COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 805631-85**
James Wilson (deceased)	Employee
Judith Wilson	Claimant
Western Massachusetts Electric Company	Employer
Western Massachusetts Electric Company	Self-insurer

REVIEWING BOARD DECISION

(Judges Costigan, Levine and Maze-Rothstein[1])

APPEARANCES

Donald W. Blakesley, Esq., for the employee
Ronald C. Kidd, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from an administrative judge's decision finding that the claimant widow is entitled to death benefits beyond the 250-week period of conclusively presumed dependency because she is "in fact not fully self-supporting." G. L. c. 152, § 31. The self-insurer maintains that the claimant is fully self-supporting by virtue of her receipt of monies from a structured settlement which resolved a loss of consortium lawsuit against her husband's employer. The self-insurer argues that excluding the claimant's loss of consortium damages from the determination of whether she is fully self-supporting grants her a double recovery in contravention of § 38 of the act. We disagree, and affirm the decision.

James Wilson died on May 1, 1997, as the result of an industrial injury sustained on October 1, 1985.[2] As his conclusively presumed dependent under

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[1] Judge Maze-Rothstein no longer serves on the reviewing board.

[2] Although the decision does not so indicate, the Board file reveals that the employee received weekly total incapacity benefits at the maximum base rate of $360.50 under §§ 34 and 34A until he died. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in the board file).

§ 32,[3] his widow, Judith Wilson, received the maximum payment of two hundred and fifty weeks of compensation pursuant to § 31.[4] (Dec. 2.) Prior to the expiration of those benefits, she filed a claim alleging that she was entitled to ongoing § 31 benefits because she had not remarried and was not fully self-supporting. (Self-ins. brief, 1.)[5]

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[3] General Laws c. 152, § 32, as amended by St. 1950, c. 738, § 4, provides in pertinent part:

> The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
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> (a) A wife upon a husband with whom she lives at the time of his death.

[4] General Laws c. 152, § 31, as amended by St. 1990, c. 177, § 347, provides in pertinent part:

> If death results from the injury, the insurer shall pay the following dependents of the employee . . . *wholly dependent* upon his or her earnings for support at the time of his or her injury, or at the time of his or her death, compensation as follows, payable, except as hereinafter provided, in the manner set forth in section thirty-two.
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> . . .
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> The total payments due under this section shall not be more than the average weekly wage in effect in the commonwealth at the time of the injury . . . multiplied by two hundred and fifty plus any costs of living increases provided by this section . . . except that *after a dependent unremarried widow or widower . . . has received the maximum payments, he or she shall continue to receive further payments but only during such periods as he or she is in fact not fully self-supporting*.

(Emphasis added.)

[5] The administrative judge incorrectly stated that the self-insurer's request for a discontinuance of § 31 benefits, following the expiration of the initial 250 weeks of payments, brought the case to a § 10A conference. (Dec. 1.) In fact, the case came to conference on the widow's claim for continuing § 31 benefits, but the judge erroneously characterized his conference order as an order denying modification or discontinuance. (Self-ins. brief 1, n.1.)

The question of whether a surviving spouse is fully self-supporting is, in the first instance, a factual issue for the administrative judge to decide. Marconi v. Crusader Paper Co., 10 Mass. Workers' Comp. Rep. 609 (1996); Murphy v. Salem State College, 8 Mass. Workers' Comp. Rep. 185 (1994). The judge found that Mrs. Wilson is an un-remarried, unemployed widow who receives no wages or salary and has only two sources of income in addition to her § 31 death benefits. (Dec. 4.) The first is a pension from the employer of less than $500 per month, and the second is the payout of a loss of consortium structured settlement reached in 1993,[6] whereby she a) received an initial payment of $100,000; b) receives monthly payments of $2,000 for life and balloon payments of $25,000 every five years (the first in 1998 and the second in 2003); and will receive a $100,000 payment when she reaches the age of eighty. (Dec. 3.)

To answer the question of whether Mrs. Wilson is "in fact fully self-supporting" under § 31, based on either or both of those sources of income, and therefore not entitled to continuing workers' compensation benefits, the judge looked to G. L. c. 152, § 38, as amended by St. 1986, c. 662, § 33, which states:

> Except as expressly provided elsewhere in this chapter, no savings or insurance of the injured employee[7] independent of this chapter shall be

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6 We note that the claimant's right to sue her husband's employer for loss of consortium based on his industrial injury arose before § 24 was amended to bar such suits. See Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass 507 (1980). In response to Ferriter, the legislature amended § 24 to provide, in relevant part, that if the employee has not given notice to his employer that he preserves his right of action at common law, the employee's spouse shall also be held to have waived any right to sue for loss of consortium resulting from the industrial injury. St. 1985, c. 572, § 35. That amendment took effect on December 10, 1985, see Powell v. Cole-Hersee Co., 26 Mass. App. Ct. 532 (1988), approximately two months after the employee's injury here.

