# Is Jail Time Lost Time?: The Inner Workings of Massachusetts Workers' Compensation Timeframes, Entitlements and Exposures

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## INTRODUCTION

An employee sustains "an injury rising out of and in the course of his employment."[1] Thereafter, his remedy is regulated by the Workers' Compensation Act, which sets wage replacement and medical benefits. Damages defined by disability with ensuing incapacity are contingent upon the average weekly wage ("AWW") earned prior to the all-encompassing date of injury. Medical benefits are restricted to the "adequate and reasonable"[2] with the caveat of continuing causation.

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[1] MASS. GEN. LAWS ch. 152, § 26. All statutory sectional references are contained within MASS. GEN. LAWS ch. 152, the Workers' Compensation Act, unless expressed otherwise. *See id.* § 1(7A) (defining "personal injury"); *see also* Cornetta's Case, 68 Mass. App. Ct. 107, 108 (2007) (applying the causation standards); § 26 (describing qualifying employment activities); *cf*. Carroll v. State Street Bank & Trust, 19 Mass. Workers' Comp. Rep. 306, 310 (2005), *aff'd sub nom*. Carroll's Case, 68 Mass. App. Ct. 1119 (2007) ("We acknowledge the general rule that '[t]he determination of whether an employee has suffered an aggravation of a prior injury or a recurrence of symptoms is essentially a question of fact, and the judge's findings, including all rational inferences permitted by the evidence, must stand unless a different finding is required as a matter of law.'").

[2] § 30.

"[B]eneficent design" exists to provide the immediate needs of injured employees who have checked their rights[3] to obtain more at the door when they entered into "any contract of hire."[4] To balance the equation, employers are required to obtain regulated insurance through three basic methods to provide "the compensation herein."[5]

> It was a humanitarian measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law and under the Employers' Liability Act had failed to accomplish that measure of protection against injuries and of relief in case of accident which it was believed should be afforded to the workman. It was not made compulsory in its application, but inducements were held out to facilitate its voluntary acceptance by both employers and employ[ee]s. It is manifest from the tenor of the whole act that its general adoption and use throughout the commonwealth by all who may embrace its privileges is the legislative desire and aim in enacting it. The act is to be interpreted in the light of its purpose and so far as reasonably may be to promote the accomplishment of its beneficent design.[6]

To account for, protect, and preserve equipoise in the system, safeguards are legislatively incorporated to allow third-party recoveries,[7] ensure coverage, and afford presumptions to those in need.[8] An extra-judicial system contained within the aegis of an administrative agency[9] has been created to resolve disputes arising out of this chapter between employees, insurers, employers, and other interested parties.[10] Subject to occasional legislative reach, the Workers' Compensation Act contains provisions, processes, and procedures that dictate the transmission of benefits, the format of litigation, and the resolution of disputes.

Chapter 152 does not stand alone. Its provisions are carried out by the

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[3] *Id.* § 24; Saab v. Mass. CVS Pharmacy, LLC, 452 Mass. 564, 566 (2008) (spelling out the "heart-rending" rationale: "[T]he determination whether an employee's injury is compensable under the act—and thus whether the exclusivity provision, § 24, applies—does not turn on whether a claimant is entitled to or actually receives compensation under the act."); *infra* note 6 (coining the phrase "beneficent design" in Massachusetts case law).

[4] § 1(4).

[5] *Id.* § 25A(1)–(2).

[6] Young v. Duncan, 218 Mass. 346, 349 (1914).

[7] § 15.

[8] *Id.* § 7A; *see* Carpenter's Case, 456 Mass. 436, 440 (2010).

[9] *Department of Industrial Accidents (DIA)*, COMMONWEALTH OF MASS., https://perma.cc/3GD9-L3BD (last visited July 23, 2023).

[10] § 1(2).

Department of Industrial Accidents ("DIA") and are augmented by the adjudicatory rules contained in 452 CMR 1–9,[11] interpretive case law created by the reviewing board,[12] and, if necessary, the Massachusetts Appeals Court and the Supreme Judicial Court.[13] Litigation, for the most part, is confined to the DIA with its four levels of dispute resolution:[14] conciliation,[15] conference,[16] hearing,[17] and reviewing board.[18]

The genesis of this article is an unresolved issue held over from *Connolly's Case*.[19] An employee's weekly benefits were suspended pursuant to § 8(2)(j)[20] due to his incarceration. The insurer resisted resumption upon the employee's release and his claim ensued. The hearing decision absolved the insurer from immediate resumption and subjected the employee to his ordinary burden of proof to regain the benefits lost. Unanswered is whether the time lost should count against the clock of the statutory entitlement of available weeks, or if the clock should just stop during the period of incarceration, leaving the weeks suspended available to be collected later. This article is intended to shed light upon the answer to that question.

## I. Background

### A. *Litigation Framework*

Once an employee loses five or more days of work due to an on-the-job injury,[21] the time frames imposed upon employees and insurers work to ensure the injured employees have a prompt answer. There are only two possible responses: (1) payment of benefits; or (2) reasons given for denial with instructions to file a timely claim with the Department.[22] The timely payment of initial benefits after an injury is reported creates a safe harbor

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[11] *Id.* § 5.

[12] *Id.* § 11C.

[13] *Id.* § 12(2)–(5); *see* Janocha's Case, 93 Mass. App. Ct. 179, 181 (2018).

[14] O'Brien's Case, 424 Mass. 16, 20–21 (1996) (summarizing the "course of . . . proceedings").

[15] § 10.

[16] *Id.* § 10A.

[17] *Id.* § 11.

[18] *Id.* § 11C.

[19] 418 Mass. 848 (1994).

[20] § 8(2)(j) (stating that benefits can only stop in limited circumstances, including when "the employee has been incarcerated pursuant to conviction for a felony or misdemeanor and has thereby forfeited any right to compensation during such period").

[21] *Id.* § 6.

[22] *Id.* § 7(1).

for triage, medical assistance, assessment, and investigation.[23] The 180-day "payment without prejudice period," which may be extended for another 180 days upon approval, keeps the parties at arms' length until, by the very passage of time, the insurer is forced to decide on compensability.[24] Continuation of benefits beyond 180 days creates an acceptance of responsibility for the injury, with the exception of a basic list of situations that allow an insurer to terminate or modify weekly incapacity benefits after 180 days.[25] Most of these provisions were added in 1991.[26] Stoppage of benefits with the all-important proper notice and preservation of defenses[27] likely forces the employee to obtain counsel and file a claim.

The litigation entry point for either the employee's claim or the insurer's complaint is conciliation[28] at the DIA office closest to the employee's domicile. If the conciliation does not result in resolution, referral to dispute resolution is mandated for a conference before an administrative judge.[29] It is then that the informalities cease and claims and issues ensue. Non-evidentiary submissions and representations binding upon the participants frame the dispute before an administrative judge with appeal[30] to a hearing,[31] the only option of either party (or both) aggrieved by the resulting conference order.

