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Chapter 6: Workmen's Compensation

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CHAPTER 6

Workmen's Compensation

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§ 6.1. Aggravation of Prior Injury by Ten Years of Walking on Concrete Floors; Not Considered "Personal Injury" as a Matter of Law, but "Wear and Tear" — Successive Insurers; First Liable. *Zerofski's Case*,[1] has attracted considerable attention. Its holding, summarized in the headnote above, applied the defense of "wear and tear" for the first time in decades to a physical injury. The court felt that the doctrine, which was revived in *Begin's Case*[2] had been recently recognized by the Supreme Judicial Court in *Albanese's Case*,[3] and had to be followed.[4] The current case was within its historic purview.

The claimant was a working foreman, helping to move frozen foods from warehouse to truck.[5] On August 26, 1964, he suffered a compensable injury when a pallet fell on his right foot and fractured a toe.[6] He developed complications, requiring a venal ligation, and later suffered repeated ulceration and swelling of his right leg.[7] After a period of disability for which compensation was paid by the insurer, Commercial Union, he returned in 1966 to his regular job, working on concrete floors and being on his feet eighty percent of the time.[8] His leg continued to break down and ulcerate at periodic intervals. He was laid off on February 16, 1976.[9] A claim was brought for compensation against Commercial Union for recurrence of the original injury, and against the employer, a self-insurer after November 11, 1965, for aggravation.[10] After a hearing, the single member found that he was dis-

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§ 6.1. [1] 1981 Mass. App. Ct. Adv. Sh. 1244, 421 N.E.2d 1266, *review granted*, 1981 Mass. Adv. Sh. 1909, *affirmed*, 385 Mass. 590, 433 N.E.2d 869 (1982).

[2] 354 Mass. 594, 238 N.E.2d 864 (1968). For a discussion of Begin's Case *see* Locke, *Workmen's Compensation Law*, 1968 ANN. SURV. MASS. LAW, § 16.5, at 413, 415.

[3] 378 Mass. 14, 389 N.E.2d 83 (1979). For a discussion of Albanese's Case *see* Locke, *Workmen's Compensation Law*, 1979 ANN. SURV. MASS. LAW, § 6.1, at 179-86.

[4] 1981 Mass. App. Ct. Adv. Sh. at 1249, 421 N.E.2d at 1269.

[5] *Id.* at 1245, 421 N.E.2d at 1267.

[6] *Id.* at 1246, 421 N.E.2d at 1267.

[7] *Id.*

[8] *Id.* at 1245-46, 421 N.E.2d at 1267.

[9] *Id.* at 1246, 421 N.E.2d at 1267.

[10] *Id.* at 1244, 421 N.E.2d at 1267.

abled for any work requiring standing and walking, and that his condition, originating in the 1964 injury, was aggravated by his standing and walking on concrete floors from 1966 to 1976.[11] Accordingly, compensation was awarded for a second injury to be paid by the self-insurer.[12] The reviewing board affirmed the decision of the single member, but in the superior court Chief Judge Lynch ruled that the employee had not sustained a personal injury within the meaning of chapter 152 during the period the self-insurer was on the risk, and ordered the compensation be paid by Commercial Union.[13] This judgment was affirmed on appeal.[14]

The case, on its face, presented a problem in the application of the "successive insurer rule." Where there are successive insurers and/or successive injuries, only one insurer is chargeable for the payment of compensation for a single period of disability. "Where an employee has suffered two or more compensable injuries, the insurer who is covering the risk at the time of the most recent injury bearing a causal relation to the disability must pay the entire compensation."[15] This rule was laid down in its present form in *Evans' Case*[16] and strongly restated in *Trombetta's Case*.[17] The claimant often has an interest in showing that the disability resulted from the more recent injury, because the date of injury controls the compensation benefit and the latter date usually results in higher benefits. Since it is well established that an employer takes an employee "as is," and that an aggravation of a prior injury or disease to the point of disablement or death is as much a personal injury as if the work had been the sole cause,[18] the claimant in *Zerofski's Case* sought to show that his disability after February 16, 1976, was the result of aggravation resulting from his work. This required showing not only that his disability was, in part at least, the result of his *work* after his return in 1966, but also that it was a *personal injury* arising out of and in the course of his work, as the term "personal injury" was construed. But he was unable to point to any specific incident or series of specific stressful incidents.[19] All he could show was the years of standing and walking on concrete floors. Thus, he ran afoul of the "wear and tear doctrine," which was a judicial gloss on the definition of "personal injury."

In a series of cases, beginning in 1917, the Supreme Judicial Court had held that "the gradual breaking down or degeneration of tissues caused by

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[11] *Id.* at 1245, 421 N.E.2d at 1267.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] LOCKE, WORKMEN'S COMPENSATION, 29 MASS. PRACTICE SERIES, § 178 (1981). *See also* Locke, *Workmen's Compensation Law*, 1976 ANN. SURV. MASS. LAW, § 3.1, at 50-65.

[16] 299 Mass. 435, 438, 13 N.E.2d 27, 29 (1938).

[17] 1 Mass. App. 102, 104, 294 N.E.2d 484, 485 (1973).

[18] LOCKE, *supra* note 15, at § 173 n.24.

