Chapter 4: Workmen's Compensation Law

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CHAPTER 4

Workmen's Compensation Law

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§4.1. Common employment doctrine: Abolition by legislative amendment. The 1971 Survey year marks the last days of the common employment doctrine as a defense in third-party suits by employees covered under the Workmen's Compensation Act. Responding to the Supreme Judicial Court's refusal to disturb the common employment doctrine, the legislature, rather than merely revising the defense of common employment, abolished it totally with respect to all causes of action arising on and after January 24, 1972. Since injuries occurring before that date are still affected by the common employment doctrine, lawyers and courts will still be obliged to deal with its intricacies, and injured workmen and their dependents will still suffer from its inequities for a few more years.

The common employment doctrine bars all those engaged in a common enterprise being carried out by an insured employer from succeeding in actions at law to recover damages for personal injuries. The doctrine is based on Sections 15, 18, and 24 of the Workmen's Compensation Act. Section 24 provides that unless an employee affirmatively reserves his common law right to recover damages for a personal injury, he will be held to have waived that right. Section 18 imposes on an insured employer the obligation to pay compensation to employees of uninsured contractors doing the insured employer's work, where the work done is part of the business of the insured and not merely ancillary and incidental thereto. The effect of Section 18 is to make the insured employer the "statutory employer" of the employees of his uninsured subcontractors. Section 15 establishes the procedure

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§4.1. 1 G.L., c. 152, §§1-76.
2 In Brown v. Marr Equip. Corp., 355 Mass. 724, 726, 247 N.E.2d 352, 353 (1969), the Supreme Judicial Court, notwithstanding its critical appraisal of the doctrine, stated: "[I]f the doctrine is to undergo revision such revision should be accomplished by the Legislature."
5 These three sections of the act are explained in detail in Locke §§152-155, 651, 663-665.
for third-party suits in cases where the injury is caused by a "person other than the insured."

These three sections in combination have resulted in the establishment of a rule, governing common law actions for personal injuries suffered by employees of the contractor and of subcontractors where the work is done under a general contractor who is an "insured person," that might not be apparent from a mere reading of the statute. The insurance of the general contractor or "common employer" ... throws its shadow over the whole work. In that shadow ... a cause of action for negligence causing a compensable personal injury cannot grow. ... [O]ne engaged in that common employment as contractor, sub-contractor or employee cannot be a "person other than the insured" within section 15, and the injured employee has no option to sue him at common law. An insurer, whether of the common employer or of a sub-contractor, paying compensation to an employee, cannot recover over under section 15 against a negligent contractor, sub-contractor or employee engaged in the "common employment" for the insurer succeeds only to the rights of the employee receiving compensation. ... In the application of this rule, it is immaterial whether the sub-contractors are insured or not. ... The essential thing is the existence of a "common employer" who is an "insured person" under section 18 ... and who is having work done ... which work is part of or process in his trade or business. ... 6

The doctrine of common employment was created in White v. George A. Fuller Co.,7 a 1917 case involving a suit against a general contractor by an employee of an uninsured subcontractor for the payment of damages for personal injuries. Under the terms of Section 18 as then written, the employee had a right to workmen’s compensation from the general contractor’s insurance carrier as though the employee were immediately employed by the general contractor. In response to the obligation for compensation thus placed on the general contractor by the statute, the Supreme Judicial Court extended the general contractor’s immunity against suits by his own employees by providing for an immunity as well against suits by the employees of uninsured subcontractors. The employees of uninsured subcontractors were to have no greater rights than the immediate employees of the general contractor. The narrow immunity created by the Court in White, however, was soon expanded beyond all bounds. Section 18 was converted from a grant of compensation coverage for employees of uninsured subcontractors to a grant of immunity for all employers on a common project whether or not they had any obligation to provide compensation protection for employees of uninsured subcontractors.8

7 226 Mass. 1, 114 N.E. 829 (1917).
8 Locke §665.
Chapter 941 of the Acts of 1971 eliminates the effect of the common employment doctrine by restricting the employer immunity to the immediate employer of the injured employee, thereby abolishing even the limited immunity established by White. The amendment adds the following sentence to Section 15:

