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Chapter 22: Workmen's Compensation

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The period October 1, 1953, through October 1, 1954, was most active in the field of workmen's compensation. A great many bills were submitted to the General Court advocating broad changes in and additions to the present law. The bills enacted into law are discussed herein. A complete recodification of the entire act was proposed, and though not passed this year, is still under consideration. There is little question that this proposed recodification is one of the most important, and most controversial, legislative developments in the field since the inception of the Workman’s Compensation Act in 1911.

Nineteen cases, each involving one or more provisions of the Act (Chapter 152 of the General Laws) were decided by the Supreme Judicial Court in this period. Although some of these merely clarify existing law, a number of decisions are deserving of comment because of their decisive effect on various provisions and policies in the field.

A. COURT DECISIONS

§22.1. “Arising out of and in the course of employment.” Two of the most interesting cases decided in the compensation field during the survey year involved the fundamental dual problem of injuries arising out of and in the course of employment. In one case the Court held that a book salesman who received gunshot injuries while chasing a man who had just shot his prospective customer did not receive an injury arising out of and in the course of his employment. In one case the Court held that a book salesman who received gunshot injuries while chasing a man who had just shot his prospective customer did not receive an injury arising out of and in the course of his employment. The Court states that the claimant voluntarily departed from the duties of his employment when he chased the unknown assailant. The Court expressly left open decision in a case where the conditions or

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Chapter 59, Section 5, Clause Seventeenth, to raise the maximum value of property occupied as a domicile, to which the $2000 exemption applies, from $2000 to $8000. Persons attaining the age of seventy are now eligible for the exemption if they have owned and occupied the property as a domicile for at least ten years.
obligations of the employment place the employee in a position where he may be called upon to save life or limb, e.g., protection of human life under the so-called "rescue" theory.2

Perhaps the most interesting case decided recently by the Supreme Judicial Court falls under the heading of this section. In Collier's Case,3 the claimant was a waitress in a restaurant. Her hours were from 8:00 P.M. until 1:00 A.M. At about 11:30 P.M. on the night she received her injuries, she refused to serve a customer a drink, in accordance with the instructions of her employer, because the customer was already drunk. The customer became abusive and threatened her with physical harm. One hour later the employee went off duty. She had proceeded fifty-eight feet from the front door of the restaurant, on her way to public transportation home, when she was assaulted by the drunken customer, who was obviously lying in wait for her, and as a result she suffered a fractured hip.

The single member of the Industrial Accident Board found, "... what happened in the street was merely a continuation of the quarrel the customer had begun on the premises during the course of her employment and flowed from it as a rational consequence,"4 and awarded the employee compensation. The reviewing board, on appeal, affirmed and adopted the single member's findings, but nevertheless reversed the award of compensation as a matter of law, holding that the employee's injury was not received by her in the course of her employment. On certification to the Superior Court, the claim for compensation was dismissed.

The Supreme Judicial Court in affirming the denial of the employee's claim, stated:

The question before us is whether the reviewing board was right in denying compensation as a matter of law. The board undoubtedly could have found that the intent of the customer to assault the employee arose from her refusal to serve him liquor and that this intent continued from the time of the refusal to the time of the assault. But such continuance of cause alone was not sufficient to warrant an award of compensation. . . . The altercation between the employee and the customer did not continue but ended when he abandoned his demand for a drink and left the restaurant. Thereafter an hour elapsed . . . the employee completed her work . . . left her employer's premises, and walked along the street for a substantial distance. In these circumstances it could not be found that there was one continuing event and the board was right in ruling that the injuries of the employee were not received in the course of her employment.5

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2 On the rescue doctrine see 1 Larson, Workmen's Compensation §§28.21, 28.23, 28.32 (1952).
The Court discussed the famous Cardozo opinion in *Field v. Charmette Knitted Fabric Co.*, affirming an award of compensation to a factory superintendent who was assaulted outside the building by another employee with whom he had been arguing while on the job inside the factory. The assault occurred only three or four feet from the plant and within a few minutes after the argument. Justice Cardozo asserted: "The quarrel outside the mill was merely a confirmation or extension of the quarrel begun within. . . . Continuity of cause has been so combined with contiguity in time and space that the quarrel from origin to ending must be taken to be one."  

