Chapter 2: Workmen's Compensation Law

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§2.1. Double Compensation: Serious and Wilful Misconduct of One Exercising Superintendence. In O'Leary's Case,\(^1\) the Court held that a superintendent's order to workmen to disregard an important contractual safety provision, after the danger had been called to his attention and when the means for complying with that safety provision were at hand, was an act warranting a finding of serious and wilful misconduct, within the meaning of section 28 of chapter 152 of the General Laws.\(^2\) Thus, the Supreme Judicial Court has further strengthened the importance of the Workmen's Compensation Act as a method of ensuring job safety by enhancing the power of the Industrial Accident Board to order double compensation where an employee is injured "by reason of the serious and wilful misconduct of . . . any person . . . exercising the powers of superintendence . . . ."\(^3\)

In the 1974 decision, Boardman's Case,\(^4\) the Court indicated its interest in this provision by liberally applying it where a minor had been injured by reason of a violation of the child labor laws.\(^5\) Further, the Court enhanced the provision's economic importance by construing the compensation to be doubled as including all medical costs that the insurer was obligated to pay.\(^6\) O'Leary's Case gives a liberal construction to this provision as it applies to the great majority of adult workers.

Daniel O'Leary was a journeyman iron worker sent with two others to work on the construction of a church. All three men were members of a local union that had a collective bargaining contract with the em-

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\(^{\text{2}}\) Id. at 607, 324 N.E.2d at 384.
\(^{\text{3}}\) G.L. c. 152, § 28.
\(^{\text{5}}\) See id. at 630-31, 324 N.E.2d at 597. The specific provision that the employer was found to have violated was G.L. c. 149, § 62(10). G.L. c. 152, § 28 provides that the employment of a minor, known to be such, in violation of any provision of G.L. c. 149, §§ 60-74, 104 (the child labor laws), shall constitute serious and wilful misconduct.
employer. The contract provided that when two or more employees were sent to a job, one should be selected by the employer to act as a foreman; this foreman would be the only representative of the employer who could issue instructions to the workmen. The foreman in this case was Louis Latino. At the construction site, the men noticed that the beams with which they were to work had shear connectors or steel clips attached. These are angle irons of approximately three inches in height, two inches in width, and three-eighths of an inch in thickness, affixed to the beams every six inches lengthwise and every two inches widthwise. The clips serve as bonds for the concrete that is poured around the beams after they are erected. O'Leary and his co-worker called Latino's attention to the fact that the beams had the shear connectors attached, in violation of a specific "Safety Provision" of the contract between the local union and the employer, and reminded Latino that they were not supposed to work with the beams in that condition. There was equipment available at the site for the removal of the shear connectors, but the foreman told the men that they would have to work the beams or go home.

At the hearing before a single member of the Industrial Accident Board, the single member found that "[t]hey obeyed the foreman's orders to do the work rather than risk dismissal." The employee sustained his injury when a length of beam that he was bolting rolled over and a shear connector caught his leg, causing a deep cut and breaking the leg in two places.

On review of the single member’s decision, the Industrial Accident Board found that Latino was entrusted with and exercising powers of superintendence for the employer on that day, and that his “order to get on with the work without removing the shear connectors... involved conduct of a quasi-criminal nature... [because the order was made] with the knowledge that it was likely to result in serious injury and [because the order] displayed a wanton and reckless disregard of the probable consequences.” The Board took into consideration that the Commissioner of Labor and Industries had, pursuant to section 1(4)(c) of chapter 152, determined that structural steel and iron workers were engaged in a hazardous occupation. It also took into consideration that contractual safety provisions in collective bargaining agreements.
agreements are arrived at only after serious study and hard bargain-
ing, and represent the "lessons learned from the practical experience
gained in the building trades." These considerations provided the
basis for the Board's ultimate conclusion that "the injury suffered by
O'Leary was a result of the serious and willful misconduct of Latino, a
person intrusted [sic] with and exercising the powers of superinten-
dence for this employer, within the meaning and intent' of c. 152, §
28."

