COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007759-09**

Marian Lawton	Claimant
Francis X. Lawton (deceased)	Employee
Hartford Roofing Co., Inc.	Employer
National Fire Insurance Co. of Hartford	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Levine)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Raipher D. Pellegrino, Esq., for the claimant
Martin T. Sullivan, Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision in which the administrative judge reinstated the claimant's § 31 widow's benefits because her benefit-terminating remarriage was annulled, and because he found she was "in fact not fully self-supporting." See §§ 31 and 38.[1] On both counts, we agree with the

[1] General Laws c. 152, § 31, provides, in pertinent part:

> If the widow or widower remarries, all payments under the foregoing provisions shall terminate. . . .
>
> [A]fter 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. 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.

General Laws c. 152, § 38, provides:

> Except as expressly provided elsewhere in this chapter, no savings or insurance of the injured employee independent of this chapter shall be considered in determining compensation payable thereunder, nor shall benefits derived from any other source than the insurer be considered in such determination.

See also G. L. c. 152, § 1(4), which provides, in pertinent part:

insurer that benefits should not have been reinstated. The insurer also argues the judge erred in finding that the proceeds of a § 15 third party settlement should not be part of the calculation of whether the claimant was "in fact not fully self-supporting." We agree that the judge erred in excluding the settlement proceeds from the § 31 calculation. We reverse the decision and vacate the award.

We summarize the pertinent facts. On December 19, 1989, the claimant's husband died immediately from injuries sustained in a work-related fall from scaffolding. (Ex. 4.) The insurer commenced payment of widow's benefits of $474.47 per week, then the average weekly wage in the Commonwealth and the statutory maximum rate under § 31, exclusive of cost-of-living adjustments under § 34B.[2] In July 1992, the claimant settled a third party action arising out of the death of her husband for $1,000,000. After payment of legal fees, costs, and the workers' compensation insurer's lien, the claimant received net settlement proceeds of $601,659.52. (Ex. 4.)[3] The claimant remarried on May 28, 2008. Almost a year later, the insurer learned of the remarriage and terminated payment of § 31 benefits, effective April 1, 2009. (Dec. 4; Ins. br. 3.) The claimant resided with her new husband until December 24, 2008. On the basis of failure to consummate the

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> 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.

[2] Under G. L. c. 152, § 31, then and now, death benefits payable to a conclusively presumed dependent surviving spouse are limited to the average weekly wage in the Commonwealth multiplied by two hundred and fifty, after which the dependent unremarried widow or widower "shall continue to receive further payments but only during such periods as he or she is in fact not fully self-supporting."

[3] The $666,666.67 amount cited by the judge, (Dec. 6), represented the net settlement proceeds after deduction of a $333,333.33 legal fee, but did not take into account reimbursement of $22,673 in costs and a net payment of $42,334.15 to the workers' compensation insurer for its lien. Upon approval of the third party settlement, pursuant to Hunter v. Midwest Coast Transp., Inc., 400 Mass. 779 (1987), the insurer exercised its offset rights and reduced its weekly payment to the claimant to $158.16, plus cost-of-living adjustments. (Ins. br. 2-3; Dec. 4; Ex. 4.)

marriage, the husband filed for an annulment, which the Florida courts granted on October 5, 2009. (Dec. 5.) In January 2010, the claimant filed a claim for reinstatement of weekly § 31 benefits. The insurer challenged her entitlement to those benefits on the basis that she was fully self-supporting.

At the time of the evidentiary hearing in August 2010, the claimant, then seventy-one years old, (Tr. 7), retained at least $450,000 of the third party settlement proceeds in an investment account. (Dec. 6.) Applying § 38, the judge found that the settlement proceeds (and the income they produced) should be excluded from the calculation of whether the claimant was "in fact not fully self-supporting," in order to determine her continuing eligibility to § 31 benefits. (Dec. 7.) The insurer had argued that Wilson's Case, 67 Mass. App. Ct. 1 (2006), compelled a different result. The judge disagreed:

> In Wilson, the widow was receiving a monthly payment from a loss of consortium settlement which the court classified as income. In the present case the [claimant] has invested assets that are the proceeds from a lump sum [sic] third party settlement that was subject to Section 15.[4] If utilized to supplement the widow's income then these proceeds are sufficient to pay her bills for a long time and make her totally self supporting. I find that the employee has assets of at least $450,000 available that are the result of her third party settlement. The Wilson decision does not address whether the principal invested should be considered. I find that these funds are no different than savings and should be excluded under § 38. The degree that they may constitute double compensation has already been factored through the Hunter, [supra], offset of the § 15 agreement. I find that the widow is not fully self supporting and should continue to receive her benefits pursuant to Section 31.