The Supreme Judicial Court in the *Collier* case did not assert that its decision conflicted with the *Field* case. It seemed to hold, rather, that although there may have been continuity of cause in so far as the worker's injury was concerned, there was not one continuing event, because an hour elapsed between the time of the altercation in the restaurant and the assault on the street, and because the employee had finished working, had left the employer's premises and had walked along the street for a "substantial distance" (fifty-eight feet). The Court expressly leaves open the question of its attitude toward a case which it would hold to be similar on its facts to the New York case.  

The language of the Court and its use of the *Field* decision leaves unclear one of the most important issues in the case: Is the question of the employee's being in the course of her employment at the time of injury one of fact for the Board or one of law for the Court?  

There does not seem to be any question that the injury "arose out of" the employment. The decision seems to have turned on the factors of time and space. One might well question whether recovery for an assault of this type should depend on the distance from the place of work and the length of time after leaving work. The decision would seem to be justified only on the grounds that the Court felt that whether the injury "arose out of" the employment was a question of fact for the Industrial Accident Board to determine. The Court does not make this clear, however.  

Unfortunately, only a series of decisions by the Supreme Judicial Court can give us the answer to our fact-or-law problem, for although the board can decide the question as a matter of fact in the first instance, the Court would ultimately have to pass on the issue as a matter of law. In other words, although the board might find that thirty-two feet and half an hour satisfy the space and time requirements, it is the Court which, in the end, will have to say that a finding of compensability (or noncompensability) by the Board is justifiable as a matter of law, under the individual circumstances of the particular case at bar. Therefore, only a series of decisions can establish pre-
dictable criteria for determining on which side of the line any one case may fall. Without delving any deeper into the problems created by questions of fact, questions of law, and questions of mixed fact and law, it should be obvious that one result of the Collier decision will be to create an excessive amount of appellate litigation in these cases, an unfortunate result in any area of the law, but far more serious in the field of workmen's compensation, where broad unsettled questions and extensive appellate litigation have always been thought to be against the purposes of the system.\(^{11}\)

Let us postulate now a hypothetical situation based on facts similar to those in the Collier case. Assume that the assault took place five minutes after the argument, in the doorway of the employer's premises. In such a case it might be safe to assume that recovery would be allowed; certainly we could say that the chances of the employee's recovering here would be much greater than under the actual facts in Collier.

But why should they be?

Would the assault, in our five-minute-doorway case, be any more an inherent part of the employment incident? Clearly not, for we cannot escape the fact that it was the work-connected argument which, in both cases, was the undisputed cause of the injuries received by the employee.

In the final analysis, how soon after the argument must the assault come before an award of compensation is in order? Three minutes or thirty? How close to the premises must the employee be battered, seven feet or fifty-seven? The undisputed fact that the obvious origin of the assault was the employment should be the important factor. The required unity of the transaction should not be dependent upon inches and minutes, but rather upon demonstrable employment connection. It might be well-nigh impossible, in terms of unity of time and space, to show such a connection, for example, in an assault which took place off the employer's premises a month after a work-connected altercation, but that would be solely a problem of proof, and the basic premise should remain the same.

The true test of compensability in these delayed injury cases should rest upon the determination of whether or not the origin of the single unit of injury lies within the bounds of the employment; if it does, then whether the ending does, in the form of actual impact, is immaterial.

