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CHAPTER 2

Workmen's Compensation

LAURENCE S. LOCKE*

§2.1. Introduction. The major change affecting workmen's compensation during the *Survey* year was the legislative enactment of substantial increases in weekly total and partial incapacity compensation.[1] In the decisional area, no dramatic or far-reaching changes in the construction of the Workers' Compensation Act were handed down by the appellate courts in Massachusetts during the *Survey* year. There were, however, several *Survey* year decisions which are likely to prove of some significance to practitioners.

§2.2. Superior Court Enforcement of Orders Following Conferences Under Section 7—Exhaustion of Administrative Remedies—Costs and Attorney's Fees. To expedite the prompt payment of claims under the Workmen's Compensation Act ("the Act")[1] and the prompt modification or termination of compensation, in 1971 the legislature amended section 7 of the Act to empower the Industrial Accident Board ("the board") to make orders for payment or modification of compensation after a conference before a single member, without a formal hearing on the merits.[2] Under the Act as amended, after notification by either party that a controversy exists as to payment or continuance of compensation, the board will assign the case for a conference before a member. The member is authorized to "make such inquiries and investigations as he deems necessary" and is given "the power to require and receive reports of injury, signed statements of the employee and other witnesses, medical and hospital reports, and such other oral and written matter as shall enable him to determine whether compensation

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§2.1. [1] Acts of 1976, c. 474, *amending* G.L. c. 152, §§ 34, 34A, 35 & 35A. See § 2.5 *infra*.

§2.2. [1] G.L. c. 152.

[2] Acts of 1971, c. 974 & Acts of 1972, c. 742, *amending* G.L. c. 152, § 7. For a more comprehensive discussion of these changes, see Locke, *Workmen's Compensation Law*, 18 ANN. SURV. MASS. LAW § 4.4, at 59-61 (1971).

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under . . . chapter [152] is due."[3] There is no requirement that such material be in the form of an affidavit or that oral statements be given under oath. Nor is there a provision for cross-examination. The informality of the investigation described in the statute indicates an intention that formal rules of evidence not be invoked. Instead, the member is to be guided by common sense in evaluating the information presented. Then, "[i]f the member determines, on such information, that compensation is due under chapter [152], he shall forthwith file a written order for such compensation."[4] Similar power is given to modify or terminate compensation.[5] The statute provides that immediately following the order, compensation is to be paid, modified, or discontinued in accordance with such order.[6] The order "shall for all purposes be enforceable under Section 11 [of the Act]. . . ."[7] A party aggrieved by the order may request a full hearing before another single member.[8] The decision resulting from the full hearing is appealable to the board for review under section 10.[9]

Until recently, the courts had not had occasion to consider the validity or constitutionality of the amendment. In particular, a constitutional question might be raised as to whether the amendment violates due process by authorizing the deprivation of the unsuccessful party's property prior to a full hearing.[10] During the *Survey* year, however, the Supreme Judicial Court and the Appeals Court were in two instances[11] called upon to consider cases arising under section 7. In both instances,

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[3] G.L. c. 152, § 7.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* For a detailed description of the conference-order procedure, see L. LOCKE, WORKMEN'S COMPENSATION, 29 MASS. PRACTICE SERIES § 481.5 (Supp. 1977) [hereinafter cited as LOCKE].

[9] G.L. c. 152, § 10.

[10] *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972). The Court there held that procedural due process requires notice and a hearing prior to the deprivation of a person's property by the state through a statutory prejudgment replevin procedure. *Id.* at 80-84. The conference envisioned by G.L. c. 152, § 7, although not labeled a "hearing," might in itself meet the due process requirement of an opportunity to be heard. The Court observed in *Fuentes* that "the Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' *Boddie v. Connecticut*, 401 U.S. 371, 378 . . . ." 407 U.S. at 82. The essentials of due process are satisfied by notice and a hearing aimed at establishing at least the probable validity of the claim on which the action of deprivation is based. *Id.* at 97.