[19] 1981 Mass. App. Ct. Adv. Sh. at 1248, 421 N.E.2d at 1268.

long and laborious work was not the result of a personal injury within the meaning of the Act."[20] Additionally, in *Spalla's Case*[21] the Court held that "[b]odily wear and tear resulting from a long period of hard work is not a compensable injury even if it diminishes capacity to earn."[22] The doctrine had fallen into disuse after 1946, and had been overgrown by the broadened interpretation of injury and disease in that era. Previously, in *Mills' Case*,[23] the Court had held that a series of strains from heavy lifting over a period of months resulting in a hernia constituted a personal injury. In *Brzozowski's Case*,[24] an award for a heart attack caused by usual work amid abnormal temperatures was upheld, the Court stating that the line between wear and tear in cases "where an employee suffers a strain in the performance of his work may at times be difficult to ascertain, but it exists nonetheless."[25] Finally, in *Trombetta's Case*,[26] an intervertebral disc condition aggravated during four months' work lifting bricks and cement blocks, was considered a personal injury warranting an award against a second insurer, even though the cause of the condition could not be pinpointed to any one event. These and other cases, seemed to warrant the conclusion that the wear and tear doctrine was "eclipsed."[27]

Nevertheless, the doctrine was given new impetus in a series of cases involving mental illness. In *Begin's Case*,[28] mental breakdown from months of observing the antics of patients in a penal institution for the criminally insane was held not a compensable personal injury, but rather the result of wear and tear. Compensation was allowed for a mental illness resulting from psychic stress in *Albanese's Case*,[29] only on a showing that it resulted from a series of specific stressful incidents. Although invited to do so, the Supreme Judicial Court there declined to overrule *Begin's Case* or otherwise restrict the scope of the revitalized wear and tear doctrine. This left the Appeals Court free to extend it from the limited area of mental illness to the field of physical injury.

In its ruling, the Appeals Court noted that the Board made no finding that the aggravation was attributable to any specific instance of strain or identifiable series of strains.[30] The court felt the case was "remarkably simi-

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[20] Maggelet's Case, 228 Mass. 57, 61, 116 N.E. 972, 974 (1917).
[21] 320 Mass. 416, 69 N.E.2d 665 (1946).
[22] *Id.* at 418, 69 N.E.2d at 666.
[23] 258 Mass. 475, 155 N.E. 423 (1927).
[24] 328 Mass. 113, 102 N.E.2d 399 (1951).
[25] *Id.* at 116, 102 N.E.2d at 400.
[26] 1 Mass. App. 102, 294 N.E.2d 484 (1973).
[27] LOCKE, *supra* note 15, at § 175.
[28] 354 Mass. 594, 238 N.E.2d 864 (1968).
[29] 378 Mass. 14, 389 N.E.2d 83 (1979).
[30] 1081 Mass. App. Ct. Adv. Sh. at 1248, 421 N.E.2d at 1268.

lar" to *Burns' Case*,[31] where compensation was denied for a heart weakened by disease, the proximate cause of incapacity being travel as a night watchman seven nights a week, going up and down stairs and halls, thirteen to fifteen miles.[32] The *Zerofski* court concluded, "While the concept of wear and tear has been narrowed since it was enunciated in *Maggelet's Case* it has not been overruled, and its continuing vitality was recently recognized in *Albanese's Case*. . . ."[33]

The present author has with boring insistence expounded the inappropriateness of the wear and tear doctrine in a state which recognizes the concept of aggravation of pre-existing injury, and has liberally interpreted cases of occupational disease.[34] This discussion was referred to by the court in footnote 4, where it said, "See Locke, *Workmen's Compensation*, § 175 (1981) which contains an excellent discussion of the "wear and tear" principle and suggests that it should be overruled. Until such time as that might occur by either legislative or judicial action . . . we are bound by the principle."[35]

The decision of the Appeals Court was accepted by the Supreme Judicial Court for further appellate review.[36] Its review led to a full re-examination of the key phrase in the compensation act, "personal injury arising out of and in the course of employment."[37] The decision by Chief Justice Hennessey will be analyzed in the 1982 Annual Survey of Massachusetts Law. However, its holding deserves to be recorded here, as the current authoritative restatement of the "range of harm" covered by the Massachusetts Workmen's Compensation Act. "[T]he harm must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must, in the sense we have described, be identified with the employment."[38]

The *Zerofski* decisions will have an immediate incidental impact on the range of compensable consequences of an industrial injury.[39] Insurers often

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[31] 266 Mass. 516, 165 N.E. 670 (1929).

[32] 1981 Mass. App. Ct. Adv. Sh. 1248, 421 N.E.2d at 1268.

[33] *Id.* at 1248-49, 421 N.E.2d at 1269.

[34] *See* LOCKE, *supra* note 15, §§ 175, 196 at §§ 222-23. *See also* Locke, *Workmen's Compensation Law*, 1968 ANN. SURV. MASS. LAW, § 16.5, at 413, 415; Locke, *Workmen's Compensation Law*, 1979 ANN. SURV. MASS. LAW, § 6.1, at 179-86.

[35] 1981 Mass. App. Ct. Adv. Sh. at 1248 n.4, 421 N.E.2d at 1269 (citing Burke v. Toothaker, 1 Mass. App. Ct. 234, 239 (1973)).

[36] 1981 Mass. Adv. Sh. 1909.

[37] G.L. c. 152, § 26.

[38] 385 Mass. 590, 594-95, 433 N.E.2d 869, 872 (1982) (footnotes omitted). The impact of this case will be modified by Don Francisco's Case, 14 Mass. App. Ct. 456, 440 N.E.2d 525, which construed G.L. c. 152, § 35B, and will be discussed in the 1982 ANN. SURV. MASS. LAW.

[39] LOCKE, *supra* note 15, §§ 222, 224.

contend that the chain of causation is broken where the incapacity was worsened by everyday activities at home or play. If such ordinary activities do not trigger a compensable injury when they occur on the job, they should not bar one when they occur off the job.

§ 6.2. Policemen's Rights Under Chapter 41 Sections 100, 111F Not Exclusive Remedy, As Compared to Employee's Rights Under Chapter 152 — Third Party Impleader of Fellow Police Officer Not Barred. In *Liberty Mutual Ins. Co. v. Westerlind*,[1] the Supreme Judicial Court held that a third party tortfeasor has no right to receive compensation from a covered employer whose negligence contributed to the employee's injury. The liability of an employer, or a co-employee, for contribution or indemnification to a third party where a covered employee brings an action at law for personal injuries, has been much discussed.[2] In *Foley v. Kibrick*,[3] the Appeals Court of Massachusetts refused to extend this doctrine to Boston policemen on the ground that there was no similar exclusive remedy clause in the provisions of chapter 41 applicable to lost pay and medical expense for policemen or firemen injured in the line of duty.