On appeal, however, the superior court denied the claim for double
compensation. Thereafter, the employee appealed to the Appeals
Court and then to the Supreme Judicial Court for direct appellate re-
view, which was granted. Applying the general rule governing judi-
cial review of Board decisions, the Court noted that the Board's de-
termination that there had been serious and wilful misconduct would
be upheld if there was any evidence to warrant that conclusion.

The employer argued that Latino was not a person "regularly" ex-
ercising the powers of superintendence. Referring to the contract
provision requiring that one of the men be appointed by the em-
ployer to serve as foreman and to issue instructions to the men, the
Court held that, in the context of section 28 of chapter 152, "the
word [regularly] is simply designed to distinguish between a mere fel-
lower worker who occasionally acts in a limited supervisory capacity and
a person who is officially designated by the employer as the person in
charge of a particular facet of the employer's business and who is ac-
tually engaged in a supervisory capacity at the time of the employee's
injury." The Court also referred to the comparable language of the
Employer's Liability Act, which had been interpreted "as primarily
intended to differentiate between a mere volunteer and one actually
designated by the employer as a superintendent."

The employer also argued that Latino's actions could not constitute
serious and wilful misconduct as those words had been construed in
earlier decisions. In Burns's Case, the Court had said: "Serious and
wilful misconduct is much more than mere negligence, or even than
gross or culpable negligence. It involves conduct of a quasi criminal
nature, the intentional doing of something either with the knowledge
that it is likely to result in serious injury or with a wanton and reckless

15 Id. at 601, 324 N.E.2d at 382-83.
16 Id. at 601-02, 324 N.E.2d at 383.
17 Id. at 596-97, 324 N.E.2d at 381.
18 Id. at 597, 324 N.E.2d at 381.
19 Id. at 602, 324 N.E.2d at 383.
20 Id. at 603, 324 N.E.2d at 383.
21 G.L. c. 153, § 1.
23 218 Mass. 8, 105 N.E. 601 (1914).
§ 2.1 WORKMEN'S COMPENSATION LAW

This demanding standard all but precluded double compensation awards; in the fifty years between 1912 and 1962, there was only one case in which the Court affirmed an award of double compensation. In 1946, however, while reiterating the quasi criminality language of Burns's Case, the Court also referred to the language of the Restatement of Torts, section 500, which did not speak in terms of quasi criminality. The court again referred to the Restatement of Torts, section 500 in O'Leary's Case:

[W]e construed [section 500] as requiring that "not only must the actor intentionally do the act upon which he is sought to be charged, but also he must know or have reason to know ... facts 'which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.'"

The Court said that, under these principles, the Board was warranted in concluding that the foreman's conduct amounted to serious and wilful misconduct:

For a person exercising powers of superintendence deliberately to order workmen to disregard an important contractual safety provision, after the danger is called to his attention and when the means for complying with that safety provision are at hand, is an act which warrants a finding of serious and wilful misconduct within the meaning of G.L. c. 152, § 28.

In O'Leary's Case, the safety provision that the Court found the Board had properly used as a standard to measure the foreman's mis-

24 Id. at 10, 105 N.E. at 604. In the Brief for the Plaintiff addressed to the Supreme Judicial Court, counsel for the employee suggested that the case would give the Court the opportunity to discard or at least qualify the phrase "quasi-criminal," with its unconscious connotation of the criminal law concepts of scienter and proof beyond a reasonable doubt. Brief for Plaintiff at 31-32, O'Leary's Case. Although the Court in O'Leary's Case does not rephrase the standard language used over the years to define serious and wilful misconduct, its decision should serve to draw much of the venom from the words "quasi-criminal," and put to rest any misconceptions concerning "malevolence."


26 Restatement of Torts § 500 (1934):

The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.