Nothing in this section or in section eighteen or twenty-four shall be construed to bar an action at law for damages for personal injuries or wrongful death by an employee against any person other than the insured person employing such employee and liable for payment of the compensation provided by this chapter for the employee’s personal injury or wrongful death and said insured person’s employees.⁹

Under the amendment, if an insured person is to acquire an immunity against a suit for personal injury or wrongful death, two conditions established by the amendment must be met: first, the insured person must employ the injured or deceased employee, and second, the insured person must be liable for the payment of compensation for the injury or death of the employee. If the conditions are met, the employer has his immunity. The effect of the amendment is that the insured contractor, whose insurance carrier must pay compensation under the provisions of Section 18 for the injury or death of an employee of an uninsured subcontractor, is now liable as a third party for damages in excess of compensation if his negligence or that of his employees caused the injury. Where the Court has extended the insured employer’s immunity to protect his employees from an action at law by a fellow employee,¹⁰ the amendment explicitly preserves the protection. Of course, if at the time of injury the plaintiff or his decedent was not in the service of the defendant¹¹ or the injury did not arise out of and in the course of employment,¹² the compensation act itself has no application and the parties have the same legal rights and duties as members of the general public.

§4.2. Common employment doctrine: Employer’s liability for contribution or indemnity to third party: Indemnification based on active-passive negligence theory. In Stewart v. Roy Bros.,¹ the plaintiff was employed by Standard Storage Co. (Standard), a “public warehouseman” that stored chemicals for 15 different companies. At the time of the accident, Stewart was engaged in loading ethyl acetate into a tank trailer owned and operated by Roy Bros. (Roy), a “certified carrier” in the business of transporting liquid and dry freight. While

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so engaged, Stewart was accidentally sprayed with the ethyl acetate, a highly flammable substance which Standard stored for Union Carbide, and a fire at the front of the trailer ignited his clothing. Stewart was severely burned. He received workmen's compensation from Standard's insurance company and brought a third-party action against Roy. Roy impleaded Standard for indemnity. The jury brought in a verdict for Stewart against Roy and for Roy against Standard in the same amount, under leave reserved, after the trial judge had denied motions for a directed verdict for both defendants.

Defendants Roy and Standard appealed to the Supreme Judicial Court. After holding that there was sufficient evidence of negligence on the part of Roy and that Stewart had neither assumed the risk nor been guilty of contributory negligence, the Court considered three remaining issues: whether a verdict for the plaintiff should stand despite a jury finding of common employment; whether the third party had a right to seek indemnity from the plaintiff's employer despite the fact that a direct suit against the employer would have been barred by the compensation act; and whether Massachusetts would recognize a general tort doctrine of indemnity based upon the theory of active and passive negligence. The Court reiterated familiar law on the first issue, did not reach the second, and on the third enunciated the general proposition that the Commonwealth would not embrace the doctrine of active-passive negligence as a basis for indemnity.

The Court first considered the issue of common employment. In response to special questions, the jury had found that the loading and storage of ethyl acetate for Union Carbide by Standard and the loading, transporting, and delivery of ethyl acetate for Union Carbide by Roy was in each instance a part of and process in the business of Union Carbide and not merely ancillary and incidental thereto. The Court held as a matter of law that, notwithstanding the jury's special findings, the doctrine of common employment did not apply because the available facts "plainly" indicated that the work of Roy was not a part of or process in the business of Union Carbide. The Court observed that since every business was dependent in some way on transportation, transportation was not necessarily a "part of or process in" every business. The delivery of material to an insured employer and the shipment of its finished product would not usually be considered a part of or process in that insured employer's business. Only if the employer itself usually carried on these activities might they be considered a part of its business. "[T]here was no evidence to indicate how Union Carbide usually distributed chemicals, whether it ever used its own trucks for that purpose, or to what extent it used common carriers other than Roy. . . ." In the absence of such evidence, the Court

2 This proposition had been originally stated by the Court in Cannon v. Crowley, 318 Mass. 373, 376, 61 N.E.2d 662, 665 (1945).
saw no basis for the trial jury's finding that Roy's transportation activities were part of Union Carbide's business. Accordingly, it was held that the work engaged in by Roy had been outside the common employment.

