Chapter 2: Worker's Compensation

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CHAPTER 2

Worker’s Compensation

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§ 2.1. “Personal Injury” Arising out of and in the Course of Employment — “Wear and Tear Doctrine” Upheld. In Zerofski’s Case,1 a fifteen year effort to have the Supreme Judicial Court overrule the doctrine of “wear and tear,” or at least confine it to cases of mental or emotional injuries, was brought to an end by the Massachusetts Court.2 The Court reaffirmed the doctrine, saying, “the distinction [between compensable injury and mere ‘wear and tear’] is necessary to preserve the basic character of the [Worker’s Compensation] Act.”3 The critique of the wear and tear doctrine, however persuasive it may have seemed to the critics, obviously did not persuade the Court. The issue must be regarded as closed before the Court. Future relief will have to be sought in the Legislature.

The employee in Zerofski contended that his disability after ten years of standing and walking on concrete floors during eighty percent of his working day, with repeated breakdowns of a previously injured leg, constituted a personal injury compensable under the Worker’s Compensation Act (the “Act”).4 The Industrial Accident Board agreed, and ordered the self-insured employer to pay compensation to the employee at the rate in effect in 1976, when the employee had been laid off from work, finding that the employee was totally disabled from the aggravation of his leg condition.5 On appeal by the self-insurer, Chief Justice Lynch of the superior court reversed the board as a matter of law, and ordered compensation to be paid by the insurer on the risk at the time of the original

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3 385 Mass. at 594, 433 N.E.2d at 871. The Worker’s Compensation Act is codified at G.L. c. 152, §§ 1-86.

4 See 385 Mass. at 591, 433 N.E.2d at 870.

5 See id.
injury which had occurred in 1964. The memorandum accompanying his judgment applied the distinction between personal injury and wear and tear as re-invigorated in Albanese's Case and Camaioni's Case, and held that in the admitted absence of any noxious conditions in the work environment or any evidence of specific additional injury, there was no injury compensable under the Act during the time after 1964 when the self-insurer was covering the risk. The Appeals Court affirmed the judgment of the superior court.

On appeal to the Supreme Judicial Court, the insurer who had covered the risk in 1964, echoed by the employee, made a serious effort to persuade the Court to abrogate the wear and tear doctrine. The insurer's brief relied upon and quoted liberally from the analysis of the doctrine in Locke's treatise on Workmen's Compensation, and expanded upon the argument made therein with extensive references to decisions in other jurisdictions, including states which require that compensable harm arise from "accidental injury" or "injury by accident" — a more stringent test than that present in the Massachusetts Act. The briefs of the appellants sought in the alternative to restrict "wear and tear" to psychic injury cases. The decision of the Supreme Judicial Court in Zerofski rejected both suggestions and reaffirmed the doctrine without reservation, citing as precedents the whole line of wear and tear cases, running back to Maggelet's Case, and including Burns's Case and Spalla's Case.

The Court was well aware of the liberal interpretation of personal injury in Massachusetts, as well as the abolition of the peculiar risk doctrine which had prevailed at the time of the original enunciation of the wear and tear doctrine in Maggelet's Case. It restated these doctrines with appropriate citations. Of particular interest, however, is the Zerofski Court's conclusion that:

The line between compensable injury and mere "wear and tear" is a delicate one, as a comparison of the results reached in past decisions reveals. Nevertheless, the distinction is necessary to preserve the basic character of the act. The "purpose [of the act] is to treat the cost of personal

6 Id.
10 385 Mass. at 592-96, 433 N.E.2d at 870-72.
14 228 Mass. 57, 116 N.E. 972 (1917).
15 385 Mass. at 592-96, 433 N.E.2d at 870-72.
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injuries incidental to ... employment as a part of the cost of business.'" "It is not a scheme for health insurance." To be compensable, injury must arise "out of" as well as "in the course of" employment, and "[a] disease of the mind or body which arises in the course of employment, with nothing more, is not within the act." Much of the responsibility for separating injuries that are sufficiently work-related from those that are not rests with the Industrial Accident Board, which must determine as a matter of fact whether a causal connection exists between employment and injury. The distinction between compensable and noncompensable injuries, however, involves more than the factual problem of causation. In some cases work may be a contributing cause of injury, but only to the extent that a great many activities pursued in its place would have contributed. When this is so, causation in fact is an inadequate test.\(^{16}\)

With these last few sentences, the Court went far beyond wear and tear, a relatively minor issue, and opened up the whole question of the scope of compensability under the Massachusetts Act. The Zerofski Court seems to be saying that even if an employee’s disablement is the result of his work, he might not be entitled to compensation if "a great many activities pursued in its place" would also have contributed to his condition.\(^{17}\) Such a statement could be viewed as a retreat from the actual risk doctrine enunciated by Caswell’s Case,\(^{18}\) long considered the cornerstone of the modern trend of compensation in Massachusetts and cited approvingly by the Zerofski Court at the very start of its analysis of the law: "[An] injury ‘arises out of’ employment if it is attributable to the ‘nature, conditions, obligations or incidents of the employment; in other words, to employment looked at in any of its aspects.’ "\(^{19}\) There is nothing apparent in that latter statement which could justify excluding from injuries compensable under the Act those injuries to which "a great many activities pursued in [the employment’s] place would have contributed." This is slipping back into the language of "peculiar risk" repudiated in Caswell, and re-opens all the fallacies attendant to that doctrine.\(^{20}\) The Court points to no evidence which would support its conclusion that a great many activities include walking or standing on concrete floors, eighty percent of the time,

\(^{16}\) Id. at 594, 433 N.E.2d at 871-72 (citations omitted).