7 The statute is applicable to Mrs. Wilson by virtue of the definition of "employee" in § 1(4), which provides in pertinent part:

> Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.

> considered in determining compensation payable thereunder, nor shall benefits derived from any other source than the insurer be considered in such determination.

The judge found that "both the pension benefits and the proceeds of the consortium claim should be considered as [a] type of 'benefits [derived] from any other source' contemplated by Section 38," and "are therefore not includable as income in the calculation of whether or not the widow is fully self-supporting." (Dec. 5.) In so doing, he relied on our decision in Chase v. Grief Bros. Corp., 8 Mass. Workers' Comp. Rep. 149 (1994), in which we interpreted § 38 as prohibiting using Social Security survivors' benefits for parents with dependent children to offset workers' compensation death benefits. Since they "constitute 'savings or insurance . . . independent of this chapter' or 'benefits derived from any other source' within the meaning of G. L. c. 152, § 38," such survivors' benefits "must be excluded in determining whether th[e] claimant is either fully self-supporting or entitled to continuing benefits under G. L. c. 152, § 31." Id. at 153. The judge concluded that:

> [T]he proceeds of the loss of consortium recovery are neither investment nor business income but rather a payment to an injured plaintiff in an effort to make her whole as the result of a serious injury that she herself received. It is compensation for an independent loss and should not be considered as a substitute for income.

(Dec. 5.) The judge also found that, even if both the monthly pension of less than $500 and the $2,000 monthly payments from the loss of consortium settlement could properly be considered in determining whether Mrs. Wilson is now fully self-supporting, the $2,500 combined total amount is less than her monthly living expenses, which he found to be $2,605. (Dec. 3, 4.) Accordingly, the judge awarded the claimant continuing benefits under § 31, at the maximum base rate of $360.50 per week in effect on the date of the employee's injury, beginning on

May 1, 2002 (when her entitlement to the initial 250 weeks of benefits ended). (Dec. 6.)

The self-insurer concedes that under § 38, the $89,000 Mrs. Wilson received as proceeds of her husband's life insurance policy, and the monthly pension she receives from her husband's employer, are excludable from the determination of whether she is fully self-supporting.[8] (Self-ins. brief, 4, 6.) It contends, however, that the judge erred in excluding her loss of consortium structured settlement payments from that determination. The self-insurer argues that those damages are not "benefits,"[9] that they are not "derived from any source other than the insurer," that exclusion from the self-support analysis is not contemplated by § 38, and that by excluding them, the judge has allowed a double recovery.

The self-insurer further contends that the claimant's receipt in 1993 of the initial $100,000 payment and the ballon payments of $25,000 every five years should be prorated, in the first instance over the ten year period from 1993 to

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[8] Section 38 specifically excludes "insurance of the injured employee" from consideration in determining compensation, and the court in Mizrahi's Case, 320 Mass. 733, 737 (1947), interpreted § 38 to exclude "pension plans governmental or otherwise" from consideration.

[9] Are loss of consortium damages "benefits derived from any other source than the insurer?" The term "benefit" is defined, in part, as, "[a]dvantage; profit, fruit; gain; interest. The receiving as the exchange for promise some performance or forbearance which promisor was not previously entitled to receive." Black's Law Dictionary 158 (6th ed. 1990.) The term "damages" is defined as, "[a] pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to another person injured by the tort of another." Id. at 389. While the two terms are not interchangeable, "damages" can be a category of "benefit." See, e.g., Goodridge v. Department of Pub. Health, 440 Mass. 309, 323-324 (2003)("the right to bring claims for wrongful death and loss of consortium and for funeral and burial expenses and punitive damages resulting from tort actions (G. L. c. 229, §§ 1 and 2; G. L. c. 228, § 1)" among the "statutory benefits" provided to married couples).

2003, and added to the claimant's $2,000 monthly loss of consortium payments. That calculation would increase her effective monthly payment from the settlement to $3,250, well in excess of her monthly living expenses of $2,605. Therefore, argues the self-insurer, Mrs. Wilson is fully self-supporting. (Self-ins. brief, 4.) We need not reach that second argument because we agree with the judge's finding that none of the loss of consortium payments should be considered in determining whether the claimant is fully self-supporting.

