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Chapter 18: Workmen's Compensation

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CHAPTER 18

Workmen's Compensation

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§18.1. General. During the 1965 SURVEY year the workmen's compensation legislation enacted by the General Court has had very little effect on the current status of workmen's compensation law in the Commonwealth. And, while the decisions emanating from the courts have had a greater importance than has the legislation, none of the cases produced any startling twists to the existing state of the law.

§18.2. Status as an employee: Minors. Probably the most significant workmen's compensation case was *Garnhum's Case,*[1] which dealt with a very interesting problem of double compensation to minors under General Laws, Chapter 152, Section 28. Section 28 provides that an injured employee whose injuries are sustained as a result of serious and willful misconduct on the part of an employer may receive double compensation for his injuries. The statute does not enumerate the types of situations to which this section applies except that it does provide that the "employment of any minor, known to be such, in violation" of the workmen's compensation statute, constitutes serious and willful misconduct under the section. The Superior Court awarded double compensation to the claimant, in accordance with the decision of the reviewing board which adopted the findings and decision of a single member.

The claimant applied for a summer job with the defendant employer. In filling out the requisite applications, he stated his age to be over 16, when in fact he was under 16. He also told an interviewer that he was going on 17. This information was not verified by the employer. A few days after he started working, the claimant was injured while operating a machine. A claim for workmen's compensation was filed, coupled with a request for double compensation.

Two aspects of the statute which provide for this double compensation should be noted. The employer is liable for double damages only if he knows that the employee has not yet reached majority. If he has this knowledge, it is his responsibility to make absolutely certain that the employee has reached the minimum age to do the job to which he is assigned. General Laws, Chapter 149, Section 60, places limitations upon the work that may be performed by those under 18.

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§18.2. [1] 1964 Mass. Adv. Sh. 1223, 202 N.E.2d 255.

On the procedural aspects of double compensation, the employer has the right to contest the award without consent of the compensation carrier, as he must reimburse his insurer for that portion of the award that represents the double compensation. It is under this statutory provision that the employer in the present case had appealed the Superior Court award.

The employer raised three defenses. First, the employee should be barred from recovery under the Workmen's Compensation Act because his contract of employment was void and, therefore, he was not in fact an employee. The Supreme Judicial Court, in Justice Spiegel's cogent opinion, easily disposed of this argument by holding that General Laws, Chapter 152, Section 28, by implication specifically applies to unlawfully employed minors holding them to be employees and thus entitled to protection under the statute. Indeed, as the Court pointed out, the protection of minor employees was one of the prime purposes for the passage of this section of the statute.

As the basis for his argument, the employer contended that by awarding compensation the Court would be enforcing a contract that was void. To support his argument, the employer might have cited several old cases that so held. But these decisions were made in order to protect employees. Employees were thus permitted to avoid the limitations on recovery imposed by the early workmen's compensation laws and could instead bring their action at common law. But as the statutory benefits were enlarged, it became more beneficial for even minor employees to bring their actions under the statute. As a result, it was necessary for the courts to subtly reverse their prior decisions, which may very well have been unsound in the first place. What the courts are now doing is to find these employment contracts not illegal, but at the same time holding that the action of an employer in hiring an underaged employee is illegal. At worst, this is a voidable contract and voidable by the employee and not by the illegally acting employer. For example, the employer could not refuse to pay wages after work had been performed by the employee. To refuse the award of double compensation on the ground here suggested by the employer would be to penalize the employee for the wrongful acts of the employer. Finally, it would be absurd to negate the very words of the workmen's compensation statute by straining the interpretations of the provisions of the parent statute.[2]

This sterling example of logical reasoning evidenced by the Supreme Judicial Court is founded on a solid basis. Massachusetts has long held that an employee who works under the age limit is not working illegally unless the statute so provides. Thus his contract of employment cannot be said to be void.[3]

As his second defense, the employer contended that the employee's misrepresentation of his age was serious and willful misconduct, thereby disqualifying him for compensation under Section 27 of General Laws,

2 G.L., c. 149, §60. See 1 Larson, Workmen's Compensation §§47.52(a)-(b) (1964).
3 Pierce's Case, 267 Mass. 208, 166 N.E. 636 (1929).