\(^{17}\) Id. at 594, 433 N.E.2d at 872. The Zerofski Court thereby embraces a principle repeatedly stressed by this author as the primary flaw in the "wear and tear" doctrine. L. Locke, Workmen’s Compensation, 29 Mass. Practice Series § 175 (2d ed. 1981). "If the breakdown of mind or tissue is the result of work exposure, this disablement should be compensable." Id. The Court, however, apparently felt obliged to make the astonishing statement that all work related injuries are not compensable in order to provide a theoretical underpinning for retaining the "wear and tear" doctrine.

\(^{18}\) 305 Mass. 500, 26 N.E.2d 328 (1940).

\(^{19}\) 385 Mass. at 592, 433 N.E.2d at 871 (quoting Caswell’s Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940)).

for a ten year period. That appears to be one of the conditions of the employment involved here, if not the very "nature" of that employment. It is not "walking" or "standing" that is at issue, but walking or standing on concrete floors eighty percent of the time. The Court's statement that compensation need not be awarded even though the Industrial Accident Board found, on the basis of warrantable lay and medical evidence, that the disablement was causally related to the "nature, conditions, obligations or incidents of the employment" undercuts the very purpose of the Act — to provide wage replacement for those who are no longer able to work because of work-related harm to their minds or bodies.

The court then went on to attempt a "restatement" of the range of harm covered by the Act:

To be compensable, the harm must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must, in the sense we have discussed, be identified with the employment.

It is difficult to know what interpretation this new language of the Court should be given. One possible result of Zerofski is that a new test, "identified with the employment," has replaced the broad language of Caswell's Case. It is perhaps equally plausible, however, that the Court's language in Zerofski was "shorthand" to incorporate the Caswell Court's broader test. Does the Court consider any injury as "identified with the employment" if it arises from any feature of the employment — its nature, conditions, obligations or incidents — the employment looked at in any of its aspects — as defined in Caswell? Taken with the language

21 On facts very similar to Zerofski, the Minnesota Supreme Court held that compensation was due on a new injury. Gillett v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200 (1960) (cited by the insurer on the original injury in Zerofski in its brief submitted to the Supreme Judicial Court). Compare Robinson's Case, 292 Mass. 543, 198 N.E. 760 (1935), where a sixty-nine year old street cleaner was required as part of his duties to sweep the town square at four a.m. on a bitter cold morning and had his foot amputated as a result of such employment. The Court affirmed a decree denying any recovery, stating "[i]n the performance of his work there is nothing to show that the employee was exposed to any greater risk of freezing his foot than the ordinary person engaged in outdoor work in cold weather." Id. at 545-46, 198 N.E. at 761. The reasoning of the Robinson Court was severely criticized in 1 A. Larson, Workmen's Compensation Law, § 8.42, at n.74 (1977).


23 385 Mass. at 594-95, 433 N.E.2d at 872.

24 305 Mass. 500, 26 N.E.2d 328 (1940).
analyzed in the prior paragraph, it might seem that the ghost of "peculiar risk," thought to be laid to a final and peaceful rest by Caswell and its progeny,25 has risen again to stalk the ramparts of compensation, to strike back at the "actual risk" and "position risk" doctrines which have replaced it in the past forty years.

Nothing is to be gained, however, by speculating on Zerofski's Case or the new language it has introduced into compensation jurisprudence. For the time being, all concerned with the Act in its practical administration should take the new language into consideration. Appellate reversal of awards can be avoided by careful investigation of the facts, seeking evidence of specific incidents of periods of stress in longer stretches of work, and identifying alterations in medical status as causally related to these specific incidents or limited periods of stress. This was the method followed by careful practitioners before Albanese's Case26 and Zerofski's Case.27 The successful results of careful lawyering can be seen in the January, 1983 decision of the Appeals Court in Blevin's Case,28 where the court found a distinction between the ordinary progression of osteoarthritic disease and the result of heavy work which in one month was more than ordinarily stressful.

In summary, it can be said that Zerofski has put an end to the attempt of lawyers and commentators to put wear and tear back into the oblivion in which it rested after 1946. It must now be regarded as a sturdy, if undesirable, doctrine, to be changed only by the Legislature, and to be avoided by careful lawyering. It can also be said that the Court's venture into "restatement" went far beyond the scope of the matter under appeal, and introduced new language into compensation analysis, seemingly at variance with well-established concepts. The scope of this language and its exact effect on the state of worker's compensation law in Massachusetts, however, remains to be seen.

§ 2.2. Chapter 152, Section 35B Construed — Rate of Compensation to be Applied When Injured Worker Returns to Job and After Two Months Sustains a "Subsequent Injury" — Retroactivity — Limits on Application.

Section 35B of the Worker's Compensation Act (the "Act")1 was enacted in 1970,2 but it was not until 1982 that its meaning was sufficiently clarified to make it useful. As enacted, section 35B provides:

An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such com-

25 See supra notes 18 and 19 and accompanying text.
§ 2.2. 1 The Worker's Compensation Act is codified at G.L. c. 152, §§ 1-86.
pensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury; provided, that if compensation for the old injury was paid in a lump sum, he shall not receive compensation unless the subsequent claim is determined to be a new injury.

Those familiar with the legislative history of this amendment to the Act had difficulty construing it. The language proposed to the Legislature and appearing in all versions of section 35B until the one which was finally enacted spoke not of "subsequent injury" but of "subsequent incapacity." The change in the final version seemed to be an error which should be ignored, as otherwise the amendment appeared meaningless. In Zerofski's Case, the Supreme Judicial Court referred to the possible applicability of section 35B to the case before it, but ultimately declined to interpret this long dormant provision.