Although neither the language of § 38 nor Massachusetts case law clearly answers the question of whether the proceeds of a loss of consortium settlement should be excluded in determining a widow's entitlement to compensation, we are mindful that, " '[t]ime and again [the courts] have stated that we should not accept the literal meaning of the words of a statute without regard for that statute's purpose and history.' " Bongiorno v. Liberty Mut. Ins. Co., 417 Mass. 396, 401 (1994), quoting Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837, 839 (1986). "Statutes are to be interpreted 'according to the intent of the Legislature ascertained from all its words by the ordinary and approved usage of the language considered in connection with the cause of the enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.' " Taylor v. Trans-Lease Group, 34 Mass. App. Ct. 404, 409 (1993), quoting Industrial Fin. Corp. v. State Tax Comm'n., 367 Mass. 363, 364 (1975).

The limited case law construing § 38, though not precisely addressing the issue at hand, is instructive. In Mizrahi's Case, supra at 737, the Supreme Judicial Court identified the underlying purpose of § 38:

> This section was designed to make sure that the employee would not lose the full advantage of any savings or insurance of his own and of any sick benefits or other benefits to which he might be entitled from such sources as fraternal orders, benefit associations, pension plans governmental or otherwise, and the like. In that field it should be broadly construed. But it cannot reasonably be supposed that it was intended to save the employee

> the fortuitous advantage of receiving *double compensation for the same injury or incapacity.*

(Emphasis added.) The self-insurer characterizes the judge's exclusion of the loss of consortium payments as allowing "a double recovery, not only from the same accident, but from the same source, i.e., the Self-Insurer." (Self-ins. brief, 5.)[10] The self-insurer takes liberties with the holding in Mizrahi. The court identified the underlying purpose of § 38: to prohibit the receipt of "double *compensation* for the *same injury or incapacity*." Id. (Emphasis added.) Although both derive from the employee's 1985 industrial injury, the § 31 benefits the self-insurer pays Mrs. Wilson for the loss of her husband's earnings and support are not the same as the loss of consortium payments the employer pays her for her own independent injury which, it is important to note, arose prior to the employee's death, that is, the loss of his companionship and consortium due to his *injury*.[11]

"[A] wife's right to recovery for loss of consortium is well established." Ferriter, supra at 509, citing Diaz v. Eli Lilly & Co., 364 Mass. 153 (1973). (But see footnote 6, supra.) Her right to recover for loss of consortium resulting from personal injuries to her husband encompasses not only sexual relations with him but also his society and companionship. It does not, however, encompass her loss

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[10] Even if, as the self-insurer argues, the employer, as both the third party defendant and the workers' compensation self-insurer, are one and the same "source," we consider the employer's payment of loss of consortium damages to be a "private arrangement not approved by the board" that should not impair the widow's statutory rights under § 31. See Gould's Case, 355 Mass. 66, 72 (1968)(even though employee received disability benefits under the self-insured employer's plan, "Chapter 152 as a whole reflects a strong public interest in preserving employees' statutory rights unimpaired by private arrangement not approved by the board . . . . [I]n the absence of express statutory permission or direction," the self-insured employer was not allowed to credit disability payments against employee's workers' compensation benefits).

[11] Even before the post-Ferriter amendment to § 24, see footnote 6, supra, §§ 1(4) and 68 barred a *deceased* employee's dependents from recovering under G. L. c. 229, §§ 2 and 2B, for loss of consortium due to his *death*, as against an employer covered by c. 152. See Ferriter, supra at 528.

of financial support from her injured spouse during his lifetime. Id. at 161. Therefore, even though Mrs. Wilson continues to receive loss of consortium damages after her husband's death, due to the structured nature of the 1993 settlement, those damages, to an even greater degree than the Social Security survivors' benefits we addressed in Chase, supra, are different in nature and entirely distinct from the § 31 benefits she receives for the loss of her husband's earnings due to his death.

> Death benefits under the workers' compensation act serve as a substitute for the support previously provided by the deceased worker. Mother's and father's benefits serve a different purpose and are not intended to serve as a substitute for income lost from the deceased worker, although they result in some relief from the negative economic consequences of a parent's death.

Chase, supra at 152. Contrary to the self-insurer's argument, the widow's receipt of both does not constitute double recovery.

Neither this board nor the courts have dealt with the interplay between §§ 31 and 38 in any other cases.[12] However, because the strong policy against double recovery underlying § 38 is shared by § 15 of the act, the case law construing that statute provides important guidance.