If not, compliance with the conference order is mandated, subject to interest,[32] penalties,[33] and enforcement.[34] The hoped-for legislative removal of "dueling doctors" from litigation forces an impartial medical examination[35] before a hearing may be convened with the resulting report imbued with *prima facie* status unless otherwise altered by argument to the contrary, or by the administrative judge *sua sponte*.[36] Hearings are conducted

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[23] *See id.* § 8(1).

[24] *Id.* § 8(6).

[25] *Id.* § 8(2)(a)–(l).

[26] H.R. 6410, 177th Gen. Court, 1991 Gen. Sess. §§ 23–25 (Mass. 1991) (revising extensively ch. 152 in 1991).

[27] *See* § 8(1).

[28] *Id.* § 10(1).

[29] *Id.* § 10A(1).

[30] *Id.* § 10A(3).

[31] *Id.* § 11.

[32] *Id.* § 50.

[33] § 8(1).

[34] *Id.* § 12(1).

[35] *Id.* § 11A.

[36] *Id.* § 11A(2).

"on the record" subject to the full brunt of the Massachusetts Rules of Evidence and allow for testimony, cross-examination, medical depositions, and sundry other exhibits designed to prove a point.[37] Armed with discretion to determine credibility[38] and select medical opinion,[39] the administrative judge issues a hearing decision[40] containing the findings of fact and conclusions of law to support or deny an entitlement.

The remaining refuge of the aggrieved party within the DIA is the reviewing board, which comprises a panel of three administrative law judges constrained by a high standard that allows reversal, recommittal, and even a summary affirmation if the issues on appeal warrant nothing more.[41] Extraordinary issues and positions may be taken up to the Massachusetts Appeals Court for a first look, with the Supreme Judicial Court hovering either *sua sponte* or via an application for further appellate review.[42]

B. *Timeframes*

The concept of time embedded in the statutory entitlements for weekly incapacity is as much a factor in value as the actual medical disability and the average weekly wage. The moment an injury occurs, a medical disability is likely created. The employee and the insurer are bound by constraints upon time defined by statute[43] that are immutable. The passage of information between the employer, the employee, and the insurer is regulated by statute to ensure timely response and receipt of compensation, if appropriate.[44]

The date of injury does not necessarily[45] start the clock on the statute of

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[37] *Id.* § 11B.

[38] Lettich's Case, 403 Mass. 389, 394 (1988) ("[F]indings, not erroneous as a matter of law, directly based on 'live' testimony before [an administrative judge] given by witnesses testifying to their personal observations, are final.").

[39] *See* Amon's Case, 315 Mass. 210, 216–17 (1943) (confirming that the judge is free to adopt all, part, or none of a medical opinion).

[40] § 11B.

[41] *Id.* § 11C ("The reviewing board shall reverse the decision of an administrative judge only if it determines that such administrative judge's decision is beyond the scope of his authority, arbitrary or capricious, or contrary to law. The reviewing board may, when appropriate, recommit a case before it to an administrative judge for further findings of fact. Where the reviewing board affirms the decision of an administrative judge, it may do so in summary fashion and without discussion of the issues raised on appeal.").

[42] *Id.* § 12(2)–(5).

[43] *Id.* §§ 6–8.

[44] *Id.*

[45] *See* Sullivan's Case, 76 Mass. App. Ct. 26, 32 n.12 (2009) (stating that there is no per se rule

limitations,[46] but it does: (1) define the average weekly wage;[47] (2) require the interaction (not necessarily cooperation) between the employee, the employer, and the insurer; and (3) assign the state average weekly wage (SAWW)[48] to any later-determined scheduled awards for specific losses of function,[49] disfigurement,[50] and cost-of-living adjustment (COLA).[51] The medical disability created by the injury may not lead to immediate incapacity,[52] but in most cases it does. Partial or total inability to work caused by the medical disability creates incapacity and the entitlement to weekly benefits. The AWW is based upon the earnings in the fifty-two weeks prior to the date of injury. The SAWW, calculated by the Commonwealth each October 1st, is applicable to each date of injury within that year.

A wristwatch provides a worthy representation of the concept of time and value found in chapter 152 in any case created by an industrial injury. Any wristwatch has similar components, regardless of whether it is a Timex or a Patek Philippe. The differences in value of a watch are set by the maker. The differences in value of a workers' compensation injury are set by the average weekly wage (high or low) and the corresponding weekly compensation rate, or the minimum[53] or the maximum,[54] as defined each

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regarding impact of medical treatment after work injury relative to commencement of statute of limitations under § 41).

[46] § 41 ("No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless any claim for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between his disability and his employment. In the event of death, no claim shall be made later than four years after the death. Where an action against a third person, as provided by section fifteen, is discontinued, no claim for compensation shall be made later than sixty days after such discontinuance. The payment of compensation for any injury pursuant to this chapter or the filing of a claim for compensation as provided in this chapter shall toll the statute of limitations for any benefits due pursuant to this chapter for such injury.").

[47] *Id.* § 1(1).

[48] *Id.*

[49] *Id.* § 36(1)(a)–(j).

[50] *Id.* § 36(1)(k).

[51] *Id.* § 34B(a).

[52] *Compare* Crowley's Case, 287 Mass. 367, 374 (1934) (finding that a "personal injury" under ch. 152 "does not require incapacity for labor, or the anticipation of such incapacity, in order to constitute an injury"), *with* Perangelo's Case, 277 Mass. 59, 64 (1931) (requiring "a lesion directly traceable to a happening in the employment and arising out of it" to be a personal injury).

[53] § 1(11).

[54] *Id.* § 1(10).

October 1st by the SAWW.[55]

There are many other components to a wristwatch and a complete description of the multitude of terms, specifications, actions, and pieces need not be divulged. I am deeply indebted to my long-time watch aficionado and jeweler, Dominic Venuti, at DeScenza's of Boston who provided endless time, discussion, and whenever necessary, repair.

To briefly illustrate this inherent disparity in value, assume that two individuals sustain identical injuries on October 2, 2023, but have compensation rates that are the respective minimum and maximum. One receives $359.34 per week and the other $1,796.72. The annual payments are $18,685.68 and $93,429.44, respectively. Medical benefits incurred and potential § 36 losses of function and/or disfigurement would be the same.

It should also be noted that the SAWW is the weekly compensation rate for any AWW above $2,994.53 ($1,796.72 ÷ 0.6 = $2,994.53); thus, high-wage earners are indeed capped by statute. Low-wage earners are entitled to the minimum of $359.34 (AWW = $598.90 or less) unless the actual AWW is less than the minimum of $359.34, at which point the full AWW is the compensation rate.[56]

However, there is more to a wristwatch or a case than its mere value. The strap is just as important, for it binds the inherent time to the wearer and the statutory entitlements.[57]

### C. *Entitlements*

A watch's dial shows the time. Whatever is available and remaining to a claimant is calculated outwards from the first day of disability to either 156 weeks under § 34[58] or 260 weeks under § 35.[59] Note that the combination of §§ 34 and 35 cannot exceed 364 weeks or seven years.[60] To illustrate, if the full three years of § 34 are paid, the employee is subsequently limited to four

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[55] *Id.* § 1(9) (referring to the "[a]verage weekly wage in the commonwealth").