The plaintiff was a Boston police officer who brought a negligence action against the defendant for personal injury sustained when the police cruiser in which the plaintiff was a passenger collided with a motor vehicle operated by the defendant.[4] The defendant brought a third party complaint against the operator of the police cruiser at the time of the accident, claiming that the plaintiff's injuries[5] were caused by the driver's negligence and claiming a right of contribution under chapter 231B, section 1(a) toward part or all of the judgment.[6] On appeal, the judgments below were affirmed.[7] In this writing, we will confine ourselves to the issues raised by the third party defendant police officer.

His argument on appeal was to this effect: since he and the plaintiff were in the common employment of the City of Boston, and the City was obliged to pay the plaintiff police officer pursuant to chapter 41 sections 100 and 111F, for leave with full pay and for hospital and medical expenses, the plaintiff has received what is equivalent to "workmen's compensation" from the City and has, therefore, given up his rights to recover damages caused by the negligent act of a fellow employee.[8] Citing the *Westerlind*

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§ 6.2. [1] 374 Mass. 524, 373 N.E.2d 957 (1978).

[2] *See* Locke, *Workmen's Compensation Law*, 1978 ANN. SURV. MASS. LAW, § 4.3 at 90-104; LOCKE, WORKMEN'S COMPENSATION, 29 MASS. PRACTICE SERIES, § 673 (1981).

[3] 1981 Mass. App. Ct. Adv. Sh. 1549, 425 N.E.2d 376.

[4] *Id.* at 1550, 425 N.E.2d at 377.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 1555, 425 N.E.2d at 380.

[8] *Id.* at 1553, 425 N.E.2d at 379.

case, he argued further that there was no express or implied contract of indemnity or special relation between the City and the defendant giving rise to an obligation to indemnify.[9] He claimed, therefore, that the defendant cannot derivatively enforce the third party defendant's liability against the plaintiff.[10] "In essence, [the third party defendant] urges us to read into G.L. c. 41, §§ 100, 100A, 100J, and 111A-L . . . the express waivers and immunities from liability extended in G.L. c. 152, the Workmen's Compensation Act, and cases interpreting that Act."[11] This the court refused to do. Although the Appeals Court and the Supreme Judicial Court have looked to the Workmen's Compensation Act for guidance in interpreting the meanings of various provisions of chapter 41, there are no provisions in chapter 41 for the "express waivers and immunities extended in G.L. c. 152."[12] The Workmen's Compensation Act provides much more complete coverage and benefits than the limited payments of chapter 41. The court reasoned that "[t]he abrogation of an employee's common law rights against an employer is a specific statutory quid pro quo created by G.L. c. 152, § 24. Since no such comprehensive and exclusive recovery is provided for firefighters or police officers by G.L. c. 41 and there is no analogous provision to G.L. c. 152, § 24 in G.L. c. 41 we are constrained to conclude that a fellow employee under G.L. c. 41 is not immune from tort liability. Conflicting policy considerations lie behind the waivers and immunities extended by G.L. c. 152. It is not our place to extend such immunity where the legislature has chosen not to do so."[13]

§ 6.3. Third Party Suits; Wrongful Death Action Brought By Adult Children, Not Dependents Under the Act — Not Binding Election on Widow and Dependent Children to Claim Compensation for Same Injury. The problem in this case is not likely to recur, since it arose prior to amendments abolishing the need for election between tort remedies and workmen's compensation.[1] However, commentators have long been interested in the conflicting right to bring a wrongful death action between adult children, with rights under chapter 229 but not under chapter 152, and a dependent spouse and minor dependent children, who also have rights under chapter 152.[2]

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[9] *Id.* at 1553-54, 425 N.E.2d at 379.

[10] *Id.* at 1554, 425 N.E.2d at 379.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1555, 425 N.E.2d at 380.

§ 6.3. [1] *See* G.L. c. 152, § 15, as appearing in St. 1971, c. 888, § 1; LOCKE, WORKMEN'S COMPENSATION, 29 MASS. PRACTICE SERIES, § 668 (1981).

[2] *See* Reidy v. Old Colony Gas Co., 315 Mass. 631, 633-35, 53 N.E.2d 707, 709-10 (1944); LOCKE, *supra* note 1, § 669, pp. 815-16.

In *Gonzales' Case*,[3] a native of Puerto Rico was killed in an industrial accident in Massachusetts on August 25, 1969.[4] He was survived by two adult children from his first marriage, living in Massachusetts, and by six minor children and their mother, the claimant-widow, who was then living in Puerto Rico.[5] The adult children filed a petition for administration in Massachusetts, to which the widow assented, and commenced a third party action there, recovering sums being held by the administrators subject to a statutory or common law trust for the benefit of the claimant or of the insurer.[6] The widow claimed compensation subsequent to the commencement of the third party action, and introduced evidence in the compensation claim that she had never authorized the third party suit, nor had she elected to proceed at law rather than enforce her rights under the Compensation Act.[7] In the compensation claim the single member and the reviewing board found that an election had been made, but a judge of the superior court reversed the reviewing board's decision.[8] The Appeals Court, in rescript, affirmed the judgment.[9]

The court held that there was no evidence sufficient to warrant a conclusion that the widow on her behalf and on behalf of her minor children had ever joined in the third party suit or indicated their support for an election, sufficient to forego the right to claim compensation.[10] In reaching this conclusion, the court was influenced not only by the lack of evidence indicating the widow's participation in the decision to bring the third party suit, but also with authority disfavoring the election device as "foreign to the spirit and purpose of compensation legislation."[11] The court also referred to the subsequent amendment to section 15, abolishing elections.[12]

