Chapter 16: Workmen's Compensation

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CHAPTER 16

Workmen's Compensation

LAURENCE S. LOCKE

§16.1. Introduction. During the 1969 Survey year, the Supreme Judicial Court decided 21 cases involving the Workmen's Compensation Act, General Laws, Chapter 152. Rescript opinions were written in six of the cases, and full decisions were written in the remaining 15. The Court considered questions of first impression in five cases: whether a wife can receive payment for nursing services rendered an injured husband;1 whether the board can order an offset in awarding compensation for payments made by an employer under a voluntary noncontributory disability benefit plan;2 whether a widow's claim for death benefits survives her own death during the pendency of the claim;3 whether the reviewing board can send an employee for examination by an impartial physician after a hearing and incorporate his report in the evidence as the basis for an award;4 and whether an order of the commissioner of insurance approving rates for workmen's compensation insurance is a "regulation" or "adjudicatory proceeding" subject to the Administrative Procedure Act, General Laws, Chapter 30A.5 In addition to cases involving the determination of whether findings of the Industrial Accident Board were supported by the evidence,6 the Court in two cases dismissed

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6 DiCenso's Case, 1969 Mass. Adv. Sh. 895, 248 N.E.2d 283 (finding of total dependency for claimant widow voluntarily living apart in Italy not warranted by the evidence, but case remanded to Industrial Accident Board to make findings on partial dependency); Shirley's Case, 1969 Mass. Adv. Sh. 227, 244 N.E.2d 557 (award of total incapacity compensation upheld on basis of lay testimony of total disability, and medical testimony that claimant could do nothing more than light work); LaFlam's Case, 1969 Mass. Adv. Sh. 347, 245 N.E.2d 413 (total and permanent incapacity compensation upheld despite lack of medical evidence that claimant was unable to perform any remunerative work); Tupp's Case, 1969 Mass. Adv. Sh. 471, 246 N.E.2d 449 (finding that claimant was not guilty of serious and wilful misconduct warranted by the evidence); Sondrini's Case, 1969 Mass. Adv. Sh. 154, 243 N.E.2d 188 (reviewing board's decision omitting single member's award of partial compensation upheld); Lane's Case, 1968 Mass. Adv. Sh. 1375, 242 N.E.2d 860 (inference warranted the causal connection); Manzi's Case, 1969
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claims as a matter of law. The role of the superior court in handling an appeal from a decision of the Industrial Accident Board was afforded considerable attention. In several cases, the Supreme Judicial Court believed it necessary to remind the superior court that it was obliged to enter a decree in accordance with the facts as found by the reviewing board, if supported by the evidence and justified as a matter of law. This chapter will discuss some of the above decisions, together with a summary of the significant legislation affecting workmen's compensation enacted during the 1969 Survey year.

A. Court Decisions

§16.2. Jurisdiction: Coverage: Applicability of Massachusetts Act to injuries occurring outside the Commonwealth. Before the Massachusetts Industrial Accident Board may award compensation for an injury occurring outside the Commonwealth, the claimant must establish both jurisdiction (the power of the board over the parties), and coverage (that the insurance company has issued a policy of compensation insurance applicable to Massachusetts). If the contract of employment is made here, the Massachusetts act applies, even if the injury occurs beyond its borders. The work outside the Commonwealth need not be incidental to, or in furtherance of, an undertaking carried on in Massachusetts, but, in order that the jurisdiction of the Massachusetts board attach to the claim, the contract of employment must have been made in Massachusetts.

Whether an injured employee was working under his original contract of hire made in Massachusetts, or under a later and separate contract made in New Hampshire, was the issue in Hancock's Case. The board dismissed the claim, finding that at the time of injury the claimant was working for a New Hampshire corporation for which he had been hired in New Hampshire. The Court affirmed the decision, holding the facts warranted this finding, although a different finding would also have been supportable. For about six years before July 17, 1964, the claimant had worked as salesman and later as sales


Gwalney's Case, 1969 Mass. Adv. Sh. 255, 244 N.E.2d 314 (claimant's injury cannot be found to have arisen out of and in the course of his employment); Belyea's Case, 1969 Mass. Adv. Sh. 687, 247 N.E.2d 372 (fatal accident did not arise in the course of his employment).