During the Survey year, in Don Francisco's Case, the Appeals Court squarely addressed the issue of section 35B's proper construction, opening up new possibilities for the payment of workers' compensation in the Commonwealth. The decision of the Appeals Court in Don Francisco's Case rescues the statute from the paralysis caused by its seeming ambiguity and demonstrates how it can be construed to give meaning to its provisions and become a viable part of the Act.

Pasquale Don Francisco sustained a work-related neck injury on June 3, 1969 when he fell off a staging. The insurer paid compensation for almost three weeks and Don Francisco returned to work without restriction on his activities. During the course of his work, Don Francisco experienced progressively increasing pain in his neck and left arm but no incident report was filed. He finally left work on May 8, 1978.

The employee's medical expert stated that Don Francisco suffered from post-traumatic cervical arthritis which rendered him totally disabled and that the disability was causally related to the 1969 injury. While the doctor also stated that the degenerative changes "occurred a little bit sooner" due to the fact that Don Francisco was working, the Industrial Accident

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3 See L. Locke, Workmen's Compensation, 29 Mass. Practice Series § 302, at n.22 (2d ed. 1981), which was relied on by the employee in the case under discussion. The court's decision characterized this argument (as well as the insurer's) as failing to apply general principles of statutory construction by not giving words their plain and ordinary meaning.

4 385 Mass. 590, 433 N.E.2d 869 (1982). Zerofski's Case is discussed in section I of this chapter.

5 Id. at 596 & n.7, 433 N.E.2d at 872-73 & n.7.


7 Id. at 456, 440 N.E.2d at 526.

8 Id.

9 Id. at 457, 440 N.E.2d at 526.

10 Id. at 456, 440 N.E.2d at 526.

11 Id. at 458, 440 N.E.2d at 526-27.

12 Id. at 458, 440 N.E.2d at 527.
Board found that "the 1969 injury was not aggravated by his continuing to work anymore than it may have been by his normal daily activities, the only true aggravating factor being the passage of time." Thus, under Zerofski's Case, no new injury occurred on May 8, 1978 which would have entitled the employee to compensation under the Act. The question before the court then was whether the employee would be restricted to the compensation rate as of June 3, 1969, the date of his original injury, or, applying the provisions of section 35B, be compensated according to the rate in effect on May 8, 1978. The Appeals Court found section 35B to be applicable to the facts of the case, holding that there had been a change in the employee's condition occurring after two months from his return to work as a result of his original compensable injury.

In reaching this result, the court rejected as overbroad the suggestion of the employee that section 35B be read as "a remedial upgrading of compensation for subsequent periods of incapacity determined as a question of fact to be a recurrence." The court stated this would merely shift focus away from the word "injury" to "recurrence" without regard to the meaning of either, and might produce results which were not intended by the Legislature. The court indicated that "mere" recurrence is not

13 Id. at 457 n.2, 440 N.E.2d at 527 n.2.
15 See id. at 593-94, 433 N.E.2d at 871-72 (1982). It should be noted that had the court found a new injury occurring on May 8, 1978, the employee would have received a two-fold benefit, receiving compensation at the higher rate in effect at the later date as well as having that higher rate applied to his average weekly salary as of 1978 rather than 1969. This is because the average weekly wage of the employee at the time of the compensable injury has been considered to govern the rate of compensation. L. Locke, supra note 3, at § 302, at 352. Where the compensation rate in effect at the time of a subsequent injury which stems from a prior compensable injury is applicable under section 35B, an interesting issue arises as to whether that rate should be applied to the employee's wage at the time of the more recent injury (as if it were a completely new injury), or to the wage which was in effect at the time of the original compensable injury. Until now, it has been assumed that the most the claimant could receive, even under section 35B, would be two-thirds of the average weekly wage at the time of the original compensable injury. Thus, if the wage at the date of the original compensable injury were $225, the benefit at the time of subsequent injury could not exceed two-thirds of that amount, or $150, even though at the later date, the employee might be earning $420 and the compensation rate on this average wage would be $280. This would have the effect of drastically limiting the beneficial effect of section 35B. It should be considered whether the reasoning of the Don Francisco court (especially 14 Mass. App. Ct. at 462-63, 440 N.E.2d at 529, dealing with retrospective effect) might not require the Industrial Accident Board to apply the average weekly wage at the time of the subsequent injury, and base the compensation rate on that average wage, subject to the statutory maximum in effect at that time, in order to achieve the purposes of such a remedial statute.
17 Id. at 462, 440 N.E.2d at 529.
18 Id. at 461, 440 N.E.2d at 528.
19 Id.
enough to trigger section 35B, but rather a "change" in the condition resulting from the original injury and occurring more than two months after the return to work is required.\textsuperscript{20} The court also rejected the insurer's argument that section 35B would apply only where the employee's condition was "reappearing" and spasmodic rather than, as in the instant case, constant and degenerative.\textsuperscript{21} The court saw no "significant distinction between periodic changes resulting in lost wages and a steady deterioration of one's physical or mental abilities resulting in the inability to work."\textsuperscript{22}

The court then dealt with the prospective application of section 35B. The general rule of statutory interpretation, that statutes which are substantive in character are to be applied only prospectively,\textsuperscript{23} is embodied and qualified for the Act in chapter 152, section 2A of the General Laws, providing that any amendment which would increase the rate of compensation to be received by an employee shall "be deemed to be substantive in character and shall apply only to personal injuries occurring on or after the effective date of such act."\textsuperscript{24}