[11] Assuncao's Case, 1977 Mass. Adv. Sh. 292, 359 N.E.2d 1304; Ramalhete v. Uni-Royal, Inc., 1976 Mass. App. Ct. Adv. Sh. 1057, 356 N.E.2d 257.

the courts impliedly upheld the validity of the section.[12]

In *Assuncao's Case,*[13] the Supreme Judicial Court held that an insurer could not appeal from a judgment of the superior court enforcing an order of the single member under section 7. The Court reasoned that such an order was interlocutory in nature and that, as a consequence, the insurer could not obtain judicial review of the matter until all administrative remedies had been exhausted.[14]

After Assuncao had suffered an injury at work, and before the insurer had acted upon his claim for workmen's compensation, his wife sustained an injury while working for the same employer, and the insurer voluntarily paid her compensation benefits and dependency benefits provided by section 35A for her children.[15] At a conference before a single member pursuant to section 7, the insurer was ordered to pay, in relation to the husband's injury, compensation benefits to the husband and dependency benefits for the wife and children.[16] The insurer requested a hearing as a party aggrieved and, without waiving any rights of appeal, paid the compensation benefits but declined to pay the dependency benefits.[17] The employee, pursuant to section 11, sought enforcement in the superior court of the order of the single member.[18] When the superior court granted enforcement, the insurer filed a notice of appeal with the Appeals Court, and the Supreme Judicial Court transferred the case there on its own motion.[19] On appeal the insurer contended that section 35A did not authorize payments for child dependency to an employee whose wife was simultaneously receiving such benefits for the same dependent children as a result of her own work-related injury.[20]

As indicated, however, the Court did not reach the merits of the insurer's appeal, as the Court concluded that the record failed to demonstrate that the parties had exhausted the available administrative remedies.[21] In applying the exhaustion doctrine, the Court reviewed the policies and purposes which that doctrine seeks to effectuate. The Court noted that the exhaustion principle aims at preserving the integrity of the administrative and judicial processes.[22]

Piecemeal interlocutory review is not the function of judicial appellate

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[12] Assuncao's Case, 1977 Mass. Adv. Sh. at 297, 359 N.E.2d at 1306; Ramalhete v. Uni-Royal, Inc., 1976 Mass. App. Ct. Adv. Sh. at 1057-59, 356 N.E.2d at 258-59.

[13] 1977 Mass. Adv. Sh. 292, 359 N.E.2d 1304.

[14] *Id.* at 297, 359 N.E.2d at 1306.

[15] *Id.* at 293, 359 N.E.2d at 1304.

[16] *Id.*

[17] *Id.* at 293-94, 359 N.E.2d at 1304-05.

[18] *Id.* at 294, 359 N.E.2d at 1305.

[19] *Id.*

[20] *Id.* at 292, 359 N.E.2d at 1304.

[21] *Id.* at 294, 359 N.E.2d at 1305.

[22] *Id.*

practice, the Court emphasized.[23] Rather, the legislature has entrusted the task of enforcing the statutory scheme primarily to the administrative agency. Requiring the exhaustion of administrative remedies offers the agency a full opportunity to apply its expertise to that statutory scheme.[24] The Court concluded that these considerations are especially applicable to the administration of the Workmen's Compensation Act. Particularly, the "whole scheme of the Act" contemplates that a single member's errors will be reviewed first by the full board, and that recourse to the courts will be available only after the board has rendered its decision.[25]

Moreover, the Court reasoned that judicial review would be particularly inappropriate in this case since the aggrieved party still had two levels of administrative review in which to seek resolution of its claims of error before requesting judicial review.[26] The first level of administrative review would have been a full hearing before another member of the board;[27] the second would have been review by the full board.[28]

Finally, the Court firmly upheld the validity of the superior court's enforcement power. The Court determined that "the obvious purpose" of the 1972 amendment[29] to section 11 was to render a single member's order enforceable by the superior court.[30] This interpretation derived from language in the amendment to section 7[31] indicating that an order shall for all purposes be enforceable, but if a full hearing before a second single member is requested, the order shall be enforceable only until a decision has resulted from the full hearing.[32] The Court construed this language as providing that the conference order becomes enforceable even before the full hearing is held before a second member.[33] Thus, the

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[23] *Id.*

[24] *Id.* at 294-95, 359 N.E.2d at 1305.

