open gates." There was evidence that the sign was obscured and covered up by other bulletins. There was

7 Mich. Stat. Ann. §17.147[2] (1960 Rev.).

8 Ohio Drilling Co. v. State Industrial Commission, 86 Okla. 139, 207 Pac. 314 (1922); Trappey v. Lumbermen's Mutual Casualty Co., 77 So.2d 183 (La. App. 1954).

9 Davies v. Stillman White Foundry Co., 163 A.2d 44 (R.I. 1960). See also Superior Insurance Co. v. Kling, 160 Tex. 155, 327 S.W.2d 422 (1959).

§17.4. 1 G.L., c. 152, §27.

2 342 Mass. 495, 174 N.E.2d 360 (1961).

also evidence that the employees, including the claimant, commonly operated the elevator. No qualified operator had been assigned to the night shift.

The Supreme Judicial Court, in affirming a decree of the reviewing board awarding compensation, held inter alia that the claimant's actions did not constitute serious and willful misconduct. Observing that it was a common practice of employees to operate the elevator and that the acquiescence of the employer made the posted prohibition a "dead letter," the Court categorized the claimant's panic in an emergency and miscalculation of the drop from the window ledge as less than acts of a quasi-criminal nature such as would render him guilty of serious and willful misconduct.

In *Pearson's Case,*[3] a member of a municipal highway department was killed when the truck he was driving was struck by a railroad train at a grade crossing. There was evidence that the deceased had been operating the truck between seven and ten miles per hour, in violation of G.L., c. 90, §15. The Supreme Judicial Court affirmed a decree of compensation and stated that such conduct at worst constituted negligence.

It is difficult to finger a precise definition of "serious and willful misconduct." The cases are more effective in delineating what it is not, rather than what it is. For example, an employee who in a thoughtless and spur-of-the-moment impulse began to work near moving machinery and was crushed to death was held not to have been guilty of serious and willful misconduct, even though he had been specifically told not to go near the machinery.[4] His disobedience was found to have been a minor transgression, and not such a deliberate act as to bar compensation. An employee's failure to wear gloves while distributing handbills in the freezing cold was ascribed to lack of understanding, rather than misconduct.[5]

Serious and willful misconduct has been said to encompass conduct of a "quasi-criminal nature." [6] The employee must realize that what he is doing will probably result in serious injury, or he must evidence a wanton disregard for the probable consequences of his act. Willful misconduct would seem to fall somewhere between gross negligence and intentional self-injury.

Another type of defense often used by employers in tandem with the bar against willful misconduct is based upon the argument that the employee's acts were beyond the scope of his work, so that the injury did not arise out of or in the course of employment. Thus a claimant injured while opening a window which employees had been forbidden to open was denied compensation because his injury was sustained outside the course of the employment.[7]

In these cases, the employer must show that the employee was

[3] 341 Mass. 576, 170 N.E.2d 917 (1960).
[4] Nickerson's Case, 218 Mass. 158, 105 N.E. 604 (1914).
[5] Shute's Case, 290 Mass. 393, 195 N.E. 354 (1935).
[6] Vaz's Case, 342 Mass. 495, 174 N.E.2d 360 (1961).
[7] Borin's Case, 227 Mass. 452, 116 N.E. 817 (1917).

aware of the limits placed upon the scope of his work by rules, regulations, or direct instructions. Prohibitions which through employer acquiescence in their nonobservance become "dead letters" cannot effectively remove a particular activity from the scope of the employment.[8]

On the other hand, the conduct in question might occur in the course of work but consist of doing a job in a forbidden manner. The great majority of cases falling within this category have been decided in favor of the injured worker, inasmuch as they involve essentially negligent performance of the job at hand.[9] Therefore, the distinction between *what* the employee does and *how* he does it must be kept clear, because deviation from a prescribed *method* of work in most cases will amount to no more than negligence, which does not bar a claim for compensation.[10]

§17.5. Third party actions. Two cases decided during the 1961 SURVEY year dealt with the so-called doctrine of "common employment." In *Pettiti v. Edward J. McHugh & Sons, Inc.*,[1] the plaintiff, an employee of the Massachusetts Department of Public Works, was excavating part of a highway, which was being resurfaced, in order to install a catch basin. It was necessary to make use of a tractor compressor, to which a jackhammer was attached. The tractor was rented on an hourly basis from the defendant and was driven by one of the defendant's employees. The department foreman directed the operator of the tractor to drive it to the location of the catch basin. The operator followed these instructions and parked the tractor near the catch basin excavation. Although he knew that another department employee was about to use the tractor, he left it in gear. When this employee pulled the starter switch in the tractor, the machine bolted forward, attained its maximum speed of fifteen to twenty miles per hour, and ran over the plaintiff, who was seriously injured.

