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Chapter 20: Workmen's Compensation

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CHAPTER 20

Workmen's Compensation

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§20.1. Introduction. During the 1970 SURVEY year, the Supreme Judicial Court decided only eight cases involving the Workmen's Compensation Act.[1] Rescript opinions were written in three of the cases. The decisions involved no questions of first impression but provide useful examples of the corrective function of judicial review in preserving the rights of the parties and limiting the role of the Industrial Accident Board and the Superior Court.

A. COURT DECISIONS

§20.2. Administrative due process: Evidentiary basis of decision of Industrial Accident Board. The parties subject to the Workmen's Compensation Act are entitled to a hearing on any issue affecting them.[1] Although the Industrial Accident Board is a "quasi-judicial" or "administrative" tribunal[2] whose proceedings "ought not to be hampered by technicalities,"[3] hearings before the board are conducted in generally the same way and with the same safeguards as hearings before a master or auditor, or a judge sitting without a jury. Members of the board in presiding over hearings are guided and controlled by the same general principles which govern judicial officers in discharging similar functions. Rules as to the conduct of hearings, the admission or exclusion of evidence, burden of proof and measure of persuasion, as developed at common law and modified by statute, apply in cases before the board.[4]

Hearings must be conducted with due regard for the constitutional

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§20.1. [1] G.L., c. 152.

§20.2. [1] Joos' Case, 267 Mass. 322, 166 N.E. 723 (1929).
[2] Monico's Case, 350 Mass. 183, 213 N.E.2d 865 (1966) (quasi-judicial tribunal); Levangie's Case, 228 Mass. 213, 117 N.E. 200 (1917); Devine's Case, 236 Mass. 588, 129 N.E. 414 (1921); Broderick's Case, 320 Mass. 149, 150, 67 N.E.2d 897, 898 (1946) ("an administrative board not part of the judicial system of the Commonwealth").
[3] Carroll's Case, 225 Mass. 203, 208, 114 N.E. 285, 287 (1916); Walsh's Case, 227 Mass. 34, 116 N.E. 496, 6 A.L.R. 567 (1917); Belezarian's Case, 307 Mass. 597, 31 N.E.2d 4 (1940) (members often laymen).
[4] Pigeon's Case, 216 Mass. 51, 102 N.E. 932 (1913).

requisites of due process of law. Previous cases have upheld the right to be represented by counsel of one's choice,[5] to present evidence and have it considered in the determination of the case,[6] and to offer argument on the pertinent issues.[7] To this list, the Supreme Judicial Court, in *Haley's Case*,[8] has now added the requirement that no fact be considered and referred to by the single member or reviewing board that is not properly admitted and made a part of the evidence at the hearing.

A decision of the single member, affirmed and adopted by the reviewing board, allowing partial incapacity compensation only to February 28, 1964, was reversed as tainted with legal error where it appeared that this was the date of a medical examination by a physician who was not called to testify and whose report was never made a part of the evidence. His report was in the possession of the plant nurse when she testified before the single member. Employee's counsel attempted to incorporate a statement from the report in a question to the nurse, but an objection was sustained. Neither the report, nor any portion of it, was introduced into the evidence. Despite that exclusion, the decision of the single member contained a lengthy reference to, and quotation from, the examination and report of the physician. It was apparent that his opinion was accepted, because the date on which partial compensation terminated was the date of the examination by this physician. Both the single member and the reviewing board went beyond the evidence before them in arriving at their decision. As a result, the decree of the Superior Court incorporating the board's decision was reversed as based on an error of law by the board. In the words of the Court,

> Parties to proceedings before a single member or a reviewing board under G.L. c. 152, §§ 8 and 10, are entitled to a hearing . . . [and] are then entitled to a decision based on the evidence presented at the hearing. Nothing can be considered or treated as evidence which is not introduced as such. Although the board is an administrative body, and not a court, its decisions partake of the nature of a court's decisions . . . . Constitutional due process requirements apply to board hearings and decisions.[9]

The Court cited many cases in other jurisdictions in support of the

[5] Ackroyd's Case, 340 Mass. 214, 163 N.E.2d 271 (1960) (refusal of opportunity to have trial counsel with knowledge of the case may, in some circumstances, be an abuse of discretion, bordering on abuse of due process).