Nowhere does our statute require that an injury must be consummated in the course of the employment. It must arise in the course of the employment. If the Court would clearly differentiate between origin and completion, then a more perfect blending of "arising out of" and "in the course of" would be accomplished, and the essential

\(^{11}\) On the background and history of the system, see Riesenfield, Forty Years of American Workmen's Compensation, 7 NACCA L.J. 15 (1951); Wambaugh, Workmen's Compensation Acts, 25 Harv. L. Rev. 129 (1911).
purpose of the compensation act — to award benefits for injuries causally connected with the employment — would be fulfilled.\textsuperscript{12}

§22.2. "Specific" compensation. Every state compensation act has one or more sections in it calling for the payment of set sums for certain specified injuries resulting in actual loss or permanent loss of use of some member of the body. In some states these sums, referred to as "specific" payments, are deducted from the claimant's disability compensation, in others the specific payments are in addition to disability compensation, but the claimant cannot receive both during the same period of time.\textsuperscript{1} In Massachusetts all specific payments are in addition to all other compensations.\textsuperscript{2} In addition to scheduled payments for loss of the various members, specific sums are provided for loss of bodily function \textsuperscript{3} and for bodily disfigurement.\textsuperscript{4} Scheduled payments are at the rate of $20 per week for a specified number of weeks in the case of loss of members of the body, while in the case of bodily disfigurement and loss of function the number of weeks to be awarded is at the discretion of the Industrial Accident Board in each particular case.

In those cases where leg, foot, arm, or hand injuries do not result in severance, but in permanent loss of use, either total or partial, the Board is empowered to award specific amounts just as if there had been severance, either total or partial.\textsuperscript{5} A similar provision covers loss of use with or without severance, of fingers, toes, or other parts of hand or foot.\textsuperscript{6}

The wording of the statute \textsuperscript{7} is to the effect that severance, or loss of use of the fingers, toes, or other parts of the hand or foot are to be compensated for "in proportion to the period applicable in the event of total loss or total loss of use of said hand or foot as the functional loss arising out of said severed inutile part of said hand or foot bears to the total loss of use of the same."

The Industrial Accident Board, in connection with Section 36, has drawn up, as a guide, a chart which sets out specified amounts to be paid for loss of use, by severance or otherwise, of each phalanx of each finger of each hand and all combinations of the phalanges thereof.

In \textit{Roberge's Case},\textsuperscript{8} the Supreme Judicial Court was faced with the difficult question — unanswered by the statute or the chart — of what compensation to give when an employee loses only a \textit{part} of one phalanx of a finger. Here, the employee had lost \textfrac{3}{16} of an inch of

\textsuperscript{§22.2.} 1 For an excellent breakdown of various statutes on this point, the reader is referred to Analysis of Workmen's Compensation Laws (1954), prepared by the United States Chamber of Commerce, Washington, D.C.
\textsuperscript{2} G.L., c. 152, §36.
\textsuperscript{3} Id. §36(f), as amended by Acts of 1949, c. 519.
\textsuperscript{4} Id. §36(h), as amended by Acts of 1949, c. 519.
\textsuperscript{5} Id. §36(q).
\textsuperscript{6} Id. §36(r).
\textsuperscript{7} Ibid.
\textsuperscript{8} 330 Mass. 506, 115 N.E.2d 459 (1953).
the distal phalanx of his right thumb while working on a planing machine. The Industrial Accident Board, in accordance with its established practice, awarded 33.75 weeks' specific compensation, the same as for loss of the entire phalanx. The Supreme Judicial Court, after rejecting the insurer's theory that the statutory section involved precluded recovery for anything less than total loss of the finger, reversed the board finding. The Court held that where there was loss of less than a complete phalanx, it was necessary to determine what proportion the functional loss of \( \frac{3}{16} \) of an inch of the distal phalanx of the thumb bore to the functional loss of the hand.

It is now necessary, therefore, in cases where less than an entire phalanx is lost, that the Board determine the loss of function suffered in relation to the single bodily member involved (for example, to the thumb as a whole or the index finger as a whole), and then determine the ratio of that loss to the loss of the entire member (for example, to the whole hand).

Ostensibly, the Industrial Accident Board chart is based upon the proportional loss of function which each separate finger bears to the entire hand. One could question the reliability of such a chart, however, where all the medical testimony is in agreement as to percentage loss of function, and that agreed loss of function differs from the Board's set figure.

