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CHAPTER 7

Workmen's Compensation

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§ 7.1. Application of Section 51A — Law in Effect at Time of Decision — Amount of Compensation. During the Survey year, two decisions by the Massachusetts Supreme Judicial Court considered the applicability of chapter 252, section 51A, a 1969 amendment to the Workmen's Compensation Act. These decisions gave vitality to section 51A, which had been a practical nullity. Section 51A provides: "In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury."1

Lack of judicial interpretation of the provision from 1969 until 1983 gave rise to several questions regarding its application: (1) Despite the provisions of the amending act specifically providing that section 51A applied only to injuries occurring after the effective date of the statute, was there any basis for retroactive application?; (2) Did the words "shall take into consideration" require that in all cases the rate of compensation be that on the date of decision or did the words provide the Industrial Accident Board with an option to apply the rate existing at the time of the injury, once the Board had "considered" the more recent, and ostensibly higher rate?; (3) Did "compensation" refer only to the rate at which weekly benefits were paid or also refer to the aggregate maximum benefits payable under the relevant statute?

The first question was addressed in Squillante's Case,3 which dealt with the issue of retroactive application of the statute. The case involved a claim for disability resulting from exposure to asbestos from 1943 to 1945.4 The single member of the division of industrial accidents before

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§ 7.1. 1 G.L. c. 252, § 51A.
4 Id.
whom the suit was first heard found that the employee had become disabled due to asbestosis in September, 1974 as a result of this exposure. Consequently, the single member ordered the insurer to pay disability benefits to the employee from September, 1974 forward. In determining the amount of compensation, the member applied the rate in effect in 1945, the date of the plaintiff’s last exposure to the foreign matter, asbestos. The reviewing board and the superior court affirmed the single member’s application of the 1945 rate. The employee appealed on the sole issue of the rate of compensation and the Supreme Judicial Court ordered direct appellate review on its own initiative.

Because of the thirty-nine year time lapse between the date of the plaintiff’s last exposure to asbestos and the date he became disabled, the Court addressed the issue of retroactive application of section 51A. The Court first reaffirmed the principle that the last day that the employee worked in 1945 should be considered as the date of injury rather than the date disability began, September, 1974. According to the Court: “Where an employee’s injury results from a gradual exposure to harmful foreign matter the date of the injury is the date of last exposure to the foreign matter.” The Court found section 51A inapplicable to the case because the explicit language of the amendment which adopted section 51A provided that the provision should apply only to injuries occurring after November 25, 1969. Because the date of injury was 1945, the employee was bound by the rate in effect in 1945.

The second decision during the Survey year interpreting section 51A, McLeod’s Case, dealt with the meaning of “shall take into consideration.” In McLeod a widow claimed benefits under chapter 152, sections 31, 32 and 33 as a result of the death of her husband at work on August 25, 1945. Following a hearing, a single member of the Industrial Accident Board ordered benefits be paid to the claimant at the rates in effect at the

5 Pursuant to chapter 252, section 8, a single member investigates, holds hearings on an accident, and files an enforceable decision, subject to review.
6 389 Mass. at 397, 450 N.E.2d at 599.
7 Id. at 397, 450 N.E.2d at 599-600.
8 Id.
9 Id. at 397, 450 N.E.2d at 600.
10 Id.
11 Id.
12 Id.
13 Id. (citing Steuterman’s Case, 323 Mass. 454 (1948); L. Locke, Workmen’s Compensation § 177, at 192-94 (2d ed. 1981)).
14 389 Mass. at 397-98, 450 N.E.2d at 600.
15 Id.
17 Id. at 434, 450 N.E.2d at 615
18 Id. at 432, 450 N.E.2d at 613.

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time of the employee’s injury. Following an appeal by the insurer, the reviewing board affirmed, and adopted the findings and decision of the single member on January 28, 1981. Subsequently, the superior court affirmed the reviewing board’s decision. The claimant then filed a motion for relief from judgment, asserting for the first time that the correct rate of payment pursuant to section 51A should be the compensation rate in effect on the date of the superior court’s decision, rather than the rate available on the date of the employee’s injury. The superior court denied the claimant’s motion.