§16.2. 1 Lavoie's Case, 334 Mass. 403, 406, 195 N.E.2d 750, 752 (1956).
manager for Manzi Auto Sales, Inc., of Lawrence, Mass. From time to time, he would be sent by Manzi to Nashua, New Hampshire to straighten out the affairs of Manzi Dodge of Nashua, Inc. On July 17, 1964, Manzi and the claimant drove to Nashua, at which time Manzi fired his general manager, replacing him with the claimant. Thereafter, the Nashua corporation paid the claimant $165 a week plus ten percent of the net profit, whereas before, the Lawrence corporation had paid him $75 a week plus a commission on sales. The Nashua corporation carried the claimant as an employee for workmen's compensation. Among other evidence of the claimant's authority as manager of the Nashua corporation were income tax withholding forms signed by him and negotiations for a franchise with another auto manufacturer. The Court stated:

... These considerations, embracing as they do enlarged job responsibilities and duties, changes in the sources, subject and amount of payments, and acquiescence in the new employment, although not conclusive, were significant and provided a tenable basis for the board's conclusion that Hancock consensually had become the employee of the Nashua corporation at the time of his injury.⁴

The Court cited McDermott's Case,⁵ a leading opinion summarizing the characteristics of the status employee, in which Justice Lummus said:

... One may be a servant though far away from the master, or so much more skilled than the master that actual direction and control would be folly, for it is the right of control rather than the exercise of it that is the test.⁶

The Court also cited Langevin's Case⁷ and Keaney's Case,⁸ emphasizing the requirement that the employee consent to the transfer from his previous job to the new employment.

The board had ruled that it lacked jurisdiction because the claimant was an employee of the New Hampshire corporation. The Court correctly pointed out that this was not, per se, dispositive of the issue of jurisdiction. If the contract of hire had been made in Massachusetts, the board might still have had jurisdiction. However, the board's error was merely of academic significance, since the very facts which tended to show the new employment by the New Hampshire corporation also tended to show the contract was made in Nashua. Also, as noted, even if the New Hampshire employment had been contracted in Massachusetts, thereby conferring jurisdiction on the Massachusetts board, the

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⁴ Id. at 480-481, 246 N.E.2d at 454.
⁵ 233 Mass. 74, 186 N.E. 231 (1935).
⁶ Id. at 77, 186 N.E. at 225.
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board could not have entered an award unless the claimant could establish that the workmen's compensation coverage of the Nashua corporation extended to Massachusetts. This coverage did not appear, and the Court affirmed the decree, reiterating the familiar rule that, "The conditions precedent to an award under the statute must be met by the claimant." 9

§16.3. Disability: Incapacity to perform remunerative work of a substantial character. In 1945, the Supreme Judicial Court defined the meaning of total disability, and total and permanent disability, as these terms apply to an act designed to replace wages lost by industrial injury or disease:

... The total and permanent disability therefore is to be construed to be such as to prevent the employee from engaging in any occupation and performing any work for compensation or profit, that is, from obtaining and retaining remunerative employment of any kind within his ability to perform. Complete physical or mental incapacity of the employee is not essential to proof of total and permanent disability within the meaning of the statute. It is sufficient if the evidence shows that the employee's disability is such that it prevents him from performing remunerative work of a substantial and not merely trifling character, and regard must be had to the age, experience, training and capabilities of the employee. ... The nature of the inquiry is the same as in cases where the injury has resulted in total incapacity, and is usually a question of fact. 1

What the Court was saying is simply this: If the employee's injury prevents him from working to support himself and his family, he is entitled to total incapacity compensation, and, later, to permanent and total incapacity compensation.