Chapter 152. This argument is invalid. To bar a claimant from his rights under this section of the statute, the employee's actions must have been both serious and willful. Serious refers to the conduct itself, and not to the consequences that might eventually flow from this conduct. Willful implies an intent to do a wrongful act or such recklessness as might be considered the equivalent of intent.[4]

The employer's contention in this case merits as little consideration as did one farfetched argument based on similar grounds in the California case of *Brooklyn Mining Co. v. Industrial Accident Commission*,[5] wherein it was claimed that the employee had participated in serious and willful misconduct. As a minor, he had stopped for a moment's rest on an extremely hot day after coming up from the interior of a mine, rather than going directly to his new assignment. While resting, he was injured. The results of the litigation should be obvious.[6]

The present case does raise a serious question of long standing, namely, should the defense of willful and serious misconduct even be enumerated in the statutes? The overwhelming majority of cases decided under this provision have found no willful and serious misconduct had existed. At the same time, employers have raised the defense in almost any situation in which they seem to lack any better argument, with the resulting additional litigation and time-consuming procedures. The defense has successfully been raised only in those cases in which an employee has violated safety regulations. Would it not be more advisable to eliminate the almost-never-applied broad statute and replace it with one that is very specific, and yet one that would have practical meaning in light of court decisions? That is, should not the statute simply state that the employee is barred from recovery when he has seriously and willfully violated safety regulations? Of course, even in this area, there is room for interpretation. If the safety regulation is not generally adhered to by all employees and if the disobedience of the regulation is condoned by the employer, then should compensation be denied?

In his final argument in *Garnhum's Case* the employer contended that recovery should be denied as a matter of public policy in order to discourage employees from lying about their age. No one would take issue with the employer's contention that this would be desirable. But the Court pointed out that the public policy as stated in General Laws, Chapter 149, Sections 86 and 95, must, because they are provided for by statute, take precedence over any other public policies. The greater public policy, imposed by statute, is to encourage employers when hiring minor employees to make every effort to ascertain the prospective employee's correct age, thereby protecting the minor employee "from employment in hazardous jobs." The burden for accuracy is thus placed on the employer.

4 Scaia's Case, 320 Mass. 432, 69 N.E.2d 567 (1946). See also Thayer's Case, 345 Mass. 36, 185 N.E.2d 292 (1962), noted in 1963 Ann. Surv. Mass. Law §19.2, and Dillon's Case, 324 Mass. 102, 85 N.E.2d 69 (1949).

5 172 Cal. 774, 159 Pac. 162 (1916).

6 1 Larson, Workmen's Compensation §32.20 (1964).

While all of the defenses raised by the employer in *Garnhum* were very weak and have been disposed of many times in related cases both in Massachusetts and other jurisdictions, this was a welcomed case. It clarified the law involving an often occurring fact pattern, the case in which an employee misrepresents his age and is subsequently hired and then injured while on the job, raising the possibility that this employee may be entitled to double compensation.

§18.3. Status as an employee: Business trustee. A more justifiable argument, that the claimant was not an employee, was at issue in *Hayes's Case*.[1] In this case the claimant was employed by a business trust. The trust owned and operated a duck farm. The claimant was the principal stockholder of the trust, had exclusive control over the trust, and complete control over the management of the farm. For his work on the farm, he received an annual wage of $10,000.

The trust employed about 80 workers, all of whom were covered by workmen's compensation insurance. The claimant had been informed by the insurer's agent that he personally was covered by workmen's compensation and that the premium being paid by the trust reflected his coverage.

Nevertheless, the Superior Court held that the claimant could not recover for his medical expenses under the workmen's compensation act, as he was not an employee as defined by General Laws, Chapter 152, Section 1. He was, in effect, an employer, regardless of his formal status.

Following the precedent set in *Ryder's Case*,[2] the Supreme Judicial Court was left with no alternative but to affirm the present case. In *Ryder's Case* the claimant, along with his son, was a trustee of a family business trust. Prior to the formation of the trust, the claimant had worked for his son as a carpenter and he continued to do so after the establishment of the trust. He was paid $50 a week and took no part in the management of the business. Nevertheless, the Supreme Judicial Court found that he was not an employee working in the service of another since, as a participant in the trust, he was working for himself. The trust agreement did not create an entity separate from the claimant.

Hayes, in the case at hand, contended that his case could be distinguished from *Ryder*. In the trust agreement involved in *Ryder* the stocks were not transferable whereas in the present case they were, with the result that there existed in effect an entity very close in fact to a corporation. The Court struck down this argument, noting that while there was some similarity between business trusts and corporations, they had not generally been treated as the same by the Massachusetts courts.[3] Whether the Court was correct in drawing such a distinction in

§18.3. 1 1965 Mass. Adv. Sh. 187, 204 N.E.2d 277.

2 341 Mass. 661, 171 N.E.2d 475 (1961), noted in 1961 Ann. Surv. Mass. Law §§5.5, 17.3.