Following appeals from both parties, the Appeals Court upheld the superior court’s decision that the claimant had established her entitlement to benefits, but ruled that section 51A required that benefits be paid in accordance with the rate in effect on the date of final decision. Further appellate review was requested by the insurer solely on the issue of whether the Appeals Court had properly interpreted section 51A.

In affirming the decision of the Appeals Court, the Supreme Judicial Court first determined that section 51A could be applied in a motion for relief from judgment in the superior court despite failure of the claimant to assert its applicability either at the Industrial Accident Board hearing or in the superior court. In support, the Court cited decisions that allowed the initial presentation of an issue at the appellate level where an injustice would otherwise result. The Court stressed that the applicability of the statute in question was a “pure question of law,” that the insurer was not deprived of an opportunity to present relevant evidence, and that “[a]ny argument that would have been available to the insurer at an earlier state of the proceedings is just as available” in that court.

After establishing its jurisdiction to hear the issue before it, the Court turned to the proper statutory construction of section 51A. Although the insurer conceded that the word “shall” is generally regarded as mandatory, it contended that the meaning of the words “shall take into consideration” in the statute did not require the Industrial Accident Board to apply the rates in effect at the time of the final decision in all cases but

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19 Id. at 432, 450 N.E.2d at 613-14. The decision was filed on July 31, 1980.
20 Id. at 432, 450 N.E.2d at 614.
21 Id.
22 Id. Under the rate in effect on the date of the superior court’s decision, the claimant would receive $110 per week, to a maximum of $32,000. Id. The rate at the time of her husband’s injury provided for only $55 per week, with a maximum of $16,000. Id.
23 Id. at 433, 450 N.E.2d at 614.
24 Id.
25 Id. at 434, 450 N.E.2d at 614.
26 Id.
27 Id. at 434, 450 N.E.2d at 614-15.
only to consider those rates. After considering the rates at the time of its decision, the insurer asserted, the board could then apply either the newer rates or the rates in effect at the time of the injury. The insurer, citing Steuterman's Case, which held that compensation is paid in accordance with the rates in effect at the time of the injury, argued that the Legislature when enacting section 51A would have been more explicit if intending to mandate a contrary result.

The Court rejected the insurer's arguments and held that the applicable rates were those in effect on the date of the final decision. The operative words in the statute, according to the Court, were the words "rather than," which had the effect of excluding consideration by the board of the rate in effect on the date of injury. In further support of its decision, the Court pointed to the lack of legislative guidelines for the Industrial Accident Board to follow if discretion had been intended. The Court stated: "In the absence of a clear expression of legislative intent, we think it unlikely that the Legislature intended to vest in the board unlimited discretion to choose between rates of compensation." The Court indicated, however, that a constitutional challenge to that construction might exist but expressed no opinion on the merits of such a challenge. The case was remanded for determination of the claimant's benefits at the rates in effect at the time of the computation.

The third issue, whether the aggregate maximum to be paid to a claimant is also determined as of the date of decision rather than the date of injury was not directly raised or confronted in either of these cases. This question was inferentially addressed, however, in McLeod when the Court, identifying the different rates, noted that "[t]he compensation rate for widow's dependency benefits on the date of McLeod's injury was $55 per week, to a maximum of $16,000. . . . The rate in effect on the date of the Superior Court decision was $110 per week, to a maximum of $32,000."

The Court thus implied that the applicable aggregate maximum rate to a claim is the rate in effect on the date of the final decision.

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28 Id. at 434, 450 N.E.2d at 615.
29 Id.
31 Id. at 457, 82 N.E.2d at 602.
32 389 Mass. at 434, 450 N.E.2d at 615.
33 Id. at 435, 450 N.E.2d at 615.
34 Id.
35 Id.
36 Id.
37 Id. at 435 n.4, 450 N.E.2d at 615 n.4.
38 Id. at 435, 450 N.E.2d at 615.
39 Id. at 432-33, 450 N.E.2d at 614.
40 Id. (citations omitted).
In summary, the decisions in *Squillante*\(^{41}\) and *McLeod*\(^{42}\) have effectively laid to rest any doubts regarding the mandatory nature of section 51A and its solely prospective application. Likewise, it is clear that this section should be applied in appropriate cases whether or not the issue was raised by the claimant. Although not directly addressed, the decision in *McLeod* indicates that the aggregate maximum should also be determined as of the date of final decision.