29 Id. at 607, 324 N.E.2d at 384.

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conduct had been embodied in a labor-management contract. There are, however, other sources of safety provisions that could be used to measure serious and wilful misconduct. For example, the Court's holding would have even greater viability with respect to safety provisions mandated by statute or by regulations promulgated under statutory authority. Similarly, safe practices prescribed (and unsafe practices proscribed) by federal regulations issued pursuant to the Occupational Safety and Health Act of 1970, could constitute a standard that a foreman could ignore only at the risk that such misbehavior, should it result in serious injury or death, might be held to be serious and wilful misconduct under section 28. The result might well be the same if a foreman's conduct violated safe practices shown by competent evidence to be an accepted custom or recommended practice in the industry or community. Nevertheless, whether an injury results from serious and wilful misconduct necessarily depends in each instance on the particular facts of the case presented.

The greater monetary recovery that awaits a successful section 28 claimant, and the heightened safety consciousness of the public, exemplified by Congress's enactment of the Occupational Safety and Health Act of 1970, have already led to an increase in the number of claims filed under section 28 of chapter 152. The effect of O'Leary's Case on the attitude of members of the Industrial Accident Board in weighing evidence of employer misconduct has yet to be seen. The Board should not hesitate, however, to apply the criteria stated in O'Leary's Case and should enter an award where the facts warrant. The Court has plainly indicated that the public interest in labor safety will be upheld. Employers must ensure that those they place in superintendence take care with their machinery, appurtenances, and practices to avoid any easily perceptible risk of serious bodily injury or death. Employer awareness of the potential cost of a double award can add economic self-interest to the mandate of the Occupational Safety and Health Act of 1970, which will result in safer workplaces and fewer injuries.

§2.2. Death of Employee at Place of Employment: Prima Facie Evidence: Compensability. Under section 7A of chapter 152 of the General Laws, notice of the death of an employee found dead at his place of employment is prima facie evidence that the employee was performing his regular duties on the day of the fatality, and that the claim comes within the provisions of the Workmen's Compensation Act.
§2.2 WORKMEN'S COMPENSATION LAW

Act. In the Rescript, Iljinas's Case, the Appeals Court held that the force of prima facie evidence "warranting" a finding does not disappear when the evidence warrants a finding to the contrary.

In a death case under the Workmen's Compensation Act, the burden of proving the essential facts necessary for payment of compensation rests upon the claimant, as it does upon a plaintiff in any proceeding at law. This burden may be met by showing facts from which a reasonable inference can be made that the cause of death was related to the employment. It is not enough, however, to show a state of facts equally consistent with a right to compensation as with no such right, and therefore compensation would have to be denied where the death was unwitnessed or where the claimant-survivor was unable to obtain evidence needed to meet the burden of proof.

The Legislature came to the aid of such claimants in 1947, by amending the Workmen's Compensation Act to provide that where the employee had been killed or was physically or mentally unable to testify, it would be presumed, in the absence of substantial evidence to the contrary, that the claim came within the provisions of the Act. Although this amendment did not change the burden of proof, it did afford the claimant a powerful weapon with which to meet that burden. Where the presumption applied, even if the claimant offered no affirmative evidence, a finding for the claimant was required, unless the insurer offered substantial evidence to the contrary.

Where the insurer did offer substantial evidence to the contrary, however, the presumption disappeared entirely. Thus, if an employee died of coronary thrombosis at work, evidence that he had a preexisting history of coronary disease and that such a person could suffer a fatal heart attack at any time whether engaged in work exertion or resting at home, would constitute substantial evidence to the contrary and eliminate the presumption. The claimant would then be in the same position as before the enactment of the 1947 amend-