Although with respect to the common employment issue the Court had been on familiar ground, it then faced the issues arising from Roy's indemnification impleader of Standard, the plaintiff's employer. Roy relied chiefly on the theory that Standard had committed "active" negligence, while at most Roy had been passively negligent. On this issue the jury had found for Roy. The question for the Supreme Judicial Court was "whether the third party plaintiff (Roy) is entitled to indemnity from an insured employer (Standard) whose negligence has caused or contributed to cause the injury of its employee (Stewart). . . ."5 That question was one of first impression in the Commonwealth. Two sub-issues had been briefed and reported: (1) whether the compensation act protected an insured employer from such liability; and (2) whether the Commonwealth would recognize the doctrine of active-passive negligence. The Court dealt solely and summarily with the second: "The doctrine of active-passive negligence . . . has not been recognized in this Commonwealth nor are we willing to embrace this doctrine now."6 The Court noted that in Massachusetts the general rule barred indemnity or contribution among joint tort-feasors: "Indemnity is permitted only when one does not join in the negligent act but is exposed to derivative or vicarious liability for the wrongful act of another."7 Such was not the case with Standard. The Court was unwilling to change the general rule by embracing the doctrine of active-passive negligence.

The Stewart decision leaves unanswered the question of whether the compensation act will have any effect upon the insured employer's liability for contribution or indemnity to a tort-feasor. The question may have increased significance in view of the abolition of the common employment defense since the number of third-party suits will undoubtedly increase, and many third-party suits will involve the intimate interplay between the third party and the employer. In the construction industry, for instance, the third party's liability is often merely "vicarious" or "derivative," and the plaintiff's employer may be the active tort-feasor. Courts have been quite willing to hold an insured employer liable to a third party where there is an express or implied contract for indemnification.8 The majority of courts, however, have not been willing to overlook the exclusive remedy provision of the compensation act in the absence of a contract to indemnify, even in states which allow contribution among joint tort-feasors.9 A signifi-

6 Id. at 1615, 265 N.E.2d at 365.
7 Id. at 1617, 265 N.E.2d at 365. The general rule is expressed in Gray v. Boston Gas Light Co., 114 Mass. 149, 154 (1873). The Court's discussion in Stewart contains a full citation of authorities. Id. at 1616-1617, 265 N.E.2d at 365.
9 2 Larson §76.21 and cases cited therein.
cant number of courts do find an obligation to indemnify on the part of the employer by considering the relationship of the employer and the third party as separate from that of the employer and his injured employee. The latter courts treat the separate relationship as giving rise to an independent duty on the part of the employer to refrain from negligent acts which would impose a liability (in Massachusetts merely "derivative or vicarious" liability) on the third party with respect to the employee.\(^{10}\)

The cases which find an independent duty on the part of the employer seem more in line with the goal of making the compensation act an exclusive remedy for the injured employee and with the moral concept underlying third-party actions. They are also more in keeping with the specific provisions of the Massachusetts compensation act and with the relevant decisions of the Supreme Judicial Court. The grand design of the compensation act is based on liability without fault; the employee gives up his right to sue his employer for full tort damages in return for a modest but assured subsistence benefit. The employer receives immunity from unlimited tort liability to his employee in return for providing insurance for the prescribed compensation benefits. The exchange of rights and duties that is the essential element of workmen's compensation does not justify depriving a third party of his right to contribution or indemnity where the employer has breached an independent duty to the third party. There are two separate legal consequences: the third party's duty to pay damages to the employee, and the third party's right to receive recompense from the one whose culpable act gave rise to the third party's obligation to pay the damages. That the ultimate wrongdoer happens to be the plaintiff's employer is irrelevant to the wrongdoer's duty to indemnify the third party on whom vicarious liability was imposed. When the employer fulfilled its statutory duty to take out compensation insurance, it purchased immunity solely from liability to its employee. "The concept underlying third party actions is to ensure that the loss caused by the wrongdoer ultimately falls on the wrongdoer, while preserving the employee's right to compensation."\(^{11}\) The moral philosophy of liability for fault which justifies the suit by the injured employee against the third party should equally impose liability upon the ultimate wrongdoer, even where it is the plaintiff's employer.