3 United States v. Griswold, 124 F.2d 599 (1st Cir. 1941); Swartz v. Sher, 344 Mass. 636, 184 N.E.2d 51 (1962); Griswold v. Director of the Division of Employment Security, 315 Mass. 371, 53 N.E.2d 108 (1944); State Street Trust Co. v. Hall, 311 Mass. 299, 41 N.E.2d 30 (1942).

this case or in any other case is another matter. The crux of the problem is, would it and should it make any difference whether, for workmen's compensation purposes, these trusts are treated as are corporations?

Early compensation cases refused to make awards to corporate officers on the grounds that the benefits of the workmen's compensation statute were to be awarded workmen and not business executives.[4] This distinction between blue collar and white collar workers was soon overshadowed, however, by the dual capacity rule. The courts readily realized that, particularly in smaller corporations, executives often performed duties that generally might be left to so-called workers. With this fact in mind, the courts held that if the employee-corporate officer was injured while performing those tasks ordinarily left to "workmen," he would be protected.

But, as so often happens, the exception began to swallow the rule. With the enlargement of the exception, this, too, became an area for confusion. Another arbitrary distinction had to be drawn, between those duties which were executive and those which were labor. As more and more cases were heard, the distinguishing line became more and more arbitrary.[5] To eliminate confusion, several states amended their workmen's compensation statutes specifically to include corporate employees. Other states did so by judicial decision.[6]

Massachusetts, in *Emery's Case*,[7] in effect adopted the dual capacity doctrine, finding that when a corporate officer was injured while performing workmen's services, he was covered by workmen's compensation. There is no indication that the Massachusetts Court would go beyond this case and eliminate the dual capacity doctrine. Even if the dual capacity doctrine is in force, if the business trust is to be likened to the corporation, then in *Hayes's Case* the claimant would still be entitled to workmen's compensation coverage. For presumably good reason, there are numerous distinctions between the business trust and the corporation. But for the purposes of the workmen's compensation statutes, which by legislative edict and by judicial tradition are to be liberally construed, should they not be treated as the same?

Our original thesis, however, was that such an analogy need not even be drawn. Any employee of any entity should be protected by workmen's compensation. Is this not the intent of the legislation? But, according to the Supreme Judicial Court, the answer is apparently no. Should the legislature wish for such protection to be so extended to business trusts, they will have to so specify in legislation. "If there is practical reason for treating managing trustees of such business trusts as

[4] 1 Larson, Workmen's Compensation §54.20 (1964).

[5] Gottlieb v. Arrow Door Co., 364 Mich. 450, 110 N.W.2d 767 (1961), 28 NACCA L.J. 332.

[6] Mine Service Co. v. Green, 265 S.W.2d 944 (Ky. 1954), 14 NACCA L.J. 127; Fruit Boat Market v. Industrial Commission, 264 Wis. 304, 58 N.W.2d 689 (1953).

[7] 271 Mass. 46, 170 N.E. 839 (1930).

employees for purposes of workmen's compensation . . . we think that this is a matter for the legislature to consider."[8]

The claimant contended that the insurer was estopped from asserting the defense that the claimant is not an employee. An agent of the insurer informed him that he was considered an employee and assessed the insurance premium on this assumption. But the Court held that estoppel cannot be claimed. To allow the estoppel would permit the Industrial Accident Board to go beyond their statutory powers and adjudicate the rights of one who is not an employee and thus one over whom the Board has no jurisdiction. If it is determined by the law that there is no employee involved in a case before the Board, no matter what other considerations there might be, the Board does not have jurisdiction. If there is any question as to this fact, they must make a decision despite the claim of an estoppel.[9]

While the Court finds many cases from foreign jurisdictions to support their decision,[10] it would seem the better view is taken by the Rhode Island court when they went right to the merits of whether an estoppel would be applied in a case analogous on its facts to *Hayes's*. They were not concerned with the administrative board's jurisdiction, for it would seem, if equity demands and equitable principles are the guidelines for workmen's compensation, the claimant should prevail.[11]

§18.4. Status as an employee: Independent contractors. Adhering to the long-established criteria for determining whether a person is an employee or an independent contractor, the Court in *Brigham's Case*[1] failed to find error in the Review Board's determination that the claimant was an employee of the Prudential Life Insurance Company.

The test used by the Court was the so-called right to control test, wherein the trier of facts must decide whether the employer had a right to control the details of the claimant's methods of carrying out his responsibilities, thus classifying him as an employee of the employer. "If in the performance of his work, an individual is at all times bound to obedience and subject to direction and supervision as to details, he is an employee; but if he is only responsible for the accomplishment of

8 The Court cited to the following five cases in support of its statement that this claimant should not be covered: Cohen v. Best Made Mfg. Co., 92 R.I. 389, 169 A.2d 10 (1961); Duvick v. Industrial Commission, 22 Wis. 2d 155, 125 N.W.2d 356 (1963). But see Queen City Furniture Co. v. Hinds, 274 Ala. 584, 150 So. 2d 706 (1963); Hirsch v. Hirsch Bros., 97 N.H. 480, 92 A.2d 402 (1952). Compare Mahoney v. Nitroform Co., 20 N.J. 499, 120 A.2d 454 (1956).

