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Chapter 11: Workers' Compensation

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CHAPTER 11

Workers' Compensation

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§ 11.1. Personal injury; mental and emotional injury resulting from good faith personnel lay off and transfer; holding limited by 1985 amendment. During the 1985 *Survey* year,[1] in *Kelly's Case*,[2] the Supreme Judicial Court addressed the compensability of mental and emotional injury precipitated by the good faith lay off and transfer of an employee. The Court held that the injury arose out of and in the course of employment and, therefore, was compensable.[3] This holding, however, is superseded in part by the Workers' Compensation Reform Act of 1985.[4]

Helen Kelly had worked for a large Massachusetts employer for twenty-two years. On August 19, 1977, her supervisor called her aside and told her that the company was cutting back her department and that she would be laid off.[5] She began to cry and went home early. She remained upset over the weekend. On Monday, she was told that she could transfer to another department as a foreperson. Unhappy with the transfer, Kelly subsequently became depressed, developed chest pains, and was taken to a hospital. She remained out of work for six weeks, and returned to the new department on October 5, 1977. By October 24, 1977 she had developed further chest pains and was taken to a hospital, where she received psychiatric care.[6]

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§ 11.1. [1] This chapter covers Massachusetts Appeals Court and Supreme Judicial Court cases decided during both 1984 and 1985. No chapter on workers' compensation was prepared for the 1984 *Survey* because all attention was directed toward rewriting the workers' compensation act, Acts of 1985, c. 572, known as the Workers' Compensation Reform Act of 1985. A few noteworthy cases were decided in the Appeals Court in 1984, but they were heard on further appeal by the Supreme Judicial Court and are the main topic of this chapter.

[2] 394 Mass. 684, 477 N.E.2d 582 (1985).

[3] *Id.* at 684, 477 N.E.2d at 583.

[4] Acts of 1985, c. 572 § 67, amending G.L. c. 152, § 29.

[5] *Kelly*, 394 Mass. at 685, 477 N.E.2d at 583.

[6] *Id.*

Based on expert testimony, a single member of the industrial accident board found that she was totally disabled from August 22, 1977, and that "her depression was caused by her hearing that she was to be laid off from one department and transferred to another."[7] The single member concluded, however, that the employee had not suffered an injury arising out of and in the course of her employment and was not entitled to compensation.[8] The reviewing board affirmed. On the employee's appeal, the superior court reversed the holding of the board, and the Appeals Court affirmed this judgment.[9]

In affirming the Appeals Court, the Supreme Judicial Court first set out the standard of review for the appellate courts. The Court stated that the decision of the industrial accident board is to be upheld if warranted on the facts and is not to be reversed unless a different conclusion is required as a matter of law.[10] The Court concluded that, in this case, the law did require a different conclusion.[11]

Referring to holdings in several recent mental and emotional disability cases,[12] the Court stated that in none of those cases was it suggested that there was any different requirement for the compensability of mental injuries than for physical disabilities.[13] Because the single member and reviewing board had found that the claimant's disability was the result of her hearing that she was to be transferred to a different position, it was not in dispute that a work-related event had caused her total disability. Considering whether this particular stressful event could be considered to arise out of and in the course of employment, the Court held that the news of a good faith personnel transfer or lay off was a stress that arose out of and in the course of employment.[14] In reaching that result, the Court reiterated the following well-known standards in workers' compensation law:

(1) A disability arises out of and in the course of employment if it is

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[7] *Id.* at 685–86, 477 N.E.2d at 583.

[8] *Id.* at 686, 477 N.E.2d at 583.

[9] 17 Mass. App. Ct. 727, 462 N.E.2d 348 (1984).

[10] 394 Mass. at 686, 477 N.E.2d at 583 (citing Corraro's Case, 380 Mass. 357, 359, 403 N.E.2d 388, 390 (1980)).

[11] *Id.*

[12] Simmons v. Merchant Mut. Ins. Co., 394 Mass. 1007, 476 N.E.2d 221 (1985), rescript opinion; Foley v. Polaroid Corp., 381 Mass. 545, 550, 413 N.E.2d 711 (1980); Albanese's Case, 378 Mass. 14, 389 N.E.2d 83 (1979); Fitzgibbons's Case, 374 Mass. 633, 373 N.E.2d 1174 (1978). *See* Locke, *Workmen's Compensation Law* 29 MASS. PRACTICE SERIES, § 196 (2d ed. 1981); Locke, *Workmen's Compensation Law,* 1978 ANN. SURV. MASS. LAW, § 4.2, at 83 and Locke, *Workmen's Compensation Law*, 1979 ANN. SURV. MASS. LAW, § 6.1, at 179.