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3 Id., 322 N.E.2d at 426 (emphasis in original).
5 See Belanger's Case, 274 Mass. 371, 374-75, 174 N.E. 497, 499 (1931); Bean's Case, 227 Mass. 558, 116 N.E. 826 (1917); Locke, supra note 4, § 221, at 268 n.98.
7 For selected cases, see Locke, supra note 4, § 221, at 268 n.99.
9 Lysaght's Case, 328 Mass. 281, 284, 103 N.E.2d 259, 261 (1952). See Woloschuck's Case, 325 Mass. 10, 88 N.E.2d 640, 641 (1949); Goddu's Case, 323 Mass. 397, 400-01, 82 N.E.2d 232, 234 (1948); Locke, supra note 4, § 221, at 269 n.3.
12 For a collection of such preexisting heart condition cases, see Locke, supra note 4, § 221, at 270 n.6.
ment, faced with the necessity of introducing affirmative evidence showing that the death was work related. In 1971, the Legislature tried again to aid claimants in death cases, and this time it has apparently succeeded. The present version of section 7A of chapter 152 of the General Laws 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, that sufficient notice of the injury has been given, and that the injury or death or disability was not occasioned by the wilful intention of the employee to injure or kill himself or another.

In place of a “presumption”, the section now speaks of “prima facie evidence.” The artificial force of either a presumption or prima facie evidence, compelling a finding, disappears when the evidence warrants a finding to the contrary. The distinction between the two, however, is important. The Appeals Court held in Iljinai's Case that the force of prima facie evidence warranting a finding does not disappear when the evidence warrants a finding to the contrary. This is unlike the case under the former version of the statute, where the introduction of substantial evidence to the contrary would cause the presumption to disappear entirely.

The employee in Iljinai's Case was found dead at his place of employment. The 1971 amendment applied to the claim. For that reason alone, so the court held, “the insurer's contention that the claimant failed to sustain her burden of proof fails." The court explained that Riordan's Case “does not hold that the force of prima facie evi-

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13 "If... the presumption [was] applicable, then a decision for claimant would be required 'in the absence of substantial evidence to the contrary.' But if there was substantial evidence to the contrary, the presumption would disappear and the case would have to be considered as though there had been no presumption." Lapinsky's Case, 325 Mass. 13, 16, 88 N.E.2d 642, 644 (1949).
17 See text accompanying notes 11-13 supra.
18 1975 Mass. App. Ct. Adv. Sh. at 171, 322 N.E.2d at 426. The parties had agreed that the 1971 amendment, which took effect during the course of the hearing before the single member, applied to the case. It had been decided when § 7A was enacted in its original version that such an amendment was procedural. Goddu's Case, 323 Mass. 397, 399-400, 82 N.E.2d 232, 233-34 (1948).
20 1972 Mass. Adv. Sh. 1802, 289 N.E.2d 838. Riordan's Case in fact held that the artificial force of a presumption or of prima facie evidence, compelling a finding, disappears when the evidence warrants a finding to the contrary. Id.


§2.3. Specific Compensation: Loss of Hearing: Loss of Binocular Vision by Injury to One Eye Only. In two cases, the Appeals Court had occasion to consider two separate clauses of section 36 of chapter 152 of the General Laws, which provides so-called "specific compensation" for named permanent physical handicaps resulting from compensable injuries. In Vouniseru's Case, the court approved the Industrial Accident Board's use of a "total loss of hearing for all practical purposes" standard. In Flynn's Case, the court held that where an employee suffered a loss of binocular vision due to an injury to one eye only, specific compensation could not be awarded for loss of vision of both eyes. The two decisions not only clarify the interpretation of the specific clauses involving hearing loss and loss of binocular vision, but also provide insight into the meaning and purpose of the entire section.

In Vouniseru's Case, the court upheld an award for loss of hearing in both ears. The claimant, who had suffered a head injury, claimed compensation under section 36(f), which provided for compensation "for the loss of hearing of both ears." Two impartial physicians appointed by the Board reported that he had total deafness in the left ear and appreciably diminished hearing in the right ear amounting to an 80 percent binaural loss of hearing. On this evidence, the claimant was awarded compensation for loss of hearing in both ears.