9 Perkins's Case, 278 Mass. 294, 180 N.E. 142 (1932); Levangie's Case, 228 Mass. 213, 117 N.E. 200 (1917).

10 Soars v. Soars-Lovelace, Inc., 346 Mo. 710, 142 S.W.2d 866 (1940); Nagy v. Ford Motor Co., 6 N.J. 341, 78 A.2d 709 (1951); Chadwick v. North Carolina Dept. of Conservation & Development, 219 N.C. 766, 14 S.E.2d 842 (1941); Superior Insurance Co. v. Kling, 160 Tex. 155, 268 S.W.2d 198 (1954).

11 Davies v. Stillman White Foundry Co., 91 R.I. 337, 163 A.2d 44 (1960).

§18.4. 1 1964 Mass. Adv. Sh. 1289, 202 N.E.2d 597.

an agreed result in an agreed manner, he is an independent contractor. The essence of the distinction is the right to control."[2]

In the case under review, the claimant had a contract with Prudential, which stated that he was to devote substantially all his working time to the company's business, and was to render to policyholders all services incidental to the maintenance and care of the company's business which may be required by the policyholders or by the company. The claimant collected premiums on policies he had sold for the company and also collected premiums on policies sold by others. He was required to attend weekly meetings and classes and to make daily telephone calls or personal visits to his division manager's office. Additionally, the manager could accompany him on visits to clients and had the right to approve or disapprove his weekly work schedule. His license to sell insurance was apparently contingent upon his relationship with Prudential. The parent company also provided him with secretarial assistance and office space. Certainly, under the most narrow interpretation of the right to control doctrine, this claimant would qualify as an employee. There can be little argument with the Court's decision upholding the Board's findings.

However, while Larson in his treatise agrees that the right to control test predominates in determining whether a claimant should recover under workmen's compensation, he suggests that the trend is away from this test to the more modern test, relative nature of work.[3] This test would find that a claimant is an employee for purposes of workmen's compensation if the work he was performing was an integral part of the regular business of the employer, and if the employee, relative to the employer, is not involved in an independent business. That is, if the employee plays an integral part in the employer's business, as is the case with an insurance company's salesman, and if the employee is not involved in a separate enterprise or business, as would be the case if the salesman worked for an independent insurance agency, then he should be covered by workmen's compensation even if the employer retains minimum control over the activities of the employee.

Preference for this latter test is based on sound rationale. The "control test" stems from the common law, under which it was used to determine whether an employer had responsibility to a third party for the negligent or wrongful acts of an employee. The question often was, as it is in workmen's compensation litigation, was the working party an employee or an independent contractor? If the former, then the employer would have financial responsibility for the third party's injuries. With some logic, the courts found that if the employer had control he could be found responsible, but if he had no control then he should not be responsible. From this evolved the concept that a person was in fact an employee if there was control. But the purposes of the workmen's

[2] 1964 Mass. Adv. Sh. 1289, 1290, 202 N.E.2d 597, 598. See Hartman's Case, 336 Mass. 508, 510, 146 N.E.2d 509, 510 (1957); McDermott's Case, 283 Mass. 74, 75-77, 186 N.E. 231, 232 (1933).

[3] 1 Larson, Workmen's Compensation §43.42 (1964).

compensation statutes are far different from the questions involved in this common law litigation. The object in workmen's compensation is not to find responsibility of one party to another party for the wrongful or negligent acts of yet a third party; it is concerned with restitution for injuries sustained by that third party. Control really has no relationship to the basic tenets of the statutes. The important question is, in effect, whether the injured person is working for the employer, without paying homage to the technicalities of the relationship.[4] Under modern business practices large businesses are distributing their workload to so-called independent contractors, people who in effect work for the contracting company but maintain some modicum of resemblance to a separate entity. Many of these people perform functions in areas at which workmen's compensation legislation is aimed. If the purposes of this benevolent legislation are not to be defeated, must not some new test other than control be devised?

