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Chapter 6: Workmen's Compensation

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CHAPTER 6

Workmen's Compensation

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§6.1. Personal Injury—Mental and Emotional Disorder Causally Related to Mental and Emotional Work Stress—Specific Stressful Work-Related Episodes. During the *Survey* year two Massachusetts appellate courts considered whether a disabling mental illness causally related to mental or emotional work stress was a compensable injury. In *Albanese's Case*,[1] the Supreme Judicial Court held that "if an employee is incapacitated by a mental or emotional disorder causally related to a series of specific stressful work-related incidents, the employee is entitled to compensation." [2] The Court did not consider whether an employee's mental disorder caused by the general stress of his working conditions should be compensable absent proof of specific stressful work-related incidents.[3] The distinction between these two potential causes of mental and emotional disorder was emphasized in *Camaioni's Case*,[4] where the Appeals Court remanded the case for the board to consider whether the employee's injury was caused or aggravated by "specific stressful work-related incidents" or was simply the result of "the general stress of his working conditions." [5]

The test of compensability under the Massachusetts Workmen's Compensation Act is whether the personal injury arose "out of and in the course of employment." [6] The term "personal injury," though not defined comprehensively in the act,[7] has been interpreted to further the act's goal of providing employees relief for the personal injuries they

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§6.1. [1] 1979 Mass. Adv. Sh. 1171, 389 N.E.2d 83.

[2] *Id.* at 1171-72, 389 N.E.2d at 84.

[3] *Id.* at 1176 n.4, 389 N.E.2d at 86 n.4.

[4] 1979 Mass. App. Ct. Adv. Sh. 1147, 389 N.E.2d 1028.

[5] *Id.* at 1148, 389 N.E.2d at 1029.

[6] G.L. c. 152, § 26.

[7] The definition appearing in § 1 *inserted by* chapter 437 of the Acts of 1941, providing that the term "includes" infectious or contagious diseases under certain conditions, thereby only broadened the term's meaning.

sustain in the course of and arising out of their employment.[8] The term has been construed in the broadest possible language to include "whatever lesion or change in any part of the system produces harm or pain or a lessened facility in the natural use of any bodily activity or capability."[9] By requiring only a personal injury and not a "personal injury by accident," as was mandated by the English act and by the statutes of many other states, the Massachusetts act avoided many of the problems which plagued the administration of the compensation laws elsewhere. In Massachusetts the focus is on the harm to the employee and its causal relation to the employment, not on an external physical event, localized as to time or place.[10]

Given the broad construction placed upon the term "personal injury" and the absence of the restrictive language which appears in other compensation acts, it is surprising that only in the last few years have the Commonwealth courts held that a mental or emotional disorder[11] resulting from a mental or emotional stimulus at work may be a compensable personal injury. As early as 1915, the Supreme Judicial Court recognized that mental and nervous disorders resulting from physical trauma were compensable under the act.[12] By 1947 the Court had held that the physical trauma requirement of tort cases, mandated by *Spade v. Lynn & Boston R. Co.*,[13] was not applicable to workmen's compensation.[14] It thus allowed compensation for physical and organic disorders resulting from physical trauma.[15] It was expected that the Court would decide that mental injuries caused by mental stimulus are compensable because the Court already had held that mental illness or depression caused by physical injury was a personal injury. The Court also had stated that there was no distinction between stress resulting from physical exertion and stress "occasioned by distress, worry, fear, or anxiety."[16] In light of these decisions, this author had predicted in

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[8] Fitzgibbons' Case, 1978 Mass. Adv. Sh. 675, 680, 373 N.E.2d 1174, 1176-77.

[9] Burns' Case, 218 Mass. 8, 12, 105 N.E. 601, 603 (1914).

[10] 29 MASSACHUSETTS PRACTICE, LOCKE, WORKMEN'S COMPENSATION § 171 (2d ed. 1974). Chapter 9 contains a comprehensive discussion of personal injury and disease.

[11] In *Albanese's Case,* the Court noted that it was using the term "mental or emotional disorder" in a general sense and "intended neither to convey a precise medical meaning nor to provide in itself a basis for limitation or extension of the type of injury deemed compensable . . . ." 1979 Mass. Adv. Sh. at 1171 n.1, 389 N.E.2d at 84 n.1.

[12] These Supreme Judicial Court cases are collected in LOCKE, *supra* note 10, § 196, at 234 n.79.

[13] 168 Mass. 285, 47 N.E. 88 (1897).

[14] Charon's Case, 321 Mass. 694, 697, 75 N.E.2d 511, 513 (1947).

[15] *Id.* The cases are collected in LOCKE, *supra* note 10, § 196, at 234 n.80.

[16] McMurray's Case, 331 Mass. 29, 32, 116 N.E.2d 847, 849 (1954).

the first edition of his treatise that "one may confidently expect that the court will hold that a mental illness or depression brought about by distress, worry, fear, or anxiety occasioned by the employment is an equally compensable personal injury." [17]

Before the Court could render such an opinion in an appropriate case, the issue of whether to compensate mental injury caused by mental stimulus was presented in *Begin's Case*.[18] This case was based on an appeal from an award of compensation to a corrections officer who suffered from an acute anxiety state causally related to his three and one-half years experience guarding inmates in an institution for the criminally insane.[19] The Court reversed the award of compensation and reached back to an old line of cases, never overruled, to hold that the claimant was suffering from "wear and tear" and not from a personal injury.[20]

In the previous *Survey* year the Supreme Judicial Court finally had an opportunity, in *Fitzgibbons' Case*,[21] to rule on the issue of mental or emotional incapacity resulting from mental stimulus. In *Fitzgibbons* a corrections officer, suffering from remorse at the death of an officer he had sent into a cell block to quell a disturbance, went into a deep depression and committed suicide.[22] Affirming the award of compensation, the Court held that the term personal injury includes mental disturbances causally connected to mental trauma or shock arising out of the employment "looked at in any of its aspects." [23] The use of the language "looked at in any of its aspects" was encouragingly broad. It gave some hope that the Court might overrule *Begin's Case*, since the doctrine of wear and tear on which it relied was based on the outmoded pre-*Caswell's Case* [24] principle of "peculiar risk."

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[17] LOCKE, *supra* note 10, § 196, at 235.

[18] 354 Mass. 594, 238 N.E.2d 864 (1968).

[19] *Id.* at 595, 238 N.E.2d at 865.

[20] *Id.* *Begin's Case* was analyzed critically by this author in Locke, *Workmen's Compensation*, 1968 ANN. SURV. MASS. LAW 413, 415. It is also discussed in connection with an analysis of the "wear and tear" doctrine in LOCKE, *supra* note 10, at § 175.

[21] 1978 Mass. Adv. Sh. 675, 373 N.E.2d 1174.

[22] *Id.* at 676-77, 373 N.E.2d at 1175-76.

[23] *Id.* at 680, 373 N.E.2d at 1177 (quoting Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940)).