In a case of first impression, the court considered the standard by

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22 Id.

§2.3. 1 These payments are explicitly made "in addition to all other compensation." G.L. c. 152, § 36. This section represents a departure from the basic purpose of the Workmen's Compensation Act, which is to compensate an injured employee for the impairment of his earning capacity. Kaczmarczyk's Case, 328 Mass. 9, 12, 101 N.E.2d 353, 355 (1951). For a detailed discussion of specific compensation, see L. Locke, WORKMEN'S COMPENSATION, 29 MASS. PRACT. §§ 345-350 (1968) [hereinafter cited as Locke]. Section 36 has been rewritten by Acts of 1972, c. 741, § 1, which rearranged and renumbered the subsections and increased the monetary benefits by about 25 percent. Because the cases discussed in this section arose under the prior version of the section, the references in this article are to the clauses as they appeared in section 36 prior to this 1972 revision.
5 G.L. c. 152, § 36(f), as amended through Acts of 1966, c. 584. The relevant language of the present version is identical. G.L. c. 152, § 36(d).
7 Id. at 422, 324 N.E.2d at 921.
which "loss of hearing" should be measured. The Industrial Accident Board had issued guidelines for section 36 specific compensation, which established the standard for loss of hearing as "total loss of hearing for all practical purposes." The Supreme Judicial Court had applied the "loss for all practical purposes" standard in connection with other specified injuries under section 36. Finding the guidelines consistent with the statutory scheme, the court held that total loss of hearing for all practical purposes does not mean that the employee must be unable to hear any sound under any conditions.

The court also held that the single member was justified in taking into consideration the type of work that the employee did, since this was consistent with the purposes underlying section 36. One of the purposes of section 36 is to compensate the individual for permanent losses of bodily functions that have a definite effect on an employee's ability to do his work, to obtain future employment, and to perform chores and errands that are of value to him.

In Flynn's Case, the Appeals Court ruled that where an employee had a 40 percent loss of function in both eyes due to double vision resulting from an injury to one eye only, specific compensation could not be awarded for loss of vision of both eyes, but was limited to the benefits provided under section 36(d) "... for injury to one eye which produces an inability which is not correctible to use both eyes together for single binocular vision ... ."

The employee had sustained a work-related injury to his right eye only, but this resulted in his inability, with or without glasses, to coordinate the use of his eyes so as to obtain single binocular vision. The

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8 Id. at 416-17, 324 N.E.2d at 919.
9 Id. at 417, 324 N.E.2d at 919.
10 Id. at 417-18, 324 N.E.2d at 919-20, citing Morley's Case, 328 Mass. 148, 150, 102 N.E.2d 493, 495 (1951); Flocher's Case, 221 Mass. 54, 55, 108 N.E. 1092, 1093 (1915); Meley's Case, 219 Mass. 136, 139, 106 N.E. 559, 560 (1914).
12 Id. at 417-18, 324 N.E.2d at 919, citing Locke, supra note 1, § 348, at 419 n.91 (1968).
14 Id. at 421 n.8, 324 N.E.2d at 920, n.8, citing H.R. Doc. No. 183, at 2-3 (1947). Although these losses may be difficult to establish and measure in any given case, they should be compensated by a statutorily prescribed amount varying with the physical impairment involved. The court also noted the view expressed in Locke, supra note 1, § 345, at 413 (1968), that specific compensation also serves to "provide more adequate compensation for the employee's real loss, in a system which has taken away the employee's common law right of action against his employer for personal injuries." Id. See also Boardman's Case, 1974 Mass. Adv. Sh. 625, 310 N.E.2d 593, where the Supreme Judicial Court noted in an analogous situation that while double compensation may have a punitive aspect, "it may also be thought a tacit acknowledgement of the fact that the Workmen's Compensation Act ordinarily affords the employee rather slim recovery ... ." Id. at 632, 310 N.E.2d at 598.
16 G.L. c. 152, § 36(d), as amended through Acts of 1966, c. 584. The relevant language of the present version is identical. G.L. c. 152, § 36(a).
loss of function on that account in his eyes used together with glasses was about 40 percent.\textsuperscript{17} Section 36(b) provided specific compensation “for the reduction to twenty seventieths of normal vision in both eyes, with glasses . . . .”\textsuperscript{18} Since reduction of vision to twenty seventieths on the Snellen chart reflects visual acuity of 36 percent below normal, the single member concluded that the employee’s 40 percent loss of function brought him within the scope of section 36(b).\textsuperscript{19} The court held that this conclusion and the award and decree based on it were erroneous.\textsuperscript{20}