Section 35B was characterized by the Appeals Court in \textit{Zerofski's Case} as being "substantive in character."\textsuperscript{25} The insurer in \textit{Don Francisco} argued that the application of section 35B to the 1969 injury would be retrospective, the amendment having become

\textsuperscript{20} \textit{Id.} Calheta's Case, 14 Mass. App. Ct. 464, 440 N.E.2d 529 (1982), and Czarniak's Case, 14 Mass. App. Ct. 467, 440 N.E.2d 531 (1982), were argued and decided on the same dates as \textit{Don Francisco}. In \textit{Calheta}, the employee was laid off and did not claim any change in condition after two months from his return to work following his original injury; thus, his claim was denied. In \textit{Czarniak}, there was not a sufficient basis for the court to determine whether there was a deterioration in the employee's condition between the date of his return to work and the date he again left work, and the case was remanded to the Industrial Accident Board for further findings consistent with the law expounded in \textit{Don Francisco}. These companion cases bolster the conclusion that a change in condition, rather than a "mere" recurrence, is required to trigger section 35B.


\textsuperscript{22} \textit{Id.} The court's conclusion deserves to be quoted in full:

We hold that § 35B is a legislative remedy for the disparity which would otherwise exist between wages lost and compensation received in those situations where an employee returns to work but, because of a prior compensable injury, his ability to perform his duties changes while his compensation benefits remain the same. Our construction of § 35B is consistent with the "beneficent design" of the Act, Johnson's Case, 318 Mass. 741, 64 N.E.2d 94 (1945), and in furtherance of its purpose, Ahmed's Case, 278 Mass. 180, 179 N.E. 684 (1932).


\textsuperscript{24} G.L. c. 152, § 2A was inserted by the Acts of 1946, c. 386, § 3.

effective only on February 1, 1971. But the court held that "the employee's right to compensation at the increased rate . . . originate[s] in the change of the employee's condition subsequent to his return to work." Thus, application of the amendment to this "injury," which occurred after February 1, 1971, was found not to be retrospective.

The compensation law of the Commonwealth will be affected in two important respects by the decision of the Appeals Court in Don Francisco's Case. First, the decision will relieve the ambiguity created by the legislative history of section 35B and impart the provision with a workable construction. The Don Francisco court accomplished this result by treating the word "injury" as a "specialized" rather than "common" term, "broadly defined to include 'whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.'" On this basis, the court construed the terms "subsequently injured" and "subsequent injury" in section 35B to mean "a change in the employee's physical or mental condition . . . which occurs at least two months after his return to work. When such a change in the employee's condition occurs, it is of no consequence that the change may be found to be causally related to the injury for which he had been receiving compensation prior to his return to work. . . . The employee is entitled to compensation at the rate in effect on the day he is again required to leave work." Secondly, the court's reference to the "injury" as occurring at the time of the "change in the employee's condition" may well have broad implications. If this is the "injury" that triggers the application of a statute passed after the original 1969 injury, it might trigger other incidents of the Act as well, such as average weekly wage, dependency, rates for specific compensation, and death benefits.

It remains to be considered what effect Zerofski's Case and Don Francisco's Case taken together will have on compensation jurisprudence. Perhaps they say that there are two species of "injury" — one for "personal injury arising out of and in the course of employment" in section 26, and a second for "subsequent injury" in section 35B. This would be a cumbersome and troubling interpretation, however, lacking in

27 Id.
29 Id. at 460, 440 N.E.2d at 528 (quoting Fitzgibbon's Case, 374 Mass. 633, 637, 373 N.E.2d 1174, 1177 (1978), quoting Burns's Case, 218 Mass. 8, 12, 105 N.E. 601, 603 (1914)).
31 Id.
the simplicity and elegance that should characterize the law. Such an interpretation is not required. It is suggested that the word “injury” means still what it has always meant, from the time it was first construed in *Burns’s Case*,34 “whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.”35 The issue confronting the Zero/ski court was whether an injury resulting from ten years of walking or standing on concrete floors without any specific incident or identifiable stress causing a change in the employee’s health would qualify as a personal injury arising out of and in the course of employment,36 Its decision can best be understood as a gloss on the phrase “arising out of and in the course of employment,” that is, as an interpretation of the underlying requirement of compensability. That is why the court went to the trouble of issuing its “restatement” which deals with that issue, not with the issue of “injury.” The application of the definition of “injury” in *Don Francisco* to a set of circumstances which did not qualify as a new injury arising out of and in the course of employment is based on the statutory provisions of section 35B. Its liberal interpretation, however, has resonance for other areas of the Act.

§ 2.3. Compulsory Coverage of Employments — Employment Not in Usual Course of Trade, Business, Profession or Occupation of Employer — Homeowners Proviso. There is no section of the Massachusetts Worker’s Compensation Act (the “Act”)1 which sets forth what employments and what workers are covered by the Act. The requirements of coverage must be extrapolated from several sections of the Act. From the definition of “employee” in section 1(4) and “employer” in section 1(5) we learn what persons are brought under the Act and whether the employer has an election or an obligation to provide coverage. An employer required to provide coverage, or who elects to do so, obtains immunity from suits at common law if he obtains insurance or qualifies as a self-insurer.2 If coverage is compulsory, and the employer fails to provide insurance, however, he is subject to a personal injury action at law in which all the employee must prove to collect is that he sustained a personal injury arising out of and in the course of employment, and that the employer failed to comply with his obligation to insure, without regard to negligence

34 218 Mass. 8, 105 N.E. 601 (1914).
35 Id. at 12, 105 N.E. at 603. See supra note 29 and accompanying text.