[24] 305 Mass. 500, 26 N.E.2d 328 (1940). The Court held that "[a]n injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment." *Id.* at 502, 26 N.E.2d at 330. Compare this statement with the following from Maggelet's Case, 228 Mass. 57, 61, 116 N.E. 972, 974 (1917). "A person may exhaust his physical or mental energies by exacting toil, and become unfit for further service, but he is not because of this entitled to compensation, for the reason that this condition cannot fairly be described as a personal injury. The disease must be, or be traceable directly to, a personal injury *peculiar to the employment.*" *Id.* (emphasis added).

An opportunity to overrule *Begin's Case* was soon presented when the Supreme Judicial Court considered the employee's appeal in *Albanese's Case.* The Industrial Accident Board had denied the claim of a "working foreman" who developed a "chronic anxiety state mixed with depression and somatized reaction and . . . neurocirculatory asthenia." [25] This condition resulted from several emotionally stressful episodes in which Albanese had been humiliated by his employer in front of the workmen.[26] The board found that his incapacity was causally related to these experiences but denied the claim as a matter of law,[27] apparently on the authority of *Begin's Case.*[28] On appeal, the superior court reversed and concluded that Albanese was entitled to compensation under chapter 152.[29] The Supreme Judicial Court, transferring the case *sua sponte* from the Appeals Court, affirmed the judgment of the superior court.[30]

If the case were considered as governed by *Fitzgibbons' Case,*[31] it would have presented no difficulty when heard on appeal in 1979. The insurer, however, regarded the case as governed by *Begin's Case.*[32] The Court disagreed with the insurer's argument.[33] Therefore, the main focus of the decision in *Albanese* was directed toward distinguishing *Begin's Case.*[34] The *Albanese* Court regarded *Begin's Case* as holding only that a "disease of mind or body which arises in the course of employment, with nothing more, is not within the act." [35] Contrary to the insurer's argument that there was no evidence of "shock or stress greater than ordinary," [36] the board had found a series of specific stressful episodes and a causal nexus between these working conditions and

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[25] 1979 Mass. Adv. Sh. at 1174, 389 N.E.2d at 85.

[26] *Id.* at 1173, 389 N.E.2d at 85.

[27] *Id.* at 1172, 389 N.E.2d at 84.

[28] 354 Mass. 594, 238 N.E.2d 864 (1968). With characteristic accuracy, Justice Abrams points out that while the original decision of the reviewing board denied the claim on the authority of *Begin's Case,* the decision on recommital omitted reference to *Begin.* 1979 Mass. Adv. Sh. at 1175 n.3, 389 N.E.2d at 86 n.3.

[29] *Id.* at 1172, 389 N.E.2d at 84.

[30] *Id.*

[31] 1978 Mass. Adv. Sh. 675, 373 N.E.2d 1174.

[32] 1979 Mass. Adv. Sh. at 1174-75, 389 N.E.2d at 85-86.

[33] *Id.* at 1176, 389 N.E.2d at 86. In a footnote Justice Abrams stated that there was no issue before the Court concerning whether an employee's mental disorder caused by the general stress of his working conditions is a compensable personal injury absent proof of specific stressful work-related incidents. The footnote cited decisions from other states on both sides of this issue and referred to 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23 (1973) [now 1B, § 42.23]. The footnote also refers pointedly to *Begin's Case.* 1979 Mass. Adv. Sh. at 1176-77 n.4, 389 N.E.2d at 86 n.4.

[34] 1979 Mass. Adv. Sh. at 1176, 389 N.E.2d at 86.

[35] *Id.*

[36] *Id.* at 1175-76, 389 N.E.2d at 86.

Albanese's emotional disorder.[37] On this basis, the Court concluded that Albanese's disability was not occasioned by everyday stress or physical wear and tear resulting from a continuous period of hard work.[38] Rather, the Court observed that Albanese's injury was the result of a series of specific stressful work-related incidents which arose during a relatively short period of time.[39] Thus, the Court found that *Begin's Case* was inapplicable to the situation presented in *Albanese*.[40]

Although the *Albanese* Court's restrictive interpretation of *Begin's Case* weakens the impact of *Begin*, the *Albanese* decision appears to have given currency to the distinction between specific incident and general work-stress, if the rescript opinion of the Appeals Court in *Camaioni's Case* [41] is any indication. In *Camaioni*, another correctional guard claimed a personal injury caused by "[t]ension at work resulting in hypertension and question of heart condition." [42] The reviewing board denied the claim, concluding that the employee had not proven by a fair preponderance of the medical evidence that since May 27, 1976, he has been disabled by a personal injury arising out of and in the course of his employment.[43] Because there were no findings on any of the material issues raised by the claim, the court sent the case back to the board for reconsideration in accordance with *Fitzgibbons' Case* and *Albanese's Case*, both of which were decided after the reviewing board's decision.[44] The rescript opinion concluded that in view of the recently decided cases in this area of the law, the board should consider whether the employee's disability was occasioned or aggravated by "specific stressful work-related incidents" or was the result of "the general stress of his working conditions." [45] Thus, as the Appeals Court viewed the issue of compensability for mental or emotional disorders produced by mental stimulus, if a plaintiff can show specific stressful work-related incidents, he may obtain compensation. If his mental or emotional disorder is the result of "the general stress of working conditions," [46] he cannot.

This is also how Massachusetts law is read elsewhere.[47] This interpretation, if based upon the decisions in *Begin*, *Fitzgibbons*, and *Alba-*

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37 *Id.* at 1176, 389 N.E.2d at 86.
38 *Id.*
39 *Id.*
40 *Id.*
41 1979 Mass. App. Ct. Adv. Sh. 1147, 389 N.E.2d 1028.
42 *Id.*
43 *Id.*
44 *Id.* at 1147-48, 389 N.E.2d at 1029.
45 *Id.* at 1148, 389 N.E.2d at 1029.
46 *Id.*
47 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.23(b) n.93.4; Townsend v. Maine Bureau of Public Safety, 404 A.2d 1014, 1019 (Me. 1979).

nese, may be a fair reading. As one commentator has noted, however, the "distinction between sudden stimulus and gradual stimulus, limiting compensation to the former [is as] a matter of compensation . . . unsound." [48] Massachusetts, with its broad definition of personal injury, does not apply the distinction to physical injuries.[49] The distinction between physical and mental injuries is equally unsound.[50] There is no satisfactory reason for Massachusetts to be considered one of the small group of states that limit mental injuries to cases of sudden stimulus or a series of specific stressful stimuli. It is suggested that too much has been read into these three cases and that the issue of compensation for gradual mental injury has yet to be decided in Massachusetts. Furthermore, it is likely that when the issue is squarely confronted, the liberal Massachusetts Court will adopt a construction which provides compensation for all disabilities, mental or physical, resulting from the employment considered in all of its aspects, whether the stress is mental or physical, sudden or gradual.