Nothing in the language of the compensation act justifies escalating the employer's immunity so as to bar liability to the third party. Section 23 states:

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\(^{11}\) Locke §661 n.1, citing Furlong v. Cronan, 305 Mass. 464, 26 N.E.2d 382 (1940).
If an employee files any claim for, or accepts payment of, compensation on account of personal injury under this chapter, or makes any agreement, or submits to a hearing before a member of the division under section eight, such action shall constitute a release to the insured or self-insurer of all claims or demands at law, if any, arising from the injury. 12

By these words, the employee's assertion of his right to compensation becomes a release to the insured employer of any possible demands the employee might have at law. But how can the words of Section 23 be deemed to convert the employee's claim to compensation into a release of a third party's claims or demands at law against the insured employer? The legal injury to the third party from the employer's breach of its duty to the third party is an "injury" separate from the physical harm to the employee referred to by Section 23.

The language of Section 23 is strikingly more limited than that of the compensation statutes in those states which have barred indemnity by the employer. The typical wording of the latter compensation statutes provides that the liability of an employer shall be exclusive and in place of any other liability whatsoever to such employee, his personal representatives, spouse, parents, dependents or next of kin, or anyone otherwise entitled to recover damages at common law or otherwise on account of such injury or death. 13 As pointed out by counsel for Roy: "The reasoning of those decisions which favor employer immunity frequently is that a noncontractual duty to indemnify the third party would be an obligation on 'account of such injury' to the employee and, therefore, is barred by the language of the statute." 14 No such language appears in the Massachusetts act to prohibit employer indemnification.

Prior decisions of the Court have permitted actions at law against a negligent employer arising from a compensable injury. In King v. Viscoloid Co., 15 the parents of a minor child were held to retain their right of action for medical expenses and loss of services, despite payment of compensation to the minor-employee. The employee's waiver of common law rights under Section 24 was held not to extend to other persons who have separate and independent rights against the employer. The parent's right of action was stated to be "independent" of the employee's right. The employee could not by his own act "waive his parent's independent right." A similar result is suggested by two cases concerning an employer's liability to its deceased employee's dependents, who are not entitled to benefits under the compensation act. 16

A recent case involving a motor vehicle tort rather than a workman's

12 G.L., c. 152, §23.
13 2 Larson §76.30.
14 Brief for Defendant and Third Party Plaintiff (Roy Bros.) at 22.
compensation action indicates that the Supreme Judicial Court would not hold an employer liable in indemnity to a third party. In O'Mara v. H. P. Hood and Sons,\textsuperscript{17} in the absence of a showing of gross negligence, the Court barred recovery under the contribution statute\textsuperscript{18} as against the operator of the car in which plaintiff had been a passenger. A right of contribution exists "where two or more persons become jointly liable in tort for the same injury to person or property."\textsuperscript{19} Under the terms of the statute, unless the potential contributor would be directly liable to the injured person, the defendant wrongdoer is not entitled to contribution. If a third party against whom a tort suit has been brought under Section 15 of the Workmen's Compensation Act were to seek contribution from the employer as a joint tort-feasor under the contribution statute, the O'Mara case suggests that recovery would be denied on the ground that the employer was not directly liable to the plaintiff-employee by virtue of Sections 23 and 24 of the act. However, the Court itself in O'Mara distinguished the question of indemnity from that of contribution.\textsuperscript{20}

In short, this issue is still wide open. Considerations of public policy and statutory interpretation both combine to favor holding an employer liable in indemnity when the third-party liability is merely "derivative and vicarious" and the truly culpable wrongdoer is the employer.

§4.3. Third-party suits: Elimination of the election between compensation and tort remedy. When the General Court abolished the common employment defense, a companion amendment\textsuperscript{1} modified Section 15 of the Workmen's Compensation Act to eliminate the previous need to elect between the compensation and tort remedies, and to allow either the insurer or the employee to bring a subrogation action against the third party. Under the prior law, still applicable to all injuries occurring before October 14, 1971, Section 15 required the employee to elect between bringing a compensation claim or a tort action against the third party. He could not pursue both remedies concurrently. If he chose compensation, his right of action against the third party vested initially in the insurer as a statutory assignee; but if the insurer failed to act seasonably, the employee could proceed against the third party on his own. The insurer would be reimbursed for the compensation paid, no matter who brought the third-party action. If the insurer began the suit, the employee would be entitled to only four-fifths of the excess of the recovery over the compensation paid, whereas if the employee brought the suit, he would retain the entire excess.\textsuperscript{2}

The 1971 amendment changes all this. The amendment first provides

\textsuperscript{17} 1971 Mass. Adv. Sh. 553, 268 N.E.2d 685.
\textsuperscript{18} G.L., c. 231B, §1.
\textsuperscript{19} Ibid.