§ 2.3. 1 The Worker’s Compensation Act is codified at G.L. c. 152, §§ 1-86.
on the part of the employer.\(^3\) The employee will then be eligible for full tort damages.\(^4\) Originally the Act was completely elective, and had a number of categories of employees subject to its provisions. In 1943 the Act became compulsory for certain employees, and remained elective as to others.\(^5\) In 1972, however, all private employments were brought within the compulsory coverage of the Act with one exception, employers of casual or seasonal or part-time domestic servants.\(^6\)

During the period when the Act was elective, the emphasis was on bringing under its umbrella private commercial business activity. Public employment, small business, farm laborers, religious, charitable and educational institutions, and domestic servants were treated differently.\(^7\) Even then, however, there was no general theory that non-business employers were excluded from the coverage of the Act. The only such exception was an employee whose "employment is not in the usual course of the trade, business, profession or occupation of his employer."\(^8\) Cases arising under this provision dealt with strange and often personal errands on which employees of insured employers were sent, and decided whether injuries sustained while on such errands were to be held compensable.\(^9\) To increase the protection of such employees, the Act was amended in 1931 creating a conclusive presumption that an employee sent by his employer on such an errand remained an employee under the Act.\(^10\)

With the spreading tide of compulsory coverage, including coverage of domestic servants, however, there was a fear that an ordinary resident homeowner or occupant of a residential unit might be held responsible for an injury to the young person who mowed his lawn, or the painter who touched up his window trim. When the Act became compulsory for employers of even one person engaged in a hazardous employment,\(^11\) household residents who undertook any construction, maintenance or repair project about their premises became obligated to take out compensation insurance if they hired workers to do the job as direct employees rather than as independent contractors. In 1958, a proviso was added to the definition of "employer" to relieve certain homeowners and renters from this burden.\(^12\) This proviso exempted household residents hiring

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\(^3\) G.L. c. 152, §§ 66, 67. See L. Locke, supra note 2, at § 122.

\(^4\) See L. Locke, supra note 2, at § 122.


\(^7\) See L. Locke, supra note 2, at § 103.

\(^8\) G.L. c. 152, § 1(4). See L. Locke, supra note 2, at § 109.

\(^9\) See L. Locke, supra note 2, at § 109.


\(^12\) Acts of 1958, c. 429 (amending G.L. c. 152, § 1(5)). See L. Locke, supra note 2, at § 110. While referred to as the "homeowners'" proviso or exemption, this provision
persons to do construction or maintenance work on the house from coverage under the Act as employers.

During the period that this expansion of coverage was taking place, no one in the Legislature or the insurance industry doubted that but for the protection of the 1958 homeowners’ proviso in section 1(5) of the Act, a resident homeowner or an occupant of a dwelling unit owned by another who hired a person to do work on the house would be included as an employer under the provisions of the Act. No one referred back to the ‘‘not in usual course’’ language of section 1(4) and contended that such homeowners and occupants were not employers under the Act because the persons they hired to do work around their homes were not engaged in the usual course of their employer’s occupation, whether it be iron worker, scientist, waitress or doctor.13 During the Survey year, however, in the case of Peters v. Michienzi,14 the Supreme Judicial Court used section 1(4) of the Act to reach just such a result.

In Peters, Francesco Michienzi, a practicing physician from Ohio, and his wife hired the plaintiff, a skilled carpenter, to assist Dr. Michienzi’s father-in-law in constructing a second home for the Michienzis on land they owned in Leyden, Massachusetts.15 While working on the house, the plaintiff sustained injuries after falling from a ladder.16 The Michienzis had promised to provide compensation insurance for the plaintiff, but in fact had obtained none.17 They also failed to qualify as self-insurers under section 25A of the Act.18 The plaintiff brought this action against the Michienzis asserting that since the couple were not residents of this second home they were having constructed, they were not exempted under the homeowner’s proviso from the definition of employer in section 1(5), and therefore they were employers required to provide compensation benefits for the plaintiff as an employee under the Act!19 The plaintiff argued that the presence of the homeowner’s proviso in section 1(5) indicated that only homeowners expressly meeting its requirements should be exempted from coverage as employers under the Act.20

actually covers household residents. Accordingly, it neither covers all homeowners, nor is its coverage limited only to homeowners.

13 The word “employer” in the Act is defined as a person hiring an “employee” covered by the Act. G.L. c. 152, § 1(5). Therefore, if the person hired by the homeowner or occupant of the residence was not an “employee” under the Act, the homeowner or occupant would not be an “employer” covered by the Act. G.L. c. 152, §§ 1(4), 1(5).

15 Id. at 534, 432 N.E.2d at 697.
16 Id.
17 Id. at 533-34 & n.2, 432 N.E.2d at 697 & n.2.
18 Id. at 534, 432 N.E.2d at 697.
19 Id. at 535, 432 N.E.2d at 698.
20 Id. at 535-36, 432 N.E.2d at 698.
The Court began its analysis of the plaintiff's claim by observing that it was not the "trade, business, profession or occupation" of either of the defendants to build houses. The Court indicated that the home construction directed by the defendants was solely for personal, rather than income producing purposes. The Court stated that this fact apparently placed the plaintiff's employment outside the scope of the Act. The Court indicated that such a finding would be consistent with the "ultimate purpose" of the Act, which had been previously stated by the Court in Madden's Case as being "to treat the cost of personal injuries incidental to the employment as a part of the cost of the business." The Court concluded that the Act did in fact apply only to employees whose employment is in the usual course of the employer's regular business. The Court noted that this concept of employee for purposes of worker's compensation was consistent with the viewpoint in the majority of jurisdictions.