[56] *Id.* § 34 ("[U]nless the average weekly wage of the employee is less than the minimum weekly compensation rate, in which case said weekly compensation shall be equal to his average weekly wage."); *see Minimum Wage Program*, COMMONWEALTH OF MASS., https://perma.cc/9Y72-ASWL (last visited July 23, 2023) (confirming that the minimum wage in Massachusetts increased to $15.00 per hour effective January 1, 2023).

[57] *See generally* §§ 31, 34, 34A, 35, 36 (setting out the variety of rules for how payment is calculated based on the nature of injury).

[58] *Id.* § 34.

[59] *Id.* § 35.

[60] *See id.* §§ 34, 35.

years of § 35.[61]

Section 35 can also be extended beyond 260 to 520 weeks if there is a documented loss of function in excess of 75% to any one of the four major extremities.[62] This provision is seldom triggered or invoked but exists to provide additional benefits to a severely injured claimant.

As an aside, § 36 provides scheduled awards for losses of function, disfigurement, and scarring contingent upon a medical opinion expressed in percentages and documenting the respective loss of function and character.[63] The SAWW applicable to the date of injury is used in conjunction with the assigned multipliers. Most cases are resolved by agreement between respective parties with the able assistance of one of the DIA conciliators at any one of the five regional offices.[64] Compromises are usually accomplished if each party presents varying opinions.[65] There are restrictions contained in § 36A for loss of brain function that require the passage of at least forty-five days after the date of injury.[66]

The schedules for losses of function are contained in § 36(1)(a)–(j) and percentages must be expressed according to American Medical Association (AMA) Guidelines.[67] The disfigurement and scarring criteria[68] are published in a DIA circular letter.[69] The value attributable to any case is merely augmented by § 36, which is calculated based upon the SAWW, regardless

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[61] *See id.* § 35.

[62] *Id.* § 35 (providing "that this number may be extended to five hundred twenty if an insurer agrees or an administrative judge finds that the employee has, as a result of a personal injury under this chapter, suffered a permanent loss of seventy-five percent or more of any bodily function or sense specified in paragraph (a), (b), (e), (f), (g), or (h) of subsection (1) of section thirty-six, developed a permanently life-threatening physical condition, or contracted a permanently disabling occupational disease which is of a physical nature and cause").

[63] § 36. *See generally* ROBERT D. RONDINELLI ET AL., GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (Am. Med. Ass'n 6th ed. 2009) (explaining how the guide is used in workers' compensation systems, federal systems, automobile casualty, and personal injury cases to rate impairment, not disability).

[64] *See generally Massachusetts Workers' Compensation Guide for Injured Workers*,

DEP'T OF INDUS. ACCIDENTS (Oct. 2019), https://perma.cc/U4QA-8G92.

[65] *See* Walker's Case, 443 Mass. 157, 166 (2004) (confirming that stacking of benefits is allowed for the most severe cases usually involving quadriplegia, paraplegia, or total system failure).

[66] *See* § 36A.

[67] *Id.* §§ 36(1)(a)–(j), 36(2).

[68] *Id.* § 36(1)(k).

[69] *Scarring, Loss of Function, and Disfigurement*, DEP'T OF INDUS. ACCIDENTS, https://perma.cc/L7YT-6DX5 (last visited July 23, 2023).

of the employee's average weekly wage.[70] The available benefits are not time-contingent.

One provision affecting § 36 benefits is that if they are not paid prior to the approval of a lump sum, they are presumed to be included within the terms and conditions of the settlement.[71] Furthermore, there is a long and well-established principle adhered to by the approving administrative judge or administrative law judge and validated by case law that the attorney's fee must be reduced to reflect the employee's receipt of § 36 benefits within the lump sum settlement.[72] If § 36 is adjusted by agreement prior to lump sum via claim or agreement, approved at conciliation, then the statutory framework of attorney's fees contained within § 13A and augmented by § 13A(10)[73] applies.[74] Seldom does a § 36 claim require a § 10A conference, but such disputes do occur; § 13A(4) sets the employee's attorney's fee.[75] The aggrieved party is entitled to pursue a § 10A(3) appeal, obtain a § 11A(2) impartial medical opinion, and proceed to a § 11 hearing.[76] The current cost of an appeal carries a $650.00 fee to defer the § 11A examination, and if a hearing is required, then the full § 13A(5) fee is applicable subject to the administrative judge's discretion to increase or decrease, depending on the effort expended or the complexity of the dispute.[77] It would be a very rare case that would push the litigation process to such an arguably unnecessary extent, especially since there is pressure to resolve such issues amicably and without consumption of DIA and judicial resources.

For every date of injury, a potential entitlement to weekly incapacity is created for the injured employee. There are cases that do not disable an injured worker and are classified as "medical only," but this initial status does not preclude a later need for weekly incapacity if the condition deteriorates, creates a greater disability, or surgery or significant medical intervention is required that takes the injured worker out of work. The

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[70] *See generally* § 36.

[71] *See id.* § 36A.

[72] Richards v. Gen. Elec. Co., 3 Mass. Workers' Comp. Rep. 95, 101 (1989).

[73] § 13A(10) ("The dollar amounts . . . shall be changed October first of each year by the percentage change in adjusted benefits from the preceding year as calculated and limited in paragraph (a) of section thirty-four B.").

[74] *See, e.g.*, Circular Letter from Sheri Bowles, Dir., Dep't of Indus. Accidents, to All Interested Persons, Cost of Living Adjustments (COLA) Payment and Reimbursement Schedules & Requests; Maximum and Minimum Weekly Compensation Rates; Attorneys' Fee Schedule (Oct. 2, 2023), https://perma.cc/X5D5-C9FA.

[75] §§ 10A, 13A(4), 36.

[76] *Id.* §§ 10A(3), 11, 11A(2).

[77] *Id.* § 13A(5).

interaction of § 6 and § 29 define the obligations of the employer to report an injury and the employee to qualify for weekly incapacity.[78] Sections 7(1) and 8(1) define the responsibility of the insurer to commence weekly benefits.[79]

Section 6 requires the employer to report an injury only after an injured worker loses more than five days of work, and the days lost need not be consecutive and are counted cumulatively.[80] Section 29 states that an injured worker is not paid for the first five days of incapacity, shifting payment to the available sickness and personal time, unless more than twenty-one days of work are ultimately lost.[81] Most insurers, therefore, withhold the first five days until twenty-one days are incurred and then pay the employee the initial five days retroactively to the commencement of incapacity.