[25] *Id.* at 295, 359 N.E.2d at 1305, *quoting* Shershun's Case, 286 Mass. 379, 382, 190 N.E. 595, 596 (1934).

[26] 1977 Mass. Adv. Sh. at 296, 359 N.E.2d at 1305-06.

[27] *See* G.L. c. 152, §§ 7, 8.

[28] *See* G.L. c. 152, § 10.

[29] Acts of 1972, c. 742, § 5, *amending* G.L. c. 152, § 11.

[30] 1977 Mass. Adv. Sh. at 296, 359 N.E.2d at 1306.

[31] Acts of 1972, c. 742, § 1, *amending* G.L. c. 152, § 7.

[32] 1977 Mass. Adv. Sh. at 296 n.2, 359 N.E.2d at 1306 n.2, *citing* G.L. c. 152, § 7, *as amended by* Acts of 1972, c. 742, § 1.

[33] 1977 Mass. Adv. Sh. at 296 n.2, 359 N.E.2d at 1306 n.2. Further support for this reading was derived from the amendment to section 11 which provided that an interested party may present an order of a member to the superior court for enforcement. *Id.*, *citing* G.L. c. 152, § 11, *as amended by* Acts of 1972, c. 742, § 5. The Court found significant the deletion from section 11 of language which had previously limited enforceability to "a decision of a member from which no claim for review has been filed within the time allowed therefor. . . ." *Id.*, *quoting* G.L. c. 152, § 11, *as appearing in* Acts of 1957, c. 693, § 2, *deleted by* Acts of 1972, c. 742, § 5. This deletion was viewed as confirming the Court's

Court concluded that the enforcement of the conference order is interlocutory, and is designed to maintain a status in favor of the employee pending the administrative board's final determination.[34]

It is significant that the Court expressed no concern that enforcement of a conference order effected a deprivation of the insurer's property prior to a full hearing.[35] Instead, by insisting that the single member's order be enforced, the Court impliedly upheld the constitutionality of the amendment to section 7.

In another *Survey* year case, *Ramalhete v. Uni-Royal, Inc.*,[36] the Appeals Court impliedly affirmed the validity of the amendments to section 7. In *Ramalhete,* the court held that an employee who is obliged to seek enforcement by the superior court of a conference order may obtain attorneys' fees and costs arising from the action for enforcement.[37] It should be noted, however, that if it were unconstitutional to enforce an order emanating from an informal conference, it would presumably be improper to grant the party seeking enforcement fees and costs resulting from the enforcement action. Thus *Ramalhete* impliedly supports the valdity of section 7.

Ramalhete involved an employee who had injured his back in the course of his employment.[38] Compensation was ordered after a conference before a single member.[39] However, due to inadvertence and mistake the employer, a self-insurer, neglected to make the required payments.[40] The employee filed suit in superior court, seeking enforcement of the single member's order, a ten percent increase in the amount awarded because of the employer's unreasonable delay in making payments, and attorneys' fees and costs arising from the superior court

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interpretation. 1977 Mass. Adv. Sh. at 296 n.2, 359 N.E.2d at 1306 n.2. Finally, the Court cited LOCKE, *supra* note 8, at §§ 481.5 and 584. 1977 Mass. Adv. Sh. at 296 n.2, 359 N.E.2d at 1306 n.2. In the latter section of WORKMEN'S COMPENSATION LAW, the author states that

> [w]hen the parties engage in adversary proceedings, the matter is ripe for a decree when there is an order or decision of the division, an order of the single member under section 7, an order or decision of the single member under section 8 (whether or not a review has been claimed), or an order or decision of the reviewing board under section 10.

Although not cited by the Court, § 536 of LOCKE's treatise further emphasizes the enforceability of a single member's decision, even where a claim of review has been filed. "By striking the words, 'unless a claim for review has been filed . . . ,' the legislature mandated prompt payment of decisions of the single member, even where the insurer has claimed a review."

[34] 1977 Mass. Adv. Sh. at 297, 359 N.E.2d at 1306.