The Court next stated that it observed no incompatibility between that construction of employee in section 1(4) and the homeowner's proviso included in the definition of employer in section 1(5). The Court noted the "established rule of statutory construction" that supposedly conflicting provisions of a statute should be construed in a manner which is "harmonious and consistent with legislative design" whenever possible. The Court observed that someone could be an employer under section 1(5) only when he has hired an employee as defined in section 1(4). Under the Court's reasoning, since the plaintiff was not engaged in the usual course of either of the defendants' businesses as the Court perceived them at the time he was hurt, Francesco Michienzi was a physician and Audrey Michienzi was apparently a homemaker. See id. at 534, 432 N.E.2d at 697. Even if the Michienzis had been in the construction business at the time the plaintiff was hired by them, however, it is apparent that there still would have been no employment under the Act in the eyes of the Court since the building of their residence was a personal undertaking and would not have been in the usual course of their construction business. See id. at 536, 538 n.6, 432 N.E.2d at 698, 699 n.6.
the plaintiff could not be an employee as defined in section 1(4), and therefore the defendants could not be employers as defined in section 1(5).33 Accordingly, the employment was outside the scope of the Act.34

The Court recognized that its decision rendered the homeowner’s proviso useless, since that proviso’s intended effect of excluding some personal home construction and maintenance from coverage under the Act would be encompassed within the definitions of “employer” and “employee” in the Act.35 Nevertheless, the Court maintained that its construction of sections 1(4) and 1(5), including the homeowner’s proviso, was such that it gave “effect to the natural meaning of their words.”36 The Court rejected the plaintiff’s argument that all homeowners not expressly exempted by the homeowner’s proviso must be employers covered by the Act, and contended that the plaintiff’s construction of sections 1(4) and 1(5) would expose all kinds of non-business employment, except that expressly excluded by the homeowner’s proviso, to coverage under the Act.37 The Court noted that this would result in coverage for babysitters, teenagers hired to wash cars, and the like, all employments the Court viewed as belonging outside the scope of the Act.38 The Court concluded by stating that the non-business employment exception of section 1(4) was “basic” to the definition of employee under the Act, and characterized the homeowner’s proviso as “a legislative misunderstanding concerning the scope of the definition of employee.”39

The result reached by the Peters Court seems flawed both in logic and policy. There is no reason why a person may not have more than one occupation. In this case, the defendant could be both a physician and a homebuilder. If the carpenter was regularly employed by the doctor as a medical aide and was ordered to work on the home under construction, he would be protected by the 1931 amendment.40 Here, however, he was employed solely to work on the house under construction. If the doctor was building the house as a rental unit, or as a condominium, or for speculation, then this would be a separate “business” or “occupation” as those terms are understood by the Court. The carpenter would then be covered, even under the doctrine laid down in the instant case. Or if the doctor had arranged to have his second home built by a commercial

33 Id. at 537, 432 N.E.2d at 699. See supra note 13 and accompanying text.
34 Id. at 534, 432 N.E.2d at 697.
35 Id. at 538, 432 N.E.2d at 699. See supra note 13 and accompanying text.
36 Id.
37 Id. at 538, 432 N.E.2d at 699-700.
38 Id. at 538, 432 N.E.2d at 700.
39 Id. at 538-39, 432 N.E.2d at 700.
builder who hired the carpenter, the injured person would have been covered. From the point of view of the carpenter who fell from the ladder, the need for wage replacement and medical protection is the same, regardless of the status of his employer. It would conform to broad objectives of public policy, and be just as logical, to hold that the doctor and his wife had engaged in a second occupation, as home builders. The fact that the home was for their personal use should be immaterial.41

Instead, the Court held that the injured carpenter was without protection based on the unsupported and naked statement that building a home for personal use is not a "business" or "occupation" as those terms are commonly understood.42 No cases are cited for this proposition. The Court refers only to the basic theory of the Act, that its "ultimate purpose is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business." 43 This, and other general references to basic public policy, although using language appropriate to the overwhelming majority of business-related employment injuries, are no guide for the interpretation of the special facts here. The Court failed to note that in the last fifteen years many "non-business" occupations have come under the protection of the Act. Indeed it would be difficult to speak of treating the cost of personal injury as part of the cost of the "business" of a religious institution, or even of the "business" of operating a home employing domestic servants more than sixteen hours a week.44 The language of Madden's Case45 was never intended to limit coverage, or to confine the act to business activities, and certainly it has no application to situations not contemplated when the words were written. The Court recognized that it was in a bind in applying the canon of statutory construction whereby apparently conflicting words in a statute are read so as to give meaning to each clause and to create a harmonious whole, consistent with the legislative design.46 If the "occupation" of the homeowner is to be disregarded and cognizance given only to the everyday occupation of the putative employer, here the profession of a doctor, then there is no