There is a distinct difference between disability and incapacity, and the terms should not be used interchangeably. The nature of adjudication under the system has been described as follows:

> Compensation is not awarded for personal injury as such but for 'incapacity for work.' This concept combines two elements: physical injury or harm to the body, a medical element, and loss of earning capacity traceable to the physical injury, an economic element. Some benefits may be due for a physical injury which does not interfere with the employee's ability to earn his full wages. He would be entitled to medical and hospital care and, if left with a permanent physical handicap, to specific compensation under [G. L. c. 152, §] 36. But apart from such cases, an injury is not compensable unless the physical injury causes an impairment of earning capacity.
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> "Incapacity for work is the common statutory basis of benefits for total, permanent and total, and partial disability. The degree of incapacity determines whether the disability is total or partial. The determination of loss of earning capacity involves more than a medical evaluation of the employee's physical impairment. Physical handicaps have a different impact on earning capacity in different individuals. Education, training, age, and experience affect the ability to cope with the physical effect of injury. The nature of the job, seniority status, the attitudes of personnel managers and insurance companies, the business prospects of the employer, and the strength or weakness of the economy also influence an injured employee's ability to hold a job or obtain a new position. The goal of disability

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[78] *Id.* §§ 6, 29.

[79] *Id.* §§ 7(1), 8(1).

[80] *Id.* § 6.

[81] § 29.

> adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity, discounting the effect of all other factors . . ."[82]

For the insurer, the payments remain subject to the "payment without prejudice period" provisions of § 8(1), as long as there has been proper compliance with § 7(1).[83] The insurer must pay or deny within fourteen days of receipt of the employer's first report of injury.

The marking of time in chapter 152 has become a critical exercise. What days count and which ones do not? The mailing date of the DIA form memorializing a change in weekly benefits—whether it be commencement, modification, or termination—never counts as a day. It is the next day that does, thus making eight days of the statutory seven to ensure compliance. The various forms require and reflect the dates of action. Scrutiny by employee's counsel to discover a prejudicial mistake creating either acceptance of a case (i.e., establishment of liability), loss of defenses, a penalty, or an attorney's fee is not unheard of, nor should it be unexpected.[84]

This is an administrative practice with a discrete statute that attempts to spell everything out and ensure quick provision of weekly wage replacement along with medical benefits to injured workers who are left with chapter 152 basically as their only remedy and source of income. The marking of DIA forms[85] with the receipt date of the first report of injury and the notification of payment is critical and is usually scrutinized by employee's counsel and especially conciliators if a later extension to payment without prejudice (PWOP) is sought under § 8(6).[86]

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[82] Scheffler's Case, 419 Mass. 251, 256 (1994) (quoting LAURENCE S. LOCKE, WORKMEN'S COMPENSATION § 321, at 375–76 (2d ed. 1981) (footnotes omitted)); *see also* 1C ARTHUR LARSON, WORKMEN'S COMPENSATION § 1.03(4)–(5) (1994 & Supp. 1994) (discussing disability adjudication in similar manner).

[83] §§ 7(1), 8(1).

[84] *See, e.g.*, Mansaray v. City Foods, 16 Mass. Workers' Comp. Rep. 210, 213 (2002).

[85] *See, e.g.*, Employer's First Report of Injury or Fatality, Form No. 101 (Dep't of Indus. Accidents Aug. 2001); Insurer's Notification of Payment, Form No. 103 (Dep't of Indus. Accidents May 11, 2020); Insurer's Notification of Denial, Form No. 104 (Dep't of Indus. Accidents July 2019); Insurer's Notification of Termination or Modification of Weekly Compensation During Payment Without Prejudice Period, Form No. 106 (Dep't of Indus. Accidents July 2019).

[86] *See* § 8(6) ("Any one hundred eighty day payment without prejudice period herein provided may be extended to a period not to exceed one year by agreement of the parties provided that: (a) the agreement sets out the last day of such extension; and (b) a conciliator, administrative judge, or administrative law judge approves such agreement as not detrimental

The counting of days has become a critical component of analyzing the claim to determine and ensure whether an insurer has correctly invoked the "safe harbor" of § 8(1), inadvertently erred and thus lost the protection, or unwittingly accepted the claim.[87] Sometimes, the respective attorneys can draft a § 19 agreement to remedy such an untoward situation, allow payments without prejudice to occur, and provide weekly incapacity and medical benefits to an injured worker without the necessity of a denial and awaiting a § 10(A) conference before an administrative judge.[88]

One question that arises in a variety of situations is: how much time is left? This applies to the insurer's response under § 7(1); the remainder of PWOP under § 8(1); the remaining weeks of weekly compensation under §§ 34 and 35; and the time within which an employee's claim can be filed to comport with the basic but somewhat mutable four-year statute of limitations contained within § 41.[89] Section 34A ("Permanent and Total incapacity") and § 31 ("Dependency benefits to 'not fully self-supporting' spouses") are not subject to the question as their payment, the claimant's entitlement, and the available run of weekly benefits are by design "indefinite."[90]

To illustrate the computation of time, consider the following example: Assume that an injury occurs on a Friday at the end of the day (day number zero). The employee does not work weekends. His first day out of work is Monday, his fifth is Friday (§ 29 requires five or more calendar days of incapacity[91]). The employer's obligation to file a first report of injury starts on Saturday under § 6 (the sixth day of disability).[92] Sunday by statute does not count. Note that Sundays do not count for § 6, but *do* for § 7(1).[93] The employer's seventh day occurs on the following Saturday (this is the seventh

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to the employee's case.").

[87] *See id.* § 8(1).

[88] *Id.* §§ 10(A), 19.

[89] Doherty v. Union Hosp., 31 Mass. Workers' Comp. Rep. 195, 203–04 (2017) (confirming that § 41 is an affirmative defense that must be raised before the burden shifts to the employee to prove compliance with the notice and claim requirements it prescribes).

[90] Yoffa v. Metro. Life Ins. Co., 304 Mass. 110, 111 (1939) (establishing that permanent "is the opposite of temporary or transient" when used in the context of permanent and total incapacity, but does not mean without any possibility of change; rather, a condition is permanent if it will continue for an indefinite period which is unlikely to end, although recovery at some unforeseeable time in the future is possible).

[91] § 29.

[92] *Id.* § 6.

[93] *Id.* §§ 6, 7(1).

day of disability).[94] The insurer begins its fourteen-day clock on Sunday and the clock runs until the second Saturday after (day twenty-nine after the injury). Note that the first skipped Sunday makes it exactly thirty days.

Thus, the ultimate last day for an insurer to make its initial payment under § 8(1) and preserve PWOP occurs exactly twenty-nine days after the date of injury.[95] This would be extended by only one day if a legal holiday occurred during the § 6 period and for no other reason, because all the days are counted under § 7(1). Note that § 8(1)'s 180-day period also runs calendrically, and the clock starts on the first day of disability.[96] Termination requires a full seven days' notice.[97] The date of mailing does not count; thus, the date of termination or modification must be at least *seven* days from the notice.