The court sustained the judge's "power to fashion a judgment which credited the insurer's responsibility with the funds received for the claimant by the administrators. This credit effectively eliminated any substantial chance of prejudice to the insurer."[13] It is not clear from the rescript whether the credit was limited to funds received on behalf of the compensation beneficiary, or included all sums received by way of settlement, including those received on behalf of the adult children not beneficiaries under the Act. In *Eisner v. Hertz Corp.*,[14] it was held that the insurer's right to reim-

[3] 1981 Mass. App. Ct. Adv. Sh. 1082, 421 N.E.2d 468 (rescript opinion).
[4] *Id.* at 1082, 421 N.E.2d at 468.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 1083, 421 N.E.2d at 469.
[11] *Id.* (citing 2A LARSON, WORKMEN'S COMPENSATION, § 73.30 (1976)).
[12] *Id.*
[13] *Id.*
[14] 1980 Mass. Adv. Sh. 1667, 407 N.E.2d 1286.

bursement will be limited to the share of the third party recovery under the wrongful death act, attributable to the compensation beneficiary, where some beneficiaries are adult children with no rights under the compensation act. Presumably the rule of the *Eisner* case was followed.

§ 6.4. Wife's Third Party Suit for Loss of Consortium — Husband's Comparative Negligence — Defendant's Counterclaim Against Husband in Wife's Suit. A wife brought a count for her loss of consortium, together with her husband's count for damages for injuries suffered when the defendant drove a truck into an electric cable that the employee and a two-man crew were installing.[1] The jury returned verdicts for both plaintiffs, found that the employee was 37.5% negligent and reduced the verdict in favor of the employee accordingly.[2] The jury also returned a verdict for the wife for $73,125.[3] After the trial, the wife moved to amend the verdict on her claim for loss of consortium contending that the jury arrived at the $73,125 by determining that she was entitled to $117,000 for loss of consortium and then by reducing that amount by 37.5%, the degree of her husband's negligence.[4] The judge accepted this calculation, and it was not controverted in the appeal.[5] However, the judge declined to amend the jury's verdict on the consortium claim.[6]

In *Feltch v. General Rental Co.*,[7] the Supreme Judicial Court faced the issue whether a plaintiff's recovery in a loss of consortium should be reduced by the proportion of negligence attributable to the plaintiff's spouse.[8] The Court ruled that the contributory negligence of the employee, if any, should have no bearing upon the verdict of the jury as it relates to the wife's claim for loss of consortium.[9]

The Court stated that the underlying issue is whether a claim for loss of consortium should be viewed as a derivative or an independent claim.[10] After analysis, the Court concluded that a claim for loss of consortium is independent of the damage claim of the injured spouse.[11] "We think that the appropriate analysis is to examine the nature of the claim, not the source of the injuries."[12]

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§ 6.4. [1] Feltch v. General Rental Co., 1981 Mass. Adv. Sh. 1189, 1190, 421 N.E.2d 67, 69.
[2] *Id.* at 1190, 421 N.E.2d at 69.
[3] *Id.* at 1191, 421 N.E.2d at 69.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] 1981 Mass. Adv. Sh. 1189, 421 N.E.2d 67.
[8] The issue was left open in Ferriter v. Daniel O'Connell's Sons, 1980 Mass. Adv. Sh. 2075, 2097 n.29, 413 N.E.2d 690, 703 n.29.
[9] 1981 Mass. Adv. Sh. at 1191, 421 N.E.2d at 70.
[10] *Id.* at 1192, 421 N.E.2d at 70.
[11] *Id.* at 1193, 421 N.E.2d at 70.
[12] *Id.* at 1194, 421 N.E.2d at 71.

The Court then noted that to reduce the wife's claim for loss of consortium by the amount the employee was found to be negligent constitutes an imputation of his negligence to the wife.[13] Generally, misconduct cannot be imputed from one family member to another, and the Court found no reason to follow a different policy with respect to consortium.[14] This analysis is confirmed by the language of the Massachusetts Comparative Negligence Statute, Chapter 231, Section 85. That statute provides that in determining by what amount a negligent plaintiff's damages are to be diminished, "the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought." Since the wife was not found to be negligent, and the statute does not indicate that her recovery may be reduced by the degree of her husband's negligence, there is no warrant in legislative policy or in the statute for reducing her damages by her husband's negligence.[15]

The defendants sought a counterclaim against the negligent spouse in order to reduce the defendant's liability on the loss of consortium award by the degree of the injured plaintiff's negligence.[16] The Court declined to impute the negligence of the injured spouse to the other spouse, as just stated, and therefore would not sanction a procedure that would do so indirectly.[17] Furthermore, the Court pointed out that the defendant's suggested procedure of permitting a counterclaim allows the plaintiff with a consortium claim to sue the other spouse for injuries which arise out of the "privileged or consensual aspects of married life,"[18] since the "underlying purpose of a loss of consortium action is to compensate for the loss of the companionship, affection, and sexual enjoyment of one's spouse."[19]

No analysis is offered of this case, as the case is primarily one of tort law, but all compensation lawyers should be familiar with it.

§ 6.5. Evidence — Employer's First Report, Whether Admissible to Prove Employee's Prior Inconsistent Statements — Reference to Receipt of Workmen's Compensation Payments as Prejudicial in Third Party Suits. In a third party suit, *Wingate* v. *Emery Air Freight Corp.*,[1] the defendant was allowed to introduce in evidence the employer's first report of injury to the Industrial Accident Board and to the insurer under chapter 152, section 19.[2]

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 1195, 421 N.E.2d at 71.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 1195, 421 N.E.2d at 72 (quoting Brown v. Brown, 1980 Mass. Adv. Sh. 1779, 1781, 409 N.E.2d 717, 719).

[19] *Id.* (quoting Agis v. Howard Johnson Co., 371 Mass. 140, 146, 355 N.E.2d 315, 320 (1976)).

§ 6.5. [1] 1981 Mass. App. Ct. Adv. Sh. 680, 423 N.E.2d 793.

[2] *See* LOCKE, WORKMEN'S COMPENSATION, 29 MASS. PRACTICE SERIES, § 413 (1981).

