COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 012354-97**

Joseph Freedman	Employee
Susan Freedman	Claimant
Suffolk County Sheriff's Office	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Richard Curtin, Esq., for the claimant at hearing
Paul M. Moretti, Esq., for the claimant on appeal
John T. Walsh, Esq., for the self-insurer

HARPIN, J. The claimant appeals from a decision finding her fully self-supporting pursuant to G. L. c. 152, § 31,[1] thereby terminating her spousal benefits under that section. We recommit the case for further findings for reasons stated below.

[1] General Laws, c. 152, § 31, states, in relevant part:

> If death results from the injury, the insurer shall pay the following dependents of the employee, including his or her children by a former spouse, 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 . . . To the widow or widower, so long as he or she remains unmarried, a weekly compensation equal to two-thirds of the average weekly wages of the deceased employee, but not more than the average weekly wage in the commonwealth, . . . provided, however, that in no instance shall said widow or widower, receive less than one hundred and ten dollars per week, to the widow or widower six dollars more a week for each child of the deceased employee under the age of eighteen or over said age and physically or mentally incapacitated from earning, or over said age and a full time student qualified for exemption as a dependent under section one hundred and fifty-one (e) of the Internal Revenue Code,
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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 as determined according to the provisions of subsection (a) of section twenty-nine of

The employee was a corrections officer for Suffolk County who died on April 11, 1997, while in the course of his employment. (Dec. 359.) His average weekly wage at the time of his death was $826.96. His wife (claimant) began receiving § 31 benefits at that time, and continued to do so until the date of the decision in this case. (Dec. 359, 365.) In 2012, the self-insurer brought a complaint to discontinue the claimant's benefits, on the ground that she was, in fact, fully self-supporting. (Dec. 359.) In that year the claimant worked as a registered nurse, making $46,538.38 annually, or $894.97 per week. (Dec. 360.) Her weekly § 31 benefit in 2012 was $551.30, supplemented by a Cost of Living Adjustment, pursuant to § 34B, of $199.74, giving her a total benefit of $751.04. (Dec. 360; Tr. 8.)

After a hearing, in which the claimant testified at great length as to her living expenses, the judge, in a very in-depth review, found that the total amount of the qualified weekly expenses was $768.50, "substantially below her average weekly wage of $894.97." (Dec. 365.) He then found that she was "now fully self-supporting and is no longer entitled to survivors (sic) benefits pursuant to section 31." Id.

The claimant appeals, alleging the judge improperly discounted certain claimed expenses, which, had they been included as part of her weekly living costs, would have resulted in a total greater than her earnings. She therefor asks that the judge's decision

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> chapter one hundred and fifty-one A, and promulgated by the deputy director of unemployment assistance on or before the October first prior to the date of the injury multiplied by two hundred and fifty plus any costs of living increases provided by this section except that payment to or for the benefit of children of the deceased employee under the age of eighteen shall not be discontinued prior to the age of eighteen, and except that after a dependent unremarried widow or widower or physically or mentally incapacitated child over the age of eighteen 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. Either party may request hearings at reasonable intervals before a board member on the question of granting such payments, or on the question of restoration of such payments or on the question of discontinuance of such payments. A member of the board may set a case for hearing on his or her initiative, after due notice to both parties.

be reversed, that she be found to remain "not fully self-supporting," and thus entitled to continuing benefits pursuant to § 31.

The claimant first argues the judge incorrectly considered the employee's average weekly wage at the time of the employee's death as the benchmark for determining whether the claimant was fully self-supporting, rather than taking into account both the claimant's and the employee's wages at that time to set her standard of living. However, this argument is not congruent with what the judge actually did and was required to do.

The judge properly looked at what the claimant claimed were her weekly expenses ($1,335.60), and then determined which were "necessary and reasonable." This analysis is consistent with our decisions, and takes into account the claimant's standard of living at the time the continuing § 31 benefits were sought, rather than being based on a mathematical calculation of the employee's and claimant's total earnings on the employee's date of death. Murphy v. Salem State College, 8 Mass. Workers' Comp. Rep. 185, 186 (1994)("The administrative judge may weigh the reasonableness and the necessity of costs claimed by the widow. To hold otherwise would make an insurer liable for any expenses incurred by a surviving spouse, however extravagant or outlandish, and would encourage spendthrift behavior.") The judge then matched the permitted expenses with the claimant's actual weekly earnings. Id.; Marconi v. Crusader Paper Company, 10 Mass. Workers' Comp. Rep. 609, 611, (1996). (Dec. 365.) This is all he was required to do.