41 It is the public policy of the Commonwealth that all employers should come under the Act. Clark v. M.W. Leahy Co., Inc., 300 Mass. 565, 16 N.E.2d 57 (1938). "The Workmen's Compensation Act is to be construed broadly to include as many employees as its terms will permit." Warren's Case, 326 Mass. 718, 719, 97 N.E.2d 184, 186 (1951); see Tracy v. Cambridge Junior College, 365 Mass. 367, 304 N.E.2d 921 (1973); see also G.L. c. 152, § 18; L. Locke, supra note 2, at § 152.
42 385 Mass. at 536, 432 N.E.2d at 698.
43 Id. (quoting Madden's Case, 222 Mass. 487, 494-95, 111 N.E. 379, 382 (1916)).
44 See G.L. c. 152, § 1(4) concerning the coverage of domestic servants. See supra notes 7-10 and accompanying text.
46 385 Mass. at 537-38, 432 N.E.2d at 699.
need for the homeowner's amendment in section 1(5). The Court's reply was to turn the argument on its head. Essentially, the Court was afraid that if the homeowner's proviso was given effect, then there would be no function for the "not in the usual course" language of section 1(4). The "not in the usual course" clause, however, is a fossil from the early years of the Act, which once had considerable vitality, and which still preserves the protection of the Act for employees ordered to perform irregular jobs by their employers. The homeowner's proviso was introduced to prevent the Act from reaching the activities of maintenance, construction and repair of homes and rental units, once the compulsory coverage of the Act had been extended to employers of one or more persons. Neither clause was intended to deprive a carpenter injured while doing his usual work of home building of compensation protection merely because his employer happened to be an Ohio doctor building a second home in Massachusetts. The situation calls for Legislative relief, in much the same manner in which the Legislature has corrected other court decisions which departed from the spirit and purpose of the Act.

The Court's concluding statement that "the exception for non-business employment is so basic to the definition of 'employee,' that it cannot be deprived of its force without drastically expanding the reach of the Act," must be considered overly broad. As indicated above, there is no such exception in the Act. If the Legislature feels that additional language is needed to protect individuals from the obligation to cover their babysitters as well as other occasional and casual employees, it can easily be done by an exception similar to that excepting seasonal or casual or part-time domestic servants. The Court, however, should not provide an easy route for a homebuilder to evade the basic protection that the Act should afford to the workers who build his house.

§ 2.4. Legislative Amendment of Section 31 — Death Benefits of Spouse and Other Dependents — Revised Cost of Living Allowance Added. There was much public attention and scrutiny given to worker's compensation during this Survey year. A series of articles in the local press concerning gaps in the protection afforded claimants under the Worker's Compensation Act (the "Act"), as well as problems in administration, provided impetus for substantial legislative reform of the Act. Much of this pressure was directed towards convening a legislative com-
mission to study the problems. Fortunately, the Legislature did not wait for a commission report before dealing with a glaring deficiency in the compensation law as it pertained to death benefits provided in section 31 of the Act.²

Under the prior law, the surviving widow or widower of a deceased employee received $110 per week, plus $6 for each dependent child under the age of eighteen,³ up to a maximum for all such payments of $32,000. Once that maximum was reached payments for the surviving spouse would be continued as long as he or she was not fully self-supporting. Various other provisions covered remarriage or death of the surviving spouse, with transfer of benefits to the dependent children; or covered the protection afforded children of a prior marriage. A separate paragraph covered other cases of total or partial dependency. There was no periodic revision of the benefit scale for changes in the cost of living.

These Spartan provisions for the surviving spouse in the old section 31 came under severe criticism. A worker earning $410 per week who was injured between October 1, 1981 and September 30, 1982 would receive $269.97 per week for total disability. If the injured worker were to die from this injury, however, his bereaved spouse and young children would receive only $110 per week, plus $6 per week for each child. The loss of income for widowed spouses under such a compensation arrangement was clearly substantial!

In chapter 663 of the Acts of 1982 the Legislature amended section 31 to provide that the surviving spouse would receive an amount equal to two-thirds of the average weekly wages of the deceased employee, but not more than the average weekly wage in the Commonwealth, as determined under chapter 151A, section 29(a) of the General Laws and promulgated by the director of employment security on or before October first. Up to this point, the formula is the same as that used to determine the compensation paid under section 34 for a totally disabled worker. The question remains, however, October first of what year? In section 34 it is the first day of the October preceding the date of injury. That much is clear enough. An injured employee, however, may be hurt in one year and die in the next. Accordingly, the amendment provides that the average wage referred to be that promulgated for the October first preceding either injury or death. It does not make clear, however, when one or the other will be proper. The draft that was before the Legislature had the further words, "whichever provides the higher compensation rate," but this clause disappeared mysteriously in the third reading in the Senate and was

³ Certain exceptions were made to allow benefits for children over the age of eighteen who were physically or mentally incapable of working, or involved in full time higher education.
never restored. No other reading of the amendment would make sense, however, and it seems logical to assume that since the statute refers to the date of "the deceased employee's injury or death," the claimant may choose whichever is more favorable.

The amended section 31 then proceeds to define the proper apportionment of death benefits in various factual situations. In no instance shall the widow or widower receive less than $110 per week plus $6 per week for each dependent child up to a maximum of $150. It should be noted that no separate amount for children is provided in the preceding clause where the benefit is over $150 per week. For the purposes of payments to individual dependent children and the $150 ceiling for such payments, the payments to the surviving spouse and children are considered one inclusive benefit. If there is a child by a former wife or husband, the death benefit shall be divided between the surviving wife or husband and all dependent children of the deceased employee, in equal shares, the surviving spouse taking the same share as a child. For instance, if there is a surviving widow and one small baby, and a 17-year-old child of a former marriage, an aggregate benefit of $269.97 would be divided in three parts, leaving $179.98 for the wife and baby and $89.99 for the 17-year-old per week. If the surviving spouse dies, or there is no spouse surviving, the amount that would have been payable to the spouse and all the children of the deceased employee is to be divided equally among such children. If the surviving spouse remarries, the amount payable to her is stopped and each child of the deceased receives $60 per week, but in no event shall the amounts exceed that which would have been payable to the surviving spouse. The total of the weekly payments due under the new section is not to exceed an amount 250 times the average weekly wage in the Commonwealth at the time of the injury as promulgated by the director of the division of employment security on or before the October first prior to the date of the injury, plus any cost of living benefits provided later in the section. Here, however, there is no choice between the October first preceding injury and that preceding death as in the earlier proviso of the amendment concerning the amount to be received by a surviving spouse. Inconsistency, perhaps, but there is no ambiguity.