[35] See note 10 *supra.*

[36] 1976 Mass. App. Ct. Adv. Sh. 1057, 356 N.E.2d 257.

[37] *Id.* at 1059, 356 N.E.2d at 259.

[38] *Id.* at 1057, 356 N.E.2d at 258.

[39] *Id.* at 1057-58, 356 N.E.2d at 258.

[40] *Id.* at 1058, 356 N.E.2d at 258.

proceeding.[41] Shortly after the complaint was filed, the employer complied with the conference order by paying the claim.[42] In its answer the employer denied the allegations of the complaint and asserted the payment as a defense.[43] The superior court dismissed the complaint and entered judgment for the employer, whereupon the employee appealed.[44]

The Appeals Court determined that the employer's tardy payment had mooted the claim for enforcement of the conference order. However, the court reasoned that dismissal of the entire complaint was not warranted since the other elements of the complaint were not mooted by the payment.[45] The court upheld the superior court's refusal to consider the request for an increase in the compensation awarded, however, because the statute provided that such increases may be sought only from the board, reviewing board or single member. Thus, the superior court is without jurisdiction to award such an increase, but rather can only enforce an increase ordered by one of the statutorily designated bodies.[46] The court determined, however, that the claim for attorneys' fees and costs arising from the enforcement action was cognizable by the superior court and had not been rendered moot by the employer's payment.[47] The court thus reversed the decision and remanded the case to the superior court for further proceedings consistent with its opinion.[48] By deciding that an employee obliged to seek court enforcement of a conference order may obtain attorneys' fees and costs arising from the enforcement action, the Appeals Court impliedly upheld the validity of judicial enforcement of conference orders.

§2.3. General Employer, Special Employer Relation Under 1969 Amendment—Presumption of General Employer's Liability for Payment of Compensation. In 1969, the legislature amended section 18 of chapter 152 to provide that where an injured employee had been "on loan" from a general employer to a special employer when the injury occurred, the general employer or its insurer will normally be liable for

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 1059, 356 N.E.2d at 259.

[46] *Id.*

[47] *Id.*

[48] *Id.* In addition, the court held that claims for an attorney's lien under G.L. c. 221, § 50 and for interest on the award under G.L. c. 152, § 50 were not properly before the trial judge since those claims were not asserted in the complaint. *Id.* at 1058, 356 N.E.2d at 258-59. In two interesting footnotes the court alluded to the enforcement of claims for attorneys' fees in workmen's compensation cases, referring to LOCKE, *supra* note 8, § 634 at 749, and stating, "we need not decide whether G.L. c. 221, § 50, applies to a case such as this." 1976 Mass. App. Ct. Adv. Sh. at 1058 n.1 & 1059 n.2, 356 N.E.2d at 259 n. 1 & 2. The mystery as to whether an attorneys' lien under § 50 applies to claims arising under the Workmen's Compensation Act thus remains unsolved.

the payments.[1] The special employer or its insurer will be liable, however, if the parties have so agreed or if the general employer is not an insurer or insured person.[2] It was not certain whether the amendment was directed specifically to employment agency cases or whether it extended to all instances of "loaned employees." This question was decided in favor of a broad reading of the amendment in *Ramsey's Case,*[3] decided during the *Survey* year.

Ramsey's Case involved a claim for death benefits brought by the dependants of Ramsey, a bulldozer operator killed while operating an earth moving machine.[4] Ramsey was employed by Ashland Excavating Company (Ashland), which had sold the earth moving machine to A.J. Lane Construction Corp. (Lane) and had supplied Ramsey to Lane to operate the machine.[5] The single member found and the reviewing board affirmed that Ramsey's death was compensable under the Act and that compensation should be paid by Lane's insurer rather than the insurer of Ashland.[6] The latter finding rested upon the determination that since Ramsey was working under the direct control and supervision of Lane at the time of the accident, he was in fact in the employ of Lane rather than of Ashland.[7] The member's subsidiary findings indicated that Ashland frequently supplied operators to purchasers of equipment until such time as they could obtain their own operators, and that Ramsey continued on Ashland's payroll, while Ashland billed Lane for Ramsey's time.[8] Lane's insurer sought review in the superior court, which found that the board was in error as a matter of law.[9] Characterizing Lane as a "special employer" and Ashland as the "general employer," the superior court ordered that the claim be paid by the insurer of Ashland. The court reasoned that such result was required by the 1969 amendment.[10] On appeal by Ashland's insurer, the Appeals Court affirmed the ruling of the superior court.[11] The Appeals Court concluded that the subsidiary facts found by the single member compelled a finding that Ramsey was still in the general employ of Ashland at the time of his death.[12] As a result, the 1969 amendment mandated that compensation be paid by Ashland's insurer.[13]

