380 Mich. 513 (1968)
158 N.W.2d 473

MAGRETA
v.
AMBASSADOR STEEL COMPANY.

Calendar No. 8, Docket No. 51,371. Calendar No. 14, Docket No. 51,371.

Supreme Court of Michigan.

Decided March 7, 1967.
Decided on rehearing May 6, 1968.

516 *516 *Kelman, Loria, Downing & Schneider,* for plaintiff.

LeVassuer, Werner, Mitseff & Brown, for defendants.

Amici Curiae:

Michigan Self-Insurers' Association, Inc., by *Stanley E. Beattie* and *Buell A. Doelle.*

The Employers' Group Insurance Companies and Firemen's Fund American Insurance Companies, by *John E. Miley* (*Vincent F. McAuliffe,* of counsel).

International Union, UAW, by *Steven I. Schlossberg, John A. Fillion, Jordan Rossen,* and *Bernard F. Ashe.*

Aetna Casualty & Surety Company, American Insurance Association, American Mutual Insurance Alliance, Auto-Owners Insurance Company, Citizens Mutual Automobile Insurance Company, Employers Mutual of Wausau, Liberty Mutual Insurance Company, Michigan State Accident Fund, and the Travelers Insurance Companies, by *Charles H. King.*

517 *517 ## ON REHEARING

O'HARA, J.

Our decision in this case upon its original presentation is reported in 378 Mich 689. It was unanimous. The facts are therein set forth in complete detail. We shall not restate them herein.

The case is one of statutory interpretation. The statute involved is the workmen's compensation act.[*] The specific sections are part 2, §§ 9 and 10. They deal with the minimum and maximum benefits limitations payable for total incapacity under part 2, § 9, and the maximum limitations upon benefits for partial incapacity under part 2, § 10.

Our decision admittedly changed the uniform construction accorded the sections both by the workmen's compensation appeal board and by this Court over the years since its enactment.

We preface our decision here with the recognition that there is no vested right in the continuation of judicial error. If we have been wrong in our interpretation, we are not only free to, but obligated to, correct that error.

The effect of our original decision is well phrased in one of the many *amicus* briefs filed in response to our grant of permission to any party of interest in the subject matter who sought to do so. It is phrased as the statement of issue before us on this rehearing:

"The issue before the Court is whether the maximum dollar limitations on the compensation to be paid to partially incapacitated employees are applicable to the benefits payable to employees who suffer what are called `schedule losses.'"

518 *518 Schedule losses, as above used, are synonymous with specific loss benefits payable for loss or functional destruction of a particular anatomical member, *e.g.,* a hand, foot, or leg.

We held in our prior decision that such dollar limitations were not so applicable. This is to say that the historic "not less than, nor more than *x* dollars" in the computation of benefit payments in schedule losses did not obtain. The pragmatic result was to remove the ceiling on weekly benefits, and to set claimant's award, and any award to those similarly situated, at 2/3 of his weekly earnings, whatever the amount thereof. We further held that this amount was to be neither diminished nor enlarged by reason of the number of his dependents.

We are impelled to reverse our previous position. The prior interpretation accorded to the 2 involved sections and their relationship to each other is what may properly be called a grammatical analytical approach. It can be justified in a purist sense of according to the words, clause, antecedent, and similar terms, their grammatical definitions. Our duty extends beyond this method but does not exclude it completely.

In statutory construction we are bound to determine legislative intent. In the exercise of that duty we are obligated to utilize all the tools of the historic judicial method. We feel we overemphasized the grammatical analysis to the prejudice of other well-recognized and long-established methods. In addition, we underevaluated a wisely self-imposed limitation of the appellate process.

We discuss first our departure from the usual appellate process. In our original decision, we said at p 701:

519 *519 "Both parties to this appeal, it should be noted, proceed on the assumption that the specific loss benefits specified in the schedule in part 2, § 10 are subject to the maximum and minimum benefit limitations."

Of course they did, and small wonder, for that "assumption" had been part of the settled case law and administrative application of the statute since its inception. Simply put, we decided this case upon an issue that was not only never raised below, it was not even considered an issue before the referee, the appeal board, or the Court of Appeals. We hardly need cite authority for the proposition that such an issue is not generally considered by any appellate court, and particularly by a court of ultimate review. We mention *Young* v. *Morrall* (1960), 359 Mich 180, 187, as expressive of the general principle.

The second basis which convinces us we did not properly apply the recognized tests of statutory construction was our failure to accord sufficient weight to the invariant interpretation accorded the statute by the commission legislatively delegated to administer it. Admittedly, our original decision gave to the statute an interpretation in conflict with that accorded it by the commission over the years.