[6] Meunier's Case, 319 Mass. 421, 66 N.E.2d 198 (1946) (provision giving conclusive force to report of medical panel in occupational disease cases held unconstitutional deprivation of fundamental rights of parties).

[7] Khachadoorian's Case, 329 Mass. 625, 110 N.E.2d 115 (1953); Benham's Case, 356 Mass. 196, 248 N.E.2d 507 (1969) (actual argument not necessary if opportunity for oral argument is offered at some stage of proceedings before final decision).

[8] 1970 Mass. Adv. Sh. 133, 255 N.E.2d 322.

[9] Id. at 136, 255 N.E.2d at 325.

rule that the decision on a workmen's compensation claim may not be based upon facts not introduced in evidence at the hearing. The same rule has been applied to a number of administrative boards in Massachusetts. The Court then held that the board's action in considering and treating the medical report as part of the evidence violated the employee's right to administrative due process.

> . . . For this reason, we hold the decision of the board should be set aside, even though there was other evidence which, if believed, was sufficient to support the decision.[10]

The Court felt so strongly about the violation of the employee's rights that it ordered a trial de novo before the board. It might have remanded the case for a decision anew on the evidence already introduced, with the admonition to ignore the medical report; but, obviously, this would involve the risk that the board might merely rely upon the other evidence which warranted the same conclusion. Only a completely fresh hearing before another member would adequately protect the employee from the taint of the board's error.

Not all workmen's compensation boards decide controversies in the manner of a court. Some permit decision on the basis of letters, interviews, hospital and medical reports, and even memoranda by staff medical and legal advisers. Such procedures are intended to provide speedy adjudication with a minimum of bother to physicians and a minimum of involvement by lawyers. They further the slow erosion of legal guarantees and the steady drift toward bureaucratic absolutism. Fortunately, the majority of jurisdictions insist on the minimum guarantees of administrative due process spelled out in *Haley's Case*. Significant rights of the parties are involved and, in the long term, the rights of the injured will be best protected — as the instant case shows.

The case, however, should not be construed by the members of the Industrial Accident Board as depriving them of any powers vested in them under the act, provided they are consistent with administrative due process. The Workmen's Compensation Act gives the single member the power to "make such inquires and investigations as shall be deemed necessary."[11] The problem of backlog plaguing injured employees, insurers and the board alike requires a creative use of the board's powers in an efforts to secure fair disposition of controversies without formal hearings and to expedite the hearings and the filing of decisions. As the board strives to make important progress in this direction, the reminder of the Court to temper its actions in the spirit of due process is especially timely.

10 Id. at 137, 255 N.E.2d at 326.

11 G.L., c. 152, §8. These powers are set forth in detail by the author in 29 Mass. Practice Series §491 (1968).

§20.3. Assaults: Incapacity: Power of the Superior Court to modify the decision of the single member. While proceeding on an errand connected with his work, an employee was struck on the back of the head with a piece of pipe wielded by a fellow employee. The board found that he was hit "for no reason whatsoever; that he . . . did or said nothing to provoke this." Even though there was evidence that there was bad blood between them (connected with racial antagonism), there had been no fight and the victim had done nothing to provoke the fellow employee into striking him. The board found that the injury arose out of and in the course of the employment and awarded compensation for several periods of claimed incapacity. The Superior Court found no evidence of compensable disability beyond a certain date and entered a decree awarding compensation with this modification. The Supreme Judicial Court affirmed the decree.[1]

The Court had no difficulty with the case. It rested its decision on the broadest of general grounds, restating its rule from *Caswell's Case*: "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 aspects."[2] The Court referred to its decision in *Baran's Case*[3] for a full discussion of the reasons underlying its opinion in the case before it. The Court there had upheld an award of compensation to an employee who, while leaving his employer's mill at the close of the day's work, was unintentionally shot by a youth alone in his room in a nearby house and engaged in aiming practice. It then concluded with a passing reference to *Dillon's Case*[4] and to an influential article in this area by Samuel B. Horovitz.[5]