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§2.3. [1] Acts of 1969, c. 755, § 2.
[2] G.L. c. 152, § 18, *as amended by* Acts of 1969, c. 755, § 2.
[3] 1977 Mass. App. Ct. Adv. Sh. 336, 360 N.E.2d 911.
[4] *Id.* at 337-38, 360 N.E.2d at 912-13.
[5] *Id.*
[6] *Id.* at 338-39, 360 N.E.2d at 913.
[7] *Id.*
[8] *Id.* at 337-38, 360 N.E.2d at 913.
[9] *Id.* at 339, 360 N.E.2d at 913.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 339, 342-43, 360 N.E.2d at 913, 914-15.

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Ashland's insurer had sought to escape the effect of the 1969 amendment by contending that the amendment was intended to apply only to cases arising in the labor service industry.[14] This claim was based on the fact that the amendment had been enacted following the decision of the Supreme Judicial Court in *Galloway's Case*.[15] *Galloway's Case* held that where an employment agency supplied a clerk typist to another company as temporary help, the recipient company was liable under workmen's compensation for the typist's job-related injury.[16] Ashland's insurer argued that because the amendment was a legislative response to this specific case, which involved the labor service industry, it should be confined to employment agency cases.[17] Rejecting this argument,[18] the Appeals Court recognized that legislative concern may have been precipitated by the particular difficulties created by *Galloway's Case* for the labor service industry as well as for employees supplied by employment agencies to uninsured special employers.[19] However, the court noted that the distinction between "general employer" and "special employer" had been utilized in workers' compensation cases since long before the development of the modern labor service industry.[20] The courts adhered in those cases to the common law criteria of control and assent by the employee in imposing liability as between a special employer and a general employer.[21] The *Ramsey* court therefore concluded that "[t]he 1969 statute, in minimizing the use of these criteria by imposing primary liability on the general employer, thus addresses broadly the uncertainty and consequent litigation which has resulted from the use of these criteria."[22] Moreover, the court emphasized that the statute speaks broadly of "any case" and is not limited, as is a similar statute in Rhode Island,[23] to the labor service industry. The holding and reasoning of *Ramsey* thus indicate that insured employers who lend employees to other employers will normally be liable for work-related injuries that occur during the period of the loan, even where the lending employer is not in the labor service industry.

§2.4. Death Benefits—Proof that Death was Work-Related—Effect of Prior Adjudication. During the *Survey* year the

[14] *Id.* at 340-41, 360 N.E.2d at 914.
[15] 354 Mass. 427, 237 N.E.2d 663 (1968).
[16] *Id.* at 429-31, 237 N.E.2d at 665-66.
[17] 1977 Mass. App. Ct. Adv. Sh. at 340-41, 360 N.E.2d at 914.
[18] *Id.* at 342-43, 360 N.E.2d at 914-15.
[19] *Id.* at 341, 360 N.E.2d at 914.
[20] *Id., citing* Scribner's Case, 231 Mass. 132, 135, 120 N.E. 350, 351 (1918).
[21] *Id.*
[22] 1977 Mass. App. Ct. Adv. Sh. at 341, 360 N.E.2d at 914.
[23] R.I. GEN. LAWS § 28-29-2(d) (1968).