Unfortunately, the simple intention of the Court gets lost in the thicket of daily claims administration by insurers and litigation before the board. If the employee, despite his handicap, looks for light work — or worse, if he actually obtains an adjusted job and tries it for awhile — the insurance company immediately will argue that he has "admitted" or "established" a "capacity" for some work and therefore cannot be "totally" disabled. To the companies, it makes no difference that the employee can never find the light work he seeks, no matter how eager he may be to become self-supporting; or that he cannot hold a job once he gets it; or that he can work only on a part-time basis for wages insufficient to support his family. Hundreds of claims every year are brought before the board involving such circumstances, and many are


settled with insurance companies because of doubt that the board will find the employee to be totally disabled rather than dismiss the claim on the ground that he can do some adjusted work. The practical burden imposed on the claimant gradually shifts to a requirement that he show complete physical or mental incapacity, and attempts at light work become obstacles to recovery. For this reason two decisions of the Supreme Judicial Court involving total disability and permanent and total disability,2 reiterating the principles of Frennier's Case and applying these principles in a common sense way to the fact situations before the Court, will have an impact far greater than the other cases discussed in this chapter. For these other cases resolve questions that occur only occasionally in the application of the compensation act to the lives of the wage-earners of the Commonwealth.

In Shirley's Case, the insurer questioned an award of total incapacity for a period between 1960 and 1966, as to which an orthopedic physician testified that the employee could "do some lighter forms of work," that he had a "permanent partial disability at that time and still felt encouraged he could do something." When he testified in 1966, the doctor said the permanent and total aspects appeared "in the last year or year and a half. . . ." The board's finding of total disability was made on "consideration of all the testimony." (Emphasis added.) This included testimony of the employee's wife that the claimant "appeared to be in pain continually," and of the claimant himself as to his pain and "terrific cramps." The Court held that there was adequate support for the board's conclusion, and, additionally, stated these important holdings: (1) The board was not required to accept as conclusive the physician's opinion that the employee could do some lighter forms of work. (2) The board was entitled to give weight to the testimony of the employee and his wife as to the extent to which his affliction interfered with normal activity. (3) The board could conclude that the afflictions were such as to make it very unlikely that the employee, trained as a general electrician, could find and keep employment.

This realistic and humane approach was again emphasized in LaFlam's Case, which sustained an award of permanent and total disability. The claimant had been an attendant at a state mental hospital, where she so injured her back that she was forced to be hospitalized three times for corrective surgery. In 1963 her husband purchased a small variety store in which she worked as a clerk six and one-half hours a day, five days a week. She did no bending or lifting. The board found that "because of the difficulties in her working at the store her husband was forced to sell the store in January, 1964." Thereafter, she did no gainful work. The Court sustained the board's finding of disability, despite the fact that for a period of time she had done a modest job in her husband's store. In fact, the Court looked upon that experience as support for her claim, as it demonstrated that "she was

virtually unable to work even a limited number of hours a day at a job that required little physical exertion."

On the basis of LaFlam's Case, the following may be added to the holdings in Shirley's Case: (4) The claimant is not required to produce medical testimony to the effect that she is unable to perform any remunerative work. (5) The claimant is not required to show that she attempted to obtain employment which common sense would indicate she is incapable of performing.

It is to be hoped that the Court's clarification of the meaning of total disability and the evidence needed to establish support for an award will be reflected in the day-to-day administration of the act.

§16.4. Medical services rendered to husband by wife: Laches. Can an insurer be made to pay for practical nursing services furnished an injured employee by his own wife? This was a question of first impression decided by the Court in Klapacs's Case.1 The courts of other states are divided, the earlier cases barring recovery on the ground that the wife did no more than her marital duty, while the later cases have allowed recovery on reasoning similar to that offered by the Court in this case in the course of its decision to align Massachusetts with the modern view.2