§ 7.2. Injury in Course of Employment — Accident While Driving From Place of Employment. During the Survey year, the Appeals Court in *Maguire's Case*\(^{1}\) held that injuries sustained by an employee in an automobile accident which occurred while she was driving home to retrieve medication prescribed for work-related injuries were not compensable under the Workmen’s Compensation Act.\(^{2}\)

*Maguire's Case* involved a teacher who suffered a work-related dental injury that initially required treatment with penicillin and codeine, and ultimately the extraction of the injured tooth.\(^{3}\) Following the extraction, while driving back to school for the balance of the day, the employee began to feel sick, weak and tired.\(^{4}\) When the employee reached the school driveway, she discovered that she had left her codeine medication at home.\(^{5}\) As she was driving home to retrieve the medication, she was involved in an automobile accident which caused disabling injuries.\(^{6}\)

The employee first tried unsuccessfully to establish that the anesthetic administered by the dentist caused the accident.\(^{7}\) A factual determination by a single member, however, found no causal relationship between the industrial injury to the tooth and the automobile accident.\(^{8}\) On appeal to the reviewing board, the employee changed her position and alleged that the injuries resulting from the car accident were work related because the accident occurred while she was en route from authorized medical treatment.\(^{9}\) The reviewing board rejected this argument, and the superior court affirmed the board’s decision.\(^{10}\)

\(^{2}\) Id. at 339, 451 N.E.2d at 448.
\(^{3}\) Id. at 337-38, 451 N.E.2d at 447.
\(^{4}\) Id.
\(^{5}\) Id.
\(^{6}\) Id.
\(^{7}\) Id.
\(^{8}\) Id.
\(^{9}\) Id. The Appeals Court rejected the insurer’s contention that the court could not address an issue that had not been raised before the single member. Id. at 338 n.1, 451 N.E.2d at 447 n.1. The court noted that to preserve a question for appeal, the issue can be raised either before the single member or before the reviewing board. Id.
\(^{10}\) Id. at 339, 451 N.E.2d at 447.
On appeal, the Appeals Court refused to accept the issue as framed by the employee. Instead, the court framed the issue narrowly. According to the court, since the employee had already returned from her dentist to her place of employment, the issue was "whether an employee is entitled to compensation for injuries sustained in an automobile accident occurring while traveling home to retrieve medication prescribed in the treatment of work-related injuries." The Appeals Court ruled that these circumstances did not warrant recovery under the Workmen's Compensation Act and affirmed the judgment of the superior court.

The court reviewed the general principles concerning injuries that arise out of employment and indicated that, as a rule, an injury will be compensable if it can be attributed to the "nature, conditions, obligations or incidents of the employment; in other words, [to] the employment looked at in any of its aspects." The court stated, however, that, unless the employment impelled the employee to make the trip, an injury sustained while going to or coming from a fixed place of employment does not "arise out of" the employment and therefore is not compensable under the Workmen's Compensation Act.

Although the Appeals Court did not decide whether an injury occurring while en route to treatment of work-related injuries would be compensable in Massachusetts, the court reviewed, in dictum, decisions from other jurisdictions allowing recovery under those circumstances. The court found that the reasoning underlying recovery awards by other jurisdictions is that "employers have a duty to pay for medical treatment and transportation thereto, and employees have a duty to have injuries treated in order to mitigate damages."

The Maguire court noted, however, that, although analogous duties and responsibilities of the employer and employee exist under Massachu-