Appeals Court held, in *Moore's Case,*[1] that a previous adjudication of the work-related origin of an injury, coupled with a death certificate stating that death resulted from the injury, constituted adequate evidence that the death was work-related.[2] The case concerned an employee (Moore) who suffered from asbestosis. The Industrial Accident Board had previously ruled that this condition was an injury which arose out of and in the course of Moore's employment.[3] After Moore's death, his dependent presented to the board a death certificate which described the cause of death as asbestosis. The board concluded that no further evidence was needed to connect the employee's death with his employment, and ruled that death benefits must be paid to the dependent.[4] The superior court enforced the award and the Appeals Court affirmed.[5]

The Appeals Court's ruling appears correct, since the employer or its insurer was previously accorded the opportunity to litigate the question of the origin of the injury. To argue that issue again in the context of a death benefits claim would be wasteful of the board's time and resources.

An interesting question might arise where the prior determination that an injury was work-related had proceeded from an informal conference under section 7[6] and had not been appealed. Should liability for death benefits be determined in part by a prior informal conference which had addressed the question of the work-related nature of the injury? It would appear that *Moore's Case* should control here as well. It is reasonable to assume that the critical factor is the opportunity to litigate relevant issues in a hearing attended by full procedural safeguards.[7] Where a party has waived that opportunity by failing to appeal from the conference order, he may be deemed to have conceded the correctness of the order. While the subsequent action should afford an opportunity to litigate the question of whether death was caused by the prior injury, the issue of whether that injury arose out of and in the course of the deceased's employment should be considered settled.

That the crucial factor is whether the appellant had a prior *opportunity* to litigate the "work-relatedness" issue in full adversary proceedings, and not whether such litigation actually took place, is demonstrated by cases involving agreements for compensation. *Kareske's*

§2.4. [1] 1977 Mass. App. Ct. Adv. Sh. 569, 362 N.E.2d 1203 (Rescript).
[2] *Id.* at 569, 362 N.E.2d at 1204.
[3] *Id. See* Moore's Case, 362 Mass. 876, 289 N.E.2d 862 (1972) (Rescript).
[4] 1977 Mass. App. Ct. Adv. Sh. at 569, 362 N.E.2d at 1204.
[5] *Id.*
[6] G.L. c. 152, § 7.
[7] See text at notes 8-13 *infra.*

Case,[8] cited by the Appeals Court in *Moore's Case,*[9] held that where a written agreement for compensation, which was approved by the board, indicated that the injury was work-related, the agreement was conclusive on that issue.[10] It was immaterial that the issue of the injury's origin had not been litigated. "The insurer . . . ought not now to be able to raise any question which it then forbore to litigate."[11] This view was reaffirmed in *Brophy's Case*[12] where a recital in an agreement for payment of compensation was deemed to be conclusive on the issue of the date of injury in an action by the subsequently deceased employee's dependent.[13] It was immaterial whether the issue of date of death had actually been litigated.[14] Similarly, it appears that where a party has waived the opportunity to litigate the "work-relatedness" issue by failing to appeal from a conference order, that issue should be deemed settled for the purposes of a subsequent death benefits determination.

§2.5. Benefits for Total or Partial Incapacity—1976 Legislative Enactment. The most significant change in the Massachusetts Workmen's Compensation Laws to occur during the *Survey* year was the enactment of chapter 474 of the Acts of 1976, which increased the maximum amount of compensation for incapacity under several sections of chapter 152.[1]

Prior to the enactment of chapter 474, weekly compensation for temporary or permanent total incapacity was set at two-thirds of the disabled employee's average weekly wage up to a maximum of $95 a week.[2] This maximum has now been raised by the 1976 statute to $140 a week for injuries occurring after January 1, 1977 and before October 1, 1977.[3] For injuries sustained between October 1, 1977 and October 1, 1978, the maximum is increased to $150 a week.[4] For injuries occurring as of October 1, 1978, the weekly maximum will be the average weekly wage in Massachusetts as determined for purposes of employment security benefits under section 29(a) of chapter 151A of the General Laws by the

[8] 250 Mass. 220, 227, 145 N.E. 301, 304 (1924).
[9] 1977 Mass. App. Ct. Adv. Sh. at 569, 362 N.E.2d at 1204.
[10] 250 Mass. at 227, 145 N.E. at 304.
[11] *Id.*
[12] 327 Mass. 557, 99 N.E.2d 922 (1951).
[13] *Id.* at 558-60, 99 N.E.2d at 923-24.
[14] *Id.* at 560, 99 N.E.2d at 924.