§4.3. 1 Acts of 1971, c. 888, §§1, 2, amending G.L., c. 152, §15.
\textsuperscript{2} Locke §§665, 668-672.
that where an injury is caused under circumstances creating a liability for damages in a person other than the employer, "the employee shall be entitled, without election, to the compensation and other benefits provided under this chapter." The amendment abolishes the need to choose between compensation and the tort remedy. Next it provides: "Either the employee or insurer may proceed to enforce the liability of such person, but the insurer may not do so unless compensation has been claimed or paid under an agreement." The amendment abolishes the need to choose between compensation and the tort remedy. Next it provides: "Either the employee or insurer may proceed to enforce the liability of such person, but the insurer may not do so unless compensation has been claimed or paid under an agreement." Thus, although the insurer may still control the third-party suit as a statutory assignee if it pays compensation under an agreement or if the employee claims compensation, it does not have exclusive control or ownership of the right of action. If the insurer has not brought suit, the employee may do so at any time. An employee wishing to bring suit may first bring his third-party action and then file his claim for compensation, thus maintaining appropriate control over his own rights and remedies.

The amendment makes other needed changes. It provides that the sum recovered shall be for the benefit of the insurer unless the recovery is greater than the compensation paid to the employee, "in which event the excess shall be retained by or paid to the employee." Retention by the insurer of 20 percent of the excess recovery in those cases where the insurer brought the third-party action is thus eliminated. The amendment also clarifies the distribution of costs and interest, and ends the confusion as to payment of attorneys' fees. The party bringing the action is to retain the costs recovered. Interest is to be "apportioned between the insurer and the employee in proportion to the amounts received by them respectively, exclusive of interest and cost." Similarly, the expense of any attorneys' fees "shall be divided between the insurer and the employee in proportion to the amounts received by them respectively under [Section 15]." The provisions for approval of the third-party settlement and the distribution of the proceeds remain unchanged.

I have previously pointed out:

Our Massachusetts system is subject to criticism on two grounds, one a matter of statutory provision and the other a matter of judicial decision. First, the requirement of an election is unduly techn-

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4 Ibid.
5 Furlong v. Cronan, 305 Mass. 464, 467, 26 N.E.2d 382, 385 (1940), construed the prior Section 15 as granting ownership of the third-party suit to the insurer where a claim had been filed, even though the insurer contested the claim before the Industrial Accident Board.
6 He previously had to wait 15 months. Locke §669.
7 Acts of 1971, c. 888, §1. The former provision had permitted the anomalous situation in which the 20 percent insurer's recovery might exceed the compensation benefits paid to the employee.
8 Ibid.
9 Ibid.
10 These provisions are described in Locke §669.
nical and hazardous, and may leave the employee without actual relief if his choice proves unsuccessful. Secondly, the court has construed the concept of third persons against whom an action at law may be brought so as to exclude all persons employed on the same project under an insured "common employer," including contractors and sub-contractors and their employees. This has extended the immunity justifiably granted employers to persons who have assumed no obligation under the act to warrant it. 11

The 1971 Massachusetts legislature, by enacting Chapters 888 and 941 of the Acts of 1971, has in one year cured the two aforementioned defects, which had persisted since the compensation act was first put on the statute books in 1912.

§4.4. Other amendments: Compensation orders after conference; Depositions of medical witnesses; Presumption for death on premises; Coverage of nurses; Increase in weekly incapacity benefits. In its most productive year since 1949, the legislature made other very important reforms in the Massachusetts Workmen's Compensation Act. The reforms focused on two continuing problems: the backlog in controverted cases, and the inadequate compensation payments for incapacity and death.

Critics of the Massachusetts compensation system attribute the long delay in adjudication of claims to several causes. Insurance companies have been criticized for unfairly refusing to pay compensation voluntarily in cases where they clearly would eventually have to pay, thereby forcing into litigation disabled workers who are without compensation when they need it most. 1 For their own part, insurance companies have complained that once claims are accepted, payments cannot be stopped without the assent of the employee or the approval of the Industrial Accident Board, even if the insurer has medical evidence that the employee is able to return to work. 2 Other observers have noted the lack of authority of members of the board to control board proceedings or to issue temporary orders without formal hearing. Finally, some commentators feel that the act could be simplified so that issues now subject to controversy could be eliminated. 3 All of these considerations influenced the reforms enacted in 1971.