(Dec. 7.) The judge also found that the annulment of the claimant's remarriage

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[4] General Laws c. 152, § 15, provides, in pertinent part:

> Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee shall be entitled, without election, to the compensation and other benefits provided under this chapter. . . . The sum recovered [in any proceeding against such person] shall be for the benefit of the insurer, unless such sum is greater than that paid by it to the employee, in which event the excess shall be retained by or paid to the employee.

rendered the marriage void ab initio. He therefore reinstated the claimant's § 31 benefits, retroactive to their termination on April 1, 2009. (Dec. 6, 8.)

We first consider the annulment issue, as it provides an independent basis for vacating part of the § 31 award. In Callow v. Thomas, 322 Mass. 550 (1948), the Supreme Judicial Court recognized that the annulment of a marriage makes it void ab initio. However, the effect of that result has limits:

> While it doubtless is true that a decree of nullity ordinarily has the effect of making a marriage, even one which is voidable [for reason of failure to consummate[5]], void ab initio, this is a legal fiction which ought not to be pressed too far. To say that for all purposes the marriage never existed is unrealistic. Logic must yield to realities. Public policy requires that there must be some limits to the retroactive effects of a decree of annulment. . . . The better rule, we think, is that in the case of a voidable marriage, transactions which have been concluded and things which have been done during the period of the supposed marriage ought not to be undone or reopened after the decree of annulment.

Id. at 555. See also Gleason v. Galvin, 374 Mass. 574 (1978)(status of tenancy by the entirety, during period of marriage, stands, even though annulment thereafter changed status to tenancy in common).

The insurer contends that the termination of the claimant's right to § 31 benefits by virtue of her remarriage, although ultimately annulled, should be characterized as such a "thing which has been done," and therefore not to be reopened. We disagree. Instead, we view the marital status, prior to its annulment, as a legitimate basis upon which the insurer terminated § 31 benefits. This application of Callow and Gleason is the correct one: the claimant's remarriage was voidable by judicial action of annulment, but for the purpose of § 31, was not void ab initio, and the termination of § 31 benefits based on that relationship ought to be considered the "thing which has been done," until the marriage was annulled on October 5, 2009. The judge erred by treating the marriage as completely void ab initio, and ordering

[5] Such marriages are distinguishable from marriages prohibited by law, e.g., for reasons of consanguinity or bigamy. See G. L. c. 207, §§ 1, 2, 4.

retroactive reinstatement of § 31 benefits prior to the effective date of the annulment. See Nason, Koziol and Wall, Workers' Compensation § 21.8 (3d ed. 2003).

As to the issue of whether the claimant "is in fact not fully self-supporting" for the purpose of continuing § 31 payments, we agree with the insurer that the holding in Wilson, supra, controls, and the claimant's aforesaid third party settlement proceeds must be considered. Citing to § 15, the Wilson court noted that a "settlement . . . made in the context of a tort claim . . . has long been open to consideration under the Act." Id. at 7 n.10. It reasoned:

> The settlement payments are not savings or insurance. Nor can the settlement payments be characterized as "benefits" due the claimant. . . . Payments derived from a tort settlement (or judgment) are not the product of a benefit scheme to which the employee (or claimant) contributed. Nor is such a settlement equivalent to a "private arrangement" with the employer [citation omitted] that could potentially be excluded from consideration of the claimant's income pursuant to § 38. We believe an effort to construe § 38 to encompass the settlement payments here would do violence to the provisions of the statute and run counter to the design of the Act as a whole.

Id. at 7.[6] Hence, the judge's conclusion that the § 15 proceeds held by the claimant in the present case were akin to savings cannot stand.

The Wilson court made clear that the § 38 exclusionary rule stands independent of the double recovery considerations underlying § 15's offset provisions:

> Section 31's command that a surviving spouse may only receive continuing death benefits during periods when she "is in fact not fully self-supporting" is wholly concerned with ensuring that such benefits are provided to those truly in need. *That has nothing to do with the legislative concern expressed in § 15 that an employee should not receive a windfall by way of recovery in a third-party action attendant to the underlying workplace accident.*

Id. at 8 (emphasis added). Because "the Legislature did not intend to provide for continuing benefits without a showing of need by a claimant," id., the judge erred by

[6] "Benefits," as used in § 38, refer to "any sick benefits or other benefits to which [the employee or dependent] might be entitled from such sources as fraternal orders, benefit associations, pension plans governmental or otherwise, and the like." Mizrahi's Case, 320 Mass. 733, 737 (1947).

not considering the § 15 settlement proceeds in the § 31 "not fully self-supporting" analysis.