§2.5. [1] G.L. c. 152, § 34, *as amended by* Acts of 1976, c. 474, §§ 1, 3, 5; G.L. c. 152, § 34A, *as amended by* Acts of 1976, c. 474, §§ 2, 4, 6; G.L. c. 152, § 35, *as amended by* Acts of 1976, c. 474, §§ 7, 8, 9; and G.L. c. 152, § 35A, *as amended by* Acts of 1976, c. 474, §§ 10, 11.
[2] G.L. c. 152, §§ 34, 34A, *as amended by* Acts of 1973, c. 978, §§ 4, 5.
[3] *Id., as amended by* Acts of 1976, c. 474, §§ 1, 2.
[4] *Id., as amended by* Acts of 1976, c. 474, §§ 3, 4.

Director of the Division of Employment Security on or before October 1 of each year.[5]

Benefits for partial incapacity were similarly increased by the 1976 statute. Prior to the 1976 amendments, an employee able to return to work at lesser pay after sustaining a compensable injury was entitled to payment in the amount of the entire difference between his pre- and post-injury wages, up to a maximum of $95 per week.[6] This maximum has now been raised in a manner parallel to the total incapacity maximum payment increases. The maximum weekly payment for injuries occurring between January 1, 1977 and October 1, 1977 is $140;[7] for injuries sustained between October 1, 1977 and October 1, 1978, it is $150;[8] for injuries received thereafter, the weekly maximum is set at the average weekly wage.[9]

The 1976 amendments have also increased the maximum as to the total benefits that a temporarily disabled employee may receive. Prior to the 1976 amendments, an employee temporarily incapacitated either totally or in part could receive not more than $23,750.[10] If adjudged permanently and totally incapacitated, the injured employee could receive weekly payments beyond this amount subject to the weekly maximum of $95 per week.[11] As a result of the 1976 amendments, the maximum total payment for temporary incapacity will be $35,000 for injuries occurring between January 1, 1977 and October 1, 1977;[12] $37,500 for injuries occurring between October 1, 1977 and October 1, 1978;[13] and $45,000 for injuries occurring on or after October 1, 1978.[14] If the employee is subsequently adjudged permanently and totally incapacitated, weekly payments may continue beyond these amounts subject to the amended weekly maxima.[15]

Chapter 474 of the Acts of 1976 also effected a modification with regard to payments of additional dependency benefits under section 35A.[16] The injured employee will still receive $6 per week for each dependent in additional benefits up to the amount of the employee's average weekly wage, but in no event can the amounts payable under this sec-

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[5] *Id., as amended by* Acts of 1976, c. 474, §§ 5, 6.

[6] G. L. c. 152, § 35, *as amended by* Acts of 1973, c. 978, § 6.

[7] *Id., as amended by* Acts of 1976, c. 474, § 7.

[8] *Id., as amended by* Acts of 1976, c. 474, § 8.

[9] *Id., as amended by* Acts of 1976, c. 474, § 9.

[10] G.L. c. 152, § 34, *as amended by* Acts of 1973, c. 978, § 4; G.L. c. 152, § 35, *as amended by* Acts of 1973, c. 978, § 6.

[11] G.L. c. 152, § 34A, *as amended by* Acts of 1973, c. 978, § 5.

[12] G.L. c. 152, §§ 34, 35, *as amended by* Acts of 1976, c. 474, §§ 1, 7.

[13] *Id., as amended by* Acts of 1976, c. 474, §§ 3, 8.

[14] *Id., as amended by* Acts of 1976, c. 474, §§ 5, 9.

[15] G.L. c. 152, § 34A, *as amended by* Acts of 1976, c. 474, §§ 2, 4, and 6.