### D. *Exposures*

There are three basic classes of cases: (1) cases limited to the temporary schemes of weekly incapacity contained in §§ 34 and 35;[98] (2) permanent and total incapacity cases under § 34A;[99] and (3) death cases under § 31 that provide dependency benefits to widows, widowers, children, and other individuals reliant upon the income of the deceased in whole or in part.[100] These classes are not mutually exclusive. An employee can become injured, collect a measure of temporary incapacity benefits, migrate to a permanent and total incapacity, and later, if death ensues brought about by the original injury, his or her dependents may qualify for dependency benefits.

There is no need to exhaust the temporary benefits before collecting § 34A.[101] An individual severely disabled and incapacitated by the injury from the outset may immediately and directly collect § 34A with its higher weekly rate of 2/3% of the average weekly wage, rather than the 60% available under § 34 or the maximum 45% of the average weekly wage under § 35.[102] The 1991 legislative reforms reduced the percentage of average weekly wage

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[94] *Id.* § 7(1).

[95] *Id.* § 8(1) (providing that the safe harbor provision begins if the insurer has made timely payments pursuant to §7(1)).

[96] § 8(1).

[97] *Id.* § 8(5).

[98] *Id.* § 34 (providing for no more than 156 weeks of compensation for total incapacity); *id.* § 35 (providing for no more than 260 weeks of compensation for partial incapacity).

[99] *Id.* § 34A.

[100] *Id.* § 31.

[101] *See* Slater's Case, 55 Mass. App. Ct. 326, 326–27 (2002).

[102] *Id.* at 326–28.

from the previous 2/3% and the same percentage upon the differential between the average weekly wage and the earning capacity. The time frames were reduced from 260 weeks to 156 for § 34 and from 600 to 260 for § 35.[103] Also added was the maximum amount an individual could receive under § 35 (i.e., no more than 75% of the § 34 rate).[104]

The "Max. 35" is in effect never more than 45% of the actual average weekly wage as long as the AWW is not based upon a figure higher or lower than the SAWW maximum or minimum rate.[105] In those instances, simply resort to 75% of the actual § 34 rate.

Another change from 1991 was the imposition of the blended number of weeks collectable under §§ 34 and 35.[106] Under singular circumstances, the respective years available are three and five, or 156 and 260 weeks. If an individual only collects temporary incapacity weekly benefits, the maximum available is reduced to seven years or 364 weeks spread across the two sections.

This blended scenario lends the calculation of the three- and four-year exposure to an easy determination which I call "The Canniff Constant." As long as the average weekly wage is not based on a figure higher or lower than the SAWW, this Constant is 187.2. If the weekly rate is either the SAWW maximum or minimum, then the Constant is 312.

So how is this Constant calculated? Every case has an average weekly wage, much like the case of a wristwatch, which provides the housing for the movement, dial, and glass. The case protects the movement from dust, dampness, and shock. The average weekly wage sets the available amount of every weekly benefit.

The average weekly wage—once calculated according to the parameters of § 1(1),[107] either by simple arithmetic or contested litigation given either the circumstances or the shortness of employment—is a continuing constant figure that provides the 60% rate for § 34,[108] the 75% maximum rate for § 35,[109] and the 2/3% rate for §§ 31 and 34.[110] The AWW and the compensation

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[103] *See* §§ 34–35.

[104] *Id.* § 35.

[105] *See id.*

[106] *See id.*

[107] *Id.* § 1(1); *see infra* pp. 15–16 (outlining the parameters of § 1(1)).

[108] § 34.

[109] *Id.* § 35.

[110] *Id.* §§ 31, 34.

rate remain constant for the life of the case except for § 35B,[111] § 35C,[112] and when § 51[113] is invoked by an employee or § 51A[114] is self-operatively applied.

The determination of the AWW is usually a matter of fact.[115] The various sentences/phrases of § 1(1) are parsed out below. The numbered subsections are merely for convenient reference:

> [1.] "Average weekly wages", the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two;
>
> [2.] but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted.
>
> [3.] Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as

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[111] *Id.* § 35B ("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 compensation 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.").

[112] *Id.* § 35C ("When there is a difference of five years or more between the date of injury and the initial date on which the injured worker or his survivor first became eligible for benefits under section thirty-one, thirty-four, thirty-four A, or section thirty-five, the applicable benefits shall be those in effect on the first date of eligibility for benefits.").

[113] *Id.* § 51 ("Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, in the open labor market, his wage would be expected to increase, that fact may be considered in determining his weekly wage. A determination of an employee's benefits under this section shall not be limited to the circumstances of the employee's particular employer or industry at the time of injury."); *see* Wadsworth's Case, 461 Mass. 675, 681–82 (2012) (setting forth parameters for determining eligibility for § 51 wage enhancement).

[114] § 51A ("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 injury."); *see also* McLeod's (Dependents') Case, 389 Mass. 431, 435 (1983).

[115] More's Case, 3 Mass. App. Ct. 715, 715 (1975).

> above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury,
>
> [3(a).] was being earned by a person in the same grade employed at the same work by the same employer,
>
> [3(b).] or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.
>
> [4.] In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages.
>
> [5.] Weeks in which the employee received less than five dollars in wages shall be considered time lost and shall be excluded in determining the average weekly wages;
>
> [5(a).] provided, however, that this exclusion shall not apply to employees whose normal working hours in the service of the employer are less than fifteen hours each week.[116]

Section 34 provides a maximum statutory 156 weeks and if the blended § 35 is triggered, then only 208 weeks are available.[117] For § 34, AWW x .6 x 156 = AWW x 93.6. For § 35, AWW x .45 x 208 = AWW x 93.6. Simple addition of the two equations provides AWW x 187.2 = "The Canniff Constant."

This very simple Constant saves the time and trouble of calculating annual exposures by calculating the annual aggregate. AWW x .6 x 52 = one year of § 34 x 3 = three years of § 34 (.6 x 52 = 31.2 x 3 = 93.6). AWW x .45 x 52 = one year of § 35 x 4 = four years of §35 (.45 x 52 = 23.4 x 4= 93.6).

The Canniff Constant immediately calculates the respective three- and four-year exposures by simple mathematics. AWW x 93.6 ÷ 3 = one year of § 34. AWW x 93.6 ÷ 4 = one year of § 35. The Canniff Constant works solely upon the average weekly wage.

If the weekly rate is based upon either a very high or low average weekly wage, that triggers the applicable SAWW maximum or minimum, then the Canniff Constant is 312 (187.2 ÷ .6 = 312). Other constants that calculate the annual exposure under a variety of sections are provided below but 187.2 is the most convenient and useful.

In practice, rounding 187.2 up to 200 x AWW provides a quick and easy approximate assessment of the temporary incapacity exposure of the

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[116] § 1(1).