11 Id. at 339, 451 N.E.2d at 448.
12 Id.
13 Id.
14 Id. (citing Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328 (1940); Papanastassiou's Case, 362 Mass. 91, 93, 284 N.E.2d 598 (1972)).
16 The court specifically noted that the case before it did not present this question. Id. at 337 n.3, 451 N.E.2d at 448 n.3.
17 Id. at 340, 451 N.E.2d at 448.
19 16 Mass. App. Ct. at 340, 451 N.E.2d at 448, (citing Levenson's Case, 346 Mass. 508, 510-13, 194 N.E.2d 103 (1963); Snider's Case, 334 Mass. 65, 70, 134 N.E.2d 16 (1956); and G.L. c. 152, § 30, for the proposition that an employer is responsible for costs of medical treatment and necessary transportation incurred for work related injuries.)
setts law, these duties do not extend to a circumstance where "the employee is simply returning to his home to retrieve medicine forgotten there." To distinguish the circumstances in which other jurisdictions awarded compensation, the court emphasized that the employer in Maguire's Case had no control over the trip and could not verify its purposes, in contrast to a scheduled visit for medical treatment. Accordingly, the court ruled that the employee in Maguire's Case was on an "independent enterprise" and that she was not, at the time of her injury due to the automobile accident, "engaged in, nor impelled by, her employer's business . . . nor did the journey arise out of obligations or incidents of her employment." Consequently, the Appeals Court affirmed the lower court's denial of compensation for the employee under the Workmen's Compensation Act.

Although the claimant in Maguire's Case was unsuccessful, the court offered hope to injured workers who in the future claim injury while en route to treatment of work related injuries. The court's review of cases allowing such recovery in other jurisdictions demonstrated that the underlying bases for such recovery in those jurisdictions — the duty of the employer to provide for medical treatment and transportation thereto and the duty of the employee to secure medical care — have analogous footing in Massachusetts. Accordingly, if the court follows its own dictum, a future claimant could receive a more favorable decision if he were injured while actually en route to a regularly scheduled medical appointment, or to emergency medical treatment, for a work-related injury.

§ 7.3. Employee Disability — Series of Stressful Episodes. Blevins's Case involved an oil delivery man who claimed disability benefits as a result of acute cervical radicular syndrome with extensive osteoarthritis. The employee's duties required heavy work, including pulling and rolling up oil hoses, filling up oil tanks, and working on his truck. Between March 8, 1979 and March 23, 1979, while performing work that was more than ordinarily stressful, the employee suffered increasing symptoms of

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22 Id. at 340-41, 451 N.E.2d at 448-49.
23 Id. at 341, 451 N.E.2d at 449.
24 Id.
25 Id.
26 Id. at 340, 451 N.E.2d at 448.
2 Id. at 926, 443 N.E.2d at 1369.
3 Id.
pain and numbness in his upper extremities that resulted in his leaving work and becoming hospitalized.  

The superior court affirmed the decision of the reviewing board, which found that the employee had sustained a compensable injury as a result of hauling a heavy hose in March, 1979. The insurer appealed, arguing that the employee's condition resulted from a personal injury sustained in 1971 and that his present disability fell within the "wear and tear" doctrine.

In reviewing the facts, the court concluded that, although the case was close, the decision by the board could have properly been based on the position that the disability resulted in part from a specific series of stressful episodes in March, 1979, rather than from the natural progression of the underlying condition. In finding this case compensable, the court distinguished the facts from the "wear and tear" cases on the basis that the onset of the symptoms was not gradual but sudden; that the causally related work activity was not mere walking, as in Burns's Case and Zerofski's Case, but involved heavy hauling; that the work in March was more than ordinarily stressful; and that the resulting condition was "not common and necessary to all or a great many occupations." This decision is the first appellate decision concerning the "wear and tear" theory since Zerofski. In Blevins's Case, the Appeals Court affirmed that the line of cases that allows recovery for an injury based on a series of stressful episodes has as much vitality as the newly revitalized line of cases supporting the "wear and tear" defense. Successful claimants in a close case will have to present evidence that will allow the board to find the facts necessary to distinguish a "wear and tear" case from a claim involving a compensable injury.