In Klapacs's Case, the wife was a trained physiotherapist and licensed masseuse. Her husband, an elderly man, was receiving permanent and total disability compensation for retinal hemorrhages, which rendered him legally blind, and for myocardial infarction. The services performed by the wife attributable to the compensable disability were keeping track of and administering medicines, preparing six meals a day for a salt-free diet, dressing and undressing the patient, massaging, and accompanying him wherever he went. In 1965, she requested a hearing on the liability of the self-insurer for nursing services rendered from September 1954, and the board allowed $10 a day to June 1967, a total of $46,500. The superior court dismissed the claim and the employee appealed. The Supreme Judicial Court reversed, holding as follows: (1) "The wife was not barred from receiving payment for nursing services because of the marital relationship."3 (2) Although no debt may have arisen between the husband and wife, the insurer is under an "affirmative duty to furnish an injured employee 'adequate and reasonable medical . . . services . . . together with the expenses necessarily incidental to such services,' G.L. c. 152, §30."4 (3) However, the services for which the insurer is liable are only those "medical services" covered by the act. These include the services of a nurse or

4 Ibid.
trained attendant rendered under the direction and control of a physician. (4) Most of the services performed by the wife have not been medical services. The giving of particular medicines, dressing and undressing the employee, accompanying him because of his blindness, preparing frequent salt-free meals — these are not in the category of expert services. (5) Nevertheless, the board could have found that the physician prescribed massaging of the feet, arms, back, and legs for circulation, knowing that the wife was a trained physiotherapist. (6) There need not be any control by the physician of such trained or expert services performed as directed so long as the need continued. (7) The doctrine of laches does not apply. There is no statute of limitations applicable to a claim for medical services where compensation is being paid. (8) Therefore, the case is remanded for findings as to whether the physician prescribed the services of a masseuse and, if so, for a determination of a reasonable allowance therefor.

The holding of the Court that a wife is not barred from receiving payment for medical services rendered a husband is salutary.5 However, the Court’s construction of Section 30 so as to exclude attendent care except when rendered by an expert or trained person under the direction of a physician seems unduly narrow and in conflict with the direction of modern health care. Many seriously handicapped persons may not require medical care in a hospital, but may yet be unable to dress themselves, provide their own meals, move about without an attendant, or take needed medicines without reminder or help. If such a person lives alone, paid care will be required; otherwise, the person must be placed in a nursing home or other custodial institution. Would attendant care rendered by a stranger come within the definition of medical services laid down in this decision? The Court seems unclear on this. It says, “That paid care would have been the alternative, absent the spouse, does not bring the services within the statute.”6 It would seem immaterial whether the services are rendered by a spouse or a stranger in determining whether they are “medical services.” If not compensable when rendered by a wife, presumably they would not be compensable no matter who rendered them. But then, if an injured person is placed in an institution, not for medical treatment but purely for custodial care, would such care come within the definition of “hospital services”? If attendant care is not “medical services” when given at home, how can it be “hospital services” when given in a custodial institution?

In practice, these problems can be avoided. If there is no one available to attend an injured employee unable to care for himself, his medical treatment will require that he remain in a hospital or nursing home. To avoid the high cost of hospitalization, the insurer may be willing to agree to pay for custodial care, whether at a hotel or rest

5 A wife may now contract with her husband, G.L., c. 209, §2, as amended by Stat. 1963, c. 6, 765, §1.

The holding was to this extent anticipated by the author. Locke, Workmen’s Compensation, 29 Mass. Practice Series §363 n.21 (1968).

home, or whether rendered by a trained expert, a paid attendant, or even a spouse. In the absence of agreement, however, the narrow construction adopted by the Court will jeopardize the employee's welfare. The easy solution was rejected by the Court: to look upon such attendant care as a form of medical treatment, analogous to the beneficent effect of the Florida sun in *Levenson's Case*. Nevertheless, the problem can still be resolved without legislative action by regarding the cost of a paid attendant or a rest home as an expense necessarily incidental to medical services, analogous to transportation costs. Unless the employee receives such care, his convalescence will be retarded or even reversed. If the Court is unwilling to adopt such an approach to the problem, the legislature must act to close the gap in the protection afforded injured workers under the act.