The claimant next asks us to review certain excluded expenses, and find as a matter of law that those expenses are within the established § 31 criteria for allowable costs. We have said before that "our standard of review does not extend to what conclusions we would have reached had we been the finders of fact, but is instead limited to whether there is sufficient evidence, including all rational inferences therefrom, to support the judge's decision." Marconi, supra. However, we will examine such findings if they "edge[] into the realm of whim or caprice," id., or are contrary to law.

Before we examine the claimant's argument, however, it is worth noting that there is not a "redline" for determining whether an expense is reasonable or necessary, as each

case must be determined on its own merits, with due consideration given to each individual claimant's standard of living. "[W]idows accustomed to higher standards of living should be allowed higher earnings before being deprived of compensation benefits." Kistin, Dependency Benefits Under the Massachusetts Workmens' Compensation Act, 5 Boston College Industrial and Commercial Law Review, 530, 564-565 (1964), as cited in Marconi, supra, at 612. "The Legislature . . . could not have meant to depress all surviving spouses to any common denominator of living standards." Id.

The claimant argues the judge erred in finding her daughter's college expenses not reasonable and necessary.[2] She maintains that nothing in the statute requires expenses to be "necessary," a contention we have previously rejected, and do not revisit. See Murphy, supra. She further argues the judge lacks authority to decide whether the claimant "can choose to pay for her daughter's college education." (Claimant br. 15.) She also argues that, in any event, the statute contemplates the continuance of dependency benefits when a child reaches the age of eighteen but is enrolled full-time in college.[3] For the following reasons we hold that college tuition must be factored into a determination whether a widow or widower is fully self-supporting.

We begin by noting that § 31 is silent regarding whether college expenses for a child of the deceased employee over the age of eighteen may be considered to be a reasonable and necessary expense of the widow. Where a statute is silent on an issue, we interpret it in the context of the overall objective the legislature sought to accomplish. Seller's Case, 452 Mass. 804, 810 (2008). That analysis must be made, of course, with an acknowledgement of the beneficent design of the Act. See Spaniol's Case, 466 Mass.

[2] There is no dispute the claimant's college-age daughter is the employee's offspring.

[3] The claimant misinterprets that language, for that provision refers to the situation where the widow receives less than $150.00 per week, and qualifies for an additional $6.00 per week for each child in college, until the $150.00 maximum is reached. O'Day v. Hingham District Court, 10 Mass. Workers' Comp. Rep. 370, 372 (1996). The provision does not contemplate the continuation of § 31 benefits to non-incapacitated full-time college students over eighteen. Beal v. City of Newton, 9 Mass. Workers' Comp. Rep. 248, 250 (1995).

102, 107 (2013)(Workers' Compensation Act "is to be construed 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"); Litchfield v. Town of Westford, 27 Mass. Workers' Comp. Rep 71, 80 (2013); Higgins's Case, 460 Mass. 50, 53 (2011), quoting Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998).

The judge assumed that any costs of college expenses were not "contemplated by the writers of section 31." (Dec. 364.) He also found that, "I am not aware of any instance in which expenses related directly to an adult child's college education expenses were accepted as an expense in a section 31 'fully self-supporting' analysis." Id. After referring to alternate ways of paying for college, such as taking on "onerous debt," part-time study, delayed entry, or ROTC, the judge concluded: "Section 31 was not created to save the claimant's daughter and the many others like her, from using these or other strategies to obtain a college education." Id. The fundamental error made by the judge, however, was in assuming that college expenses were solely for the benefit of, and a cost to, the claimant's daughter, and not attributable to the claimant. This fails to take into account the "beneficent design" of the Act generally and of § 31 specifically, and verges into caprice or whim, requiring our intervention. Marconi, supra.

The policy of encouraging post-high school education is manifest in § 31's provision that additional benefits of $6.00 per week shall be paid "to the widow or widower for each child of the deceased employee over [the age of eighteen] and a full-time student qualified for exemption as a dependent under Section one hundred and fifty-one (e) of the Internal Revenue Code . . . ."[4] We do not cite this provision of § 31 to highlight the explicit benefits provided therein, however, but rather to demonstrate the legislature's contemplation and recognition of this particular class of dependents, thus signaling the necessity for analysis of their interests in the context of the beneficent design of the statute.