In *Boyer-Campbell Co.* v. *Fry* (1935), 271 Mich 282, 296, we quoted with approval the following language of the United States Supreme Court in *United States* v. *Moore* (1877), 95 US 760, 763, (24 L ed 588, 589):

"`The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.'"

520 Third, we must recognize that we did not consider the doctrine of legislative acquiescence to have *520 any bearing on the issue. We would not be understood to hold that standing alone this principle is controlling, yet we must assume that the legislature was aware of the prior interpretation of the act. Session after session the act has been amended in some particular, but no specific amendment of the language here under consideration was made. In support of this basic principle we refer to the language in *In re Clayton Estate* (1955), 343 Mich 101, 106, 107:

"The silence of the legislature since 1922 to this Court's interpretation of its intent as expressed in the *Fish Case* [*In re Fish's Estate*, 219 Mich 369], can only be construed as consent to the accuracy of that interpretation."

The same may be said to be applicable to the question here presented.

Last, we mention that the concept of a maximum and minimum upon compensation benefits has been a settled principle in our act since its inception. When we, by our prior holding, removed any ceiling on benefits, we drastically changed its basic approach to the amount of benefits to be allowed. We introduced newly into the act a concept of 2/3 of whatever wages a claimant had been making as his measure of compensation, as against the concept of a maximum imposed by the act itself. On due reflection, we are constrained to hold that if such an innovation in a statute is to be made it is properly to be made by the legislature.

For the reasons herein detailed, we reverse ourselves as expressed in our original opinion in *Magreta* v. *Ambassador Steel Co.*, 378 Mich 689.

Nothing set forth above shall be construed as affecting, as precedent or otherwise, any portion of the
521 Court's original opinion save that which is addressed to the restricted question framed by our *521 order granting rehearing. That order, entered July 21, 1967, confined rehearing to question whether the maximum rates provided in part 2, § 9, of the workmen's compensation act apply to specific loss cases enumerated in section 10 where the specific loss is less than total and permanent.

The result now determined is that the order of the Court of Appeals, denying leave to review the appeal board's order, is reinstated. No costs on appeal to either court and no costs on rehearing are allowed, this being a case of statutory interpretation.

DETHMERS, C.J., and KELLY, BLACK, ADAMS, and BRENNAN, JJ., concurred with O'HARA, J.

BLACK, J. (*concurring*).

I agree with Justice O'HARA. Along with my endorsement of his opinion, I believe it permissible that further reference be made to the degree of respect we ordinary mortals of the 1960's "Drest in a little brief authority"[1], owe to the timelessly valuable precepts which appeared early in our reports. Three of us — still here — pursued that thought pertinently when *People* v. *Holbrook* (1964), 373 Mich 94, 99 was handed down:

"We have in this State a rule of statutory construction which — for this case — will bear repeating. It is that a long continued construction, given a long-standing statute by executive officers charged with its execution

and administration (no one meanwhile having questioned such construction so far as our reports disclose), is entitled to most respectful consideration and will not be overruled without cogent reasons."

On the occasion of *Holbrook* this Court had before it for guidance, not only a unanimous decision written
522 *522 by Mr. Justice COOLEY (*Johnson* v. *Ballou* [1874], 28 Mich 379), but also a long since mature opinion of the attorney general,[2] both of which amply supported the principle quoted above. The period of continuously unchallenged administrative interpretation and application involved in this case being at least as long as that considered in *Holbrook,* I would adhere to the even more firm convictions which this Court recorded in *Malonny* v. *Mahar* (1847), 1 Mich 26, 29, 30:

"The construction I have given to the statute is the construction which it has received by the executive department of the State government, and by the county treasurers, ever since the revised statutes went into operation, and its correctness has never, up to the present time, been questioned. This construction has become universal, and we are not disposed to disturb it at this time, without stronger reasons than were urged by counsel upon the argument. It has become, to some extent, a rule of property. Many titles depend upon it, and in this view it is important to sustain the acts of the deputy, unless his authority to do the act complained of is manifestly against law. This I have endeavored to show is not the case.

"In conclusion, we think that the deputy treasurer had, by a fair and reasonable construction of the statute, the authority to administer the oath required by section 9; and that this construction having been uniformly given to the statute by the State and county authorities, we have the right, even if the statute were doubtful, to invoke the aid of the legal maxim, *communis error facit jus,* and sustain his authority."

Communis error facit jus spells out, as I recall, that common error makes law. If it were error administrative
523 to construe and apply sections 9 and *523 10 of part 2 (CLS 1961, §§ 412.9, 412.10) as the department below has done for so many years — and that upon rehearing has become the more doubtful — I would say with *Malonny* that the error itself has made the law to which we owe fidelity.

SOURIS, J. (*dissenting*).