Begin's Case cannot be regarded as settling the issue of compensation for gradual mental injury. It was not a careful and reasoned analysis of the problem. The decision side-stepped the issue by reaching back fifty years to apply to mental injuries a series of cases dealing with physical injuries arising from long years of unremitting toil. At the time these cases were decided they were without justification in compensation theory. Furthermore, they have since become outmoded by developments in compensation law arising between 1940 and 1968. Invited to reconsider the matter in *Albanese's Case,* the Court declined to do so, but clearly regarded the issue as open.[51] The Court specifically refused to address the issue of whether an employee's mental disorder causally related to the general pressures of his working environment is compensable as a personal injury absent further proof of specific stressful work-related incidents.[52]

Unless the Court intends to disregard all our prior case law and draw distinctions between mental and physical injuries and between specific and cumulative injuries, it should not set special stringent rules limiting the compensability of mental or emotional disorders caused by mental

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[48] LARSON, *supra* note 47, at § 42.23(b).

[49] Trombetta's Case, 1 Mass. App. 102, 294 N.E.2d 484 (1973); Brown's Case, 334 Mass. 343, 135 N.E.2d 669 (1956); Harrington's Case, 285 Mass. 69, 188 N.E. 489 (1933); LOCKE, *supra* note 10, at § 172.

[50] McMurray's Case, 332 Mass. 29, 32, 116 N.E.2d 847, 849 (1954) (no difference between stress brought about by physical exertion and stress occasioned by distress, worry, fear or anxiety).

[51] 1979 Mass. Adv. Sh. at 1176 n.4, 389 N.E.2d at 86 n.4.

[52] *Id.*

or emotional stress. Commentators have explained the special rules limiting compensability of mental injuries, sudden or gradual, as necessary to avoid fraudulent and frivolous claims and to prevent the conversion of the compensation act into a scheme of general health insurance.[53] The Supreme Judicial Court, however, has already answered this argument in the even more difficult area of tort claims for bystander injury. In *Dziokonski v. Babineau*,[54] the Court noted its rejection of the fraud argument as justification for disallowing recovery for emotional distress where there is no proof of physical injury.[55] The Court rejected the difficulties of proof and the threat of fraud as absolute bars to recovery in all cases, because it believed that these dangers were matters for the consideration of the trier of fact.[56] An argument based on frivolous claims has even less merit under the workmen's compensation act, where cases are tried before an expert tribunal, well able to sift facts and weigh medical evidence. In addition, the possibility of a few fraudulent claims ought not to deny benefits, under a law infused with humanitarian purpose,[57] to the many victims of mental disorders genuinely causally related to work-stress.

Other jurisdictions have taken varying positions with regard to mental injuries caused by work-stress. The liberal position adopted by the California and Michigan courts apparently presents no insuperable obstacles to administration by their respective industrial commissions.[58] The Wisconsin courts have adopted a contrary position in order to meet the problem of providing humanitarian relief for worthy claimants while avoiding conversion of the compensation act into general health insurance. The Wisconsin courts have held that in order for non-traumatically caused mental injuries to be compensable, the disorder must be causally related to a working condition of stress greater than the everyday mental

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[53] The leading article on the subject, frequently cited by later commentators, is Comment, *Workmen's Compensation Awards for Psychoneurotic Reasons*, 70 YALE L.J. 1129 (1961). An article reflecting the fear of unrestricted awards is Brill & Glass, *Workmen's Compensation for Psychiatric Disorders*, 193 J.A.M.A. 345 (1965). An interesting casenote, placing an Illinois case in a nationwide context, is *Recovery for Nervous Injury Resulting from Mental Stimulus under Workmen's Compensation Laws*, CHI.-KENT L. REV. 731 (1977). The leading New York case, Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 330 N.E.2d 603 (1975), is discussed in 28 SYRACUSE L. REV. 690 (1977). *See also* 2A LARSON, *supra* note 47, § 42.21.

[54] 1978 Mass. Adv. Sh. 1759, 380 N.E.2d 1295.

[55] *Id.* at 1773, 380 N.E.2d at 1301.

[56] *Id.* at 1772, 380 N.E.2d at 1301.

[57] *See* Young v. Duncan, 218 Mass. 346, 349, 106 N.E. 1, 3 (1914); Hurle's Case, 217 Mass. 223, 226, 104 N.E. 336, 338 (1914) ("in favor of a liberal interpretation of 'personal injuries' . . .").

[58] Baker v. Workmen's Compensation Appeals Board, 18 Cal. App. 3d 852, 96 Cal. Rptr. 279 (1971); Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960).

stress and pressure experienced by all employees.[59] The Maine court, in a recent well-reasoned decision,[60] added another facet to the Wisconsin rule. Noting that some susceptible workmen may succumb to the ordinary stress of everyday work and properly deserve compensation, the court would allow compensation if the cause of the injury is established by clear and convincing evidence.[61] The elaborated rule was thus stated:

> In sum, where there is a sudden mental injury precipitated by a work-related event, our typical workers' compensation rules will govern. Where, however, the mental disability is the gradual result of work-related stresses, the claimant will have to demonstrate either that he has been subjected to greater pressures and tensions than those experienced by the average employee or, alternatively, by clear and convincing evidence show that the ordinary and usual work-related pressures predominated in producing the injury.[62]

Thus, these jurisdictions have, in varying degrees, permitted compensation for mental injuries attributable to work-stress.

The law relative to mental or emotional disorders caused by mental or emotional work stress will undoubtedly be the subject of considerable development in the near future. It is desirable that the principles of broad construction, which have dominated judicial interpretation of the Massachusetts compensation act, will be applied in this field. It is hoped that the trend reflected in *Fitzgibbons' Case* and *Albanese's Case* will be implemented to fashion a rule establishing the compensability of mental disorders causally related to cumulative work-related stress where there is evidence sufficient to satisfy the Industrial Accident Board in the course of the adversary process.

§6.2. Arising Out of and In the Course of Employment—Travel as an Essential Part of Employment by a Temporary Help Agency—Automobile Accident During Weekend Travel to Visit Family. During the *Survey* year the Appeals Court in *Swasey's Case* [1] considered whether an injury sustained by an employee of a temporary help agency while driving home to spend the weekend with his family arose out of and in the course of his employment.[2] Lehigh Design Company, Inc., located in Waltham, Mass., operated a business which supplied engineering per-

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[59] Swiss Colony v. Department of ILHR, 72 Wis. 2d 46, 51, 240 N.W.2d 128, 130 (1976); School District No. 1 v. Department of ILHR, 62 Wis. 2d 370, 377-78, 215 N.W.2d 373, 377 (1974).

[60] Townsend v. Maine Bureau of Public Safety, 404 A.2d 1014 (Me. 1979).

[61] *Id.* at 1020.