[4] The IRS Code section has since been redesignated. See note 5, *infra*.

We find support for our analysis in Correia's Case, 275 Mass. 340, 343 (1931), where the Supreme Judicial Court held that costs incurred in raising a minor child are considered as expended for the parent's own purposes, as she has a duty to furnish reasonable support to the child. In addition, when parties divorce, a court determines whether this duty is fulfilled, as it "may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties." G. L. c. 208, § 28. The court may also

> make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree.

Id. The requirement of paying for post-high school education for adult children up to the age of twenty-three can thus be a discretionary policy consideration in fashioning a support obligation enforceable in a court order. McCarthy v. McCarthy, 36 Mass.App.Ct. 490, 493-494 (1994).

In consideration of the policies acknowledging the primacy of education**,** and the beneficent purpose of the Act, we hold, as a matter of law, that the reasonable cost of a college education for any former dependent of a deceased employee is a necessary expense of a surviving spouse, and must be considered in determining whether the spouse is fully self-supporting under § 31.[5] Just as it would be arbitrary and capricious for a

[5] We recognize that the statute explicitly defines "student" with reference to the Internal Revenue Service, and that Code refers to full-time students as those attending an educational institution up to the age of 24. The phrase "a full time student qualified for exemption as a dependent under section one hundred and fifty-one (e) of the Internal Revenue Code" was added to § 31 in 1974 (St. 1974, c. 438 §1), at which time the reference to the section for the definition of a "dependent" under the Internal Revenue Code was correct. However, in 1986, § 151(e) was redesignated as §151(c) by Pub. Law L. 99-514. Subsection (c) was then amended generally by Pub. Law L. 108-311 in 2004. Currently, 26 USC § 151(c) states "An exemption of the exemption amount for each individual who is a dependent (as defined in section 152) of the

judge to hold that expenses for food, housing, or clothing should not be factored into computing a widow's or widower's reasonable and necessary expenses, so too is the exclusion of expenses for a non-minor child's college costs. As rising tuition costs increasingly place a crushing financial burden on those seeking a college education, parental support is not only reasonable, but essential. We do not differentiate between full and part-time attendance at a post high school institution, as our analysis is concerned solely with the expense to the claimant. However, we adopt the Internal Revenue Service Code's age restriction and limit includable college expenses to those incurred only up to the child's twenty-fourth birthday.

The judge must still determine whether the expenses are reasonable in the same way that all other expenses are so determined. The judge found "the claimant and her daughter are to be commended for finding a quality education at a fine college (Suffolk University) for 'only' $22,000.00 a year." (Dec. 364.) Were it not for the fact that the claimant's daughter had not yet begun college at the time of the hearing, we could infer the judge's findings indicate the projected expenses were reasonable. However, there is no evidence indicating that any expenses related to college had yet been incurred. Under

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taxpayer for the taxable year." 26 USC § 152(a)(1) states: "(a) For purposes of this subtitle, the term "dependent" means (1) a qualifying child." Section 152(c) states: "(c) The term "qualifying child" means, with respect to any taxpayer for any taxable year, an individual— (C) who meets the age requirements of paragraph (3)." Section 152(c)(3)(ii) states: "Age requirements (A) For purposes of paragraph (1)(C), an individual meets the requirements of this paragraph if such individual is younger than the taxpayer claiming such individual as a qualifying child and— (ii) is a student who has not attained the age of 24 as of the close of such calendar year." 26 UCS § 152(f)(2)(A) states: "The term "student" means an individual who during each of 5 calendar months during the calendar year in which the taxable year of the taxpayer begins— (A) is a full-time student at an educational organization described in section 170(b)(1)(A)(ii)." Finally, "educational organization" is defined at 26 USC §170(b)(1)(A)(ii) as "an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on."

the circumstances, findings regarding the actual expenditures relating to college are required, and we therefore recommit this case for further findings on that issue.[6]

The claimant next argues the judge erred by excluding her expenses for daycare for her minor daughter, who is not the daughter of the employee, and was born several years after the employee's death. The weekly daycare cost was $88.38, half of which was paid by the daughter's father, leaving the claimant to pay $44.19. The judge rejected any payment of the daycare expenses. (Dec. 362.) The claimant argues that these payments are necessary, as they "allow[] her to work to provide earnings to be included in the 'self-supporting' analysis." (Claimant br. 19.)