[117] *See id.* §§ 34–35.

blended seven years. One-hundred times the AWW represents the respective exposures for the three years of § 34 or the four years of § 35.[118]

Section 34A does not lend itself to such a simple calculation of the future exposure, not because the weekly compensation rate is the two-thirds percentage of the average weekly wage, but rather the injured individual's entitlement is not bound by any specific number of weeks or years.[119] "Indefinite" is the best characterization,[120] and the entitlement continues as long as the permanent and total disability status/condition is maintained. An insurer seeking to discontinue or modify the permanent and total weekly incapacity rate must show an improvement[121] documented by either medical opinion or vocational capability. Such a task is daunting and seldom successful. The maintenance of the status quo is most often prevailing.

Section 34A exposure is best then calculated by AWW x (2/3) x 52 x the individual's life expectancy.[122] Employees and their counsel have obviously different opinions of future values than the insurers. Settlement is achievable, but not without a significant expenditure of time, effort, compromise, and funds.

Provided below are other aids to the calculations of various exposures, all based upon the AWW.

1. Compensation Calculations

§34[123] = Temporary Total Incapacity = 3 YEARS= 156 WEEKS
§35[124] = Temporary Partial Incapacity = 5 YEARS = 260 WEEKS
Blended §34 & §35[125] = 7 YEARS = 364 WEEKS
75% Loss of Function (LoF)[126] Blended §34 & §35 = 10 YEARS = 520 WEEKS
§34A[127] = Permanent & Total Incapacity = *Indefinite*
§31 DEPENDENCY[128] = 250 x SAWW/CR = + *"Fully Self-Supporting"*

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[118] *See id.*

[119] *Id.* § 34A.

[120] *Id.*; *see* Yoffa v. Metro. Life Ins. Co., 304 Mass. 110, 111 (1939).

[121] *Cf.* Foley's Case, 358 Mass. 230, 232 (1970); Frennier's Case, 318 Mass. 635, 638–40 (1945).

[122] *See* § 34A.

[123] *Id.* § 34.

[124] *Id.* § 35.

[125] *Id.* §§ 34, 35.

[126] *See id.* § 35 (regarding the permanent loss of seventy-five percent or more of any bodily function).

[127] *Id.* § 34A.

[128] § 31.

2. Weekly Compensation Rates

(All are capped by SAWW = State Average Weekly Wage) (Minimums = 20% SAWW or Actual AWW, if lower)
§31[129] = AWW x .66
§34A[130] = AWW x .66
§34[131] = AWW x .6
§35[132] = AWW x .45

3. Statutory Exposures

§31[133] = 250 x SAWW@DOI *plus*
§34A[134] = AWW x 34.66 x *Life Expectancy*
§34[135] = AWW x 93.6
§35 (4 years)[136] = AWW x 93.6
§34 & §35 (7 years)[137] = AWW x 187.2
§35 (5 years)[138] = AWW x 117
§35 (7 years)[139] = AWW x 163.8

4. Quick Calculations

AWW x .66 = §31 or §34A
AWW x .6 = §34
§34 x .75 = Maximum §35 Partial Weekly Rate AWW x .45 = Maximum §35 Partial Weekly Rate
AWW x .25 = Minimum Earning Capacity Minimum Earning Capacity x 4 = AWW
Minimum Earning Capacity x 1.8 = Maximum §35 Partial Weekly Rate
Minimum Earning Capacity x 2.4 = § 34

The Section 34B COLA was added into the legislative reforms of 1986,

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[129] *Id.*
[130] *Id.* § 34A.
[131] *Id.* § 34.
[132] *Id.* § 35.
[133] *Id.* § 31.
[134] § 34A.
[135] *Id.* § 34.
[136] *Id.* § 35.
[137] *Id.* §§ 34–35.
[138] *Id.* § 35.
[139] *Id.*

which enhanced the weekly rate by a series of multipliers for each year of injury. The multipliers are updated each October 1st by the DIA circular letter that contains the new SAWW and the maximum and minimum rates.[140]

The Workers' Compensation Trust Fund ("WCTF") is involved in COLA as well. For dates of injury prior to October 1, 1986, the entirety of COLA paid is reimbursable from the WCTF because the premiums collected by insurers prior to this date did not provide for COLA.[141] Between October 1, 1986 and December 24, 1991, as a result of the Legislative Reforms, COLA reimbursement was drastically reduced to reimbursement multipliers also available from the annual DIA circular letter. After December 24, 1991, COLA reimbursement from the WCTF was eliminated with the insurers/self-insurers bearing the full brunt of payment and the annual rate capped at no more than five percent or the annual CPI.

Section 31 dependency benefits carry the same two-thirds percentage rate for the weekly benefit when the employee dies either on the job or resulting from his/her injuries and the same entitlement to § 34B COLA, contingent upon the annual multiplier.[142] As an aside, § 34B COLA by statute is not payable until the first October 1st, which is more than two years (24 months) after the date of injury.[143] What this means is that individuals collecting either § 34A or § 31 must wait until the weekly COLA enhancement becomes available and payable. Once the time frame is qualified, the § 34B COLA is not severable from the underlying compensation rate unless an offset is created in conjunction with Social Security Disability Insurance benefits. This requires the completion, submission, and calculation by the SSA (Social Security Administration) via a Form CR-28 available in the DIA Form Bank.

Section 31 is one of the very few sections of chapter 152 that is vestigial and harkens back to an earlier statutory monetary cap imposed upon all weekly benefits that was eliminated by the legislative reforms of 1986.[144]

This status supports the statement that "death is different." Not only is a presumption afforded under § 7A to aid in the proof and qualification for § 31, but § 31 contains what is known as the initial period of presumptive dependency (IPPD), defined as 250 x the SAWW in existence on the date of

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[140] § 34B; Circular Letter from Sheri Bowles, Interim Dir., Exec. Off. of Lab. and Workforce Dev., Dep't of Indus. Accidents, to All Interested Persons, Cost of Living Adjustments (COLA) Payment and Reimbursement Schedules & Requests; Maximum and Minimum Weekly Compensation Rates; Attorneys' Fee Schedule (Oct. 3, 2022), https://perma.cc/MBG4-QSY3.

[141] Beatty's Case, 84 Mass. App. Ct. 565, 566 (2013).

[142] §§ 31, 34B.

[143] *Id.* § 34B.

[144] *See id.* § 31.

injury.[145] The 2023 SAWW is $1,796.72 and therefore the IPPD is $449,180.00.

The protection of future weekly entitlements after the IPPD is reached is applicable solely to surviving spouses. The surviving spouse is entitled to continue to receive weekly § 31, plus § 34B COLA as long as they can show they are "not fully self-supporting" after reaching the IPPD.[146] What this means in a legal sense is whether they have entirely replaced their deceased spouse's income. Very seldom does this occur, and litigation over such a proposition entails an analysis of income and living expenses to the obvious detriment of the insurer.