[13] *Kelly*, 394 Mass. at 686, 477 N.E.2d at 583.

[14] *Id.* at 687, 477 N.E.2d at 584.

"attributable to the nature, conditions, obligations or incidents of the employment; in other words, [to] employment looked at in any of its aspects."[15]

(2) A disability arises out of and in the course of employment even if it does not result from an unusual event or a risk greater than that experienced by the general public.[16]

(3) An employer takes an employee "'as is,' that is, with whatever peculiar vulnerabilities to injury the employee may have."[17]

Turning to the standard of proof required in mental and emotional disability cases, the majority rejected the argument that to be compensable, an emotional injury need be the result of an unusual, objectively stressful event.[18] It distinguished injuries involving the natural progression of an underlying condition, or bodily "wear and tear."[19] In such cases, a causal relationship between employment and disability can only be established by showing that the employment exposed the employee to an identifiable condition [of the employment] that is not common and necessary to all or a great many occupations.[20]

The Court also distinguished *Korsun's Case*,[21] in which compensation was denied an employee who had become emotionally disabled from fear that he might lose his job, when, on returning from his vacation, he found a whiskey bottle in his work bench. The majority considered *Korsun* to have been based on a lack of evidence of causal connection between the emotional disability and any work-related incident. The dissent quoted approvingly the language in *Korsun* that "apprehension over the prospect of losing one's job does not arise 'out of the nature, conditions, obliga-

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[15] *Id.* (quoting Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940)).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* This phrase refers to a line of cases in which the Court held that "the gradual breaking down or degeneration of tissues caused by long and laborious work is not the result of a personal injury within the meaning of the act." Maggelet's Case, 228 Mass. 57, 61, 116 N.E. 972, 974 (1917). Otherwise phrased, "bodily wear and tear resulting from a long period of hard work is not a compensable injury, even if it diminishes capacity to earn." Spalla's Case, 320 Mass. 416, 418, 69 N.E.2d 665, 666 (1946). The doctrine had fallen into disuse after 1950, but was reactivated for mental and emotional injury cases in Begin's Case, 354 Mass. 594, 238 N.E.2d 864 (1968), and for gradual-onset disease cases in Zerofski's Case, 385 Mass. 590, 433 N.E.2d 869 (1982). *See* Locke, Workmens' Compensation Law, 29 MASS. PRACTICE SERIES § 175 (2d ed. 1981).

[20] Zerofski's Case, 385 Mass. at 594, 433 N.E.2d at 872. The *Kelly* Court clarified the scope of this language in *Zerofski* by limiting it to "wear and tear" cases. *Cf.* 1981 ANN. SURV. MASS. LAW, § 2.1, which warned against the potential scope of the *Zerofski* "restatement." This holding of Kelly's Case is a salutary return to the classic workers' compensation doctrines summarized in the text accompanying notes 15 and 16.

[21] 354 Mass. 124, 235 N.E.2d 814 (1968).

tions or incidents of the employment'. . . . Rather it is a state of mind which arises from the common necessity of working for a living."[22] The *Kelly* Court considered that this broad language referred only to "wear-and-tear" cases.[23]

In conclusion, the *Kelly* majority found that an emotional injury precipitated by the news of a lay off and transfer was an injury arising out of and in the course of employment. Furthermore, the Court held that the disability was attributable to an incident of employment and such a disability need not be the result of an unusual stressful event.

The decision drew a strong dissent by Chief Justice Hennessey, with whom Justices Wilkins and Lynch joined. The dissent recalled that in its prior decisions on mental and emotional injuries, the Court had relied on findings by the board of a single traumatic event, or a series of specific, stressful, work-related incidents, stresses greater than the ordinary stresses of everyday life.[24] It repeated that "what is critical in determining causation is not the subjective feelings of the employee but the objective event triggering the feelings."[25] The dissent regarded the board as justified in finding that the event triggering the employee's depression did not sufficiently identify the employment as its cause, but to be not more than an ordinary stress of everyday work.[26] Therefore, the dissent concluded that the employee's disability was noncompensable.