The second criteria for employee status under the relevance of work test must not be ignored. The basic philosophy of compensation legislation "is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product."[5] If no separate product or service evolves from the acts of the employee in question, and if his actions play an integral part in the employer's business, then upon whom is the burden for this employee's compensation to fall? Is it fair that he bear the burden himself because he failed to meet some technical criteria, when in fact he is, for all practical purposes, an employee? On the other hand, if he is the producer of an independent product or service, even though he plays an integral part in the employer's business, he should have coverage from the prime product or service to which he is connected and not from an employer with whom he has little actual affiliation. This should be so even if a claim of some technical relationship between the claimant and the employer can be sustained.

But can it not be argued that we are again dealing merely in polemics? In practice would not any person who is not involved in an independent business, and is playing an integral part in the activities of another business, be under control of that business? Not necessarily. Take the facts of *Gordon v. New York Life Insurance Co.*,[6] as outlined by Larson.[7] In this case we also have an insurance salesman. Under the written contract, she was free to exercise her own discretion and judgment with respect to persons from whom she would solicit applications and with respect to the time, place, and manner of her solicitation of them. She was paid by commission, she paid for her own expenses, she was not required to attend meetings or classes or the like, nor did she report to anyone on her activities, except as to policies sold, and she had no office space. Her contract of employment indicated in specific

4 Ibid.
5 Id. at §45.10.
6 300 N.Y. 652, 90 N.E.2d 898 (1950).
7 1 Larson, Workmen's Compensation §43.54 (1964).

terms that she was an independent contractor. Yet, after a stormy history, the New York Court of Appeals sustained the compensation board's determination that she was an employee for the purposes of workmen's compensation coverage. The New York court did not state they were changing New York's right of control test but, in effect, they had apparently done so. Be that as it may, this is the perfect example of the case in which a person may not be under the control of the employer, and yet may be performing a task intimately connected with the employer's business and is not producing an independent product or service.[8]

§18.5. **Course of employment.** Massachusetts is one of the few states that does not require an accident for recovery under the workmen's compensation statutes, providing that the injury arose out of the employment and occurred in the course of the employment. Whether an injury has arisen out of and occurred during the course of employment is a question that is often litigated and is the basic question in *Uberto v. Kaufman*.[1] Breaking down the actual question in this case, the Supreme Judicial Court was faced with the problem of determining whether the expert witness who testified to the effect that the claimant's injuries were work connected was qualified to so testify. If so, was his testimony properly brought before the trial court? This is not a workmen's compensation issue, but the case as a whole does focus attention on the interesting area of what can be termed occupational heart disease. Most state courts have been confronted with the situation in which an employee suffers a heart attack after performing some unusually difficult task or by the even more controversial situation in which an employee in the course of his regular work suffers heart failure which can in some way be attributed only to the general strain of his employment. The basic question in most states is, was the heart attack an accident? Because Massachusetts does not have the accident requirement, the problem would appear to be that much easier. In reality, it is not. The real question in all jurisdictions is one of medical causation.[2] No matter what the test for awarding compensation, the damage must be work connected; i.e., it must be shown that the injury was medically related to the work.

Massachusetts has not been known for handing out awards in heart

[8] For general discussions on this topic, see Hollingsworth & Frazier v. Barnett, 226 Ark. 54, 287 S.W.2d 888 (1956); Yarnty Insurance Co. v. Industrial Accident Commission, 137 Cal. App. 2d 691, 290 P.2d 920 (1955); Industrial Commission v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Aetna Casualty & Surety Co. v. Daniel, 80 Ga. App. 383, 55 S.E.2d 854 (1949); Brewer v. Millich, 276 S.W.2d 12 (Ky. App. 1955); Lowell Daily Leader v. James, 224 Miss. 654, 80 So. 2d 770 (1955); Bemis v. Friedman, 1 App. Div. 2d 860, 148 N.Y.S.2d 740 (3d Dept. 1956); Potash v. Bonaccurso, 179 Pa. Super. 582, 117 A.2d 803 (1955); Barker v. Curtis, 199 Tenn. 413, 287 S.W.2d 43 (1956); Standard Insurance Co. v. McKee, 146 Tex. 183, 205 S.W.2d 362 (1947); 1 Larson, Workmen's Compensation §§43.00-45.32(d) (1964); 2 NACCA L.J. 38.

§18.5. [1] 1964 Mass. Adv. Sh. 1329, 202 N.E.2d 822.
[2] 1 Larson, Workmen's Compensation §38.83 (1964).

attack cases merely because they happened on the job.[3] Yet the Court did not seem to have any trouble in the *Uberto* case in finding the causal connection. Once the causal connection requirement is satisfied, the arising-out-of criteria has been met, for if the injury were connected to the job, then it arose out of the job.