Also, in connection with this chart, it might be pertinent here to note that there is something quite odd in the notion that the loss of function which a laborer sustains when he loses his fourth or ring finger, is exactly the same loss of function which a violinist sustains when he loses that same finger. Whether the Board would adhere to its standard chart in such a case, and whether, if it did, it would be upheld by the Court on appeal is an interesting question, and one that has yet to be decided.

The specific compensation section covering loss of sight was also clarified this year with regard to partial loss of sight. In *Pizzano's Case* the employee suffered an industrial accident which reduced his vision to a ratio of 20/45. By statute, reduction of vision to 20/70 is equivalent to removal, or total loss of use, and an employee suffering such loss is entitled to 200 weeks of specific compensation. Reference to the Snellen Visual Acuity Chart shows that with 20/45 vision, one's sight is 20 percent less than normal, and with 20/70 vision, 36 percent less than normal.

The Board found that the employee was entitled to compensation for 20/36 of 200 weeks, or 111 weeks. The insurer appealed on the ground that the proper award should have been 40 weeks for 20 percent loss of vision. The Supreme Judicial Court affirmed the Board's holding that industrial loss of sight, rather than total loss was the proper ratio base, stating, "The legislative history of the provisions of the

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9 G.L., c. 152, §36(r).
10 Id. §36(a)-(e).
workmen’s compensation law manifests a strong tendency to liberalize those portions dealing with eye injuries.”

It is important to note here that the *Pizzano* case in no way deals with the problem of what a proper award ratio would be if the claimant had had less than 20/20 vision previous to his accident. Clearly that is still an open question in Massachusetts.

§22.3. **Dependency allowances.** Under the dependency section of our Workmen’s Compensation Act, a widow or widower whose spouse is killed in an industrial accident is entitled to receive compensation at the rate of $20 per week for 400 weeks plus $5 extra each week for each dependent child. After the expiration of 400 weeks, the widow or widower may, if not fully self-supporting, continue to receive these benefits.

The 400 weeks' compensation that the widow or widower receives is not based upon need or social status; rather it is required that the insurer pay compensation for that period in any case, unless the surviving spouse should die or remarry before such period expires. The statute states: “If there is no surviving wife . . . of the deceased employee, such amount or amounts as would have been payable under this section to or for the use of a widow . . . and for the benefit of all such children of the employee shall be paid in equal shares to all such surviving children of the employee . . . .” The statute makes almost identical provision for the decedent’s children in the case where there is a surviving spouse who dies after having received benefits under the dependency statute.

In *Canavan’s Case* the employee’s wife predeceased him, and when he was killed, he left as sole survivor a sixteen-year-old son. The insurer paid the son $20 a week plus $5 more as called for by the statute. When the son reached eighteen, the insurance company stopped all payments to him. The son contended that although the $5 payment could logically be stopped, he was entitled to have the $20 payments continue until the maximum period for which his mother would have been entitled to receive compensation, i.e., 400 weeks, had been reached.

The Supreme Judicial Court, reversing the decree of the Superior Court in favor of the claimant, held that the son was not entitled to receive any payments after reaching the age of eighteen or the age of maturity, on the ground that the child inherited no right to his surviving parent’s share under the statute; rather that he was entitled to receive $20 a week because of his condition of minority only. The Court felt that when his status as a minor surviving child came to an end, so did his right to dependency benefits. By statute, when the surviving spouse’s status changes through remarriage, her right to benefits also ceases, even before the expiration of the 400-week period.
However, the statute itself clearly provides that surviving children, where no parent survives, should get the same benefits as that parent would have received as a survivor. A reasonable argument could be made that the Court should have held that, as the receipt of benefits for the 400-week period does not depend upon need, and as there is no wording in the statute to the effect that the mandatory period should cease when the child reaches eighteen, as is specifically provided for, for example, when the widow remarries, then dependency benefits to those minor children should not be discontinued before the termination of the period.  

Another dependency case decided during the survey year, McFarlane’s Case, involves the well-established rule of law that an employee’s settlement of his claim during his lifetime for an injury that later results in his death does not bar the surviving spouse from later making her own claim for dependency benefits. The settlement, compromise, or release by the deceased of his rights under the act cannot bar the statutory rights of his dependents since their rights are independently created by statute, and do not mature until the death of the employee.