The *Kelly* Court recognized that lay offs and job transfers are frequent events and that the legislature might wish to consider the issues of public policy involved in making emotional injuries resulting from these events a cost of doing business in Massachusetts.[27] In an amendment to General Laws chapter 152, section 29, the Workers' Compensation Reform Act provided, "No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter."[28] The key phrase in the amendment is "arising principally out of a bona fide, personnel action." If the personnel action can be

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[22] *Id.* at 128, 235 N.E.2d at 816.

[23] 394 Mass. at 688–89, 477 N.E.2d at 585. *See supra* note 19.

[24] *Id.* at 690, 477 N.E.2d at 586.

[25] *Id.* at 690–91, 477 N.E.2d at 586 (citing Fitzgibbon's Case, 374 Mass. 633, 639, 373 N.E.2d 1174, 1178 (1978)).

[26] *Id.* at 691, 477 N.E.2d at 586.

[27] *Id.* at 689, 477 N.E.2d at 585.

[28] Acts of 1985, c. 572, § 67. The exception for intentional infliction of emotional harm was designed to keep such cases within the coverage of the workers' compensation act, thus barring tort remedies for such claims. *See, e.g.*, Simmons v. Merchant Mut. Ins. Co., 394 Mass. 1007, 476 N.E.2d 221 (1985), rescript opinion, relying on Foley v. Polaroid Corp., 381 Mass. 545, 550, 413 N.E.2d 711, 714 (1980).

shown to have been other than routine or ordinary, in that the claimant was singled out for special treatment, or the notification was made in an unusual or dramatic manner that could be identified as a specific, work-related traumatic event, then the disability could be found compensable. Similarly, if there had been a specific event or series of specific events occurring within the employment, preceding the personnel action, and it could be shown that these were a significant contributing cause of the disability, and that the personnel action was not the principle cause, then the disability could be found compensable.

The legislature also addressed the issue whether there should be a higher standard of proof in mental and emotional disability cases. In an amendment to General Laws chapter 152, section 1(7A), the legislature provided "Personal injuries shall include mental or emotional disabilities only where a contributing cause of such disability is an event or series of events occurring within the employment."[29] This amendment rules out compensation for mental injury cases resulting from gradual or prolonged stress, without a specific event or series of events.[30]

The legislature did not require that the stressful event be unusual or in some way out of the ordinary. Nor did it require that the event be "objectively" stressful, whatever that term means. *Kelly* remains the authoritative construction of the compensation act on this issue.

§ 11.2. Incapacity—Partial Disability Despite Higher Post-injury Earnings as a Result of Working Longer Hours—Legislative Reversal—Current Criteria for Partial Disability Benefits. Compensation is not awarded for a personal injury alone, but for a personal injury resulting in "incapacity for work."[1] Incapacity combines the medical element of harm to the body and the economic element of loss of earning capacity. Depending on the degree of loss of earning capacity, incapacity for work may be total or partial. "The goal of disability adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity, discounting all other factors."[2] Taking this goal into consideration, in *Sjoberg's Case*,[3] the Supreme Judicial Court held that income due to

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[29] G.L. c. 152, § 1(7A), as amended by Acts of 1985, c. 572, § 11. The legislature also provided for special impartial medical examiners in claims of mental or emotional disability. G.L. c. 152, § 11A, as amended by Acts of 1985, c. 572, § 25.

[30] *Cf.* Begin's Case, 354 Mass. 594, 238 N.E.2d 864 (1968). *See supra* note 19.

§ 11.2. [1] Zeigale's Case, 325 Mass. 128, 129–30, 89 N.E.2d 264, 265 (1949) ("Compensation is not awarded for the injury as such but rather for an impairment of earning capacity caused by the injury.").

[2] Locke, *Workmen's Compensation Law*, 29 MASS. PRACTICE SERIES § 321, at 375 (2d ed. 1981) (*cited in* Ballard's Case, 13 Mass. App. Ct. 1068, 434 N.E.2d 1306 (1982)).