A dependent is absolutely entitled to receive the full measure of the IPPD with additional § 34B COLA without contest or intervention by the insurer. For example, if § 31 is the SAWW of $1,796.72 then the surviving spouse receives the $1,796.72 weekly benefit for 250 weeks without any intervention by the insurer. If the § 31 rate is one half the SAWW or $898.36 then the surviving spouse collects for at least 500 weeks before the "not fully self-supporting" Rubicon is reached.

Therefore, when dealing with the future value of a surviving spouse's case, the individual's life expectancy is the best measure, possibly reduced to the present-day value of the annual stream of benefits. Such an approach is also appropriate and applicable to § 34A.

Of course, a settlement could occur prior to attainment of the IPPD, but the value would certainly have to presuppose and include such a value in order to obtain judicial approval unless there were initial problems with the compensability of the case or claim.

Section 31 also provides for a virtual, all-inclusive, and encompassing class of potential dependents truly within and without wedlock, spouses, and incapacitated children beyond the age of eighteen.[147] The statute is written to cover every possible scenario or familiar relation in connection to the deceased. Also contained therein are ways for distribution of the singular weekly benefit and what is to occur if, and when, a dependent is no longer eligible to receive.

### E. *Settlements*

Settlement of any case is governed by § 48.[148] Ordinarily, cases are settled "with liability," meaning the injury is deemed compensable; although future weekly indemnity benefits are completely redeemed, medical benefits

[145] *See id.*

[146] *Id.* §§ 31, 34B.

[147] *Id.* § 31.

[148] § 48.

remain open and available, as do vocational rehabilitation benefits for two years from the date the agreements are approved.[149] A case may be settled "without liability" and medical and vocational rehabilitation are closed out as well.[150] Sometimes medical benefits are included and paid only up through the date of approval or to a future certain date agreed upon by the parties.

Section 48 contains additional provisions that limit each settlement solely to one date of injury[151] and provide an oft misunderstood and misapplied $1,500 per month exclusion to the employee from returning to his/her injurious employer.[152]

With respect to settlement, the most important provisions pertain to the percentage of attorneys' fees that may be taken from the gross amount by employee's counsel. Settlements "with liability" allow for and are capped at 20%.[153] Settlements "without liability" allow for and are capped at 15%.[154] Woebegone is the attorney who attempts to exceed these percentage amounts for failure to reduce the fee if § 36 has not previously been paid and is included in the gross figure. "[Section] 36 benefits are redeemed by payment of an approved lump sum amount, unless those benefits have been specifically reserved by the parties in the settlement document."[155]

This article is designed to facilitate ease of calculation. There are two constants that apply to settlements that allow for a quick determination of the respective "gross" and "net" figures.

Assume a settlement is "with liability" for $10,000, the maximum fee is 20% and the net is $8,000 dollars. Assuming the employee wishes to net $10,000, the gross settlement must be increased to $12,500. Why? Because 80% of $12,500 is $10,000, the fee is $2,500. If one merely multiplies the desired "net" figure by 1.25, the appropriate "gross" figure is calculated ($25,000 net requires a gross of $31,250; $25,000 x 1.25 = $31,250. The twenty percent fee is $6,250.) The 1.25 constant can also be used as its reciprocal and the net may be divided by four (25%) to arrive at the fee figure.

On a "without liability" settlement, a similar constant that generates the net is also available, only the number is slightly more complicated and less easy to remember or employ. Again, assume the without liability settlement

[149] *Id.* § 48(2).

[150] *Id.* § 48(1).

[151] Kszepka's Case, 408 Mass. 843, 845–46 (1990).

[152] § 48(4).

[153] *Id.* § 13A(8)(b).

[154] *Id.* § 13A(8)(a).

[155] Sylvia v. Burger King Corp., 6 Mass. Workers' Comp. Rep. 272, 274 (1992).

is for $10,000. The maximum fee is 15% and the net is $8,500. Assuming the employee wishes to net the full $10,000, the gross settlement must be increased to $11,764.71. Why? Because 85% of $11,764.71 is $10,000. The fee is $1,764.71. If one merely multiplies the desired net figure by 1.1765, the appropriate gross figure is calculated (a $25,000 "net" "without liability" requires a gross of $29,412.50; $25,000 x 1.1765 = $29,412.50. The 15% fee is $4,412.50). The 1.1765 constant can also be used as its reciprocal and the net may be multiplied by .1765 to arrive at the $4,412.50 fee figure.

The evaluation of exposure, values, and settlement requires a full analysis of the figures, a realistic approach if compromise and approval are to be obtained, and certainly a creative bent by both parties. Most cases are sooner or later settled because of the financials and uncertainty of the future dictate.

F. *Is Jail Time Lost Time?*

The second focus of this article addresses what becomes of the entitlement to weekly incapacity benefits to an incarcerated individual.[156] The statute provides for the stoppage of weekly benefits, but it does not make mention of provision for the future use or allocation of the time stopped, and *Connolly's Case* left the issue unaddressed.[157]

> The board expressed a concern that, if § 8 were retroactive, "a previously injured claimant who is released from incarceration and can establish a present loss of earning capacity causally related to his work injury may nevertheless be totally ineligible for weekly benefits if . . . the maximum period of time for which compensation was due . . . elapsed during the period of incarceration." Section 8(2)(j) terminates an employee's eligibility for compensation benefits while he or she is incarcerated. The words of the statute do not expressly address, and the facts of this case do not raise any issue of a released prisoner's eligibility for benefits if the prisoner establishes after release a present loss of earning capacity due to a prior work-related injury. Also, no issue of how the time period should be computed in such circumstances is before us. We therefore do not reach those issues.[158]

The wristwatch attached upon the date of injury is most definitely stopped, but the question is whether the time spent incarcerated is

[156] *See* § 8(2)(j).

[157] Connolly's Case, 418 Mass. 848, 852–53 (1994).

[158] *Id.* at 854 n.3.

completely lost (i.e., eliminated from the clock of weeks),[159] merely postponed until freedom allows correction (i.e., the clock of weeks is stopped only to be restarted), or the time continues to run even though weekly benefits need not be paid (i.e., the clock of weeks continues to run and decreases the available amount).

The scenario where an individual is incarcerated for life without the possibility of parole eliminates any inquiry. Individuals incarcerated for less or more manageable periods of time warrant consideration. There can be no doubt, as described in *Connolly*, that the insurer has no obligation to immediately resume weekly benefits upon release from incarceration as the concept of continuing causation and the possibility of an unrelated intervening incident, event, or injury occurring while incarcerated befalls the employee's burden of proof.[160] There could never be a penalty assessed upon the insurer given the employee's shouldering of the burden of proof to demonstrate a present causally related disability contingent upon supporting medical records, a date certain, and a full and fair investigation into the individual's activities while incarcerated. Nevertheless, resumption is entirely possible subject to the usual constraints of a bona fide claim. "An employee who is incarcerated loses his ability to work because of the incarceration, not the injury."[161]

The previously described settlement parameters are probably not applicable to the two latter descriptions of § 34A and § 31,[162] but the available temporary benefits are possibly at risk to be paid to the incarcerated upon release. What has been previously paid prior to incarceration is easily calculated, thus leaving the potential future exposure subject to what is available on the clock of weeks.