Moreover, it is axiomatic that the claimant bears the burden of proving every element of her claim. Ormonde v. Choice One Communications, 24 Mass. Workers' Comp. Rep. 149, 154 (2010), citing Sponatski's Case, 220 Mass. 526 (1915). Here, the essential element the claimant had to prove was that she was "in fact not fully self-supporting." Just as an insurer's illegal discontinuance of weekly benefits does not necessarily result in a restoration of those benefits, absent a showing by the employee of ongoing incapacity, the claimant was not entitled to restoration of her widow's benefits, for any period following the insurer's lawful termination, absent a showing she was not fully self-supporting. In that regard, the judge found:

> In the present case the employee [sic] invested assets that are the proceeds from a lump sum [sic] third party settlement that was subject to Section 15. If utilized to supplement the widow's income then *these proceeds are sufficient to pay her bills for a long time and make her totally self-supporting.* I find that the employee [sic] has assets of at least $450,000 available that are the result of her third party settlement.

(Dec. 7; emphasis added.) These findings stand independent of the judge's erroneous interpretation of the holding in Wilson. The finding that the widow had $450,000 in assets available at the time of the hearing in August 2010 compels the inference that her assets were at least equal to, and probably greater than, that amount in the period between October 5, 2009, the date of the annulment, and the hearing. The judge further found:

> Employee [sic] has cash assets of $903,000 in investment accounts. At issue is whether these may be considered or whether they are excluded pursuant to Section 38. At least $450,000 of these funds are derived from the third party settlement and the balance from other sources such as the sale of real estate. The widow has monthly income from various sources of $4,311.37. I find that the portions from Social Security, Stop and Shop pension and the IRA are excluded pursuant to Section 38. This brings her monthly income from her investments ($2052.00) substantially below her monthly expenses which I find to be $4,290.42. I do not find the changes on the monthly expenses sheet made in pen credible. Her monthly expenses are double the income that is not excluded. I do not find her fully self supporting based upon the consideration

of her income and expenses.

(Dec. 6-7.)

Applying the claimant's $450,000 in assets to her monthly expenses of $4,290.42, as found by the judge, on a strict pay-down basis, *without* including either prospective interest to be earned on those assets, the monies realized from the sale of real estate, or her non-excludable monthly investment income, her monthly expenses would be covered for at least 8.7 years beyond the hearing date. Even factoring in the approximately one-year period from the date of the annulment to the filing date of the judge's decision, that period exceeds seven years. Thus, the claimant was and remains in fact fully self-supporting throughout the entire period at issue, and not entitled to any § 31 benefits.[7]

Accordingly, we reverse the decision and vacate the award of benefits. The statute reserves to the claimant the right to file a claim for restoration of § 31 benefits, should she become in fact not fully self-supporting: "Either party may request hearings at reasonable intervals before a board member . . . on the question of restoration of such payments. . . ." G. L. c. 152, § 31.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

[7] In Wilson, supra, the court stated that consideration must be given to "[w]hether or how to prorate" certain of the third party settlement proceeds, to wit, periodic balloon payments contained in the structured settlement agreement. Id. at 9 n.11. Here, the claimant's third party settlement contained no such payments. Taking judicial notice of the National Vital Statistics Reports (United States 2007), Vol. 59, No. 9 (September 28, 2011), see Richards v. McKeown, 9 Mass. App. Ct. 838 (1980), we note that the seventy-one year old claimant's actuarial life expectancy in 2010 was approximately fifteen years, or 180 months. Even if the $450,000 third party settlement proceeds are prorated over that life expectancy, that calculation produces a monthly income of $2,500. When that amount is added to the $2,052 in monthly investment income the judge found the claimant has, her monthly assets, not excludable under § 38, total $4,552, in excess of her monthly expenses of $4,290.42, as found by the judge. (Dec. 6-7.) Thus, whether on a strict pay-down or prorated basis, the claimant's third party settlement proceeds rendered her fully self-supporting from and after the insurer's lawful termination of § 31 benefits.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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