[3] 394 Mass. 458, 476 N.E.2d 196 (1985).

factors other than the injury should not be included in an employee's post-injury loss of earning capacity for the purposes of determining partial incapacity compensation. The Court's decision was superseded by the legislature, however, in new section 35D of the amended Workers' Compensation Act.[4] Section 35D substituted a legislative measure of incapacity for work for the previous administrative/judicial interpretation.

In *Sjoberg's Case*, the claimant, a pressman and molder, suffered a back injury on June 12, 1978, when he was earning $302.31 per week.[5] After two brief periods of total incapacity he returned to work, but his back remained stiff and sore. After losing a bid for a less strenuous job, he submitted his resignation. He later filed a claim for continuing partial incapacity benefits from the date of his resignation. Based on a thirty-seven hour week and an hourly rate in excess of eight dollars, at the time of his resignation his average weekly wage was still $302.31.[6] After his resignation, he obtained various less demanding jobs, and in 1981, by working over 50 hours, his average weekly wage was $317.48, although his hourly rate was only $4.50.[7] On this evidence, the single member of the Industrial Accident Board found that he had a diminished earning capacity, notwithstanding his higher actual earnings, and awarded partial disability compensation of forty dollars per week.[8] This award was affirmed by the reviewing board, and the insurer's appeal was dismissed by the superior court.[9]

The Appeals Court affirmed the decision of the board on the issue of partial incapacity. The issue, the court noted, is not what the employee is actually earning but what amount he is capable of earning.[10] If his post-injury earnings are higher because of factors other than his injury, his income due to these factors is not to be taken into account. The court stated, "[w]here, as here, the board found an impairment of earning capacity and a reduced per hour wage, we see no reason to deny compensation because the diminution in earning capacity is concealed by the longer hours worked."[11]

On further appeal, the insurer argued to the Supreme Judicial Court that an award of partial compensation is controlled by the actual post-injury earnings of the employee and cannot exceed the difference between

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[4] *See* G.L. c. 152, § 35D(1), inserted by Acts of 1985, c. 572, § 45.

[5] Sjoberg's Case, 394 Mass. at 459, 476 N.E.2d at 197.

[6] *Id.* at 461, 476 N.E.2d at 198.

[7] *Id.*

[8] *Id.* at 459, 476 N.E.2d at 197.

[9] *Id.* at 460, 476 N.E.2d at 197.

[10] 18 Mass. App. Ct. 1, 3, 462 N.E.2d 353, 354 (1984).

[11] *Id.* at 3–4, 462 N.E.2d at 355 (citing Locke, Workmen's Compensation Law, 29 MASS. PRACTICE SERIES § 343, at 402 (2d ed. 1981)).

the prior average weekly wage and the amount he earns.[12] Rejecting this reasoning, the Court stated that because the legislature had not specified a method of computing "the average weekly wage [the employee] is able to earn thereafter,"[13] the Court must give due deference to the administrative interpretation by the Industrial Accident Board, in matters which are within its scope.[14] The Court reasoned that the board "properly could find that the employee had 'a significant impairment of earning capacity concealed within an income equal to his former wage . . . .'"[15] The Court concluded, "[t]hus, it was not error for the board to conclude that overtime payments, income from special projects, or income derived from non-employment sources should not be included in the employee's post-injury 'average weekly wage.'"[16]

Commentators and practitioners alike have struggled with the problem of how to reflect the true loss of earning capacity suffered by a worker with a long-term impairment. When the loss is made up of factors that are difficult to quantify, such as loss of fringe benefits and seniority protection in the prior job, or are hidden by erosion of actual wage loss by a general rise in wages, income from non-employment sources, or post-injury wages based on longer hours at a lower wage rate, as in *Sjoberg*, the difficulty is acute. In periods of rising wages based on inflation, too often a true loss of earning capacity has been concealed by general wage increases. This issue has disturbed courts and text writers for the past three decades.[17] But the appropriate response to continuing partial incapacity compensation from the viewpoint of workers' compensation analysis may not reflect the economic and political realities that the legislature had to deal with in drafting a major revision of the compensation act in 1985.

The 1985 Reform Act made two major changes in benefits for partial incapacity. First, it reduced the weekly benefit from 100% of the difference between the former average weekly wage and the wage the employee is able to earn thereafter to two-thirds of the difference. However, it also raised the maximum period for receipt of such benefits from 250 weeks (including any period of total incapacity benefits) to 600 weeks, almost twelve years.[18] Second, it added a limited cost of living adjustment

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[12] *Sjoberg*, 394 Mass. at 460, 476 N.E.2d at 198.

