

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 38426-96
03303-97**

Domenic DiGregorio
Elizabeth DiGregorio
Bethlehem Steel Corp.
Bethlehem Steel Corp.
Workers' Compensation Trust Fund

Employee
Widow
Employer
Self-Insurer
Insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy & Wilson)

APPEARANCES

David J. McMorris, Esq., for the widow
Scott E. Richardson, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq. for the self-insurer on brief
Paul R. Ingraham, Esq., for the Trust Fund

SMITH, J. The self-insurer and the Workers' Compensation Trust Fund ("Trust Fund") appeal from an award of § 31 benefits to a widow who married the employee after the date of his latent industrial injury. We conclude that § 35C, the latent injury provision of the workers' compensation act, is not broad enough to enlarge the scope of eligibility for benefits. The version of § 31 that applies to the case is that in effect on the date of the employee's last injurious exposure to asbestos. As this version of § 31 requires dependency on the date of injury, we are compelled by law to reverse the award of benefits and deny the widow's claim.

Elizabeth DiGregorio filed a claim for survivor's benefits following her husband's death from lung cancer. Because of the operation of G.L. c.152, § 35C, and G.L. c.152, § 65(2), the judge allowed Bethlehem Steel's motion to join the Workers' Compensation Trust Fund ("the Fund") as a party. After a § 10A conference, the judge issued an order denying the claim. (Dec. 2.) The widow appealed. After hearing, the judge found that the employee's cancer and resulting death was caused by occupational exposure to asbestos during his employment at the Quincy shipyard from 1941 to 1943. (Dec. 4.) The

judge ordered benefits based on the employee's out of state wages even though the widow was not married to Mr. DiGregorio on the date of last exposure in 1943. (Dec. 5-6, 7). Both the self-insurer and Trust Fund appeal.

Domenic DiGregorio worked for Bethlehem Steel Corporation, as a machinist, from the fourth quarter of 1941 until he was drafted into military service in the fourth quarter of 1943 and briefly after the war ended, for the last three quarters of 1946. (Dec. 3; April 15, 1998 Tr. 4; Employee's Ex. 3, 5.) While at the shipyard, Mr. DiGregorio was exposed to asbestos. (Dec. 3; April 15, 1998 Tr. 6.) Apparently, the workers in the crew above him were fitting pipes while he was in the machine area below. (Dec. 3; May 22, 1998 Tr. 8.) As a result, the employee was constantly covered in a light powder of asbestos, which was said to have fallen like snow. (Dec. 3; May 22, 1998 Tr. 8.)

Mr. DiGregorio married Elizabeth A. Watson on January 8, 1955. (Dec. 3; May 22, 1998 Tr. 5; Employee's Ex. 7.) Mr. DiGregorio died on November 14, 1994, of metastatic mesothelioma. (Dec. 3; May 22, 1998 Tr. 5; Employee's Ex. 3, 4.)

Mark Friedman, M.D., reviewed Mr. DiGregorio's medical records and prepared a report. (Dec. 3; Employee's Ex. 3.) Dr. Friedman reported that Mr. DiGregorio was diagnosed with metastatic mesothelioma approximately six months before he died. (Dec. 3; Employee's Ex. 3.) Dr. Friedman opined, within reasonable medical certainty, that Mr. DiGregorio's malignant mesothelioma diagnosed in July of 1994 and his death in November of 1994 were related to occupational exposure to asbestos-containing products during his employment at the Fore River Shipyard in Quincy from 1941 to 1943. (Employee's Ex. 3.)

The judge concluded that the widow was entitled to benefits under the Act by reasoning that certain conflicting language in G.L. c.152, § 31 merely intended to confer benefits on a particular class of dependents and not to define "widow," and that G.L. c. 152, § 32 supported such a conclusion. The self-insurer and the Trust Fund appeal from the award of benefits, arguing that the widow is not entitled to benefits and,

even if she is so entitled, the administrative judge erred in determining the average weekly wage.