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4 The amendment uses the same qualifying language as the prior version of section 31.
5 Thus, benefits for children are limited to the difference between the $150 limit and the surviving spouse's benefit. Accordingly, even where the spouse receives the minimum of $110, no more than six and two-thirds children may receive benefits.
6 This is the same language as the prior section 31.
7 This figure represents the average weekly wage of the Commonwealth before October 1, 1982 when it was raised to $297.85.
8 Again, the language of the prior section 31 has been retained here.
9 No "dowry" is provided to encourage remarriage and discourage cohabitation without the benefit of a formal marriage.
The apportionment of death benefits under the new section 31 is not without its inequities. As in prior section 31, payments continue in the case of a surviving spouse who is not fully self-supporting, or is physically or mentally incapable of working. That much is reasonable. If the spouse is in fact self-supporting but there is a child still under eighteen, or over that age and physically or mentally incapable of working, the new section provides that the payments for such children shall continue so long as he or she is not fully self-supporting. This apparent benefit for these children is in fact illusory. No specific payment is provided for children in section 31, except in the one instance where the benefit to the surviving spouse is under $150.\(^{10}\) This is a glaring omission since it is not at all clear how any payment can be made to such a child when the former benefit to the spouse was over $150. Legislative amendment is clearly called for, without delay. Also treated with an element of unfairness is the child over eighteen who is a full-time student. Although provided for in an earlier clause, this dedicated youngster is dropped from legislative sight once the payments to the surviving spouse reach the magic 250 week mark. This omission is carried over from prior section 31 and also calls for legislative remedy.\(^{11}\)

Apart from making payments to a surviving spouse equal in most instances to the benefit payable to an injured employee, the most significant change wrought by the 1982 amendment is the provision for the first time in the Massachusetts Worker's Compensation Act of a cost of living adjustment ("COLA") to persons receiving death benefits under section 31. Effective October first of each year weekly benefits are to be increased by a percentage equal to the percentage the Commonwealth average weekly wage exceeds the average weekly wage for the preceding year, with a five percent cap on any increase. While the benefit may be increased by up to five percent, no provision is made for downward revision. This is probably due more to a sense of realism rather than to any generosity on the part of the Legislature since the chance of the Commonwealth average weekly wage going down is so small as to be ignored.

Interpretative difficulty with this paragraph begins with the opening clause: "weekly benefits payable to each person under this section for a death which occurred after January 4, 1983 . . . ."\(^{12}\) The amendment was enacted by the Senate and House on January 4, 1983 and approved by

\(^{10}\) See supra note 5 and accompanying text.

\(^{11}\) Space forbids any extensive discussion of the benefits provided for other cases of total or partial dependency, except to note that the underlying language tracks the prior section 31, but without the presumption in the case of partial dependents that provided a minimum weekly payment.

Governor King on January 5, 1983 — without the emergency preamble obviously anticipated by the reference to January 4, 1983. Governor Dukakis on January 21, 1983 put in place such emergency language, by letter, and the amendment is declared by the Secretary of the Commonwealth to be effective on January 24, 1983. The date January 4, 1983 will have to be read as January 24, 1983.

A second and even more basic confusion revolves around the question of to whom the cost of living provision applies. The cost of living provision states that the allowance would be payable for “a death which occurred after January 4, Nineteen Hundred & Eighty Three . . . ,” the date the Legislature approved the bill.\(^\text{13}\) However, during third reading preparation, section 2 was added to the statute stating, “[t]his Act shall apply to injuries arising on and after the effective date of this Act.”\(^\text{14}\) There will be numerous cases of workers who will have had injuries prior to the effective date of the Act but who will die after that date. Spouses of such employees will find themselves in limbo until the courts or the Legislature can clarify whether the COLA applies to them.

This, however, does not end the difficulties with this amendment. If an employee is injured on April 1, 1983 and dies before October 1, 1983, the surviving spouse will be entitled to COLA based upon the Commonwealth average weekly wage promulgated on October 1, 1983. Suppose, however, that the injured employee lives until October 10, 1984. This raises the problem of whether the surviving spouse will be entitled to COLA for the years beginning October 1, 1983 or October 1, 1984. The language of the section would seem to require that to be entitled to COLA the dependent spouse or children would have to be entitled to death benefits at the time the COLA increase is promulgated on any given October first. It is not clear that this was a deliberate expression of legislative intent, as it would penalize those dependents whose decedent managed to live for several years after injury. No reason for this distinction is apparent; once the COLA concept is accepted, it should apply to all death benefits where the injury occurred after its effective date, regardless of whether the deceased employee survives one day or four years. Again, legislative amendment is needed.

These are small points, however, which may be easily cured. Great credit is due the courageous 1982 Legislature for enacting this bold and forward-looking statute.

\(^{13}\) Acts of 1982, c. 663, § 1.