[13] G.L. c. 152, § 35.

[14] *Sjoberg*, 394 Mass. at 460, 476 N.E.2d at 198.

[15] *Id.* at 461, 476 N.E.2d at 198 (citing Locke, Workmen's Compensation Law, 29 MASS. PRACTICE SERIES § 343 at 402 (2d ed. 1981)).

[16] *Id.*

[17] *See* the important discussion by Arthur Larson in volume 2 of his highly regarded treatise, WORKMEN'S COMPENSATION § 57.21 (1983) *cited in* Sjoberg's Case, 394 Mass. at 461 n.2, 476 N.E.2d at 198 n.2.

[18] G.L. c. 152, § 35, effective January 1, 1986, amended by Acts of 1985, c. 572, § 44.

for recipients of partial incapacity benefits.[19] In light of these legislative responses, the problems created by *Sjoberg's* exclusion of factors outside of the injury in determining an employee's post-injury loss of earning capacity become apparent. First, if the principle of *Sjoberg's Case* were to apply without restriction over the 600 weeks of compensable partial disability, the premium cost would be substantial. Secondly, if a partially disabled worker were to be paid benefits for his full loss of earning capacity, despite all other non-impairment factors, the economic cost on the employer might well approximate the economic loss suffered by the injured worker! Daunted by the prospect of the substantial economic cost to the employer community, a restriction of the *Sjoberg* rule became a bargaining chip in the political negotiations that led to the passage of the 1985 Reform Bill. In response to the employer's concerns, the legislature enacted General Laws chapter 152, section 35D(1) which measures the loss of earning capacity by the actual wage earned.[20] Because the Reform Bill contained a number of important benefit increases, it seemed a small matter for the legislature to restrict *Sjoberg* and make the actual wage the employee earns the measure of his loss of earning capacity.

A discussion of other features introduced by the legislature in General Laws chapter 152, section 35D as well as other provisions of the Reform Act affecting the benefits for loss of earning capacity is beyond the scope of this chapter.[21]

11.3. Third Party Suits—Common Employment Doctrine—Temporary Labor. It is now fifteen years since the legislature by chapter 941 of the Acts of 1971 abolished the common employment doctrine, but the memory lingers on. The doctrine plagued injured workers seeking third party recovery for the negligence of individuals and employers who were in some way affiliated with each other in an enterprise.[1] Two recent cases have emphasized that, as the statute intended, the doctrine has indeed been abolished.

In *Searcy v. Paul*,[2] a window cleaner was injured when he fell from a ladder while working at an apartment complex. He brought a negligence action against a number of co-defendants who were affiliated in financing, constructing, and managing the complex.[3] He also brought a workers'

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[19] G.L. c. 152, § 35F, effective November 1, 1986, inserted by Acts of 1985, c. 572, § 45.

[20] G.L. c. 152, § 35D(1), Stat. 1985, c. 572, § 45.

[21] For a fuller discussion, see Locke, Workemens' Compensation Law Supplements to 29 MASS. PRACTICE SERIES (1986) and (1987).

§ 11.3. [1] *See* Locke, Workmens' Compensation Law, 29 MASS. PRACTICE SERIES §§ 663-665 (2d ed. 1981).

[2] 20 Mass. App. Ct. 134, 478 N.E.2d 1275 (1985).

[3] *Id.* at 135, 478 N.E.2d at 1276.

compensation claim against Vortex, one of the defendants, asserting he was an employee of Vortex. This claim was eventually settled by a lump sum, approved by the industrial accident board.[4] A pretrial motion for summary judgment was brought alleging that the lump sum settlement barred the tort action against all the defendants. It was allowed as to Vortex, but denied as to the others.[5] A verdict of $112,500 was returned against two of the defendants, and a directed verdict was allowed as to the third, a bank.[6] On appeal, the judgments were affirmed.

The Appeals Court, relying on the 1971 amendment to General Laws chapter 152, section 15, held that it meant just what it said and allowed "a corporation's employee to bring actions for negligence against third parties, either individuals or corporations, even if in some degree affiliated with the injured employer corporation (at least where no joint venture with another corporation is established)."[7] The court found no basis for extending the Massachusetts decisions with respect to "disregarding the corporate fiction," under the circumstances of the case.