In *Uberto,* there was no question that the accident occurred in the course of employment. The claimant was a fifty-five-year-old worker who on the day of the heart attack arrived at work apparently feeling perfectly well. The employee performed various chores and then moved a large sack of paper weighing approximately ninety pounds. Immediately thereafter, he suffered pain in his lower breast bone and apparently fell to the ground. He was hospitalized for several months, and at the time of the hearing, was still undergoing treatment.

While the basic question in the area of what might be termed occupational heart disease, i.e., whether it arose out of the employment, is not really raised in this case, it is a very interesting facet of workmen's compensation law. Many studies have been made on the question, and many cases involving this topic have been litigated. Despite the variance between Massachusetts treatment of the subject and the general practice, this material becomes relevant for the Massachusetts practitioner as it must be remembered that the central concern, despite the literal wording of the opinions, is that of medical causation, something very important in Massachusetts cases.[4]

§18.6. Recovery by the insurer. Under General Laws, Chapter 152, Section 15, an insurer who has paid workmen's compensation to an injured party may bring an action at law against a third party who might have been responsible for the worker's injuries. Damages recoverable are the same as they would be in any common law action. The right to bring such an action, however, is limited to parties other than the insured.

[3] Herlihy's Case, 267 Mass. 232, 166 N.E. 556 (1929). And see 1 Larson, Workmen's Compensation §38.83 (1964).

[4] Two articles on occupational heart disease may be found at 14 Clev.-Mar. L. Rev. 322 (1965) and 37 U. Colo. L. Rev. 205 (1965). There have been several cases decided on this question. The most recent include: Geurian v. Kansas City Power & Light Co., 192 Kan. 589, 389 P.2d 782 (1964), 7 NACCA News L. 176, 274 (July & Nov. 1964), 8 ATL News L. 304 (Dec. 1964); Easthampton Contributory Retirement Board v. Contributory Retirement Appeal Board, 347 Mass. 777, 199 N.E.2d 551 (1964), 7 ATL News L. 304 (Dec. 1964); Gracie v. C. E. Halback Co., 23 App. Div. 2d 622, 256 N.Y.S.2d 352 (3d Dept. 1965), 8 ATL News L. 195 (Aug. 1965); Markowitz v. Mack Markowitz, Inc., 22 App. Div. 2d 1001, 255 N.Y.S.2d 28 (3d Dept. 1964), 8 ATL News L. 150 (June, 1965); Post v. Wallauer Paint Co., 22 App. Div. 2d 981, 254 N.Y.S.2d 720 (3d Dept. 1964), 8 ATL News L. 195 (Aug. 1965); Hamilton v. Transport Workers Union, 21 App. Div. 2d 434, 251 N.Y.S.2d 104 (3d Dept. 1964), 8 ATL News L. 26 (Feb. 1965); Woodworth v. County of Orondago Sheriff's Dept., 20 App. Div. 2d 945, 249 N.Y.S.2d 239 (3d Dept. 1964), 7 ATL News L. 305 (Dec. 1964); Goodwin v. New York State Workmen's Compensation Board, 20 App. Div. 2d 951, 249 N.Y.S.2d 63 (3d Dept. 1964), 8 ATL News L. 26 (Feb. 1965); H. J. Jeffries Truck Lines v. Grisham, 397 P.2d 637 (Okla. 1964), 8 ATL News L. 196 (Aug. 1965); Lea Machinery Co. v. Emmons, 395 P.2d 857 (Okla. 1964), 8 ATL News L. 63 (March, 1965).

Under General Laws, Chapter 152, Section 18, the insurer of an employer may be responsible to the employer's employee for injuries sustained while working at the behest of a subcontractor or independent contractor who can be considered a common employer with the insured. The insurer is entitled to recover from the noninsured employer the damages it has sustained. However, it can recover no more than what it has actually paid out to the employee, for if this subcontractor or second employer is considered a common employer for the purposes of this section of the statute, it is not a party other than the insured under Section 15 of General Laws, Chapter 152.

Whether the defendant was a common employer with the insured prime employer was the question raised in *Carr v. Arthur D. Little, Inc.*[1] The decision does not hinge on an interpretation of law, but an interpretation of the facts. Were the facts sufficient to sustain a jury finding that the defendant and the prime employer, Tech Welding Corp. (Tech), were not common employers?

The defendant was engaged in industrial engineering. Tech was a metal fabricator. A third party contracted to purchase from the defendant a vessel for the purpose of testing pumps under exposure to liquid oxygen which Little was going to design, fabricate, and test for performance. The project was under the direction of one of the defendant's employees. Tech and the defendant entered into an oral agreement whereby Tech would manufacture a part of this container. The oral contract was subsequently confirmed by written orders. Tech was not equipped to test this product completely; therefore, it was agreed that the defendant would do this testing, but at Tech's plant. Tech agreed to this arrangement only on the promise that the defendant would not interfere with Tech's regular work schedule. When the test did not proceed properly, the defendant's employees consulted Tech's employee, Carr, the shop foreman. Carr had over-all supervision of the entire shop, which at the time was working on numerous other projects as well as on the one for defendant. Any work done on the defendant's project was done as an incident of Carr's general duties as shop foreman. This testing arrangement between defendant and Tech was formulated after the contract terms had been completed and most of the work had been finished.