Section 15 permits an employee injured by the negligence of a third party to receive, without election, workers' compensation benefits and to also seek damages from that third party. However, "[t]he sum recovered shall be for the benefit of the insurer, unless such sum is greater than that paid by the insurer to

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[12] To a limited extent, we have addressed the meaning of "in fact fully self-supporting" in § 31. In both Murphy, supra, and the predecessor to Marconi, supra, -- Marconi v. Crusader Paper Co., 8 Mass. Workers' Comp. Rep. 167, 168 (1994) -- we dealt primarily with the reasonableness of a widow's living expenses. In both cases, the widows earned their income, and there was no issue of whether their earnings should be excluded in determining whether they were in fact fully self-supporting. In Lee v. Universal Pre-Stressed Concrete, 8 Mass. Workers' Comp. Rep. 264, 265 (1994), we noted that "a widow or widower making claim under § 31 is under no obligation to support herself or himself even if he or she has the capacity to do so. See Locke, Workmen's Compensation, Mass. Practice Series, Vol. 29, § 379 at p. 454."

the employee." G. L. c. 152, § 15, as appearing in St. 1991, c. 398, § 39. "[T]he underlying principle of § 15 [is] the prevention of double recovery [by the employee] - 'once by way of compensation [paid by the employer or its insurer] and once by way of damages.' " Pina's Case, 40 Mass. App. Ct. 388, 392 (1996), quoting Percoco's Case, 418 Mass. 136, 141 (1994), quoting Richard v. Arsenault, 349 Mass. 521, 524 (1965).

Pursuant to § 1(4), a widow is "the employee" for purposes of § 15. (See footnote 7, supra.) But a widow's right to retain workers' compensation benefits in the face of receipt of damages for loss of consortium has existed for almost twenty-five years. In Eisner v. Hertz Corp., 381 Mass. 127 (1980), a widow collecting § 31 death benefits recovered damages against a third party for her husband's wrongful death, and for her loss of consortium. The court held that under § 15, the workers' compensation insurer was entitled to reimbursement for damages the widow recovered in the wrongful death action, because to deny such reimbursement would allow her a double recovery: the § 31 benefits she was paid for the loss of financial support due to her husband's death were of the same nature as the damages she received from the third party for his wrongful death. Id. at 132-133. The court held, however, that the workers' compensation insurer was *not* entitled to reimbursement for the loss of consortium damages the widow received from the third party. Id. at 133-134. As the court explained in a later decision:

> The claims of the spouse of an injured employee for loss of consortium . . . are entirely independent and distinct from the personal injury claims of the employee. Feltch v. General Rental Co., 383 Mass. 603, 607-608 (1981). Moreover, a spouse's loss of consortium is not a compensable injury under G. L. c. 152. Bongiorno v. Liberty Mut. Ins. Co., 417 Mass. [396], 404 n.9. Taylor v. Trans-Lease Group, 34 Mass. App. Ct. [404], 405 n.4, citing Eisner v. Hertz Corp., supra at 133-134. Hence, [the workers' compensation insurer's] lien for "benefits provided under this chapter [G. L. c. 152]" does not extend to that portion of the settlement that has been allocated to a nonemployee spouse for loss of consortium. See

> Bongiorno v. Liberty Mut. Ins. Co., supra; Walsh v. Telesector Resources Group, Inc., [40 Mass. App. Ct.] 227, 229 (1996).

Hultin v. Francis Harvey & Sons, Inc., 40 Mass. App. Ct. 692, 695 (1996). In other words, there is no double recovery, because the injuries being compensated under § 31 and under the loss of consortium settlement are different. Section § 31 benefits are "a substitute for the support previously provided by the deceased worker." Chase, supra at 152. Loss of consortium damages are paid as a result of the wife's loss of her husband's companionship and consort. See Hultin, supra at 697; Owens Corning Glass Corp. v. Industrial Comm'n, 198 Ill. App. 3d 605 (1990)(under § 5(b) of Illinois Workers' Occupational Diseases Act of 1983, self-insured employer was not entitled to a credit for wife's recovery in loss of consortium action brought by her during her husband's lifetime, against widow's benefits she was entitled to receive for her husband's death from work-related mesothelioma).

We think §§§ 31, 38 and 15 can be harmoniously read, and the case law construing those statutes can be consistently and properly applied, to conclude that Mrs. Wilson's receipt of loss of consortium damages, and payment to her of § 31 benefits beyond the five-year period of conclusively presumed dependency, do not constitute a double recovery prohibited under our workers' compensation act. The administrative judge correctly found that the claimant widow is not in fact fully self-supporting, and is therefore entitled to continuing § 31 benefits. Accordingly, we affirm the decision.

Pursuant to § 13A(6), the self-insurer is order to pay claimant's counsel a legal fee of $1,276.67.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **September 7, 2004**