The employer's report was introduced for the sole purpose of impeaching the plaintiff's credibility.[3] On voir dire, the trial judge found that the first report of injury was a record kept in good faith by the insurer before the actions were commenced, and was therefore admissible as a business record under chapter 233, section 78.[4] The Appeals Court, in a rescript opinion, reversed the judgment.[5]

They reasoned that to impeach the employee's testimony at trial by proof of a prior inconsistent statement, there should be proof that he made or took responsibility for such a prior statement.[6] The mere fact that the insurer has in its business records a first report of injury to it as the employer's workmen's compensation carrier does not in and of itself report, or purport to report, any statement by or attributed to the employee or for which he assumed responsibility.[7] In the absence of some such proof, the court concluded that the employer's first report of injury should have been excluded.[8] The court did not deem it necessary to consider whether the employer's first report of injury should have been excluded on the further ground that it improperly suggested to the jury that the injured employee had received workmen's compensation payments.[9] However, it cited a number of cases excluding references to workmen's compensation payments as prejudicial.[10]

§ 6.6. Claim for Compensation, When Award Permitted for an Injury Without Prior Filing — Illegal Discontinuance, Costs Under § 14, or Under § 12A. A claim for compensation is ordinarily a prerequisite for initiating a proceeding before the Industrial Accident Board. However, under the particular facts in *Corbosiero's Case*,[1] an award of compensation was upheld for an injury of April 2, 1970, even though the employee never filed a claim for that injury.

On May 5, 1969, the employee injured his neck, lower back, and left leg.[2] Compensation was paid on this injury, pursuant to an agreement approved

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[3] 1981 Mass. App. Ct. Adv. Sh. at 681, 423 N.E.2d at 793-94.

[4] *Id.* at 681, 423 N.E.2d at 794.

[5] *Id.* at 682, 423 N.E.2d at 795.

[6] *Id.* at 681-82, 423 N.E.2d at 794.

[7] *Id.* at 682, 423 N.E.2d at 794.

[8] *Id.* at 682, 423 N.E.2d at 795.

[9] *Id.*

[10] *Id. See* Torre v. Harris-Seybold Co., 1980 Mass. App. Ct. Adv. Sh. 887, 891-92, 404 N.E.2d 96, 102; Goldstein v. Gontarz, 364 Mass. 800, 807-10, 309 N.E.2d 196, 202-03 (1974); Benson v. Guyette, 350 Mass. 759, 759 (1965); Gerry v. Worcester Consol. St. Ry., 248 Mass. 559, 566-68, 143 N.E. 694, 696-97 (1924). *See also* West v. Molders Foundry Co., 342 Mass. 8, 9-10, 171 N.E.2d 860, 861 (1961).

§ 6.6. [1] 1981 Mass. App. Ct. Adv. Sh. 640, 417 N.E.2d 1229 (1981), *review denied*, 1981 Mass. Adv. Sh. 1214.

[2] *Id.* at 641, 417 N.E.2d at 1230.

by the board, until January 2, 1970.[3] The employee then returned to work until April 6, 1970.[4] On April 2, 1970, while at work the employee suffered an aggravation of his previous injury.[5] He informed the insurer of this incident by letter on April 8, 1970.[6] The insurer paid compensation for his absence from work thereafter, at the rate provided in the prior agreement, until June 28, 1971.[7] On that date, the insurer terminated compensation on its own initiative, notifying the board that it did so because of the board's failure to set the case for a conference for discontinuance of compensation payments based on an application of January 29, 1971.[8] At the hearing on the employee's request as to illegal discontinuance, and for resumption of compensation benefits, the single member found that the employee had suffered a new injury on April 2, 1970, and awarded compensation accordingly.[9] On appeal, the decision of the board was affirmed.[10]

Proceedings for compensation cannot ordinarily be maintained unless the statutory requirements for notice and claim have been made or satisfactorily excused. These provisions are found in sections 41, 42, 44, 49 of the Act.[11] It was early held in *Levangie's Case*,[12] that a claim for compensation was always a prerequisite for jurisdiction of the Industrial Accident Board. But under an amendment added by St. 1923, chapter 125, no claim is required where the employee seeks further compensation for recurrence of an injury for which compensation already has been paid.[13] The *Corbosiero* court noted that the insurer had paid benefits following April 2, apparently on the basis that the April 2 incident caused a recurrence of the disability resulting from the May, 1969 injury, rather than on the basis of a new injury. This was seen by the court as sufficient to overcome the absence of a formal claim for an injury of April 2, 1970, prior to a hearing, and to give the board jurisdiction to issue an award of compensation based on the April 2 injury.[14]

Apart from the problem of *Levangie's Case*, the court also had to face the problem presented by *Morse's Case*,[15] and *McHugh's Case*,[16] where vol-

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[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 642, 417 N.E.2d at 1231.
[10] *Id.* at 644, 417 N.E.2d at 1232.
[11] G.L. c. 152.
[12] 228 Mass. 213, 117 N.E. 200 (1917).
[13] G.L. c. 152, § 49; Sulham's Case, 337 Mass. 586, 150 N.E.2d 273 (1958).
[14] 1981 Mass. App. Ct. Adv. Sh. at 642-43, 417 N.E.2d at 1231.
[15] 345 Mass. 776, 189 N.E.2d 530 (1963).
[16] 1 Mass. App. 803, 294 N.E.2d 455 (1973).

untary payments were held not to be an admission of liability. The court sidestepped these cases with the statement, "[T]he decision to pay compensation was a 'recognition by the insurer that the employee ha[d] sustained an injury which arose out of and in the course of his employment'. . . ."[17] In this case the employee has not claimed that the insurer made an admission of liability, but merely that the insurer had recognized that a claim had been asserted.[18] The court further commented, "[s]uch recognition is particularly evident in this case because the only element of liability the insurer contested was incapacity."[19]