In *Lang v. Edward J. Lamothe Co.*,[8] a temporary laborer was sent by his employer, Peakload, to work for the defendant on its premises. He was supervised by an employee of the defendant. After his injury, he received workers' compensation from his employer's insurance company and brought this action for negligence.[9] A judge of the superior court rejected the defendant's claim that the Workers' Compensation Act was the exclusive remedy, relying on the 1971 amendment to section 15, applied in *Searcy v. Paul*, and the additional language pertaining to general and special employers in section 18 of the Act.[10] The court adopted the reasoning of the superior court judge that, in these circumstances, for an employer to be immune from common law action, the employer must satisfy a two-part test: "(1) the employer must be an insured person liable for the payment of compensation, and (2) the employer must be the direct employer of the employee."[11] Meeting the provisions of the amendment to section 18, Peakload provided workers' compensation insurance and had no agreement with the defendant that it would be responsible for payment of compensation.[12] The defendant

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[4] *Id.*

[5] *Id.* at 136, 478 N.E.2d at 1277.

[6] *Id.*

[7] *Id.* at 139, 478 N.E.2d at 1278.

[8] 20 Mass. App. Ct. 231, 479 N.E.2d 208 (1985).

[9] *Id.* at 232, 479 N.E.2d at 209.

[10] *Id.* at 232, 479 N.E.2d at 209 (citing Locke, Workmen's Compensation Law, 29 MASS. PRACTICE SERIES § 150 (2d ed. 1981); Acts of 1969, c. 755, § 2).

[11] *Id.*

[12] *Id.* at 232–33, 479 N.E.2d at 210.

therefore could not satisfy the first part of the test, as it was not liable for the payment of compensation to the plaintiff.

Both decisions are sound. It would be hoped that they would put to rest the vestigial remnants of the common employment doctrine and its progeny.

11.4. Exhaustion of Administrative Remedies—Practice and Procedure—Insurer's Right to Interplead Another Insurer. During the *Survey* year, the Appeals Court addressed the issue of what procedure an insurer should follow to transfer the burden of compensation onto the insurer in fact providing the employer with workers' compensation coverage at the time of the injury when another insurer had voluntarily undertaken to pay compensation under the mistaken impression that it was the insurer covering the employer's compensation risk. In *Utica Mutual Insurance Co. v. Liberty Mutual Insurance Co.*,[1] Utica began payment of compensation by agreement in January, 1981. In July, it discovered that Liberty had provided compensation coverage for the employer on the date of injury.[2] After some discussions between the two insurers, Liberty declined to accept the case voluntarily. In October, Utica requested a conference before the Industrial Accident Board to discontinue compensation on the ground that Liberty was the insurer liable on the claim.[3] Both companies were present at the conference. In February, 1982, the single member presiding at the conference denied the request and ordered Utica to continue payments. But before the member had issued the order, Utica began the present action against Liberty in superior court, seeking reimbursement for all payments made.[4] Later, it settled the compensation claim with the employee. Utica sought reimbursement of all amounts paid, including the lump sum. The superior court found for Utica and Liberty appealed.[5]

The Appeals Court reversed the judgment on the ground that Utica had begun this action without exhausting its administrative remedies. The court stated that the superior court should not have decided the case on its merits because at the time the action was brought, there were still remedies available to it within the administrative scheme established by the workers' compensation act.[6] That the controversy here involved two insurers, the court noted, made the case peculiarly appropriate for ad-

§ 11.4. [1] 19 Mass. App. Ct. 262, 473 N.E.2d 722 (1985).

[2] *Id.* at 263, 473 N.E.2d at 723.

[3] *Id.* at 264, 473 N.E.2d at 723.

[4] *Id.* at 264, 473 N.E.2d at 724.