The easy acceptance of this award is in sharp contrast with the difficulty encountered by victims of assault in the early days of the act. In the first cases, assaults were considered as related to employment only where they might be reasonably anticipated because of the general character of the work or the peculiar duties of the workman.[6] However, the range of this rule was narrow, and most cases fell outside its scope. Compensation was not awarded for a night watchman

§20.3. 1 Parker's Case, 1970 Mass. Adv. Sh. 605, 258 N.E.2d 308.

2 Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940) (hurricane caused factory wall to crumble upon employee).

3 336 Mass. 342, 145 N.E.2d 726 (1957).

4 324 Mass. 102, 85 N.E.2d 69 (1949).

5 Horovitz, Assaults and Horseplay Under Workmen's Compensation Laws, 41 U. Ill. L.R. 311, 339-341 (1946).

6 McNicol's Case, 215 Mass. 497, 102 N.E. 697 (1913) (fellow employee of known vicious disposition when drunk); Reithel's Case, 22 Mass. 163, 109 N.E. 951 (1915) (ejecting trespasser); Broadbent's Case, 240 Mass. 449, 134 N.E. 632 (1922) (quelling disturbance); Cranney's Case, 232 Mass. 149, 122 N.E. 266 (1919), Zygmuntowicz v. American Steel & Wire Co., 240 Mass. 421, 134 N.E. 385 (1922) (assaults by disgruntled employees).

accidentally shot,[7] nor for an employee waiting in line when he was knocked down by other employees engaged in a friendly scuffle,[8] nor for a peacemaker struck down while trying to stop a fight over tools.[9]

The General Court came to the rescue of the innocent victim in 1937. It provided a conclusive presumption of compensability for an employee "injured by reason of the physical activities of fellow employees in which he does not participate, whether or not such activities are associated with the employment."[10] The Court in the instant case could have relied upon this amendment, as the claimant was the victim of a blow from a fellow employee and had not provoked or participated in the event. However, as indicated, the Court chose to rely upon the broader ground.

The evolution of a general theory of compensability of assaults in Massachusetts followed the broadened concept of compensability laid down by the Court in *Caswell's Case*, mentioned above. The "actual risk" test gradually replaced the test of foreseeability. In 1948 the Court upheld an award made, without proof of motive, to a taxi driver who was assaulted late at night by a passenger: "The question is whether his employment brought him in contact with the risk that in fact caused his injuries."[11] The taxi driver was a nonparticipant who could have recovered under the 1937 amendment, but the Court preferred to use the occasion to expand the concept of compensability of assaults.

The protection of the act was extended to participants, even if they were initiators of an affray, in the landmark decision in *Dillon's Case*.[12] A gang leader in charge of eight longshoremen was blinded by a blow struck by a fellow workman in the course of a fight, as he tried to enforce discipline. On evidence that Dillon had struck the first blow, the board dismissed the claim. On appeal, the Court remanded the case. Even if the victim strikes the first blow, that fact does not bar recovery "if it can be seen that the whole affair had its origin in the nature and conditions of employment."[13] On recommittal, the board made an award. Later, in a case where two employees quarreled over the use of a new tool, the board again allowed recovery. The Supreme Judicial Court affirmed, saying that it would support such awards "when supported by reasonable evidence of

7 Harbroe's Case, 223 Mass. 139, 111 N.E. 709 (1916) (reversed by Baran's Case, 336 Mass. 342, 145 N.E.2d 726 (1957)).

8 Lee's Case, 240 Mass. 473, 134 N.E. 268 (1922); Moore's Case, 225 Mass. 258, 114 N.E. 204 (1916).

9 Gavros' Case, 240 Mass. 339, 134 N.E. 269 (1922).

10 St. 1937, c. 370, §1, amending G.L., c. 152, §26. The test is nonparticipation, and previous participation is no bar if it ended before the injury. See Zarba v. Lane, 322 Mass. 132, 76 N.E.2d 318 (1947).