An action in tort was commenced against the owner of the tractor and the owner's driver. An auditor, and subsequently a judge of the Superior Court sitting without a jury, found for the plaintiff. The Supreme Judicial Court held that as a matter of law the doctrine of common employment barred a finding for the plaintiff, and entered a judgment for each defendant.

Although agreeing that the driver had been negligent in leaving the tractor in gear, the Court found that the use of the tractor was "part of or process in, the trade or business carried on by"[2] the Department of Public Works. Therefore, the work in which the driver was engaged under the contract of hire between the owner and the Commonwealth placed the driver in the "common employment"

8 Vaz's Case, 342 Mass. 495, 174 N.E.2d 360 (1961).

9 See 1 Larson, Workmen's Compensation §31.20 (1952).

10 Lawrence's Case, 330 Mass. 244, 112 N.E.2d 601 (1953); Maguskas' Case, 298 Mass. 80, 9 N.E.2d 380 (1937). But see Silver's Case, 260 Mass. 222, 157 N.E. 342 (1927).

§17.5. 1 341 Mass. 566, 171 N.E.2d 169 (1960).

2 G.L., c. 152, §18.

of the department along with the plaintiff and barred a common law suit. In a subsidiary holding, the Court found that the common employment doctrine applied to the Commonwealth as well as to other employers.

In *Harrington v. H. F. Davis Tractor Co.*,[3] the employee of a general contractor was injured through the negligence of a crane operator. The crane had been rented from a rental service by a sales company, which was trying to sell a particular model of a truck crane to the general contractor. The crane was operated by an employee of the rental service.

The plaintiff brought an action in tort against the rental service and the sales company. The jury found for the plaintiff against both defendants, who excepted to the denial of their motions for directed verdicts. The Supreme Judicial Court overruled the exceptions of the rental service, and sustained the exceptions of the sales company.

The Court held the common employment doctrine inapplicable because no contract of employment existed between the plaintiff's employer and the sales company. The injury was sustained during an informal demonstration. General Laws, c. 152, §18, which affects only situations in which the general contractor enters into a written or oral contract with an independent contractor or a subcontractor, did not apply to the attempted sale of the crane. The ultimate holding in the case was based upon a finding that at the time of the injury the crane operator was the servant of the rental service company, rather than the sales company.

It is interesting to note that here, as in all the common employment cases, the Court by its language gives the impression that the doctrine of common employment derives from specific language in Section 18 of G.L., c. 152. In fact, the doctrine is a judicial creation peculiar to Massachusetts. As such, the evolution of the doctrine is worthy of note.

The statute permits the injured worker to sue in tort when "the injury for which compensation is payable was caused under circumstances creating a legal liability in *some person other than the insured* to pay damages in respect thereof."[4] (Emphasis supplied.) This language seems plain enough, but the Court has construed it in light of Section 18. Under Section 18, a general contractor becomes liable to pay compensation to the employees of an independent contractor or subcontractor hired to do "part of or process in, the trade or business" of the general contractor. The latter retains a right of indemnity against the independent contractor or subcontractor. Although Section 18 would seem merely to make the general contractor secondarily liable to pay compensation to injured employees of subcontractors or independent contractors, the Court has made use of this section to create a concept of common employment which severely restricts the worker's right to sue at common law.

[3] 1961 Mass. Adv. Sh. 935, 175 N.E.2d 241.
[4] G.L., c. 152, §15.

This position was reached in three steps. In *White v. George A. Fuller Co.*,[5] the Court held that the employee of an uninsured subcontractor could not bring a tort action against an insured general contractor whose employee had caused the injury. Then *Bindbeutel v. L. D. Willcutt & Sons Co.*[6] extended the general contractor's immunity in the same situation, save for the fact that the subcontractor was insured. Since it is possible to consider the general contractor as the statutory employer under Section 18, both results stand on sound ground.

However, in *Catalano v. George F. Watts Corp.*,[7] the employee of a general contractor was injured through the negligence of an employee of the subcontractor. The general contractor paid compensation and then brought a third party action against the subcontractor.[8] The Court held that the employees of the general contractor stood in the same position as the employees of the subcontractor, and therefore the subcontractor could not be sued in tort. This result appears illogical, since it makes the subcontractor (or, indeed, his employee) the statutory employer of the general contractor's employee.[9] In fact, neither the subcontractor nor his employees are liable for compensation payments to the employees of the general contractor.