The major innovation is embodied in Chapter 974 of the Acts of 1971, 4 which introduces a new procedural step between the notification of the board that a controversy exists as to payment or continuance of compensation and the formal hearing provided by Section 8.

11 Locke §416.

2 The present system is set forth in G.L., c. 152, §6. A summary of the procedure for payment of compensation by agreement can be found in Kareske's Case, 250 Mass. 220, 145 N.E. 301 (1924), and in Locke §417. G.L., c. 152, §29 covers discontinuance of compensation. See also Locke §§424-428.
4 Amending G.L., c. 152, §7.
The new step is a conference before a single Industrial Accident Board member, to be held not later than 28 days after notice of a controversy is given to the board. The board member is to make "such inquiries and investigations as he deems necessary and shall have the power to require and receive reports of injury, signed statements of the employee and other witnesses, medical and hospital reports and records and such other oral and written matter as enable him to determine whether compensation . . . is due." It is not required that the "oral matter" be sworn testimony or be subject to cross-examination. If the issue before the board member is the commencement of compensation and if the member determines from all of the available information that compensation is due, he is to file forth with a written order for such compensation. On the other hand, if the issue before the board member is whether compensation already being paid is to be continued, he is not restricted to either terminating the compensation entirely or continuing it unchanged, as under prior law, but also has the power given by Chapter 974 to "modify" compensation, that is, to order the continuance of compensation in lesser amounts.

Any party aggrieved by an order arising from the conference may request the Division of Industrial Accidents to set the case for a hearing before another board member. That hearing would be conducted in accordance with long-standing statutory procedures. By inadvertence, however, Chapter 974 of the Acts of 1971 did not prescribe a time limit within which a request for a hearing must be made. Presumably an insurer could begin payments under the order and if, months later, it found the payments burdensome, it could ask for a hearing. The failure to prescribe a time limit within which a request for a hearing must be made gives unwarranted leverage to the insurer in negotiations for a lump settlement and places the employee in needless uncertainty. A prompt amendment is in order to provide that a reasonable time limit, such as 10 days, be established.

After a request for a hearing is made, the hearing is to be scheduled within three months. Until a decision is rendered, payments are to continue in accordance with the order that resulted from the conference. The decision of a single board member after a hearing, however, supersedes the order arising from a conference. Once a decision has been filed, it is enforceable in the superior court unless a claim of review is filed within seven days. Formerly, if the decision of the board member at a formal hearing was in favor of commencing compensation to the employee and the insurer claimed a review, payment did not begin until after the decision of the reviewing board. Whether

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6 G.L., c. 152, §29.
8 G.L., c. 152, §8.
9 Amendments to this effect have been entered as House Bill 1493 (10 days) and Senate Bill 231 (14 days) for the 1972 legislative session.
10 Acts of 1971, c. 974, provides that both orders (arising from a conference) and decisions (arising from a hearing) are enforceable under G.L., c. 152, §11.
11 G.L., c. 152, §§8, 10, 11.
the filing of a claim by the insurer for review under the new procedure would similarly act to suspend payment, even if the insurer had been making payments under the temporary order of a single member, is not explicitly stated in the amendment. The intent of the amendment would indicate that payments should be continued, but a further amendment is in order to clarify that point. If after a hearing the single board member decides that weekly payments made under the original order were not warranted, the state treasurer will reimburse the insurer and the employee will reimburse the state treasurer.

The 1971 amendment emphatically expresses the legislative intent that industrial injury or death be promptly compensated; by giving the board member the power to order such payment in cases where the insurer now unjustifiably withholds voluntary payment, the legislature will ensure that its intent is carried out. The amendment gives the board member substantial authority at an early stage in the proceedings and should go far to eliminate the staggering backlog of undecided cases.