§16.5. Survival of claim for compensation: Dependency benefits of widow. Does a claim for compensation abate upon the death of the claimant prior to any administrative award in his favor, or does the claim survive his death as an asset of his estate? This question was raised in *Carlson's Case* involving the death of a widow, the Court holding that the claim survived.

The claimant widow was the sole dependent of an employee who suffered a compensable injury which led to his death on January 10, 1961. On September 29, 1965, the single member dismissed the widow's claim on the ground that there was no causal relation between the employee's work and his death. Her claim for review was heard on November 8, 1965. The widow died on October 21, 1966, before any decision was filed. On July 11, 1967, the reviewing board reversed the single member and ordered the insurer to pay her estate dependency compensation from January 10, 1961, to October 21, 1966. The insurer appealed, contending that the claim for dependency compensation abated on the death of the widow prior to any administrative award in her favor.

General Laws, Chapter 152, Section 31 provides that upon the death of the widow any benefits which would have been payable for her use and for the use of all children of the employee shall be payable in equal shares to the surviving children of the employee. The ancestor statute of Section 31 provided that compensation benefits were personal and lapsed with the death of the sole dependent; yet, even then, "if the dependent died after an award but, pending appeal, before payment, the dependent's estate became entitled to the benefits from the date of death of the employee to the date of death of the dependent: Murphy's Case, 224 Mass. 592, 596 [113 N.E. 283, 285 (1916)] . . . ." The Court in the instant case held that it was immaterial that the widow died before any award. In the absence of a clear provision in the

2 Id. at 50, 243 N.E.2d at 182.
act, a claim for abatement must be rejected. Such a conclusion, the Court insisted, does not frustrate statutory intent by disregarding classes of alternate beneficiaries. Although the decision of the Court deals only with the narrow question of survival of the claim of a sole dependent widow, the reasoning adopted by the Court applies equally to other claims, including that of the injured employee himself. The decision should resolve whatever doubt may have existed heretofore as to whether an injured employee's claim for compensation survives in the event of his death and becomes an asset of the estate.

In the course of deciding the case, the Court placed primary emphasis upon three conclusions: (1) The death of the claimant does not render the award pointless, as either she or someone else had to provide her living expenses after the death of the injured employee; (2) "Sound public policy would frown upon a statutory interpretation which places a premium upon delay in administrative or judicial proceedings"; (3) "... the Legislature never intended that the insurer should be given, by way of bonus, an exoneration from payment of the amount of a posthumous award." These reasons support the survival of the claim of the employee himself.

Furthermore, there seems no reason why such a claim should not survive even if filed with the board only subsequent to the death of the dependent or the injured employee. If compensation benefits become an asset of the estate in the event of an award, why should not the right to compensation survive the death of the party to whom such compensation would be due, whether or not a claim had been filed during his lifetime? From a practical standpoint, the estate has the additional burden of establishing the case without a primary witness, as well as the task of meeting the requirements of notice and claim, or showing lack of prejudice to the insurer by delay. Nevertheless, as a matter of law, the right of survivorship should be the same.

§16.6. Benefits from other sources: Payments to employee by employer under voluntary, noncontributory disability benefit plan. In addition to workmen's compensation laws, a wide variety of public and private systems protect the modern employee against the hazards of wage-loss from accident, sickness, injury or death. The correlation of these benefit programs with workmen's compensation has been an increasing problem in the administration of workmen's compensation laws nationwide. Failure of the insurer to make prompt payment of compensation for disability or death is at the root of much of the

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8 For a full discussion of this issue, see Locke, Workmen's Compensation, 29 Mass. Practice Series §469 (1968).
5 Ibid.