11 McLean's Case, 323 Mass. 35, 38, 80 N.E.2d 40, 43 (1948).

12 324 Mass. 102, 85 N.E.2d 69 (1949).

13 Id. at 107, 85 N.E.2d at 72.

injuries from fights occurring during ordinary routine of employment and in connection with incidents of that employment."[14]

Finally, in 1969, the Court upheld an award under even more extended circumstances. Two co-workers had a protracted dispute over the use of work equipment. The claimant, an older and smaller man, became enraged, grabbed a pipe and attacked the other from behind, striking him on the back of the head. In the scuffle that followed, claimant was knocked to the floor and the other man ruptured the globe of his eye. The Court upheld an award, saying that, although the injury did not, strictly speaking, result from a work-quarrel, it occured "in the line of consequences resulting from the circumstances and conditions of the employment . . . ."[15]

And, most recently, the Supreme Judicial Court, in *Parker's Case*,[16] has placed assaults on the same footing as all other claims for injuries arising out of and in the course of employment. No special rule must be relied upon, limited to so-called assault cases. It is now enough, as it should always have been, to show that the employee was injured while he was "upon his employer's premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment."[17] The Court has now applied to assault cases not just the "actual risk" test laid down in *Caswell* but the broader "position-risk" test enunciated in *Baran*. Where the risk is neutral, that is, not clearly employment-related nor clearly personal to the employee, the application of such a test would appear to generate just results.

A subsidiary feature of the case pertains to the power of the Superior Court to modify an award of partial incapacity compensation. When the case was before the Superior Court, the judge had ruled that there was no evidence in the record to sustain an award for a certain period and had entered a decree omitting this period. The Supreme Judicial Court affirmed this aspect of the decree. On a review of the record, it found that the evidence was not sufficient to sustain the finding that the employee was partially incapacitated for this period. Although, admittedly, the board has full power to find the facts on conflicting evidence and to draw all reasonable inferences from the evidence — and on appeal, the board's action will be final — its finding must be based upon some evidence, however slight. Where there is no evidence, nor any basis whatsoever for an inference, the Superior Court or the Supreme Judicial Court may set aside the finding, and either dismiss the claim to that extent or remand the case for further evidence and decision de novo. This power is an essential aspect of judicial review, and its continuing exercise is requisite to the constitutional due process to which the parties are entitled.

[14] Blanchard's Case, 335 Mass. 175, 177, 138 N.E.2d 762, 763 (1956).
[15] Tripp's Case, 355 Mass. 515, 517-518, 246 N.E.2d 449, 451 (1969).
[16] 1970 Mass. Adv. Sh. 605, 258 N.E.2d 308.
[17] Id. at 606, 258 N.E. at 309, citing Baran's Case, note 7 *supra*.

§20.4. Specific compensation: Award to survivor. In Section 16.7 of the 1968 ANNUAL SURVEY, this author discussed the rights of survivors to share in an award of specific compensation, a payment for permanent injuries over and above all other benefits, as set forth in a schedule in G.L., c. 152, § 36. The right of survivorship is provided by Section 36A, as construed in *Henderson's Case*,[1] *Lauble's Case*,[2] and two cases discussed in Section 16.7 of the 1968 SURVEY — *Bosanquet's Case*[3] and *Morris's Case*.[4] It was stated then that these cases make it clear that there is no requirement of a minimum period of time during which the employee must live following his injury in order for the survivor to become entitled to collect the payment that would have been due the injured employee. Any lingering doubts would not be put to rest by the rescript opinion of the court in *Chin's Case*.[5] A 26-year-old man fell from the twenty-first to the tenth floor of the Prudential building, then under construction, and suffered multiple injuries from which he died several hours later. The claimant widow was awarded specific compensation for total loss of function of both arms and both legs, disfigurement, and for losses of other bodily functions. On appeal, the Court found that the award was based upon evidence which, though contradicted, supported the decision of the board. No point was made as to whether the injured man had ever recovered consciousness and no differentiation was made between those losses which were the direct cause of death and those losses which were separable from the fatal injury.