§ 7.4. Injuries Sustained in Performance of Duty — Statutory Interpretation of Chapter 41, Section 111F. The claimant in Allen v. Board of
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Selectmen of Weymouth, 1 decided during the Survey year, was a police sergeant who was seriously injured, without fault on his part, while returning from court to his home in his own automobile after testifying in a criminal matter at the direction of his superiors. 2 He filed an action for declaratory relief to determine his right to pay under chapter 41, section 111F 3 during a disability leave. 4 The Appeals Court, reversing a trial court decision, found the sergeant entitled to compensation. 5

An understanding of the issue, the meaning of the words "sustained in the performance of... duty," 6 requires a review of prior judicial interpretation of chapter 41, section 111F. Initially, in 1969, the Supreme Judicial Court in Petinella v. City of Worcester, 7 in dictum, interpreted this language in a restrictive sense as requiring that the injury not only have been sustained while in the performance of the officer’s duties, but also to have resulted from the duties. The Court stated that these dual requirements applied in accidental disability retirement claims, also governed by chapter 41, section 111F. 8 In 1975, however, the Court in Wormstead v. Town Manager of Saugus 9 specifically overruled this dictum and held that this statute should be given a broader meaning and construed in light of decisions interpreting "arising out of and in the course of his employment," analogous language found in the compensation statute. 10

The claimant in Wormstead was a police officer who was injured in an automobile accident while returning to the police station from home during an authorized lunch break. He was paid for the lunch break and was considered on call. 11 In regard to the police officer’s "on call" status, the Court noted that in the past he had made arrests and had been called back to the station during this break, and sometimes took no break at all. 12 The Court ruled that consideration of the officer’s employment "in all of its aspects" would require a decision in the officer’s favor. 13

According to the Court, several pertinent factors controlled its decision

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2 Id.
3 G.L. c. 41, § 111F provides for a leave with pay for policemen and firemen injured and incapacitated in the performance of duty without fault of the policeman or fireman.
5 Id. at 1010, 448 N.E.2d at 783.
6 G.L. c.41, § 111F.
8 Id. at 415-16, 245 N.E.2d at 453-54.
10 Id. at 663-64, 322 N.E.2d at 174-75.
11 Id. at 661-62, 322 N.E.2d at 173.
12 Id. at 665, 322 N.E.2d at 175-76.
13 Id. at 664, 322 N.E.2d at 175.
that the injury was sustained while in the performance of duty.\textsuperscript{14} The \textit{Wormstead} Court stressed that the injury occurred during a period: 1) for which the police officer was being paid; 2) when he was on call; and 3) while he was engaged in activities consistent with and helpful to the accomplishment of police functions.\textsuperscript{15} Although the Court specifically stated that these three factors were determinative given the facts of that case, it did not state that these factors would be a necessary element in all future cases.\textsuperscript{16}

In \textit{Allen}, the superior court denied compensation because it found that the three factors that had been enumerated in \textit{Wormstead} were not present.\textsuperscript{17} In reversing the trial judge, the Appeals Court reiterated that section 111F is to be interpreted in a manner consistent with chapter 152, section 26.\textsuperscript{18} According to the court, the superior court had been too rigid in requiring the presence of all three elements from the \textit{Wormstead} case.\textsuperscript{19}

The Appeals Court held that the \textit{Wormstead} decision stood for the principle that whether an injury occurred ‘‘in the performance of his duties’’ under section 111F should be determined on the basis of an individual’s ‘‘employment in all of its aspects’ including the ‘natures, conditions, obligations or incidents of the employment.’’\textsuperscript{20} In this broader light, the court easily ruled that the police officer's trip to the courthouse to testify was a special mission which was part of the claimant’s employment.\textsuperscript{21} In dictum, the court noted that a different result might have been required if the claimant ‘‘had deviated significantly on his journey to his house, or had gone off from the courthouse on his own affairs.’’\textsuperscript{22}

\section*{§ 7.5. Lump Sum Payment to Injured Employee — Enforcement of Settlement Agreement Following Employee's Death. \textit{Ferreira v. Arrow Mutual Liability Ins. Co.}}\textsuperscript{1} concerns two issues: 1) Can an insurer unilaterally rescind a lump sum agreement subsequent to execution of the written agreement and presentation to the Industrial Accident Board ("Board") but prior to its approval?; 2) Does the Board have jurisdiction to approve,
subsequent to the death of an employee, a settlement redeeming the insurer’s liability to pay weekly benefits to the employee?

The insurer and the employee in Ferreira agreed upon a lump sum settlement, executed the agreement, and presented it to the Board for approval. The parties agreed that the insurer would redeem its liability for payment of weekly disability benefits upon payment of $7500. In explaining that the agreement was in the best interest of the employee, the parties stipulated that the employee was suffering from terminal illnesses unrelated to his industrial injury.