§16.6. 1 See generally Larson, Workmen's Compensation Law §§97.00-97.65 (Supp. 1968) and Locke, Workmen's Compensation, 29 Mass. Practice Series, c. 30. As to correlation of compensation and social security disability benefits, see 5 Trial 52 (No. 5 1969).
difficulty. The injured employee or his dependents often must turn elsewhere for aid. If they are assisted by public welfare, the legislature has authorized the welfare administrator to secure reimbursement from later compensation payments by means of a lien and assignment.\(^2\) If the injured employee is able to do some work and secure unemployment benefits under General Laws, Chapter 151A, he is barred from receiving workmen's compensation for the same period.\(^3\) The legislature has made no provision for reimbursement of the unemployment fund by the insurer,\(^4\) and the employee cannot receive even the amount by which the compensation payment exceeds the smaller unemployment benefit.

Of what effect are payments from private sources? Many employees are protected by benefit plans of fraternal orders, mutual benefit societies, trade unions, and by employer benefit plans, some to which the employee contributes and others which are paid for by the employer alone. If the employee receives payments from private insurance policies of his own, it is clear from the provisions of the compensation act itself that these are not to be considered in determining the compensation payable.\(^5\) Sick benefits or other benefits to which he might be entitled from such sources as fraternal orders, benefit associations and pension plans have been held to be included in Section 38, so that the employee obtains the full benefit of such programs.\(^6\)

The Supreme Judicial Court has now decided that the board may not credit an insurer with payments made by the employer under a voluntary, noncontributory disability compensation plan in later awarding disability compensation for the same period. In Gould's Case,\(^7\) the Court held that the Workmen's Compensation Act,

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\text{... as a whole reflects a strong public interest in preserving employees' statutory rights unimpaired by private arrangements not approved by the board. ... Accordingly, we think that the board, in the absence of express statutory permission or direction, should not be required to interpret and apply the provisions of this private contractual disability plan.} 
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The employer in Gould's Case, H. P. Hood & Sons, was a self-insurer. Additionally, the company maintained a voluntary, noncontributory

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\(^3\) Pierce's Case, 325 Mass. 649, 92 N.E.2d 245 (1950) (except an employee suffering from a specific injury listed in §3).


\(^5\) G.L., c. 152, §38. These provisions "were introduced to encourage the employee in habits of thrift." 1912 Commission Report 50, cited in Locke, Workmen's Compensation, 29 Mass. Practice Series §611 n.2 (1968).

\(^6\) "This section was designed to make sure that the employee would not lose the full advantage" of such programs for his benefit. Mizrahi's Case, 320 Mass. 733, 737, 71 N.E.2d 383, 385 (1947).


\(^8\) Id. at 1351, 242 N.E.2d at 752.
disability plan, financed solely by the employer, which supplemented the amount of workmen's compensation benefits in the event of industrial injuries, and paid a schedule of disability benefits if the absence was due to a non-industrial condition. Under the plan, if it is later adjudicated that the absence was "due to an industrial accident it is understood that that employee will reimburse the company for his . . . plan payments in the amount of workmen's compensation payments found to be due for the same period."9 The Industrial Accident Board found that Gould received benefits from the disability plan but held that it was without authority to order any credit or repayment. On appeal, the superior court ordered a credit to the self-insurer for these payments. The Supreme Judicial Court reversed, and held that no offset or credit could be ordered.

The Court viewed the issue as one of first impression in Massachusetts. Earlier Massachusetts cases were regarded as not determinative of the issue,10 and the cases in other jurisdictions under varying statutes were in conflict. Nor did the Court find the provisions of the Massachusetts act to be decisive:

The language of c. 152, s. 38 . . . does not expressly preclude a credit to, or reimbursement of, the self-insurer for payments made by it under its disability plan to the extent that these payments were, in effect, an advance on account of workmen's compensation benefits.11

Section 38 expressly rules out consideration of "savings or insurance of the injured employee" or "benefits derived from any other source than the insurer," and, in construing Section 38, the Court limited "savings or insurance" to funds or insurance directly owned by the employee or wholly or partly paid for by him, and regarded the benefits under the disability plan as paid by the insurer and not from any "other source."12 Further, the Court held that,