Implementation of the new procedure will require an enlarged staff and budget for the Division of Industrial Accidents. More board members will be needed if the board is to hold conferences and hearings within the prescribed 28- and 90-day time limits. Unfortunately, the only provision made by the legislature for such additional staffing is Chapter 953 of the Acts of 1971, which authorizes the governor to recall former members of the board for 90-day periods if the workload of the board so requires and the board so requests. The recalled members are barred from practicing before the board during the period of recall, and their salary is limited to the difference between any retirement pension they may be receiving and the current salary of an active board member. Probably few will accept recall under those circumstances, and therefore it is doubtful that Chapter 953 will fill the need for additional board members created by the present backlog of controversies and the new conference procedure. The next legislature will have to enlarge the membership of the board substantially on either a permanent or a temporary basis.

In a related move to strengthen the executive department's responsibility for the performance of the Division of Industrial Accidents, the legislature made the term of the chairman of the Industrial Accident Board coterminous with that of the governor.

Since most cases before the board involve medical questions, diffi-

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12 An amendment to this effect has been entered as House Bill 1493 for the 1972 legislative session.
14 The backlog of cases awaiting the attention of the board is large, but until the board analyzes its caseload to determine the number and the types of cases that are being delayed, the exact character and extent of the backlog cannot be known.
15 Adding §15A to G.L., c. 23.
16 An amendment to this effect has been entered as House Bill 1854 for the 1972 legislative session.
difficulty in producing expert medical witnesses at hearings causes many delays and postponements. Chapter 882 of the Acts of 1971\(^{18}\) provides for the taking of depositions of medical witnesses and makes such depositions admissible in proceedings before the board. The statute requires a party to make a written request for the taking of a deposition, and the division or a board member then has the option to approve or disapprove the request. Depositions are to be taken for "use as medical evidence only" and not for purposes of discovery. The cost of stenographic services is to be paid by the party requesting the deposition, but if the decision is in favor of the employee, his expenses for stenographic services are to be added to the award and paid by the insurer. This statute will need amendment because it fails to provide the board with the power to order depositions without a written request, and similarly does not obligate the member to authorize a deposition when a party makes such a request.\(^{19}\) The new statute also limits the use of depositions to medical testimony only. The deposition of any witness, lay or medical, should be permitted and admissible in proceedings before the board for all purposes, whether discovery or testimony.

Chapter 702 of the Acts of 1971\(^{20}\) clarified the Workmen's Compensation Act with respect to the presumption applicable in the event of the death or disability of the employee. Prior law had provided that in any claim for compensation where the employee had been killed or was physically or mentally unable to testify, it was to be presumed, in the absence of substantial evidence to the contrary, that the claim was within the provisions of the Workmen's Compensation Act.\(^{21}\) However, use of the presumption failed to simplify hearings in cases of unwitnessed deaths because the Supreme Judicial Court had held that the presumption disappeared upon introduction of substantial evidence to the contrary.\(^{22}\) The amended statute provides:

> In any claim for compensation where the employee has been killed, or found dead at his place of employment or is physically or mentally unable to testify, it shall be prima facie evidence that the employee was performing his regular duties on the day of injury or fatality or death or disability and that the claim comes within the provisions of this chapter. . . . 23 [Emphasis added.]

The emphasized phrases are new. By replacing "presumed in the absence of substantial evidence to the contrary" with "prima facie evidence," the legislature intended to make sure that even if evidence was introduced to show that the injury was not in the course of the em-

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\(^{18}\) Amending G.L., c. 152, §5.

\(^{19}\) An amendment to this effect has been entered as House Bill 1855 for the 1972 legislative session.

\(^{20}\) Amending G.L., c. 152, §7A.

\(^{21}\) G.L., c. 152, §7A; Locke §221.

\(^{22}\) LeBlanc's Case, 332 Mass. 334, 125 N.E.2d 129 (1954); Lapinsky's Case, 325 Mass. 13, 88 N.E.2d 642 (1949). See also Locke §184.

 employee’s employment the board could, if it so believed, find that the injury arose out of and in the course of employment on the sole basis that the employee could not testify because of either death or incapacity. Although it is for the board to decide what weight will be given to prima facie evidence, such evidence remains in the case in the face of contradictory evidence.24

By Chapter 811 of the Acts of 1971,25 the legislature extended the coverage of workmen’s compensation to nurses employed by religious, charitable, and educational institutions. Previously it was necessary to show either that the institutions had elected voluntarily to cover nurses by including them in their compensation policy, or that the duties of the particular nurse claimant were essentially those of “laborers or workmen.”26 The reform is to be welcomed, but the practice of piecemeal extension of coverage, based upon organized lobbying by particular groups, is to be deplored. The elimination of all exemptions from compulsory coverage should be speedily accomplished.27