[62] *Id.*

§6.2. [1] Swasey's Case, 1979 Mass. App. Ct. Adv. Sh. 2032, 395 N.E.2d 884,

[2] *Id.*

sonnel to their clients, companies which needed such engineering services.[3] In 1965 Swasey, an engineering aide, was interviewed by Lehigh for a project of International Business Machines Corporation (IBM) in Poughkeepsie, N.Y.[4] Lehigh told Swasey that he would receive an additional per diem allowance to cover some of his expenses of travel between his home in Arlington, Mass. and Poughkeepsie and the cost of living away from home.[5] On this basis Swasey accepted the position.[6] He took a room in Poughkeepsie where he cooked his meals on a hot plate, and on weekends he returned to his home in Arlington.[7] One Friday, he left for Arlington by his own car about 10:30 p.m.[8] While driving through Westfield, Mass., about 1:00 a.m., he went off the road, hit a tree, and sustained serious injuries.[9] After a brief hospitalization and six months more out of work, he returned to IBM on crutches.[10] He managed to continue working there and on other jobs until he was finally forced by his injury to stop work in 1972.[11]

Swasey then filed a claim for compensation benefits.[12] A single member of the Industrial Accident Board allowed his claim, finding *inter alia* that the per diem allowance was a term of Swasey's employment contract and ruling that his injury arose out of and in the course of his employment.[13] The reviewing board affirmed the decision.[14] On appeal, the superior court reversed and dismissed the claim, ruling that the findings were not warranted by the evidence.[15] On the employee's appeal, the Appeals Court reversed the judgment of the superior court. The court held that when viewed in its entirety, it was the employment that "impelled the employee to make the trip," [16] thus rendering the risk of the

[8] *Id.* at 2033, 395 N.E.2d at 885. Lehigh hired the people and assigned them to companies, paid their wages, made the necessary deductions for state and federal taxes and social security benefits, and provided worker's compensation insurance. *Id.*

[4] *Id.*

[5] *Id.* Swasey had objected that the original salary offered would not cover these expenses. Lehigh agreed to pay Swasey an additional per diem of $1.25 per hour up to 40 hours to cover travel expenses or food and lodging, or both, as he should choose. *Id.*

[6] *Id.*

[7] *Id.* at 2034, 395 N.E.2d at 883.

[8] *Id.* at 2034, 395 N.E.2d at 886. The accident occurred on October 30, 1965. *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 2035, 395 N.E.2d at 886.

[12] *Id.* "An injury arises out of the employment if it arises out of the nature, conditions, obligations, or incidents of the employment; in other words, out of the employment looked at in any of its aspect." Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940).

[13] 1979 Mass. App. Ct. Adv. Sh. at 2035, 395 N.E.2d at 883.

[14] *Id.*

[15] *Id.* at 2032, 395 N.E.2d at 885.

[16] *Id.* at 2037, 395 N.E.2d at 887, *quoting* Carson's Case, 351 Mass. 406, 409, 221 N.E.2d 871, 874 (1964).

trip a hazard of that employment.[17] It ruled that the "going and coming" rule had no application to the case because the employee came within "that class of 'travelling workers' not barred from receiving compensation." [18]

The chief issue presented in *Swasey's Case* was whether the injury arouse out of and in the course of employment.[19] Chapter 152, section 26, of the General Laws entitles an employee to benefits when he suffers an injury "arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer . . . ." [20] The insurer contended that Swasey did not fall within the street risk clause, as he was not "actually engaged" in his employer's business at the moment of injury.[21] Similarly, the insurer argued that because Swasey was injured while on his way home to visit his family, he is precluded from being compensated by the "going and coming" rule, which states that an employee injured on his way to or from work is not entitled to compensation.[22]

The court first disposed of the "going and coming" rule argument by observing that when his employment was viewed in its entirety, Swasey was a "travelling worker." [23] Travelling workers do not come within the scope of the "going and coming" rule which is limited to persons with a fixed place of employment and fixed hours.[24] When going or coming from the employment, workers are protected only when on the employment premises.[25]

The court then considered the nature of Swasey's employment. It noted that Swasey was specifically hired by Lehigh as an engineering aide who would be assigned and sent to work on projects in distant locations.[26] Swasey was to continue with each project until its completion.[27] The court also noted that it was important to the success of Lehigh's

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17 1979 Mass. App. Ct. Adv. Sh. at 2037, 395 N.E.2d at 887.

18 *Id.*, *quoting* Wormstead v. Town Manager of Saugus, 366 Mass. 659, 667, 322 N.E.2d 171, 176 (1975).

19 1979 Mass. App. Ct. Adv. Sh. at 2042, 395 N.E.2d at 886.

20 G.L. c. 152, § 26, *as amended by* Acts of 1973, c. 855, § 1.

21 1979 Mass. App. Ct. Adv. Sh. at 2038, 395 N.E.2d at 887.

22 *Id.* at 2036, 395 N.E.2d at 886. For a discussion of the "going and coming" rule, see 29 MASSACHUSETTS PRACTICE, LOCKE, WORKMEN'S COMPENSATION §§ 262-265 (2d ed. 1974).

23 1979 Mass. App. Ct. Adv. Sh. at 2037, 395 N.E.2d at 887.

24 LOCKE, *supra* note 22, §§ 262, 310-311.

25 Gwaltney's Case, 355 Mass. 333, 244 N.E.2d 314 (1969). This case provides a good general review of the rule.

26 1979 Mass. App. Ct. Adv. Sh. at 2037, 395 N.E.2d at 887.

27 *Id.*

business that its employees travel.[28] The court did not base its conclusion narrowly on the per diem, but used the per diem to demonstrate that Lehigh understood that travel and living temporarily away from home was an essential part of its business.[29] This analysis supported compensation on general principles of "arising out of and in the course of employment" and on the "street risk" amendment.[30] The court stated that "Swasey . . . was injured while engaged in an activity which constituted a critical and substantial incident of his employment . . . ."[31] The court concluded, therefore, that Swasey's injury arose out of a risk of the street while he engaged in the undertakings of his employment.[32]

The court's holding in *Swasey's Case* is well supported by precedent. Had Swasey been injured in his rooming house, rather than on his way home for the weekend, he would have come within the landmark decision of *Souza's Case*[33] which was the basis of the "actual risk" doctrine. Consideration of whether the employment impelled the trip brought the case within the oft-cited *Caron's Case*,[34] which held that where the employment impels the employee to make the trip, the risk of the trip is a hazard of employment.[35]

In basing its decision on the principle of "arising out of and in the course of employment," the *Swasey* court once again provided a rational construction of the compensation act. Instead of focusing on a series of narrow fact-oriented rules, the court gave a basic interpretation of the broad language and purpose of the act.[36] The *Swasey* decision broadens the protection afforded employees of temporary help agencies, the nature of whose employment is such that travel is "a critical and substantial incident" of the employment.[37] The rationale of the decision is not limited to employees of temporary help agencies, nor to injuries during

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[28] *Id.*

[29] *Id.* at 2037-38, 395 N.E.2d at 387.

[30] *Id.* at 2038, 395 N.E.2d at 887.

[31] *Id.*

[32] *Id.*

[33] 326 Mass. 332, 55 N.E.2d 611 (1944) (traveling repairman killed by fire in rooming house where he slept while working away from home on assignment).

[34] 351 Mass. 406, 221 N.E.2d 871 (1966) (returning home at night from a company dinner).