The employee is also excused from lateness of claim if the lateness is based upon reasonable cause. On this point, without specifically identifying it, the court commented that an "employee receiving benefits on disability resulting from an injury that may be either a recurrence of a previous injury or a new injury incurred in the service of the same employer, is unlikely to question the characterization of his injury made by the insurer."[20]

Finally, a claim for compensation shall not be held invalid or insufficient by reason of any inaccuracy in stating the *time*, place, cause or nature of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby.[21] In the instant case, it is clear that the insurer had investigated and knew of the nature and extent of the April, 1970 injury. In fact it was the insurer itself which raised the question of this injury, not the employee, hoping to take advantage of the jurisdictional issue implicit in the failure to file a claim for the later injury. The court ruled, relying on *Joyce's Case*,[22] that "[i]n these circumstances the insurer cannot complain that it was misled by the employee's claim for compensation even if that claim referred only to the May, 1969 injury."[23]

In *Joyce's Case*, the testimony of the employee under cross-examination in the first day of hearing revealed that there had been subsequent aggravations by later injuries at work for the same employer after the initial injury and prior to the commencement of the incapacity for which compensation was then sought.[24] At the commencement of the second day of trial, claimant's counsel moved to amend the initial claim by including the other dates which had been shown in the testimony on the first day of hearing.[25] The

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[17] 1981 Mass. App. Ct. Adv. Sh. at 642, 417 N.E.2d at 1231 (*citing* Thayer's Case, 345 Mass. 36, 44, 185 N.E.2d 292, 297 (1962)).

[18] *Id.*, n.3.

[19] *Id.*

[20] *Id.* at 643, 417 N.E.2d at 1231. On delay excused for reasonable cause, *see* LOCKE, WORKMEN'S COMPENSATION, 29 MASS. PRACTICE SERIES (1981) § 448, especially n.64.

[21] G.L. c. 152, § 49.

[22] 350 Mass. 77, 213 N.E.2d 235 (1966).

[23] 1981 Mass. App. Ct. Adv. Sh. at 643, 417 N.E.2d at 1231.

[24] 350 Mass. at 79, 213 N.E.2d at 236.

[25] *Id.* at 80, 213 N.E.2d at 237.

single member reserved action on the motion, but in his decision awarded compensation, finding that the employee had sustained injuries on the subsequent dates, and admitted the motion, with the further finding that the insurer was not misled.[26] In its decision the Supreme Judicial Court stated "[t]here is force in the employee's contention that the first of these two sentences of § 49 is applicable and that an amendment of the claim, though advisable, was not required."[27] The single member, finding no prejudice, rightly granted the motion as an amendment rather than as a substitution of new claims.[28]

The decision of the Appeals Court in *Corbosiero's Case* should put an end to the technical defenses raised by insurers when testimony at a hearing reveals events which would support a later claim for aggravation of a preexisting condition. Insurers often will seek to suspend or terminate the existing proceedings to require the employee to file new claims and start all over again, with attendant delay. The decision in this case shows an alternate method of dealing with this problem, more in consonance with a liberal interpretation of the Act, and the injunction in section 5 of chapter 152 that proceedings under the Act should be as simple and summary as possible.

Yet the court also held that costs should not be assessed under section 14 for an illegal discontinuance,[29] a ruling which seems less supportable. The court stated that under its terms that section does not authorize an award of costs for an illegal discontinuance, but rather provides that costs are to be awarded if it is determined that a party has "brought, prosecuted, or defended" proceedings "without reasonable ground."[30] The court noted that the insurer defended its action in discontinuing compensation payments on the basis of medical evidence from which it could have been found that the employee's disability was not work related.[31] The court felt that this was a reasonable basis on which to defend against the employee's claim for compensation and that it was, therefore, error to award § 14 costs.[32]

This analysis overlooks the fact that the insurer's discontinuance of compensation was without authority either under the Act or the rules of the board. Mere impatience with the board's failure to assign the case for conference in due course certainly did not warrant the discontinuance on its own motion. The court found such discontinuance to be illegal.[33] The proceedings for further compensation were initiated because of the illegality of the insurer's action in discontinuing compensation. A defense against a

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[26] *Id.*
[27] *Id.* at 81, 213 N.E.2d at 237.
[28] *Id.*
[29] 1981 Mass. App. Ct. Adv. Sh. at 644, 417 N.E.2d at 1232.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 643, 417 N.E.2d at 1232.

violation of statutory procedure by citing conflicting medical reports, seems clearly a defense "without reasonable ground." The action of the court holding otherwise deprives the Industrial Accident Board of a powerful weapon with which to discipline insurers and force them to comply with the provisions of the Act. In a period of budgetary stringency, in which the Board's ability to act with due promptness is hampered by shortness of staff and unavailability of courtrooms, the court's action encourages insurers to take unilateral action, in violation of the statute.

The court regarded the nature of the hearing as one primarily concerning the continuance of compensation.[34] That being so, the court felt that reasonable costs could be awarded under chapter 152, section 12A, as appearing in St. 1972 chapter 742, section 6,[35] and recommitted the case to the Industrial Accident Board for assessment of such costs.[36] Costs under § 12A, however, are allowable only if the proceeding is brought by an insurer. Although the statement of proceedings in the decision is unclear, it is apparent that the court regarded the case as one brought by an insurer, since it was initiated by the petition for discontinuance.

In *Rival's Case*,[37] an employee whose claim for partial compensation had been denied by the single member, reviewing board, and Superior Court, prevailed before the Appeals Court, and the Supreme Judicial Court denied the insurer's application for further appellate review.[38] The employee thereupon sought awards of counsel fees in the Appeals Court under chapter 152, sections 10, 11A and 12A.[39] The motion was denied with the statement, "[t]here being no authorization in the applicable statutory provisions for an award of counsel fees in a case in which the claimant did not prevail in workmen's compensation proceedings before the single member, the reviewing board, and the Superior Court, and in which the claimant, and not the insurer, took the appeal to the Superior Court, it is hereby ordered that the said motion be and hereby is denied."[40] On further appeal, the Supreme Judicial Court affirmed the order denying the employee's motion.[41] The Court carefully analyzed the provisions of each of the cited

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[34] *Id.* at 644, 417 N.E.2d at 1232.