Section 47 . . . preventing the assignment or attachment of workmen's compensation payments has no direct application. What is now involved is merely a credit for payments already advanced on account of, or in lieu of, workmen's compensation . . . as

9 Id. at 1347, 242 N.E.2d at 750.
10 Pierce's Case, 325 Mass. 649, 92 N.E.2d 245 (1950) (barring payments for period in which unemployment benefits received); Mizrahi's Case, 320 Mass. 735, 71 N.E.2d 883 (1947) (barring compensation where employee had already received payments under the Longshoremen's and Harbor Workers' Compensation Act for another injury); McLaughlin's Case, 274 Mass. 217, 171 N.E. 485 (1931) (giving Massachusetts insurer credit for payments under New Hampshire act); MacAleese's Case, 508 Mass. 515, 55 N.E.2d 280 (1941) (denying reimbursement to uninsured contractor for medical payments in emergency, though insurer would have been liable for such payments if they had not been paid by the volunteer).
12 This reasoning is hard to accept. The payments under the disability plan were made by the employer, as a fringe benefit and in the form of deferred wages, in his capacity as an employer and not as an insurer.
The giving of a credit against compensation ordered to be paid, the Court found to involve no assignment. The Court's holdings, in contrast to its dicta, are a strong reaffirmation of the scheme of the compensation act, requiring payments in accordance with the benefit scale established by the act, either by voluntary agreements subject to administrative approval or by award after a hearing. Any other payments are not payments under the act and ought not to be given even half-hearted sanction by being characterized as "an advance on... compensation benefits" or "as satisfying, in part, the... obligation to provide workmen's compensation." They are entirely separate private payments and have no more place in the scheme of the compensation act than would private payments by a third party volunteer.

B. LEGISLATIVE DEVELOPMENTS

§16.7. Incapacity: Weekly benefits. Weekly benefits were again raised. Effective November 23, 1969, the maximum for weekly total, permanent and total, or partial incapacity will be $70. The minimum was left at $20, the figure at which it was set in 1955. The aggregate maximum for total disability was left at $16,000. At the present maximum of $70, a totally disabled workmen can receive payment for no more than 228 weeks, four days.

§16.8. Benefits: Law governing. The legislature tried to deal with the persistent back-log of claims pending before the board, and at the same time overcome some of the built-in obsolescence of the scale of benefit payments. General Laws, Chapter 152 was amended by the addition of Section 51A which provides:

In any claim in which no compensation has been paid prior to

§16.7. 1 Acts of 1969, c. 529.

the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury.

The problem of constitutionality is met by providing that the section shall apply only to injuries occurring on or after its effective date. This new section will undoubtedly require considerable judicial interpretation before its effect can be determined.

§16.9. General and special employers: Liability. An attempt was made to deal with the problem of employment contractors. In *Galloway's Case*, the Court ordered compensation paid by the insurer of the company (Sylvania) hiring the injured employee through an employment contractor, even though the contractor's fee included a surcharge for compensation insurance. By Acts of 1969, Chapter 755, the definition of "employer" in Chapter 152, Section 1(5) was amended to "include both the general employer and the special employer in any case where both relationships exist with respect to an employee." Section 18 was also amended by adding the following paragraph:

In any case where there shall exist with respect to an employee a general employer and a special employer relationship, as between the general employer and the special employer, the liability for the payment of compensation for the injury shall be borne by the general employer or its insurer, and the special employer or its insurer shall be liable for such payment if the parties have so agreed or if the general employer shall not be an insurer or insured person under this chapter.

In the *Galloway* situation, the employment contractor would be considered the general employer and Sylvania the special employer. The contractor would be liable for compensation, even if at the time of the injury the employee was under the direction and control of Sylvania. Sylvania's carrier should be liable only if the parties so agreed or if the employment contractor was uninsured. Of course, the amendment to Section 1 is worded in general terms, so that its reach would extend beyond employment contracting to all cases involving general and special employment.