[35] *Id.* at 409, 221 N.E.2d at 874. The decision of the *Swasey* court enabled it to avoid considering whether the trip was an exception to the "going and coming" rule. The employee had argued, as a second line of defense, that the award granted by the board should be sustained according to a line of cases in other jurisdictions dealing with travelling workers engaged in paid travel to distant worksites. 1979 Mass. App. Ct. Adv. Sh. at 2036, 395 N.E.2d at 886-87.

[36] Another outstanding example of this approach to compensation appeals is D'Angeli's Case, 369 Mass. 812, 343 N.E.2d 368 (1976).

[37] 1979 Mass. App. Ct. Adv. Sh. at 2038, 395 N.E.2d at 887.

travel. Rather, it is based broadly on the essential meaning of the term "arising out of and in the course of employment." [38]

§6.3. Rights of Employees of Non-Insured Employers—Negligence Action Against Corporate Officer for Failure to Provide Compensation Insurance. The Massachusetts Workmen's Compensation Act is compulsory for all employees in private employment, with the sole exception of seasonal or casual or part-time domestic servants for whom there is elective coverage.[1] Every employer for whom the act is compulsory must pay to his employees the compensation provided by the act.[2] The employer may provide for these payments by (1) insurance with an insurer, or (2) qualifying as a self-insurer.[3] The employer's obligation to comply with the requirement of coverage is enforced by a statutory fine of not more than $500 and imprisonment for not more than one year.[4] More importantly, where an employer fails to provide coverage and an incident ensues, the employer may be sued in a civil action for the full scope of tort damages.[5] In such an action the employer cannot raise the usual common law defenses of fellow servant, assumption of the risk, and contributory negligence.[6] Furthermore, the employee has only to show that the injury arose out of and in the course of employment. The employee does not have to establish fault on the part of the employer.[7]

Two cases decided during the *Survey* year dealt with the problem of recovery of damages against a non-insured employer. In *Samagais v. Davidson*,[8] the Appeals Court upheld a determination of the superior court that as a matter of law the employer was not insured on the date of the injury.[9] The superior court found that the compensation insurance had been effectively cancelled before that date and had not been reinstated by any actions thereafter.[10] The case is of interest primarily for the facts illustrating the maneuvers of the employer to avoid the finding that he was not insured.

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[38] *Id.* at 2037, 395 N.E.2d at 887.

§6.3. [1] G.L. c. 152, § 1(4); MASSACHUSETTS PRACTICE, LOCKE, WORKMEN'S COMPENSATION § 101 (2d ed. 1974).

[2] G.L. c. 152, § 25C.

[3] G.L. c. 152, § 25A.

[4] G.L. c. 152, § 25C.

[5] G.L. c. 152, §§ 66, 67.

[6] *Id.*

[7] *Id.*

[8] 1979 Mass. App. Ct. Adv. Sh. 4, 384 N.E.2d 210.

[9] *Id.* at 6, 384 N.E.2d at 212.

[10] *Id.*

In the second case, *LaClair v. Silverline Manufacturing Co., Inc.*,[11] the Supreme Judicial Court held that a principal corporate officer could be found personally liable for his negligence in failing to provide workmen's compensation coverage.[12]

Joseph W. LaClair was a supervisor in charge of plant production for Marian Plastics, Inc., a small company in the business of manufacturing and coloring plastics.[13] He was severely burned when an explosion and fire occurred at his employer's factory, and he died nine days later.[14] At the time, Marian Plastics was substantially in debt and had neither fire nor workmen's compensation insurance.[15] A number of actions were brought, including an action against the corporation under chapter 152, sections 66 and 67, which resulted in a verdict in the plaintiff's favor.[16]

A separate action was brought against Robert E. Lewis, the president, treasurer, sole stockholder, and day-to-day manager of the company business, alleging that he negligently failed to obtain workmen's compensation insurance in behalf of his employees.[17] At the close of the evidence, the judge allowed a motion for a directed verdict against the plaintiff.[18] On appeal, the Supreme Judicial Court reversed, concluding that the evidence presented at trial was sufficient for a jury to find that Lewis was negligent in failing to obtain workmen's compensation insurance.[19] The Court remanded the cause of action for retrial.[20]

The Court's line of reasoning is clear. After recapitulating the employer's obligation to provide for payment of compensation and the civil and criminal penalties for noncompliance, Chief Justice Hennessey stated: "What these statutory provisions reveal . . . is that the Workmen's Compensation Act is a humanitarian measure designed to provide adequate financial protection to the victims of industrial accidents."[21] The Court noted that without such insurance, many injured employees and their families would personally have to pay large portions of the costs of job-related accidents.[22] Workmen's compensation provides the employee and his family with a limited but substantial right to be in-

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[11] 1979 Mass. Adv. Sh. 2228, 393 N.E.2d 867.
[12] *Id.* at 2229-30, 393 N.E.2d at 869.
[13] *Id.* at 2230, 393 N.E.2d at 869.
[14] *Id.*
[15] *Id.* at 2236, 393 N.E.2d at 871.
[16] *Id.* at 2229, 393 N.E.2d at 869.
[17] *Id.* at 2231, 393 N.E.2d at 869.
[18] *Id.* at 2229, 393 N.E.2d at 869.
[19] *Id.* at 2229-30, 393 N.E.2d at 869.
[20] *Id.* at 2230, 393 N.E.2d at 869.
[21] *Id.* at 2234, 393 N.E.2d at 871.
[22] *Id.* at 2234-35, 393 N.E.2d at 871.

sured against the serious financial costs that result from job related injuries.[23]

The Court emphasized that its decision was based upon ordinary negligence principles.[24] In determining whether Lewis was negligent the Court applied the same test that is used in all negligence cases—"how a person of ordinary prudence would act in similar circumstances."[25] The Court ruled that there was sufficient evidence to submit to the jury the question of whether Lewis was negligent in failing to provide workmen's compensation coverage.[26] The Court noted that Lewis, as corporate president and treasurer, was subject to criminal sanctions for his firm's failure to obtain workmen's compensation insurance.[27] According to the Court, while this violation of the safety statute or like enactment was not conclusive evidence, it was evidence of the violator's negligence as to all consequences the statute sought to avoid.[28] The Court also found that Lewis was well aware of his company's precarious financial condition.[29] Thus, the Court reasoned that Lewis should have known that an employee's attempt to satisfy a personal injury claim against the corporation from the company's assets would probably be futile.[30] In addition, the Court noted that Lewis knew of the company's use of extremely volatile chemicals and of the company's poor safety precautions.[31] From these facts it could be inferred that Lewis knew or should have known that there was a significant probability of industrial accidents during the production process.[32] The Court concluded that from this evidence a jury could find that Lewis's failure to obtain compensation insurance was negligent.[33]

Addressing the issue of damages, the Court held that damages would be limited to the amount of recovery that the claimant would have been otherwise entitled to receive under chapter 152.[34] The Court observed