[35] G.L. c. 152, § 12A provides, in part:

> . . . in any proceeding brought by an insurer as to the continuance of compensation being paid under the chapter, there shall be awarded an amount sufficient to compensate the employee for the reasonable costs of such hearing or proceeding, including reasonable counsel fees, provided the employee prevails at such hearing or proceedings.

[36] 1981 Mass. App. Ct. Adv. Sh. at 644, 417 N.E.2d at 1232.

[37] 1981 Mass. Adv. Sh. 712, 418 N.E.2d 340 (1981).

[38] 8 Mass. App. Ct. 66, 391 N.E.2d 932 (1979), *review denied*, 379 Mass. 925 (1979). For a discussion of *Rival's Case see* Locke, *Workmen's Compensation Law*, 1979 ANN. SURV. MASS. LAW § 6.4, at 194-97.

[39] 1981 Mass. Adv. Sh. at 714-15, 418 N.E.2d at 342.

[40] *Id.* at 713 n.1, 418 N.E.2d at 341 n.1.

[41] *Id.* at 713, 418 N.E.2d at 341.

sections applicable to costs, and concluded that in each instance costs were allowable only where the claimant prevailed or the request was made by the insurer.[42] The Court felt that the legislative intent tends to discourage parties from seeking judicial review of a board decision.[43] The employee who appeals a decision adverse to him obtains no award of counsel fees, even if he prevails on appeal.[44] An insurer (or self-insurer) will be obliged to pay an employee's counsel fees if the insurer appeals and loses.[45] The Court further stated that "[a]lthough the statutory scheme is not without reason, it does mean that an employee who persists against adversity before the board and who ultimately, after considerable expense, prevails in court, obtains no award of counsel fees (*see* L. Locke, Workmen's Compensation, § 641 at 758 [1968]), whereas an employee who is fortunate enough to win early in his contest with the insurer and who preserves his success on the insurer's appeal will be awarded counsel fees."[46] The Court in several other sentences seems to be bringing the matter strongly to the attention of the legislature that there is a need for amendment of this section to prevent the injustice found in this case, in which counsel's persistence "leading to an ultimate success on an issue affecting numerous similarly situated claimants" be rewarded.[47]

It seems to this author that the Court's decision is unduly technical. If technical arguments are needed to overcome the construction taken by the court, it could be argued that the ultimate decision in the employee's favor requires entry of new judgments at least in the Superior Court, on rescript from the Supreme Judicial Court or Appeals Court as the case may be. Then, on the basis of such a judgment after rescript, it could be held that the employee had indeed prevailed at that level. However, the route of statutory amendment seemed preferable to further argument over the interpretation of the statute which on its face at least is unjust.

§ 6.7. Enforcement of Decision of Single Member in Superior Court, Despite Claim for Review — Attorney's Fees, Appeal. By an amendment to section 8 of the Workers' Compensation Act,[1] the decision of a single member is enforceable in the Superior Court under § 11, even if a claim for review has been filed.[2] This opportunity to enforce the single member's decision, pending review, is not frequently utilized by prevailing claimants'

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[42] *Id.* at 715-16, 418 N.E.2d at 342-43.

[43] *Id.* at 716, 418 N.E.2d at 342.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 717, 418 N.E.2d at 343.

§ 6.7. [1] G.L. c. 152, § 8, as amended by St. 1972, c. 742, § 2.

[2] This change was noted in LOCKE, WORKMEN'S COMPENSATION, 29 MASS. PRACTICE SERIES, (1981), § 536 n.39.

counsel. The Appeals Court in *Kintner's Case*,[3] recognized the impact of the amendment, upholding, without comment, the superior court's order of compliance in such a case.

The claimant had prevailed before the single member; the employer/self-insurer sought review.[4] Before the case was heard by the reviewing board, the employee filed a certified copy of the single member's award with the superior court, seeking judicial enforcement.[5] The self-insurer appealed.[6]

The court, recognizing *Assuncao's Case*,[7] noted that "the Town concedes, properly, that the judgment is presently unappealable insofar as it directs compliance with the Order of the single member; . . ."[8] In other words, as the underlying decision of the single member was pending on review, the superior court judgment was essentially interlocutory and hence not subject to appeal.

The Town, however, urged the Appeals Court to consider the validity of an award of attorney's fees, of $300.[9] The Appeals Court declined to do so, preferring to let this matter come up after the decision of the reviewing board. ". . . [T]he Town may obtain review of the counsel-fee award by taking an appeal from the decision of the Board, even if that decision be in its favor."[10] The court reasoned that by deciding the appeal was premature, interlocutory appeals would be discouraged and appellate review would not be, at least in these cases, conducted on "a piecemeal basis."[11] The court noted that a different result would be proper only where the superior court's order was not subject to review by other means.[12]

In both halves of the decision, the court recognized the possibility that the decision being enforced might be reversed on review. Yet this possibility did not make the court hesitate to leave the judgment undisturbed. In view of often significant delays between the decision of the single member and the decision of the reviewing board, it is incumbent upon claimant's counsel to seek enforcement in the superior court of awards by the single member, even if a claim for review has been filed.