Before a 1959 amendment\textsuperscript{21} to section 36(d),\textsuperscript{22} there was no explicit provision in section 36 relating to loss of binocular vision. At a time when section 36 provided a specified amount for reduction to one tenth of normal vision in both eyes, and a lesser amount for a similar reduction in one eye, the Supreme Judicial Court held in \textit{O'Brien's Case}\textsuperscript{23} that an employee suffering an injury to his right eye resulting in double vision was entitled to compensation for the injury to one eye alone.\textsuperscript{24} Although in \textit{O'Brien} the Court did not discuss the availability of compensation for reduction of vision in both eyes, the Appeals Court in \textit{Flynn} found that \textit{O'Brien} implies that such compensation would not be available.\textsuperscript{25} Thus, an award would have been warranted for reduction to twenty seventieths of normal vision in one eye under section 36(c),\textsuperscript{26} but for the clause inserted in section 36(d) by the 1959 amendment, which specifically granted compensation “for injury to one eye which produces an inability which is not correctible to use both eyes together for single binocular vision . . . .”\textsuperscript{27} The 1959 amendment represented a liberalization of section 36 in that it permitted an award for such an injury regardless of the severity of the double vision, as long as it was not correctible. The court held that the claim clearly fell within that category and should have been dealt with accordingly.\textsuperscript{28}

\textsuperscript{18} G.L. c. 152, § 36(b), \textit{as amended through} Acts of 1966, c. 584. The relevant language of the present version is identical. G.L. c. 152, § 36(b). Although awards under § 36 prior to the 1972 amendment were expressed in terms of $25 per week for specified numbers of weeks for each specific loss, payment was actually made in a lump sum. So here, under § 36(b), the award would have been for $12,500; under § 36(d), applied by the Court, the award would have been for $5,000.
\textsuperscript{20} \textit{Id}.
\textsuperscript{21} Acts of 1959, c. 230.
\textsuperscript{22} G.L. c. 152, § 36 (d), \textit{as amended,} G.L. c. 152, § 36(a).
\textsuperscript{23} 228 Mass. 211, 117 N.E. 1 (1917).
\textsuperscript{24} \textit{Id.} at 212-13, 117 N.E. at 2.
\textsuperscript{26} G.L. c. 152, § 36(c) \textit{as amended through} Acts of 1966, c. 584. The relevant language of the present version is identical. G.L. c. 152, § 36(a).
\textsuperscript{27} G.L. c. 152, § 36(d), \textit{as amended,} G.L. c. 152, § 36(a).
The employee had argued that his real loss was from the double vision, which affected both eyes, not just the injured right eye. To regard the employee's injury as subject to section 36(b) was inconsistent with the statutory provision of section 36(d), however, and the court would not adopt a construction that would bring statutes into conflict with one another.\(^9\)

Although the court's interpretation seems somewhat narrow, it is consistent with the long-established case law and the 1959 amendment, and is fully warranted. It does not indicate any departure from the tradition of liberal interpretation that the Appeals Court has adopted as its touchstone.

\(^9\) *Id.* at 773-74, 328 N.E.2d at 896.