The deceased employee’s widow participated with her husband in signing the lump sum agreements settling his case. The Court held that although the usual rule of law still prevails generally with respect to the widow’s dependency rights after a settlement obtained by her husband, “There is nothing in the workmen’s compensation act which takes this unmatured right out of the general rule that a right which has not arisen may be released or made the subject of a contract not to sue.”

Since there was nothing in the record regarding the circumstances of Mrs. McFarlane’s signing of the lump sum agreement, the Court sent the case back to the Board so that evidence could be taken on this point.

The McFarlane decision seems to assert that if the widow had signed the lump sum agreements for a consideration, rather than as a witness or as an accommodating party or the like, then she would have lost her rights to all dependency benefits. Just exactly what the circumstances of the widow’s signing would have to be in order for her to be deprived of these benefits is not set out in the Court’s decision, but as stated, it would seem that she would have had to receive a separate consideration for her signature, since the right she could have been held to have signed away is too important to be lost for a simple accommodation. It should be noted in this regard that the Court employs the analogue of a covenant not to sue in connection with the wife’s signature on the lump sum agreements. It would thus seem that if the signature is to be pleaded in defense to a compensation claim by the widow, the defense would have to be specifically enforce-

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* Cripp’s Case, 216 Mass. 586, 104 N.E. 565 (1914); 2 Larson, Workmen’s Compensation §64.10 (1952) and cases cited.
able, and it would be open to the widow to contend under general equity principles that this was either a hard bargain or an improvident contract.  

B. LEGISLATION

§22.4. Redefinition of “employer.” Only two bills amending Chapter 152 of the General Laws were actually passed into law in the survey period. The first amends Section 1(5), and merely redefines the word “employer” as used in the workmen’s compensation law, to include two or more individuals, partnerships, associations, corporations, or other legal entities engaged in a joint enterprise.1

§22.5. Copies of medical reports for employees. Chapter 194 of the Acts of 1954 strikes out Section 20A of Chapter 152, and replaces it with a new, similarly numbered section intended to put teeth into the requirement that an employee who has been examined or treated at an insurance company dispensary or clinic should be able to obtain by himself, or through his attorney, copies of reports of all examinations, treatments, diagnoses, prognoses, and the like, made by the insurance company doctors.

The new Section 20A also states: “No such medical report shall upon objection by the claimant be admissible in evidence in any proceeding under this chapter, unless a copy thereof has been furnished to the claimant . . . or his attorney within twenty days after a written request therefor.”

It should be noted, however, that it has always been the practice of the Industrial Accident Board to disallow any medical report in evidence upon objection of either party when the doctor who wrote it is not present to testify. And, of course, if the doctor is present to testify, the report is not at all important, except perhaps for the purpose of reference.

§22.6. Proposed legislation: Recodification. The most important legislation submitted during the survey year in the field of workmen’s compensation was, of course, the 112-page recodification of the present law.1

The bill was not enacted, but was referred to a Special Committee for study and report to the next legislative session.2

As noted, the recodification is a document of considerable length, and it cannot be discussed in the space available in this chapter. The purposes of the recodification were asserted to be a “consolidation, rearrangement, and recodification of the act without substantive

8 Pomeroy, Specific Performance, §§192-197 (5th ed. 1941); Walsh, A Treatise on Equity §104 (1930); Pomeroy, Equity Jurisprudence §2211 (4th ed. 1919).

§22.4. 1 Acts of 1954, c. 265.

§22.6. 1 Senate No. 760 (1954).

2 House No. 2976 (1954).
changes."³ At the legislative committee hearings this year, it was asserted by some of the speakers that the bill did actually make substantive changes in the law. This is perhaps inevitable in any extensive recodification. Although periodic recodification has been deemed desirable in many fields, it may be questionable whether it is wise in workmen's compensation, where the often extensive litigation necessary to clarify new provisions is itself contrary to the purposes of the compensation system.

³ Report of the Special Committee on Senate No. 760, p. 5 (1954).