The issue is whether costs incurred for out-of-home care of a minor child, not the offspring of the deceased employee, should be considered when determining the amount of allowed expenses under § 31. We find, in line with our reasoning for college expenses, that such costs must be attributed to the claimant for maintenance of her standard of living, Correia, supra, as long as they are reasonable. It is hard, however, to contemplate a daycare expense that could be any more reasonable than $44.19 per week; thus we agree with the claimant and find that this cost should be included in the total of considered expenses.

The claimant's next argument has merit, in part, and also requires recommittal for further findings. The claimant asserts the judge used an incorrect amount for her weekly grocery bill, and improperly failed to take into account the pay-down amount on her credit cards. The judge wrote, in a spreadsheet incorporated with the decision, that the claimant's weekly grocery bill was $37.50, yet in a footnote explaining that amount noted the claimant's submitted list of weekly purchases averaged $148.35. He references Exhibit 11, which does indeed show that average over eleven separate weeks. This error,

[6] We also note the judge, without making a finding, referred to incidental expenses related to college attendance, and felt these could total $100.00 per week. (Dec. 365.) If the judge, on recommittal, finds that such expenses are reasonable and necessary to maintain the claimant's standard of living and are not strictly for maintenance of the daughter, then he may consider them in his calculations as well.

if it is an error, is compounded by the fact that the judge then divided the $37.50 by two, to arrive at a weekly grocery bill attributed solely to the claimant (and not to her partner and their daughter) of $18.75, which he then added to the expenses he deemed to be reasonable and necessary. The claimant also asks that we find that parsing the grocery bill by deducting an amount that would be used to feed non-related persons is arbitrary. She states that, "[i]t is irrelevant under a Section 31 analysis who is invited to join [the claimant]. Should [the claimant] entertain frequently, are expenses associated with the preparation of those meals excluded?" (Claimant br. 19.)

The correct analysis of the grocery bill involves whether the claimant has sufficient income to support herself in her reasonable standard of living, not who eats what during a normal week. The emphasis must be on whether the claimant's meals are reasonable for her family situation, an analysis the judge chose not to make, relying instead on a numerical calculation, by assuming that half of the meals are eaten by persons not related to the employee. This is too arbitrary a determination. Instead, the judge on recommittal must consider whether the claimant's grocery bill is reasonable, given her family situation, without trying to artificially divide out the participants at the meals. He must also use the correct amount of the average bill, which, given this record, was $148.35 per week. If he finds that the reasonable and necessary expense is less than that amount, his findings must state with particularity why the claimant's reasonable standard of living requires that reduction.

The claimant's final argument is that an allocation of only $45.00 per week to pay down her Visa credit card bill is arbitrary, as that amount, approximately the minimum payment, does not take into account the fact her running balance is close to $13,000.00. At oral argument the claimant's attorney argued that having such a large balance, which the claimant was able to service only with the minimum payment, meant that she had to use credit to get by, and therefore she was not fully self-supporting for that reason alone. However, the attorney was not able to proffer a specific weekly amount attributable to the credit card to be added to the judge's determination of expenses. (OA Tr. 14.) Nor has the claimant ever provided an actual credit card monetary figure

for inclusion in her weekly expenses that is different than that found by the judge to be reasonable and necessary.[7] We see nothing to support a finding that, as a matter of law, the judge erred in reaching the conclusion he did as to the allowable credit card payments. We also reject the claimant's assertion that having a high credit card balance alone is indicative of not being fully self-supporting. There is nothing in the record that sets out how the claimant reached that balance; thus there was nothing for the judge to consider in determining whether the expenses were reasonable and necessary. A *per se* rule that a high balance must mean a claimant is not fully self-supporting would rely on anecdotal evidence, and therefore we decline to follow it.

This case is recommitted for further findings consistent with this decision. Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under section 13A(7). If such fee is sought, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until that fee agreement is reviewed and approved by this board.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard F. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **July 28, 2016**

[7] No amount was offered as evidence at hearing, and the claimant's appellate brief and oral argument before the board are devoid of any specific claim.