Enough cases have now been decided on the interpretation of Section 36A so that it can be said with confidence that the Supreme Judicial Court is not going to narrow the scope of the section by judicial construction. So long as there is medical evidence from which the board is able to determine with reasonable medical certainty the exact losses of bodily function the employee would have been left with had he survived, the board's determination will be affirmed.[6]

§20.5. Findings and decision of Industrial Accident Board: Powers of Superior Court to affirm, modify or reverse. Cases in which the court reviews decisions of the Industrial Accident Board to determine whether there is sufficient evidence to warrant a finding may be of little interest in the development of the law or construction of the act, but they are of intense interest to those responsible for the daily administration of workmen's compensation. In such cases the outer limits of the act are tested, and the resultant decisions influence

§20.4. [1] 333 Mass. 491, 131 N.E.2d 925 (1956).
[2] 341 Mass. 520, 170 N.E.2d 720 (1960).
[3] 353 Mass. 364, 231 N.E.2d 567 (1967).
[4] 354 Mass. 420, 238 N.E.2d 35 (1968).
[5] 1970 Mass. Adv. Sh. 835, 258 N.E.2d 925.
[6] See also Machado's Case, — Mass. —, 249 N.E.2d 743 (1969) and Taylor's Case, 355 Mass. 797, 247 N.E.2d 395 (1969).

practical decision-making by insurance companies, claims attorneys and individual board members.

In *Larrabee's Case*,[1] the board awarded benefits to a widow, finding that the employee's death resulted from "acute liver failure caused by extensive damage to his liver organ." He had inhaled fumes containing clorothene, and the board found that he was especially susceptible to harmful effects from such inhalation because of certain medication he was taking for an unrelated medical condition. There was medical testimony of a direct causal relationship between the inhalation of these fumes and the destructive process which a medical expert found upon autopsy of the employee's liver. The Supreme Judical Court found the testimony of the pathologist competent although he was not a toxicologist.

In *Wax's Case*,[2] total disability compensation was awarded to a newspaper mailer for aggravation of obstructive emphysema and fibrosis as the result of exposure to a dusty environment containing paper particles and printer's ink. After reviewing the testimony that the employee's emphysema had been aggravated by his work atmosphere, the Court upheld the decision of the reviewing board. The fact that one doctor on cross-examination had, at one point, admitted that the link was a "possibility" did not detain the Court, nor did alleged inconsistencies in the testimony of the other physician: "It was for the board to evaluate this testimony and weigh its infirmities in the context of all the evidence before it concerning the place of employment and the conditions obtaining there."[3]

In *Rennie's Case*,[4] the Court reviewed an award of death benefits for a fatal heart attack to determine whether the inferences drawn by the board were proper and whether errors in a hypothetical question were so material as to require the board to have excluded the answer. The deceased was a gas company serviceman. On the day before his death, he worked his regular shift from 8 A.M. to 5 P.M. and worked again that evening, returning about 10 P.M. While sitting at home, he stated that he had never felt as tired in his life. After retiring that night, he suffered severe chest pain. However, the next morning he arose at his regular hour and went to work, saying he felt fine. He was ordered to install a five-light meter at a home in Newtonville. He was found dead in the seat of the employer's truck about 10:50 A.M. at the Newtonville address. His death was due to acute myocardial infarction. A company official visited the house later that morning and found a meter weighing ten pounds partially installed on the wall about five feet from the floor. Such meters were carried in the service trucks for installation.

§20.5. [1] 1970 Mass. Adv. Sh. 836, 258 N.E.2d 927.
[2] 1970 Mass. Adv. Sh. 903, 259 N.E.2d 561.
[3] Id. at 905, 259 N.E.2d at 563.
[4] 1970 Mass. Adv. Sh. 955, 260 N.E.2d 186.

The insurer contended that the board decision contained unsupported findings. The Court noted that these findings, even if unsupportable, were not germane to the issue of whether the employee's job-related activity caused his death. On that issue, the evidence supported the conclusion that he lifted the meter and carried it from the truck to the house and then partially installed it. This conclusion, in turn, supported a finding that such activity caused the heart disorder which precipitated death.