[16] G.L. c. 152, § 35A, *as amended by* Acts of 1976, c. 474, §§ 10, 11.

tion and the total and partial incapacity sections[17] exceed the previously set forth statutory weekly maxima.[18] Thus, an employee cannot receive more than $140 per week for injuries received before October 1, 1977 or $150 per week for injuries received therafter, regardless of the number of dependents he may have.[19]

In addition to providing for increases in amounts of compensation, chapter 474 provides a method for the adjustment of compensation levels. After October 1, 1978, incapacity compensation rates will be automatically corrected, on an annual basis, by adjusting the maximum compensation amount to the average of the wages of all workers in the Commonwealth.[20]

The enactment of chapter 474 will have a positive effect on workmen's compensation in Massachusetts in that it will provide injured employees with a more reasonable level of compensation than was heretofore provided. First, the increase in weekly compensation benefits are long overdue and should help alleviate the financial burden on injured employees, particularly for employees earning higher weekly wages. Effective October 1, 1977, a worker earning up to $225 per week will retain two-thirds of such wages as compensation during total or partial incapacity.[21] Indeed, it appears that an injured employee's income while he or she is incapacitated will not be substantially less than his or her effective take home pay prior to the injury, since compensation payments are not subject to state[22] or federal[23] income tax; and since an employee does not have to pay for transportation to and from work, for meals, uniforms and other incidental expenses. Secondly, it appears that more reasonable levels of compensation will result not only from the increases in compensation, but also from the new method of rate adjustment. This method will allow compensation rates to increase with inflation and thus to bear a more realistic relation to wage levels in the Commonwealth.

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[17] G.L. c. 152, §§ 34, 34A and 35.

[18] G.L. c. 152, § 35A, *as amended by* Acts of 1976, c. 474, §§ 10, 11. See text at notes 2-9 *supra*.

[19] *Id.* Surprisingly, § 35A was not amended conformably with the other sections for injuries occurring after October 1, 1978. As a result, as the law now stands, added compensation for dependents may not bring total weekly compensation above $150 even for injuries occurring after October 1, 1978, although the maximum weekly benefits for such injuries under the partial and total incapacity sections will be the average weekly wage. G.L. c. 152, §§ 34, 34A and 35, *as amended by* Acts of 1976, c. 474.

[20] G.L. c. 152, §§ 34, 34A, 35, *as amended by* Acts of 1976, c. 474.

[21] *See* G.L. c. 152, §§ 34, 34A and 35, *as amended by* Acts of 1976, c. 474.

[22] G.L. c. 62, § 2 (1971 enactment) adopts the federal income tax laws' definition of gross income for income tax purposes. The federal law excludes workmen's compensation benefits from gross income. I.R.C. § 104(a)(1).

[23] I.R.C. § 104(a)(1).

While chapter 474 is thus a significant positive development, it should be noted that the beneficial effects of chapter 474 will accrue only to employees injured after the effective dates of the respective amendments. The legislature has yet to enact amendments which will provide more reasonable compensation rates and a method of wage adjustment to workers injured prior to the effective dates of the amendments.[24] Thus, such workers are still to be paid compensation in accordance with the compensation rates in effect on the date of their injuries and subsequent increases in compensation benefits do not apply to them. It is to be hoped that the legislature in 1978 will correct this inequity.[25] Employees who are disabled as a result of work injuries sustained in the 1950's and 1960's cannot subsist in 1978 on compensation payments fixed on the basis of rates established in prior years. Until the legislature incorporates provisions for cost of living increases into the Workmen's Compensation Act for all classes of individuals receiving compensation, the system will fail to meet its obligations to persons disabled by reason of work injuries and their dependents.[26]

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[24] The 1976 amendments to G.L. c. 152, §§ 34, 34A and 35 increased the maximum weekly compensation only for injuries occurring after the effective dates of the amendments. Acts of 1976, c. 474, § 12.

[25] *Cf.* LOCKE, *supra* § 2.2 note 8, § 302, at 358.

[26] The 1976 legislature also failed to increase benefits for widows and widowers of employees whose deaths are compensable under the Workmen's Compensation Act. It is to be hoped that the current legislature will enact an increase in such benefits, which have remained fixed at $55 per week since 1974. G.L. c. 152, § 31, *as amended by* Acts of 1974, c. 438, § 1.