An employee represented by counsel would certainly push for the middle scenario of a mere postponement of time to whenever release is

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[159] Connolly v. Wire and Metal Separation Sys., 6 Mass. Workers' Comp. Rep. 241, 248–69 (1992). Both the reversed majority opinion of the Reviewing Board and the dissent agree upon this point. The majority states: "The impact of this distinction is that a previously injured claimant who is released from incarceration and can establish a present loss of earning capacity causally related to his work injury may nevertheless be totally ineligible for weekly benefits if, for example, the maximum period of time for which compensation was due (e.g., the current 260 weeks for § 35 benefits) elapsed during the period of incarceration. To the extent the statutory compensation period continues to run during incarceration and is forfeited, this constitutes a second context in which compensation is decreased." Meanwhile, the dissent states: "The majority is correct in its interpretation that the statute prevents employee from ever collecting compensation for the period of his incarceration."

[160] *Id.* at 265–66 (Smith, J., dissenting).

[161] *Connolly's Case*, 418 Mass. at 853.

[162] *See id.* at 854 n.4.

obtained; resumption can be pursued after release. Such an approach would maximize the variable exposure and value.

The insurer would obviously prefer either the first scenario that entails elimination from the clock of weeks or the third scenario where the clock of weeks continues to run during the incarceration. In actual fact, the two scenarios create the same end result (i.e., reduction), but the means and mode by which reduction is achieved should be accurately distinguished.

The employee may invoke the overriding principle of the "beneficent design" of the Workers' Compensation Act[163] to support his or her position, but the insurer may well have the better arguments and the longer end of the stick. This reduction of the statutory scheme is consistent by analogy with § 35B.[164] An incapacitated employee that returns to work receives the benefit of an updated compensation rate upon a resumption of incapacity, but the time already paid counts against the statutory scheme.[165] The weekly rate is reset but not the clock. The term "rate in effect" includes use of the employee's average weekly wage at the time of the subsequent injury to calculate weekly benefits.[166]

The employee has put themselves in this predicament whether the offense occurred before or after the date of injury. Their responsibility to society is paramount and the punishment meted out carries far-ranging and -reaching consequences. *In pari delicto, potior est conditio defendentis*.[167] The insurer has no part in the offense, and it is not the insurer that is taking advantage of the employee, but rather, the statute is imposing its reach, edict, and design. In conclusion, although the employee's wristwatch may remain fixed upon their wrist during the period of incarceration, the time, despite the non-payment of weekly benefits, continues to run and reduce the

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[163] Young v. Duncan, 218 Mass. 346, 349 (1914).

[164] § 35B ("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 compensation 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."). Hence, the "subsequent injury" does not start the benefits clock running anew. There is, after all, only one "personal injury" under the Workers' Compensation Act in this case—that which occurred on December 27, 1984. *See, e.g.*, Sullivan v. Transmission Structures Ltd., Board No. 088117-84, at 5–6 (Dep't of Indus. Accidents Feb. 8, 2000), https://perma.cc/94R9-ARGS; Rainville v. Roy's Towing, 9 Mass. Workers' Comp. Rep. 662, 664 n.2 (1995).

[165] Don Francisco's Case, 14 Mass. App. Ct. 456, 461 (1982).

[166] Bernardo's Case, 24 Mass. App. Ct. 48, 51 (1987).

[167] "In equal fault the condition of the defending party is better."

available clock of weeks.

The question then arises whether the clock of weeks is reduced solely for the incapacity benefits which the individual was receiving when incarceration commenced. If the statutory weeks available under either § 34 (156 weeks) or § 35 (260 weeks)[168] are reached while incarcerated, does the clock of weeks continue to run and reduce the other temporary capacity section for total or partial benefits that have not yet been triggered? In the legal taking of their entitlement to this unqualified measure of benefits, its own clock of weeks would appear to be a drastic measure, unwarranted, illegal, and violative of the individual's rights. If an individual is incarcerated while collecting § 34A, the ongoing indefinite clock of weeks is merely stopped with loss of benefits while incarcerated, subject to resumption upon release with the previously described burdens of proof imposed upon the individual.

Also note that even if the incarcerated employee has dependents that would qualify under § 31 and receive weekly benefits in the event the employee had died, there is no such provision in chapter 152 to provide any measure of support to these obviously needy and bereft individuals who have lost their aid through no fault of their own. Any such remedy would require legislative reform. "A more comprehensive solution will have to await legislative attention."[169] "Deficiencies in the compensation awards pursuant to the [workers' compensation] statute are matters of concern for the Legislature."[170]

Further support for reducing and/or eliminating the clock of weeks, at least for that temporary section the individual is receiving at the time of and during incarceration, is that if the individual were not incarcerated, the available clock of weeks would continue to run and reduce the future exposure. In effect, the incarcerated employee has removed himself from any potential workplace and earning capacity. He or she should not be rewarded by merely postponing the available clock of weeks. Section 8(2)(j) should operate to enforce the legal punishment already imposed and eliminate the clock of weeks for that section of weekly incapacity benefits the individual was receiving at the time the incarceration commences.

Smith, J. in her dissent to *Connolly*, provided a definitional rationale for the complete loss of the clock of weeks while incarcerated.

> The word "forfeit" is defined by the *American Heritage*

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[168] MASS. GEN. LAWS ch. 152, §§ 34–35 (2022).

[169] Louis's Case, 424 Mass. 136, 143 (1997).

[170] Saab v. Mass. CVS Pharmacy, LLC, 452 Mass. 564, 572 (2008) (quoting Longever v. Revere Copper & Brass Inc., 381 Mass. 221, 225 (1980)).

> *Dictionary*, 2nd ed. 1991, as "something surrendered as a punishment for a crime, offense, error, or breach of contract,"' surrendered or alienated for a crime, offense, error on breach of contract." The Legislature by the use of this term is merely indicating that the incarceration for criminal activity is responsible for the loss of compensation. ... [T]he word "forfeit" means to lose compensation because of some action or inaction. Where the Legislature intended compensation to resume, after the required action or inaction had ceased, it so specifically provided.[171]

Forfeiture should not be interpreted merely to eliminate a benefit entitlement for a specific defined period of time without carrying the consequence of counting against the benefit scheme and the "maximum period of time for which compensation was due."[172] The employee, by virtue of his own actions, should have no claim for future benefits that were previously forfeited.

When I get to heaven,
I'm gonna take that wristwatch off my arm
What are you gonna do with time
after you've bought the farm?[173]

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[171] Connolly v. Wire & Metal Separation Sys., 6 Mass. Workers' Comp. Rep. 241, 268–69 (1992) (Smith, J., dissenting).

[172] *Id.* at 248 (majority opinion).

[173] JOHN PRINE, *When I Get to Heaven, on* THE TREE OF FORGIVENESS (Oh Boy Records 2018).