We granted rehearing of this appeal to reconsider only one of the three issues decided unanimously in 378 Mich 689. That issue is whether disability benefits provided by section 10 of part 2 of our workmen's compensation law[1] for specific losses of anatomical members are subject to the minimum and maximum limitations upon benefits contained in part 2, section 9.[2] On rehearing, my Brother O'HARA concludes, contrary to our prior decision, that they are.

He states that this Court, previous to our original decision in this case, had so construed the act; yet, he cites no case in which this Court rendered such a construction of the act. The fact is that this Court never before had considered the issue we decided on the first decision of this appeal. It is true, apparently, that the appeal board and the practitioners before that board had *assumed* that the limitations apply to specific losses, but such assumptions are mighty weak reeds to support a proud appellate court's construction of statutory language absent any showing that the assumed construction is consistent with the legislative scheme of compensation. No one, not even Justice O'HARA, yet has demonstrated that the legislature intended the limitations to apply to specific loss benefits. In fact, in our previous decision, at pages 703 to 705, we analyzed the legislative scheme of compensation and concluded, unanimously, that our holding,
524 now challenged, was consistent therewith. Without *524 even acknowledgment of that substantive analysis of the act, Justice O'HARA would reverse our decision simply because it upset the assumption of the

appeal board and because, he concludes mistakenly, the concept of minimum and maximum limitations upon compensation benefits is a settled, universal principle of our compensation law.

To paraphrase my Brother, there is no vested right in the continuation of appeal board error in the construction of a statute. It may be conceded that all courts should give "the most respectful consideration" (*United States* v. *Moore* [1878], 95 US 760 [24 L ed 588], as quoted in *Boyer-Campbell Co.* v. *Fry* [1935], 271 Mich 282, relied upon by Justice O'HARA) to the construction of a statute by those agencies charged with its administration; but their error of construction, however prolonged it may be, cannot be allowed by a court to foreclose its reasoned decision that the statute does not say what the administrators mistakenly believe it says. "Cogent reason" (again from *United States* v. *Moore, supra*) exists for overruling an administrative construction when a court concludes, as this Court did unanimously, that the legislative language compels a contrary construction and when such contrary construction based upon a "grammatical analytical approach" (see Justice O'HARA's opinion on rehearing) is consistent with the legislative scheme of compensation, as we found it to be in our substantive analysis of the act at pages 703-705 of our original opinion.

It is not true that minimum and maximum limitations apply to all other compensation benefits payable under our act. Consequently, the argument that such limitations therefore must have been intended to apply, as well, to specific loss benefits is specious. The fact is, as was noted in our previous *substantive* analysis of
525 the legislative scheme of *525 compensation, that of the other compensation benefits payable, *minimum and maximum* limitations apply only to "cases of total incapacity for work, where the injured worker theoretically retains no wage-earning capacity [and where] * * * the legislature impose[d] a minimum weekly benefit limitation, see part 2, § 9(a), in recognition of the need in such cases to provide at least a minimum subsistence level of benefits for that injured employee whose average weekly wage before injury was small." 378 Mich 689, 704. For all other workers whose incapacity for work is partial, there is no *minimum* limitation, but only a maximum, presumably because those workers likely are able to earn some wages during their disability. For those who suffer specific losses and who may or may not be disabled from earning wages, there is no minimum benefit limitation and the only maximum limitation is that provided by the specific loss paragraph of section 10 — two-thirds of claimant's average weekly wage. No one yet has pointed out any error in the logic by which we reasoned to this conclusion in our first decision:

"Our construction of the first sentence of the last paragraph of section 10, making it applicable only to the total and permanent disabilities defined in the provisions immediately preceding that sentence, is entirely consistent with the scheme of compensation benefits devised by the legislature, imposing maximum limitations determined by the number of a claimant's dependents upon all weekly benefits except for specific losses and imposing minimum limitations, similarly determined, only upon weekly benefits for total incapacity." 378 Mich 689, 704, 705.

Accordingly, I would reaffirm our previous decision and, upon remand for further proceedings, I would order
526 the appeal board to recompute plaintiff's *526 weekly benefit rate in accordance with Part III of our original opinion at 378 Mich 689. I would also allow plaintiff his costs on this rehearing.

T.M. KAVANAGH, J., concurred with SOURIS, J.

[*] PA 1912 (1st Ex Sess), No 10, as amended (CL 1948, § 411.1 *et seq.,* as amended [Stat Ann 1960 Rev and Stat Ann 1965 Cum Supp § 17.141 *et seq*.]).

[1] Shakespeare, Measure For Measure, act 2, scene 2.

[2] See OAG 1928-1930, pp 658, 659 — REPORTER.

[1] CLS 1961, § 412.10 (Stat Ann 1960 Rev § 17.160).

[2] CLS 1961, § 412.9 (Stat Ann 1960 Rev § 17.159).