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[23] *Id.* at 2235, 393 N.E.2d at 871.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 2235-36, 393 N.E.2d at 871.
[29] *Id.* at 2236, 393 N.E.2d at 871.
[30] *Id.* Although the opinion is silent on this point, it is a reasonable inference that the judgment against the corporation was essentially uncollectible.
[31] *Id.*
[32] *Id.* The Court also held that Lewis would not be immune from personal liability for his failure to obtain workmen's compensation coverage, because this failure occurred while performing corporate business. The Court stated that a corporate officer is liable for those torts in which he has personally participated, whether or not he is acting within the scope of his authority. *Id.*
[33] *Id.* at 2235, 393 N.E.2d at 871-72.
[34] *Id.* at 2238, 393 N.E.2d at 872.

that no greater sum would be warranted given the absence of a statute establishing the measure of damages.[35] In so stating the Court invited comparison of this case with actions brought under section 66,[36] which are characterized as actions to recover damages for personal injury. The Court apparently meant to distinguish the present case from actions carrying with them a statutory measure of damages, particularly the usual damages in a personal injury action. The Court seems unnecessarily narrow in so limiting damages, particularly after having excoriated the defendant's conduct in terms that would have seemed to warrant even punitive damages.

In assessing damages on retrial the jury should consider all the elements entering into a compensation award. These elements would include benefits for widows and dependent children, funeral benefits, and medical and hospital benefits. There are two additional elements of damages that should be considered along with the other benefits in assessing the amount of compensation that would have been obtained from workmen's compensation. One such damage is the specific losses allowed under section 36, which survive to the dependent widow by virtue of section 36A.[37] The other is the series of additional costs and fees provided by the compensation act for unreasonable delay in payment.[38] If the plaintiff is going to be limited to the compensation act as a measure of damages, at the very least she should be entitled to the benefit of all the provisions of the compensation act, as a properly instructed jury might see fit to allow.

The Court concluded its discussion of the corporate officer's liability by expressing its hopes "that the self-interest of employers, their officers, and agents will lead them all to consistent compliance with c. 152, and, in turn, to a reduction in uncompensated industrial accidents." [39] Recognizing that self-interest might not invariably lead to such a course of action, the Supreme Judicial Court in *LaClair* has added an important new weapon to the arsenal of rights of an employee of an uninsured employer. Nevertheless, more than a private remedy is needed. A state fund is required to provide compensation for the injured worker where the employer has failed to meet his statutory obligation. Under such a scheme, it would be the responsibility of the state, rather than the employee, to pursue the elusive defaulting employer. Bills to create such a fund have been submitted to the General Court for the past

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35 *Id.*
36 *Id.*
37 *See, e.g.*, Bagge's Case, 369 Mass. 129, 338 N.E.2d 348 (1975).
38 G.L. c. 152, §§ 12A, 14 & 51A.
39 1979 Mass. Adv. Sh. at 2238, 393 N.E.2d at 872.

several years but have failed of passage. The commonwealth, which requires compulsory compensation, should stand behind its own standard and protect those whom the employer fails to insure.

§6.4. Unemployment Benefits—Bar to Receipt of Workmen's Compensation Payments—Exception for Workers Sustaining Injuries Specified Under Chapter 152, Section 36. Ordinarily, an employee may not receive both the benefits for unemployment under chapter 151A, the Employment Security Act, and the total or partial incapacity compensation under chapter 152, the Workmen's Compensation Act.[1] Although the Employment Security Act and the Workmen's Compensation Act address different hazards,[2] there may be occasions when an employee is out of work as a result of both.[3] No provision in the compensation act deals with this situation, but the Employment Security Act bars an employee who "is receiving or has received or is about to receive compensation for partial or total disability" under workmen's compensation from receiving unemployment benefits.[4] In *Pierce's Case* [5] the converse of the prohibition of chapter 151A, section 25(d), was applied to bar an employee who had received unemployment benefits from receiving incapacity compensation for an overlapping period.[6] In *Gallant's Case* [7] the Court held that the Industrial Accident Board did not have the power to prevent insurance companies from receiving a windfall by ordering an insurer to reimburse the Division of Employment Security.[8]

An exception to this rule has been made for employees suffering from injuries specified in chapter 152, section 36, of the compensation act.[9] This exception was based on a similar exception in clause (3) of subparagraph (d) of chapter 151A. In dictum in *Pierces' Case* the Supreme Judicial Court noted that the legislature had also recognized that an exception should be made in cases where a workman suffers partial incapacity due to any of the injuries listed in section 36.[10] The Court observed that in such instances it may be assumed that "the workman would not only suffer a diminution of his earning capacity due directly to his injury but would be further handicapped in securing employment

§6.4. [1] Pierce's Case, 325 Mass. 649, 92 N.E.2d 245 (1950).

[2] *Id.* at 656, 92 N.E.2d at 250.

[3] For example, an injured employee may continue to work despite his pain and handicap until he is laid off. Such an employee with a permanent handicap is unable, following a layoff, to find work suited to his limited capability.

[4] G.L. c. 151A, § 25(d).

[5] 325 Mass. 649, 92 N.E.2d 245 (1950).

[6] *Id.* at 657, 92 N.E.2d at 250-51.

[7] 329 Mass. 607, 109 N.E.2d 829 (1953).

[8] *Id.* at 609-10, 109 N.E.2d at 830.

[9] G.L. c. 152, § 36.

[10] 325 Mass. at 655, 92 N.E.2d at 249.

during a period of business depression due to his visible maimed or crippled physical condition and so his inability to earn might in part at least be due to the economic situation." [11] This dictum, although singled out and highlighted in by this author,[12] remained largely ignored. The Court in *Pierce's Case* assumed that the legislature intended to allow unemployment compensation only when an employee actually had received payments *for* specific compensation *under* section 36 rather than allow it whenever an employee was suffering from an injury sufficiently severe to be specified under section 36.[13] During the *Survey* year the Appeals Court in *Rival's Case* [14] confirmed the validity of the dictum of *Pierce's Case*.

In *Rival's Case*, an employee who had incurred an industrial injury in 1967, resulting in loss of his right arm, was subsequently employed on a seasonal basis in a job created for him.[15] For about four months every winter he was laid off from his job owing to the seasonal nature of his work and his inability to perform the other work previously assigned to him during the winter months.[16] During these months he applied for and received unemployment benefits under chapter 151A.[17] He then applied for partial incapacity compensation under chapter 152, section 35, up to the amount of his former weekly wage.[18] He was denied such compensation by the review board.[19] On appeal to the superior court, the court entered a judgment affirming the review board's decision.[20] The judge reported a question of law to the Supreme Judicial Court, which referred the question to the Appeals Court.[21]

The Appeals Court held that an employee who has incurred an injury specified in chapter 152, section 36, and who has received unemployment benefits under chapter 151A may also receive partial incapacity compensation under chapter 152, section 35, up to the amount of his

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[11] *Id.*

[12] 29 MASSACHUSETTS PRACTICE, LOCKE, WORKMEN'S COMPENSATION § 616, at 731 n.39 (2d ed. 1974).