In her decision, the administrative judge correctly concluded that the date of injury is the date of last exposure to asbestos¹ and that the law in effect in 1943 governs eligibility for benefits. (Dec. 4.) Section 31, as it existed on the date of injury provided, in pertinent part:

If death results from the injury, the insurer shall pay the *following dependents* of the employee, including his or her children from a former spouse, wholly dependent upon his or her earnings for support *at the time of his or her injury* compensation as follows, payable, except as hereinafter provided, in the manner set forth in section thirty-two.

To the widow. . . , so long as . . . she remains unmarried. . . .

St. 1943, c. 400 (emphasis supplied).

The administrative judge reasoned that the intent of this language was to confer benefits on the employee's children by a former spouse, who are fully dependent on the employee's earnings for support at the time of the injury. She concluded that this same language was not intended to define a "widow" as the person married to the employee at the time of injury. (Dec. 4-5.) We disagree.

We begin our analysis with the statutory language. Effect must be given to every word of a statute. U.S. Jaycees v. Massachusetts Comm'n. Against Discrimination, 391 Mass. 594, 602 (1984). Moreover, in construing a statute, its words must be given their plain and ordinary meaning according to approved usage of language. Letteney's Case, 429 Mass. 280, 284 (1999). Consideration must be given to every word and phrase. The language of a statute is not to be limited or enlarged unless the object and plain meaning so require. Johnson's Case, 318 Mass. 741, 747 (1945).

Section 31 authorizes compensation to "dependents of the employee, . . . , wholly dependent upon his . . . earnings for support *at the time of his . . . injury*" (emphasis supplied.) These plain words limit the application of § 31. The judge misconstrued § 31 by

¹ See Phillips's Case, 41 Mass. App. Ct. 612, 619 (1996), citing Squillante's Case, 389 Mass. 396, 397 (1983).

concluding that “wholly dependent upon his . . . earnings for support at the time of his . . . injury” modified the language “children by a former spouse” rather than all preceding phrases, including “the following dependents of the employee.” (Dec. 4-5.) The punctuation contained within the sentence, that is, the comma separating “dependents of the employee” and “including children of a former spouse” indicates a division in a sentence that separates items in a list. The American Heritage Dictionary 296 (2^d ed. College 1982).

Additionally, the judge erred in reasoning that § 32 of the Act supported her interpretation of compensable persons. (Dec. 5.) Nothing in § 32 abrogates or qualifies the prerequisite of § 31 that eligibility originates at the time of the injury. Section 31 fixes the amount of payments to those wholly or partially dependent at the time of the injury upon the earnings of an employee whose death results from the injury. Section 32(a), which classifies as wholly dependent “a wife upon a husband with whom she lives at the time of his death,” merely determines those persons defined as dependents in § 31 who will be conclusively presumed to be wholly dependent. “The conclusive presumption applies only to those who can bring themselves within the classification of dependents” under § 31. Gleasons' Case, 269 Mass. 583, 584 (1930).

“[T]he determination of the dependents of an employee is to be made as of the date of the injury and not the date of death.” Beausoleil's Case, 321 Mass. 344, 346 (1947). DiGregorio's widow was neither next of kin nor a member of the employee's family at the time of his injury, and thus cannot recover under the version of § 31 in effect on the date of his injury.

After the date of Mr. DiGregorio's injury, the Legislature expanded dependency coverage, overcoming the holding in Gleasons' Case, *supra*. It amended § 31 to add benefits for those persons who are dependent on the employee at the time of his death, as well as at the time of injury. St. 1950, c. 738, §§ 2 and 3. Under this version of § 31, the widow Elizabeth DiGregorio, who married the deceased employee after his injury, would receive benefits. The 1950 amendment did not, however, contain any expression of legislative intent that it should be applied retroactively to past injuries. We therefore look to

the general applicability provision in G.L. c. 152, § 2A, to determine whether the amendment applies to the widow's claim.

Section 2A, as worded in 1950, provided, in pertinent part:

Every act, in amendment of this chapter . . . which increases the amount or amounts of compensation payable to . . . dependents . . . shall, for the purposes of this chapter, be deemed to be substantive in character and shall apply only to personal injuries occurring on and after the effective date of such act, unless otherwise expressly provided. Every act, in amendment of this chapter, in effect on the effective date of this section or thereafter becoming effective which is not deemed to be substantive in character within the meaning of this section shall be deemed to be procedural or remedial only, in character, and shall have application to personal injuries irrespective of the date of their occurrence, unless otherwise expressly provided.