The Supreme Judicial Court agreed that it was possible to find, based on these facts, that the testing process during which Carr sustained his injuries was not part of the work actually being done by Tech. Therefore, the defendant would not be a common employer with Tech. The defendant was working on something totally unrelated to Tech's responsibilities and was merely using Tech's facilities. The defendant Little, therefore, not being a common employer under Section 18, an action at law as provided for under General Laws, Chapter 152, Section 15, could be successfully maintained.[2]

§18.6. [1] 1965 Mass. Adv. Sh. 213, 204 N.E.2d 466.

[2] Other cases discussing the question of whether two employers were common employers are Abbott v. Link-Belt Co., 324 Mass. 673, 88 N.E.2d 551 (1949); DuBois

§18.7. Successive insurers. In *Casey's Case*[1] the basic controversy centered on which of two insurers should pay an employee's disability compensation. While working for employer number one, which was insured by Hartford Accident and Indemnity Company, the claimant sustained severe back injuries which resulted in extensive medical treatment and loss of wages. The employee returned to his work where he remained for approximately two and one-half months after which he went on his annual two-week vacation. When he returned from his vacation, it was found there was no work available for him in the department in which he had been working prior to the accident. He had been assembling playpens. He was, therefore, transferred to another job which required him to bend and lift table tops weighing fifteen to twenty pounds. Within a week he had a recurrence of the back trouble caused by the original injury and had to leave work. At the time this case was heard, he had not yet been able to return to work. His employer was insured for workmen's compensation by American Motorists Insurance Company at the time the claimant's back trouble recurred.

The question was, should American or Hartford pay the compensation? The Industrial Accident Board had found American responsible. "Only one insurer can be charged for the same disability, and where there are several successive insurers, chargeability for the whole compensation rests upon the one covering the risk at the time of the most recent injury that bears a causal relation to the disability."[2]

The actual problem is one of evidence. Was there sufficient evidence to sustain the decision of the Board that the injury was causally related to the second job? The Court found there was not, as it was requisite that the employee in such cases present expert medical testimony. The Board could not come to any conclusions as to the medical questions based on their own knowledge in such an area of expertise. While the employee did present an expert, the testimony of one of the treating physicians indicated that the second job had done little to aggravate the pre-existing condition significantly. There being no additional medical evidence, the Court refused to sustain the Board's award and recommitted the case for further proceedings.

§18.8. Court costs. *Garnhum's Case*,[1] discussed above in reference to an earlier opinion in the case,[2] was before the Court for a second time. In the previous case, the Court had awarded an employee double

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v. Soule Mill, 323 Mass. 472, 82 N.E.2d 886 (1948); Cannon v. Crowley, 318 Mass. 373, 61 N.E.2d 662 (1945); Caton v. Winslow Bros. & Smith Co., 309 Mass. 150, 34 N.E.2d 638 (1941); Meehan v. Bordon, 307 Mass. 59, 29 N.E.2d 759 (1940).

§18.7. 1 1965 Mass. Adv. Sh. 333, 204 N.E.2d 710.

2 Id. at 334-335, 204 N.E.2d at 711. See also McConolouge's Case, 336 Mass. 396, 145 N.E.2d 831 (1957), noted in 1958 Ann. Surv. Mass. Law §20.3; Costa's Case, 333 Mass. 286, 130 N.E.2d 589 (1955); Evans's Case, 299 Mass. 435, 13 N.E.2d 27 (1938).

§18.8. 1 1965 Mass. Adv. Sh. 1107, 209 N.E.2d 183.

2 1964 Mass. Adv. Sh. 1223, 202 N.E.2d 255, noted in §18.2 *supra*.

compensation under the provisions of General Laws, Chapter 152, Section 28. Following this decision, the attorney for the employee filed in the county court a motion for costs under General Laws, Chapter 152, Section 11A, requesting an order that either the insurance company or the employer pay the costs. A single justice ordered that the attorney's fees and related costs be borne by the insurer, to be reimbursed by the employer. From this decision, both the insurer and the employer appealed.