[13] 325 Mass. at 656, 92 N.E.2d at 250.

[14] 1979 Mass. Adv. Sh. 1429, 391 N.E.2d 932.

[15] *Id.* at 1430, 391 N.E.2d at 933.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1430-31, 391 N.E.2d at 933.

[21] *Id.* at 1431, 391 N.E.2d at 933. As a matter of procedure, under c. 152, § 11, the superior court justice must enter a judgment on the case before him, before he has the power to report a question of law. The court in *Pierce's Case* was confronted with a report without a decree and discharged the case. It nevertheless addressed the merits of the case because of the importance of the issue. *Id.* at 1431 n.4, 391 N.E.2d at 133 n.4.

average wage prior to the injury.[22] The court's decision was based on the exception contained in chapter 151A, section 25(d).[23] While this section disqualifies persons from receiving unemployment benefits for a period for which they are receiving or about to receive compensation for partial or total disability, it does not include payments for those injuries specified under chapter 152, section 36.[24] The court then noted the dictum in *Pierce's Case*.[25] The insurer had argued that the construction in *Pierce's Case* was contrary to the intent of the legislature which, the insurer claimed, was to permit only payments made under chapter 152, section 36.[26] In response to the insurer's argument the court noted "that the Legislature has amended c. 151A, §25, numerous times since the opinion in *Pierce* was issued in 1950, but has left the portion §25(*d*) construed in *Pierce* unchanged. It must be presumed, therefore, that the Legislature has adopted the construction of the statute given it in *Pierce's Case*." [27] The provisions of chapter 152, section 36, have been amended frequently since the decision in *Pierce* in 1950, and section 36 now encompasses a broader range of handicaps than the section construed in *Pierce*.[28] The insurer sought to draw comfort from this fact.[29] The *Rival* court, however, firmly stated that "[t]he fact that G.L. c. 152, §36, has been amended to include many more types of injuries does not render the court's construction in *Pierce* invalid, since it was c. 151A, §25(*d*), and not c. 152, §36, which the court construed in *Pierce*." [30]

No question of double benefits is raised by the allowance of partial compensation. Under section 35 the most that an employee can receive is his former average weekly wage.[31] The Court quotes this author, who has suggested that "the Board will usually set the employee's earning capacity at an amount equal to or above the unemployment benefit." [32] In this case, the Court noted, the combination of unemployment benefits and partial incapacity benefits would merely bring the employee's income up to his average weekly wage before the injury occurred.[33]

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22 *Id.*
23 *Id.*
24 G.L. c. 151A, § 25(d).
25 1979 Mass. App. Ct. Adv. Sh. at 1431, 391 N.E.2d at 933.
26 *Id.* at 1432, 391 N.E.2d at 934.
27 *Id.*
28 The principal amendments are contained in the Acts of 1949, c. 519, Acts of 1966, c. 584, and Acts of 1972, c. 741.
29 1979 Mass. App. Ct. Adv. Sh. at 1432, 391 N.E.2d at 934.
30 *Id.* at 1432-33, 391 N.E.2d at 934.
31 *Id.* at 1434, 391 N.E.2d at 934-35.
32 *Id.* at 1433, 391 N.E.2d at 934, *quoting* LOCKE, *supra* note 12, § 616, at 731-32.
33 1979 Mass. App. Ct. Adv. Sh. at 1434, 391 N.E.2d at 935.

The decision is a strong reminder to the Industrial Accident Board and to insurers that the beneficient provisions of the Legislature and the liberal construction of the appellate courts are not to be lightly set aside. It is an equally strong reminder to employees' counsel that they have a duty to insist on the enforcement of these provisions.

§6.5. Second Injury Fund—Retroactive Application of an Amendment to the Statute. An insurer is required to pay a disabled employee compensation for the combined effects of his industrial injury and any pre-existing infirmity, whether congenital or traumatic.[1] The legislature in 1919 enacted what is known as the Second Injury Fund [2] as a means of encouraging the employment of the handicapped. The intention of the legislature was to relieve the employer or the insurer from the burden of paying full compensation for the further disability of an employee whose previous injury combined with one subsequently incurred in the course of employment.[3] The original fund was markedly limited in its coverage, applying only to employees who had certain specified injuries, resulting from a personal injury. It was amended in 1950 to apply to specific injuries, whether the impairment is the result of a personal injury or a congenital defect.[4] After 1950, however, the statute still applied only to employees with the identified specific injuries. It was no aid to the great mass of handicapped workers suffering from back injuries or heart attacks or those affected by epilepsy, central nervous system diseases, muscular dystrophy, or other medical conditions. Such workers had a great problem in securing work, although fully able to give valuable service in selected occupations.[5]

Over a period of years a series of bills were introduced in the legislature by organizations interested in the employment of the handicapped, although none achieved passage until 1973. In 1962, a special commission dealing with the problems of rehabilitation, employment, or re-employment of handicapped or disabled work persons recommended passage of a broader Second Injury Fund.[6] Similar legislation was introduced in successive years.[7] The Acts of 1973, chapter 855, section 2, amended the Second Injury Fund by extending its coverage to all types of physical

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§6.5. [1] Franconnier's Case, 223 Mass. 273, 111 N.E. 792 (1916); 29 MASSACHUSETTS PRACTICE, LOCKE, WORKMEN'S COMPENSATION § 308 (2d ed. 1974).

[2] Acts of 1919, c. 272, §§ 1 & 2.

[3] McLean's Case, 326 Mass. 72, 74, 93 N.E.2d 233, 235 (1950).

[4] Acts of 1950, c. 527, to overcome the decision in *McLean's Case, supra* note 3, that personal injury did not include a congenital defect.

[5] LOCKE, *supra* note 1, § 309, at 375.

[6] House Doc. 3420 (1962).

[7] American Mut. Liab. Ins. Co. v. Commonwealth, 1979 Mass. Adv. Sh. 2685, 2690 n.11, 398 N.E.2d 491, 496 n.11.

impairment. The Fund would reimburse an insurer for up to fifty percent (50%) of any compensation paid subsequent to the first one hundred four (104) weeks of disability, where an employee with a known physical impairment sustained a compensable injury resulting in disability greater than that which would have resulted from the injury alone.[8]

The 1973 statute contained no special section limiting its application to injuries arising on or after its effective date, December 31, 1973. Considerable questions therefore arose, in the administration of the 1973 amendment, concerning the application of the amendment to injuries occurring before its effective date. In *American Mutual Liability Insurance Co. v. Commonwealth*,[9] decided at the end of the *Survey* year, the Supreme Judicial Court held that the amendment had application to all injuries, whether arising before or after the effective date of the amendment.[10] The Court found that a special provision of the compensation act, chapter 152, section 2A, controlled.[11] The Court ruled that inasmuch as the 1973 amendment did not increase the amount of compensation payable to an employee or his dependents, the amendment had retroactive effect.[12]