[5] *Id.*

[6] *Id.* (citing Broderick's Case, 320 Mass. 149, 67 N.E.2d 897 (1946); Assuncao's Case, 372 Mass. 6, 8, 359 N.E.2d 1304, 1305 (1976)).

ministrative adjudication, particularly where Liberty raised issues of causal relation and prejudice.[7]

Addressing Utica's contention that there was no procedure for bringing Liberty before the board as a party, unless the employee filed a claim against Liberty, the court held, [t]here is nothing in c. 152 which prevents the board from joining a third party against whom a claim has not been made by an employee but whose presence is necessary to dispose completely of the claim.[8] The board's rule-making power, the court stated, allows the board considerable latitude. Its practice is governed by the practice in equity and equity may be used "to supply a remedy' [even] where there [may be] a gap in the statute."[9] The court concluded that the board "may join, by any means reasonably calculated to give notice and a right to be heard, any other insurer or insurers it deems necessary for the expeditious and complete disposition of a controversy like the present one."[10]

Although neither the 1985 Reform Act nor the prior rules of the board provided for joinder or interpleader, the Regulations issued by the Commissioner of the Department of Industrial Accidents now provide for joinder on the motion of a party or on the administrative judge's initiative.[11]

§ 11.5. Amount of Compensation—Rate on Date of Final Decision—G.L. c. 152, § 51A; Whether Applicable to Separate Benefit Provisions. In 1969, the legislature inserted section 51A providing, "[i]n any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision."[1] It had been argued that even though compensation was being paid under one section (as for total incapacity under section 34), a claim under another section (as for specific compensation under section 36) would be limited by section 51A if the insurer resisted the claim and it became the subject of an award by final

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[7] *Id.* at 265, 473 N.E.2d at 724.

[8] *Id.* at 267, 473 N.E.2d at 725 (citing Locke, Workmen's Compensation Law, 29 MASS. PRACTICE SERIES § 179 (2d ed. 1981)).

[9] *Id.* (citing Locke, Workmen's Compensation Law, 29 MASS. PRACTICE SERIES § 179 (2d ed. 1981)). The court stated that "[t]his concept would appear (at least in this context) to incorporate prior equity procedure under which an adjudicative tribunal could, on its own motion, order a case to stand in order that an indispensable party might be joined." *Id.* at 267 n.5, 473 N.E.2d at 725 n.5.

[10] *Id.* at 267-68, 473 N.E.2d at 726.

[11] *See* 42 CMR 1.20. MASS. REGS. CODE tit. 42, § 1.20.

§ 11.5. [1] G.L. c. 152, § 51A, inserted by Acts of 1969, c. 833, § 1. See Locke, Workmen's Compensation Law, 29 MASS. PRACTICE SERIES § 302 at n.18; McLeod's Case, 389 Mass. 431, 450 N.E.2d 612 (1983).

decision. In *Madariaga's Case*,[2] the Appeals Court rejected this argument. In *Madariaga*, an insurer paying death benefits under section 31 resisted payment of benefits under sections 36 and 36A for losses of bodily function and disfigurement suffered by a deceased employee.[3] The insurer argued that the losses could be said to result from brain injury, to which the legislature, after the employee's injury, had placed a limit of $20,000.[4] Because the insurer had resisted the claim under sections 36 and 36A, the insurer contended that section 51A applied, and therefore its liability was limited to $20,000.[5] The court rejected the argument, holding that the payment under section 31 rendered section 51A inapplicable.[6] The court stated, "[w]e perceive no legislative intention in the words from § 51A . . . to make any separation of 'compensation' based upon the section of c. 152 under which particular compensation was paid."[7]

The court further suggested that section 51A might not apply where benefits were reduced after the date of injury.[8] Quoting the language of the Supreme Judicial Court in *McLeod's Case*,[9] the Appeals Court pointed out that the intent of the legislature was to avoid obsolesence of compensation rates. The Supreme Judicial Court, however, has not yet decided whether section 51A would apply to a case where there was a decrease in benefits after the date of injury.[10]

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[2] 19 Mass. App. Ct. 477, 475 N.E.2d 753 (1985).
[3] *Id.* at 478, 475 N.E.2d at 754.
[4] *Id.* at 482, 475 N.E.2d at 756.
[5] *Id.*
[6] *Id.* at 482, 475 N.E.2d at 757.
[7] *Id.* at 483 n.7, 475 N.E.2d at 757 n.7.
[8] *Id.* at 483, 475 N.E.2d at 757.
[9] *Id.* (quoting McLeod's Case, 389 Mass. 431, 435, 450 N.E.2d 612, 615 (1983)).
[10] *Id.* (citing Locke, Workmen's Compensation Law, 29 MASS. PRACTICE SERIES § 30 at 39-40 (2d ed. 1981)).