The relevant statute, Section 11A, provides that the employee-claimant may, if he prevails in an appeal to the Superior Court, be awarded, in addition to the actual recovery, an amount, "sufficient to relieve the employee of the reasonable cost of attorney's fees, briefs and other necessary expenses that result from the certification or appeal." The statute goes on to provide:

> If any party in interest presents certified copies to the superior court . . . under the provisions of section eleven for the purpose of enforcing decisions of the board or a member made in his favor, the court shall likewise allow such party the fees, briefs and expenses provided for by this section.

Apparently, the employee filed the above motion, but did not present the certified copies to the Superior Court as required by Section 11. It appears that the contention of the insurer and the employer was that the failure of the claimant to have done so precluded him from recovering the expenses of the appeal.

The Court found that there was no reason why the employee had to present the certified copies.

> [T]his would have been a bootless duplication of effort and expense once the same act had been performed by the employer. We think that the statute is not to be given this unreasonable interpretation. We agree that the statute could have been more clearly expressed, but we are of the opinion that in cases of serious and wilful misconduct which has been held to be "conduct of a quasi criminal nature" the Legislature could not have intended to establish a lower standard of costs for the claimant.
>
> The second sentence of §11A is not to be construed as depriving the employee of costs before the single justice or the full bench. The reference in it to "the court" must be taken to refer to the courts enumerated in the first sentence of §11A.[3]

The Court also had to determine whether the employer or the insurer should bear the burden of these costs. As discussed above,[4] under General Laws, Chapter 152, Section 28, the employer has the right to enter the case as an active defendant if the claim is for double compensation, as the employer must reimburse the insurer for the extra compensation paid to the employee. Although this section of the statute provides for

[3] 1965 Mass. Adv. Sh. 1107, 1109, 209 N.E.2d 183, 184.
[4] See §18.2 *supra*.

the employer's right to participate and, in the case of loss, to repay the insurer the extra compensation paid to employee, it says nothing about costs of the appeal as provided for in Section 11A. The Court held that while costs could not be termed extra compensation, the ultimate financial responsibility for the appeal should rest with the employer. It was only his interests which were in question on the appeal. The insurer had previously agreed to pay the usual compensation award. Inasmuch as the appeal came from the employer, and inasmuch as workmen's compensation is governed by equity, "costs should fall upon the party causing the loss."[5]

§18.9. Excess recovery. The final case for consideration in this chapter is *Richard v. Arsenault.*[1] In this case the claimant was riding in a railroad train, being transferred by his employer, a contractor, from one job to another, when the train collided with a trailer truck operated by the defendant, Joseph Arsenault, and owned by the defendant, Cushman Bakery. The employee suffered severe injuries.

The employer's insurer, Travelers, paid the employee compensation. Under the provisions of General Laws, Chapter 152, Section 15, the employee then brought a third party action against Cushman and Arsenault, Travelers having declined to bring this action within the nine months provided for in Section 15.

The employee was awarded an additional judgment. The question under review was what to do with the excess. The employee may be entitled to additional benefits from Travelers under workmen's compensation at a subsequent time, although he is now back on the job. If he should receive further compensation, it would appear that the carrier would be entitled to a setoff based on the common law recovery.

Section 15 provides for the employee's right to bring a common law action, under certain circumstances, against a third party. It also adheres to the general workmen's compensation principle that the employee should not receive double compensation for an injury except in limited situations. Therefore, should a recovery be made, the insurer who has already paid the employee must be reimbursed to the extent that he has so paid the employee, only the excess going to the employee. This is settled procedure. Complicating the *Richard* case, however, was the possibility that future compensation might be owed by the employer to the employee. If all the excess were given to the employee, and he later received additional compensation, he has had a windfall. If, on the other hand, once an excess recovery is assessed against a third party the employee is precluded from additional compensation, this might deprive him of full recovery if the excess were less than the amount of additional compensation he subsequently might receive. To give all the excess under these circumstances to the employer might result in his unjustified enrichment, should there be no subsequent award to the employee or the subsequent award be less than the as-

[5] 1965 Mass. Adv. Sh. 1107, 1110, 209 N.E.2d 183, 184.

§18.9. [1] 1965 Mass. Adv. Sh. 1163, 209 N.E.2d 334.

sessed recovery achieved against the third party. To leave the money in escrow, subject to a final determination of the workmen's compensation case, could deprive the employee of needed funds for a long and indefinite period of time. The Court, therefore, reached the most equitable result, giving the employee the excess, but providing that it was to be set off against any future compensation payments.

The Court also had to determine whether the excess could at this juncture be determined, as there was a possibility that the employee might receive further compensation. The Court held that the excess could be determined on the basis of the insurer's previously paid-out compensation. The insurer would be protected by the Court's decision that any excess retained by the employee would be set off against future payments. This all seems to make good sense.