The traditional rule is that statutes dealing with substantive rights are to be construed to deal only with transactions occurring after their enactment, unless legislative intent that they should be applied to past transactions is clearly expressed.[13] By the same rule, statutes that deal with procedural or remedial matters apply to all pending cases. For the purposes of the compensation act, however, whether an amendment applies retroactively or not is governed by a special provision of the General Laws, chapter 152, section 2A.[14] This provision states that every act in amendment of the compensation act that increases the amount of compensation payable to an injured employee or his dependents is deemed to be substantive in character and to apply only to personal injuries occurring on or after the effective date of such act, unless otherwise expressly provided.[15] All other acts are deemed to be procedural or remedial only and to apply to "personal injury irrespective of the date of their occurrence, unless otherwise expressly provided."[16] The test of ret-

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[8] G.L. c. 152, § 37.
[9] 1979 Mass. Adv. Sh. 2685, 398 N.E.2d 491.
[10] *Id.* at 2686, 398 N.E.2d at 493.
[11] *Id.*
[12] *Id.* at 2692, 398 N.E.2d at 496.
[13] Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, 3, 107 N.E. 426, 427 (1914).
[14] G.L. c. 152, § 2A, *added by* Acts of 1946, c. 386, § 3.
[15] *Id.*
[16] *Id.*

roactivity under section 2A is thus considerably broader than the traditional rule. It establishes a legislative policy that all amendments other than those increasing the amount of compensation payable to an injured employee or his dependents shall apply to pending claims. Thus, an amendment increasing the rate of interest was held applicable to injuries before its effective date, as interest was held not to be "compensation" within the meaning of this section.[17] Acts creating the presumption of compensability under chapter 152, section 7A,[18] and abolishing the presumption of permanent and total disability for specified handicaps [19] were also held to apply retroactively.

In the instant case, *American Mutual Liability Insurance Co. v. Commonwealth,* the Court found this provision applicable to the 1973 Second Injury Fund.[20] The commonwealth, in its capacity as custodian of the Second Injury Fund, argued that the case resembled *Price v. Railway Express Agency, Inc.*,[21] where an amendment extending the coverage of the act to a group of employees previously excluded was construed to extend coverage only to injuries after its effective date.[22] The Court distinguished *Price,* stating that the Court had denied retroactive application of section 2A in that case, because such application would have resulted in an increase in the amount of compensation to be paid by the employer.[23] Such an increase was considered contrary to section 2A's purpose, which was to limit the compensation to the amount fixed at the time of injury and to avoid placing an additional burden on the employer by increasing the compensation.[24] The Court noted that in the present case a retroactive application of amended section 37 would lead neither to an increase in any existing compensation obligation nor to the creation of new employee claims for compensation.[25] The only increased burden would fall on the commonwealth in making payment under the Second Injury Fund.[26] The Court observed that if the legislature so desired, it had the power to place additional burdens on the Second Injury Fund.[27] The Court then added that "where a State enacts retroactive legislation impairing its own rights, it cannot be heard to complain . . . ." [28]

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17 Murphy's Case, 352 Mass. 233, 235, 224 N.E.2d 462, 464 (1967).
18 Goddu's Case, 323 Mass. 397, 400, 82 N.E.2d 232, 234 (1948).
19 Khachadoorian's Case, 329 Mass. 625, 629, 110 N.E.2d 115, 117 (1953).
20 1979 Mass. Adv. Sh. at 2686, 398 N.E.2d at 493.
21 322 Mass. 476, 78 N.E.2d 13 (1948).
22 *Id.* at 484, 78 N.E.2d at 19.
23 1979 Mass. Adv. Sh. at 2692, 398 N.E.2d at 496.
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.* at 2692, 398 N.E.2d at 496.
28 *Id., quoting* Greenway's Case, 319 Mass. 121, 123, 65 N.E.2d 16, 18 (1946).

In the course of its decision, the Court reviewed the history of the Second Injury Fund.[29] Citing legislative efforts to broaden the Second Injury Fund to effectuate the Fund's underlying purpose, the Court emphasized that the legislative purpose was the encouragement of the hiring and continued employment of handicapped or previously injured workers.[30] In response to the commonwealth's argument that retroactive application of the act could not affect the hiring of anyone in the past,[31] the Court relied on the terminology used in section 37,[32] the third paragraph of which speaks of "retention in employment."[33] The Court viewed these words as indicating that the act was to apply to employees who were hired before or after the effective date of the act.[34]

In response to various contentions raised by the commonwealth, the Court made several interesting observations concerning statutory construction For example, the commonwealth had contended that the Second Injury Fund would be inadequate to provide reimbursement for all the claims that would arise if the amendment to section 37 were applied retroactively.[35] The Court observed that while such arguments concerning hardship may be appropriate respecting the enactment of legislation, they "are not controlling in the interpretation of existing statutes."[36] In response to the commonwealth's argument that a retroactive application of the amendment would not accomplish the legislative purpose,[37] the Court observed that it was for the legislature to determine what means would best effectuate its purpose.[38] The Court also noted that if the legislature had wanted to limit the operation of the amended section 37 to cases arising subsequent to the effective date, it could have done so expressly.[39]

The decision of the Court is a clear-cut resolution of a previously confusing and controversial problem. The Court did not base its decision on the fact that the insurer's right to reimbursement arose after the effective date of the amendment or that its petition for reimbursement had been filed after the effective date of the amendment.[40] Instead, it faced the issue squarely. Similarly, the Court did not place any limit on cases

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29 1979 Mass. Adv. Sh. at 2690 n.11, 398 N.E.2d at 495 n.11.
30 *Id.* at 2690, 398 N.E.2d at 495.
31 *Id.* at 2693, 398 N.E.2d at 496.
32 *Id.* at 2693 n.13, 398 N.E.2d at 497 n.13.
33 G.L. c. 152, § 37.
34 1979 Mass. Adv. Sh. at 2693 n.13, 398 N.E.2d at 497 n.13.
35 *Id.* at 2694, 398 N.E.2d at 497.
36 *Id.*
37 *Id.* at 2692-93, 398 N.E.2d at 496.
38 *Id.* at 2693, 398 N.E.2d at 496-97.
39 *Id.*
40 *Id.* at 2687 n.4, 398 N.E.2d at 494 n.4.

coming within the retroactive application of the amendment. While practitioners may question how far back the insurer can reach to seek reimbursement or question the effect of a prior lump sum settlement, the Court has placed no limit upon the retroactive application of the amendment.

The only limitation will be the insurer's self-restraint. Insurers know that if funds prove insufficient the legislature has provided for such inadequacy by empowering the chairperson of the Industrial Accident Board to levy additional assessments upon insurers and self-insurers in the event that payments from the Fund exceed deposits in any given year.[41] Consequently, insurers may well be moved to limit their applications knowing that they would stimulate such an assessment. On the other hand, the self-restraint of some insurers may be matched by the greed of others. Only time can tell what the pragmatic effect of the decision will be.

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[41] G.L. c. 152, § 65.