G.L. c. 152, § 2A, added by St. 1946, c. 386, § 3.

Elizabeth DiGregorio argues that, because the 1950 amendment to § 31 expanded the class of covered beneficiaries, it was procedural in nature and therefore must be applied retroactively. Although this argument has much humanitarian appeal, it has been raised before and rejected. In Price v. Railway Express Agency, Inc., 322 Mass. 476 (1948), the court held that a person who did not have a valid claim for compensation under the act at the time of the injury, could not have his claim converted into a good claim by subsequent legislative fiat, where the legislative act was silent about its application. Id. at 484-485. Following Price and § 2A, we hold that the 1950 amendment to § 31 is substantive and can only be applied prospectively to injuries occurring after its effective date.

As a result of questions raised in oral argument, and concerned about the harshness of the above applicability analysis, we invited the parties to brief the question of whether the 1950 version of § 31 was made applicable by virtue of § 35C. Section 35C reads in part:

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 . . . , the applicable benefits shall be those in effect on the first date of *eligibility for benefits*.

G.L. c. 152, § 35C, added by St. 1985, c. 572, § 45, and by § 66 deemed procedural (thus by G.L. c. 152, § 2A, made applicable to all dates of injury) (emphasis supplied). Section 35C allows the § 31 compensation rate to be calculated as of the date of death rather than as of the date of injury, where a period of five years or more has elapsed between the injury and the death. Section 35C applies to Domenic DiGregorio because his injury occurred in 1943, but his death did not occur until 51 years later. Section 35C is a legislative remedy for the disparity that would otherwise exist between wages lost and compensation received in those situations where there is a long delay between the injury and the commencement of benefits. This curative legislation by its terms merely addresses "benefits," not eligible beneficiaries. We are convinced, after a careful review of the supplemental briefs, that the language of § 35C is not sufficiently broad to cure the obsolete entitlement definition.

We construe the workers' compensation act broadly, rather than narrowly, in the light of its purpose and, so far as reasonably may be, to promote the accomplishment of its beneficent design. However, in so doing, we must give its words their plain and ordinary meaning according to the approved usage of language. We cannot by construction enlarge the language of the statute unless its object and plain meaning require it. Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998). The words of § 35C are plain and unambiguous: "the applicable benefits shall be those in effect on the first date of *eligibility for benefits*."

The reach of § 35C is demonstrated not only by the language that the Legislature employed, but also by the language it did not employ. The statute contains no language expanding the definition of eligibility. In the absence of a clear expression of legislative intent, we think it unlikely that the Legislature intended to do so. When it enacted § 35C in 1985, the Legislature is presumed to have been aware of Gleasons' Case, *supra*, which had construed § 31 to exclude from coverage widows who married after the date of injury. The Legislature is further presumed to know that § 2A would make inapplicable the 1950 amendment to § 31. See Price, *supra*. Reading § 35C in harmony with § 2A, we reluctantly conclude that, in expanding the category of eligible dependents under § 31,

the 1950 and 1985 Legislatures did not intend to be beneficent to this class of claimants. The hardship that exists in denying payments to a widow who is actually dependent on the earnings of a deceased spouse, to whom she was not married on the date of his pre-1950 injury, is a matter for the Legislature to address. See Eifler v. Flintkote, Inc., 13 Mass. Workers' Comp. Rep. 394, 398 (1999). Elizabeth DiGregorio never became eligible for benefits under § 31. Section 35C by its terms does not correct her ineligibility.

The self-insurer also argues that the judge improperly included out of state wages in determining the amounts of the widow's benefits. Letteney's Case, 429 Mass. at 285-286. However, this issue is rendered moot by our decision that the widow is not eligible for any benefits.

Because the award of benefits to the widow is contrary to law, we reverse it and order that her claim be denied.

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: June 23, 2000