Some clue to the Court's reasoning may be found in a later decision, *Bresnahan v. Barre*,[10] in which the Court further limited the scope of third party actions by barring a suit by an injured employee against a negligent co-employee. The opinion stated: "One purpose of the workmen's compensation act was to sweep within its provisions all claims for personal injuries arising out of and in the course of employment by a common employer . . ." [11] This observation seems wide of the mark. The employee relinquished his right to sue his employer in tort as part of the quid pro quo by which he received fixed compensation payments from his employer regardless of fault. The employer's immunity should not be extended to protect those not a party to the basic contractural arrangement of workmen's compensation and not liable for compensation payments. In recent years the Court has seen fit to re-examine and reverse settled lines of decision when it has become manifest that they denied justice.[12] It is suggested that the doctrine of common employment deserves a similar fate.

5 226 Mass. 1, 114 N.E. 829 (1917).
6 244 Mass. 195, 138 N.E. 239 (1923).
7 255 Mass. 605, 152 N.E. 46 (1926).
8 See G.L., c. 152, §15.
9 See 2 Larson, Workmen's Compensation §72.32 (1952).
10 286 Mass. 593, 190 N.E. 815 (1934).
11 286 Mass. at 597, 190 N.E. at 817.
12 See Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912, 1960 Ann. Surv. Mass. Law §3.1 (1960) (prenatal injury); Evangelio v. Metropolitan Bottling Co., 339 Mass. 177, 158 N.E.2d 342, 1959 Ann. Surv. Mass. Law §§3.5, 20.5 (1959) (res ipsa loquitur in exploding bottle case); Kabatchnick v. Hanover-Elm Building Corp., 328 Mass. 341, 103 N.E.2d 692 (1952) (action of deceit based upon

B. Legislation

§17.6. Extension of coverage. General Laws, c. 152, §69, has been amended by Acts of 1960, c. 655, which extends compensation coverage to the managers of municipal lighting plants.

§17.7. Liens on compensation payments. Acts of 1960, c. 792, replaces G.L., c. 152, §47, and provides that workmen's compensation payments shall not be subject to liens except to a veteran's agent or the Commissioner of Veterans' Services to the extent of veterans' benefits paid to the employee.

§17.8. Increase in death benefits. General Laws, c. 152, §31, has been amended by Acts of 1961, cc. 503 and 541. The former increases the weekly benefits payable to total dependents other than the surviving spouse and children of an employee killed in a work-connected accident from a maximum of $15 and a minimum of $8 to a maximum of $20 and a minimum of $12. The maximum amount of aggregate benefits payable to such dependents is increased from $6000 to $8500. Weekly benefits payable to partial dependents other than the surviving spouse and children are increased from a minimum of $8 to a minimum of $12, and the top level of aggregate payments is raised from $6000 to $8500.

Chapter 541 deals with the surviving spouse and children. Maximum weekly payments to the widow or widower, so long as he or she remains unmarried, are increased from $30 to $35. If the unmarried surviving spouse has one dependent child, the weekly payments are shifted from $35 to $41, with increments for each additional child increased from $5 to $6. If the surviving spouse remarries, weekly payments to each child of the deceased employee are raised from $10 to $12. Total benefits payable are increased from a maximum of $14,000 to a maximum of $16,000.

§17.9. Increase in weekly benefits for incapacity. Acts of 1961, c. 602, amends G.L., c. 152, §§34 and 34A, by increasing the amount of maximum weekly benefits payable to an injured worker for total incapacity from $45 to $50, and the maximum total compensation payable from $14,000 to $16,000.

§17.10. Industrial Accident Board. Acts of 1961, c. 611, makes a number of substantial changes in G.L., c. 23. The salaries, terms, and number of members of the Industrial Accident Board as prescribed in G.L., c. 23, §15, are increased. The powers and duties of the chairman of the board, as delineated in Section 16, are substantially expanded. Other administrative changes are made in G.L., c. 23, §§19-23, and c. 152, §§4 and 8.

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misrepresentation); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946) (Buick doctrine adopted); Bates v. Southgate, 308 Mass. 170, 31 N.E.2d 551 (1941) (when agent deceived a third person, rescission allowed in action against principal).