The insurer also contended that the physician's opinion upon which the board relied should have been ignored, because the hypothetical statement contained factual assumptions unsupported by the evidence. Again, the Court took the view that these misstatements were immaterial, that even if they had been omitted or corrected, the doctor's opinion as to the effect of lifting and partially installing the meter would have remained the same. There was no error in admitting the hypothetical question, even if the assumptions went beyond the evidence in insignificant details.

An additional contention of the insurer was that the doctor's opinion was based upon a mere statistical probability. The Court noted that the response in question — "it is on statistical probabilities" — came in answer to a narrow hypothetical question referring only to information appearing on the death certificate. Examination of the employee's symptoms between 10 P.M. and 2:30 A.M., coupled with his physical activity thereafter to the time of his death, formed the principal basis of the doctor's opinion. Upon these facts, such opinion was not limited to a mere statistical likelihood.[5]

B. Legislative Developments

§20.6. Benefit increases: Payments to widows and widowers. Section 31 of the Workmen's Compensation Act provides for benefits payable to widows or widowers, and children of the employee, in the event of death resulting from a compensable injury. The amount payable to widows or widowers had been $40 per week since August 27, 1964. This amount has now been raised to $45.[1] No other benefit provided by the section has been increased. Payments for children remain at $6 per child to the age of 18, so a widow and three children will now receive $63 per week. The change is effective for injuries occurring after November 23, 1970.

§20.7. Subsequent injuries. The date of injury has always controlled the rate of benefits payable for disability, even if the period be years or months later, when the cost of living may be much higher, and when the benefit scale for contemporary injuries may have been raised by an intervening act of the legislature.[1] This has been the cause

[5] Cf. King's Case, 352 Mass. 488, 491, 225 N.E.2d 900, 902 (1967).

§20.6. [1] Acts of 1970, c. 860, amending G.L., c. 152, §31.

§20.7. [1] Locke, Workmen's Compensation, 29 Mass. Practice Series §177 (1968).

of much hardship to workmen with protracted disability, as the declining value of their weekly compensation benefit has forced them into miserable poverty and required them to resort to charity or welfare. Particularly galling is the plight of workmen who return to work and suffer a later period of incapacity, after the legislature has increased the benefit scale. For such a workman, there is the additional problem of a potential controversy as to whether he has received a new injury which aggravates the old condition or merely has a recurrence of the old injury. Such controversies often seriously delay payment of compensation.

In an effort to alleviate this hardship, the legislature enacted Chapter 667 of the Acts of 1970, inserting a new section 35B:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury; provided, that if compensation for the old injury was paid in a lump sum, he shall not receive compensation unless the subsequent claim is determined to be a new injury.[2]

The section is to take effect on February 1, 1971.

Unfortunately, the statute is inartistically drafted and may be construed so as to effect no change from the present law. If a workman sustains a subsequent *injury,* he will not need the benefit of the amendment to receive payment at the current rate.[3] But the legislature clearly intended that amendment cover cases of subsequent *disability,* whether the cause of the disability be a recurrence of the old injury or a new incident which would qualify as a subsequent injury under the existing case law. It would be highly desirable if the act were redrafted before its effective date, to clarify its terms and eliminate the risk that the courts may frustrate the intent of the legislature.

If the act is to be redrafted, it would be desirable also to include the larger group of injury victims whose compensation benefits are limited to the rate in effect on the date of injury but who have never been able to return to work. Such victims are obviously in even greater need of help. It would be a simple matter to provide that injured workers be paid compensation according to the rate in effect at the time of disability, regardless of the date of their injury. To eliminate constitutional difficulties, the act could be made to apply prospectively to injuries occurring after its effective date. This might not aid those currently disabled, but it would rectify the problem for all injured hereafter. A start must be made.

[2] G.L., c. 152, §35B.

[3] Locke, Workmen's Compensation, 29 Mass. Practice Series §178 (1968).