It is said that one of the three main purposes of the workmen’s compensation system is rehabilitation, that is, to provide medical and vocational help to an injured workman so that he can be restored promptly to gainful employment.28 The rights of the injured worker and the obligations of insurers in the Massachusetts rehabilitation program are provided in Sections 30A-30D of the act.29 However, the procedure for enforcing the obligations of the insurer with respect to rehabilitation was formerly unclear. By Chapter 773 of the Acts of 1971,30 the legislature has provided for rehabilitation hearings before the board and has given the board the power to require an insurer to provide for vocational rehabilitation.

By Chapter 879 of the Acts of 1971,31 the legislature increased the weekly incapacity compensation limit from $70 to $77 effective November 1, 1971, and to $80 effective November 1, 1972. Although the amendment increases compensation limits, it still leaves undercompensated the injured worker whose prior earnings exceed $120 per week as of November 1, 1972. Even though the act requires the payment of two-thirds of the employee’s average weekly wage as compensation for total incapacity, the worker whose weekly wage was $160 before injury will still, because of the limits on compensation, receive only one-half his average wage when the limit is raised to $80. The worker whose weekly wage was $240 will receive only one-third of his wage as compensation.

The original 1911 act provided for a weekly compensation equal to

25 Amending G.L., c. 152, §1.
26 Brewer’s Case, 335 Mass. 601, 141 N.E.2d 281 (1957) (student nurse held employee and within class of laborers and workmen).
27 An amendment to this effect has been entered as House Bill 1857 for the 1972 legislative session.
28 2 Larson §61.20.
29 G.L., c. 152, §§30A-30D.
30 Amending G.L., c. 152, §30B.
31 Amending G.L., c. 152, §§34, 34A, 35.
one-half of an employee’s average weekly wages, but no more than $10 nor less than $4 per week. One-half was changed to two-thirds in 1914. At that time the average wage in the manufacturing industry in Massachusetts was about $12 per week, so that almost all injured workers received weekly compensation equal to two-thirds of their average weekly wage. The system of limiting the maximum weekly compensation to a fixed dollar amount has been preserved up to the present, although the weekly maximum has been periodically increased by the legislature.

The limiting of compensation on a fixed dollar basis has two faults: (1) It requires periodic legislative action to increase the weekly maximum compensation payments to keep pace with increases in the wage scale and the cost of living. Legislative action is virtually always “after the fact,” so that the weekly maximum falls farther and farther behind the level of wages and cost of living. (2) It ensures that workers earning high wages will be undercompensated. A better solution is to eliminate the weekly maximum entirely. The weekly compensation benefits will then automatically be correlated with an employee’s average earnings, which in turn will reflect changes in wage levels and in the cost of living. Although this proposal has the twin factors of fairness and simplicity, it has not been adopted in any jurisdiction. Presumably no state is willing to suffer a competitive economic disadvantage by increasing its compensation so dramatically. A federal compensation model, under consideration by the National Commission on State Workmen’s Compensation Laws, is expected to incorporate this concept.

Chapter 879 of the Acts of 1971 also increased the aggregate limit for total incapacity compensation from $16,000 to $20,000 and for partial incapacity compensation from $18,000 to $20,000. The restriction of the aggregate benefit to $20,000 means that the injured workman will exhaust his benefits in only 250 weeks at $80 per week, or in less than 5 years. Thereafter he will have to show that he is totally and permanently disabled if he is to receive any further benefits. It would be fairer to do away with the maximum period of incapacity, as has been done in the case of medical treatment, an area in which no limits are presently set. The limitations on the weekly compensation payments and on the total compensation payments ought not to be allowed to continue; the act should provide for the injured workman as long as his handicap and his need persist.

52 St. 1911, c. 751, pt. II, §6.
53 St. 1914, c. 708, §2.
54 See Locke §302 for amendments of the maximum compensation limits from 1927 to date.
55 The commission was established by the Occupation Safety and Health Act of 1970, Pub. L. No. 91-596, §27, 84 Stat. 1590.
56 G.L., c. 152, §30.