After the agreement had been executed by the parties, and a single member had recommended its approval, but before the full Board formally approved the agreement, the employee died. On the day following the employee’s death, the insurer requested that the Board not endorse the agreement. Two months later, however, the agreement was approved.

The superior court issued a judgment enforcing the agreement. The insurer appealed on the grounds that it had effectively withdrawn from the settlement prior to approval, and that the Board lacked jurisdiction because the employee’s right to weekly benefits ceased upon his death.

In rejecting the insurer’s argument that it was free to withdraw from the agreement prior to formal approval, the Appeals Court found that absent fraud, mutual mistake or other equitable principles, “when an instrument with the finality of an agreement for redeeming liability has been executed and filed with the Division, presented to the single member for approval at a hearing conference and recommended for approval by that member, the insurer may no longer unilaterally rescind the agreement.” According to the court, this was particularly true where “the very basis of the agreement was the employee’s terminal illness.”

Addressing the second issue, the Appeals Court reviewed and relied upon Henderson’s Case in rejecting the insurer’s contention that the Board lacked jurisdiction to approve the settlement agreement because the employee’s right to weekly compensation benefits terminated when he...
died. The *Henderson* decision involved a widow's claim for benefits under chapter 152, section 36 by reason of section 36A. The interplay of sections of chapter 152 allows dependents of a deceased injured employee to recover benefits for loss of function and disfigurement to which that employee had become entitled prior to his death. The insurer in *Henderson* argued that the deceased employee had not become entitled to the benefits prior to his death because there had been neither a voluntary agreement nor a Board decision awarding benefits. Accordingly, the insurer asserted, the surviving widow could not recover these benefits. The Supreme Judicial Court ruled that the widow could recover the benefits and held that the employee had become entitled to the benefits upon "the happening of the event upon which the employee bases his claim." The Court pointed out that to hold otherwise would allow recovery to depend upon factors such as "the duration of the negotiations or of the litigation and perhaps upon the interval between the date of injury and the date of the death."

The *Henderson* decision and a similar holding in *Bagge's Case* were followed by the Appeals Court in *Ferreira*, which affirmed the judgment of the superior court. The *Ferreira* court stated that a decision which allowed the outcome of a case to depend on arbitrary matters such as the time lapse between the filing and the approval of a claim would not be supported by judicial authority or comply with the settled rule that the workmen's compensation statute should be liberally construed to protect the injured employee.

In further support of its holding, the court pointed out that chapter 152, section 48 provided no language prohibiting the Board from finding subsequent to the death of the employee that the settlement was in the employee's best interest. Additionally, the court also noted that Rule IX(1) of the Division of Industrial Accidents provides that the date of execution of the agreement, and not the date of approval, is the operative date in regard to fixing the amount of the insurer's liability. For all of these reasons and in consideration of the general principle that the Workmen's Compensation Act is to be construed in the best interest of the employee, the Appeals Court held that the Board had jurisdiction to approve the settlement subsequent to the employee's death.

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14 G.L. c. 152, §§ 36, 36A.
15 333 Mass. at 495, 131 N.E.2d at 927.
16 *Id.*
17 *Id.*
20 *Id.*
21 *Id.* at 638, 447 N.E.2d at 1261 (citing Meley's Case, 219 Mass. 136, 166 N.E.2d 559 (1941); G.L. c. 152, § 48).
The *Ferreira* decision makes it clear that enforceable approval can issue from the Board subsequent to an employee's death, and that once an agreement regarding settlement under chapter 152, section 48 has been reached, executed and presented to the Board for settlement, it is beyond the power of either party to unilaterally withdraw from the agreement. At that point, the Board must decide whether the agreement is in the best interests of the employee and whether or not to approve it. Each party is bound unless he can show that he entered into the agreement due to fraud, mutual mistake, or other equitable grounds for rescission.