§ 6.8. Procedure — Impartial Physician's Report — Discretion to Exclude Late-Filed Deposition. Under chapter 152, section 9, "the division or any member thereof may appoint a duly qualified impartial physician to

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[3] 1981 Mass. App. Ct. Adv. Sh. 99, 414 N.E.2d 1022 (rescript opinion).
[4] *Id.* at 99-100, 414 N.E.2d at 1022.
[5] *Id.* at 100, 414 N.E.2d at 1022.
[6] *Id.*
[7] 372 Mass. 6, 359 N.E.2d 1304 (1977).
[8] 1981 Mass. Adv. Sh. at 100, 414 N.E.2d at 1022.
[9] *Id.*
[10] *Id.* at 100, 414 N.E.2d at 1023.
[11] *Id.*
[12] *Id.*

examine the injured employee and to report . . . The report of the physician shall be admissible as evidence in any proceeding before the division or a member thereof; provided that the employee and the insurer have seasonably been furnished with copies thereof." Under I.A.B. Rule IV, 8, "The report of the impartial physician made under § 9 of the chapter shall be accepted by the Board member as evidence in the case." In *Monoli's Case*,[1] following a conference under section 7, the single member ordered an impartial physician to examine the employee.[2] He considered the report and denied the request for compensation.[3] On the employee's request, as a party aggrieved, for a hearing on the merits before a different single member, no mention was made to the new single member of the impartial report, and it was not listed among the exhibits considered.[4] The member denied the employee's claim, and on review, the employee moved that the impartial report be considered part of the evidence.[5] The reviewing board in its discretion declined to do so.[6] On the employee's appeal, contending that the impartial report was either automatically a part of the record or that the reviewing board was obliged as a matter of law to include it in the evidence of the case, the Appeals Court upheld the action of the reviewing board.[7] The court held the party intending to rely on the impartial physician report had the burden to introduce the report formally or, at the very least, alert the member hearing the case on the merits to the existence of the report and its contents.[8] If the existence of the report is made known to the single member, it is admissible as evidence.[9] If the report is not offered, the single member has an option either to ignore the report or to consider it.[10] If he does consider it, he must advise the parties so that they may be provided with ample opportunity to rebut what is in the report.[11] The Appeals Court held in this case that the reviewing board was not "bound to expand the record" to include the impartial report.[12]

In the hearing before the single member on the merits, she gave the parties sixty days to take medical depositions.[13] The employee's medical deposition was filed six months late, after the single member had denied the

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§ 6.8. [1] 1981 Mass. App. Ct. Adv. Sh. 1341, 422 N.E.2d 1373.
[2] *Id.* at 1342, 422 N.E.2d at 1374.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 1342, 422 N.E.2d at 1374-75.
[6] *Id.* at 1342, 422 N.E.2d at 1375.
[7] *Id.*
[8] *Id.* at 1343, 422 N.E.2d at 1375.
[9] *Id.* at 1343-44, 422 N.E.2d at 1375.
[10] *Id.*
[11] *Id.*, relying on Benham's Case, 356 Mass. 196, 248 N.E.2d 507 (1969).
[12] *Id.* at 1344, 422 N.E.2d at 1376.
[13] *Id.* at 1342, 422 N.E.2d at 1374.

employee's claim.[14] At the review level, the employee moved to have the deposition included in the expanded record.[15] Again the reviewing board denied the motion.[16] This denial was held within the discretion of the reviewing board.[17] The court noted that a single member may set a time limit for the taking of a medical deposition after the hearing.[18] Here the single member gave a reasonable deadline for the filing of the medical deposition, and was under no requirement to warn a party of impending deadline.[19]

§ 6.9. Legislative Amendments. In a prior *Survey* year, the effects of chapter 474 of the Acts of 1976, were discussed.[1] That chapter provided that while an employee is totally or partially incapacitated under sections 34, 34A or 35 he shall be paid a weekly compensation equal to two-thirds of his average weekly wage but, for cases arising after October 1, 1978, not more than 100% of the average weekly wage in the Commonwealth as determined by the Division of Employment Security. In accordance with this provision, the maximum under section 34 of the Act for temporary total disability for the year beginning October 1, 1981 was set at $269.93 per week. This is also the maximum permitted under section 35 for partial incapacity and § 34A for total incapacity. Chapter 474 which had set the maximum for all benefits under sections 34 and 35 at $45,000 was amended by St. 1981 c. 572 so that the total amount under sections 34 and 35 is not to "exceed the average weekly wage in the Commonwealth in effect at the time of the injury multiplied by 250, said average weekly wage being determined according to the provision of said sub-section (a) and promulgated by the Director of the Division of Employment Security on or before the October 1st prior to the date of injury; . . ." Applying the provision to the maximum of $269.93, the maximum for injuries from October 1, 1981 to September 30, 1982, was $67,482.50. The establishment of a flexible aggregate maximum completes the legislative work initiated by chapter 474, making it unnecessary for the legislature to amend the compensation benefit provisions on an annual basis to keep them current.

In another significant provision of chapter 572, section 36 was amended to bring the benefits for specific compensation more in line with current economic conditions. Reference must be made to this statute for the amounts to be allowed for individual specific losses.

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[14] *Id.* at 1342, 422 N.E.2d at 1375.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1344, 422 N.E.2d at 1376.

[18] *Id.*, relying on Tassinari's Case, 1980 Mass. App. Adv. Sh. 911, 403 N.E.2d 1193.

[19] See Trani's Case, 4 Mass. App. 857, 357 N.E.2d 339 (1976).

§ 6.9. [1] Locke, *Workmen's Compensation Law*, 1978 ANN. SURV. MASS. LAW § 4.7, at 112-114.

However, the legislature in 1981 was unwilling to amend the benefit for the surviving spouse of a deceased employee, which has remained at $110 weekly since chapter 461, of the Acts of 1978. The disparity between the benefit maximum for the injured employee, $269.93, and the paltry $110 allowable to the surviving spouse is notorious.[2]

Furthermore, the legislature again was unwilling to enact a cost of living adjustment. This failure has energized disabled workers throughout Massachusetts and the State Labor Council (AFL-CIO) to pressure the General Court to make revision of the Massachusetts Workmen's Compensation Law a matter of significant importance. Proposals are afloat for a legislative study and a major review of the Act may be forthcoming.

[2] *See* St. 1982, c. 663, which amends the benefit provisions for the surviving spouse and other dependents. This will be discussed in the 1982 ANN. SURV. MASS. LAW.