§ 7.6. Lump Sum Settlements — Benefits Subject to Offset — Presumption of Regularity. *Harkins v. Contributory Retirement Appeal Board*¹ addressed the question of the interplay of certain provisions of chapter 152² with chapter 32, section 7,³ pursuant to the provisions of chapter 32, section 14(2)(a). Section 14(2)(a) provides, in part, that certain benefits paid to a workmen's compensation claimant who is also eligible for accidental disability retirement will be offset against payment of his retirement benefits.⁴ Without this offset provision, an injured worker who is eligible for workmen's compensation disability benefits could receive benefits substantially greater than the income that the worker was earning prior to the injury. An analogous offset provision exists regarding claimants who are receiving social security disability benefits.⁵

² G.L. c. 152, §§ 31, 34, 34A, 35 and 35A.
³ G.L. c. 32, § 7 provides for accidental disability retirement allowances.
⁴ G.L. c. 32, § 14(2)(a) provides:

(2) All sums of money payable under the provisions of sections thirty-one, thirty-four, thirty-five and thirty-five A of chapter one hundred and fifty-two directly to a retired member or to the legal representative or dependents of a deceased member on account of his death, including so much of the amount of any lump sum settlement payable under the provisions of such sections directly to any such person as is allocable to the period following the retirement or death of such member, but excluding any payments for or amounts allocable to any period prior to the date his retirement allowance became effective, shall be offset against and payable in lieu of any pension payable on his account under the provisions of section six, seven or nine by reason of the same injury, but not against his accumulated total deductions or any annuity derived therefrom. Whenever the amount of any such lump settlement is payable directly to a beneficiary, the period over which it is allocable for purposes of this section shall be determined by the actuary in a manner which is consistent with that set forth in paragraph (1)(c) of this section. If any such pension exceeds the compensation payable on account of such member under such provisions of chapter one hundred and fifty-two when both are reduced to the same periodical basis, the excess only shall be paid as a pension so long as such compensation continues. If any such pension is less than or equal to such compensation, no pension shall be paid so long as such compensation continues to be equal to or greater than such pension.
During the period that a claimant is receiving periodic benefits pursuant to chapter 152, sections 31, 34, 34A, 35, or 35A and, at the same time, receiving benefits pursuant to chapter 32, section 7 for accidental disability retirement, the offset situation is clear due to the explicit language of the statute. If, however, the workmen's compensation claim is settled by means of a lump sum settlement, the question of the amount of offset is not so clear because only those benefits paid to a claimant pursuant to chapter 152 are subject to offset. The problem becomes determining what part of a lump sum settlement, if any, constitutes benefits that are subject to the offset and what part constitutes benefits that are not subject to the offset. In such a case, the insurer and the claimant usually indicate their intentions regarding the purpose for the distribution of the payments in the body of the lump sum agreement.

The claimant in *Harkins* settled his workmen's compensation claim by means of a lump sum settlement pursuant to chapter 152, section 48.6 After the local retirement board was granted an offset of the full amount of the settlement, $10,000, the aggrieved employee filed an action in superior court. The offset was then reduced to $3,000 and the judgment was appealed by the defendants.7

The Appeals Court ruled that the local retirement board was not a party to the lump sum agreement and was not bound by its provisions.8 A presumption of regularity attaches, however, to settlements approved by the Industrial Accident Board.9 Accordingly, the burden is on the local retirement board to produce evidence which will allow the hearings officer to make findings concerning whether any of the amounts paid in the settlement actually represented amounts due under chapter 152, sections 31, 34, 34A, 35, or 35A.10 The court stated that there had been no evidence to support a finding that any of the disputed amount was intended for payment of benefits under those sections of chapter 152.11 Although the Appeals Court ruled that the superior court's judgment was erroneous, it affirmed the judgment because the employee had not appealed.12

*Harkins* stands for the principle that a local retirement board is bound by the lump sum agreement as approved by the Industrial Accident Board in most instances. To invalidate the disbursements as listed on the lump sum agreement and establish entitlement to further offset, the local retirement board must produce affirmative evidence as to its entitlement. Otherwise, the presumption of regularity will attach to the settlement regarding the intended distribution.

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8 Id. at 964, 446 N.E.2d at 739.
9 Id. at 965, 446 N.E.2d at 739-40.
10 Id. at 965, 446 N.E.2d at 740.
11 Id.
12 Id.