COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 000590-96**
Richard K. Kerstgens (deceased)	Employee
Nancy Kerstgens, Administratrix	Claimant
Babson College	Employer
NEEIA Compensation, Inc.	Insurer

Corrected Decision

REVIEWING BOARD DECISION

(Judges Horan, McCarthy[1] and Costigan)

APPEARANCES

Paul Nyer, Esq., for the claimant
Douglas F. Boyd, Esq., for the insurer
Alan S. Pierce, Esq., for the *amicus curiae,*[2] on appeal

HORAN, J. The claimant[3] appeals the administrative judge's decision denying her claim for § 31 death benefits.[4] The question of first impression is

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[1] This case was initially assigned to a panel comprised of Judges Horan, Costigan and Fabricant. The proposed decision of that panel, with a dissenting opinion, was thereafter circulated to the remaining two members of this Board. These "off panel" members agreed with the proposed dissent. In keeping with our past practice when faced with this scenario, the panel was reconfigured to ensure that our decision reflected the view of the Board's majority. This is similar to the practice of our Appeals Court's handling of published decisions. See Commonwealth v. Gross, 64 Mass. App. Ct. 829, 830 at n.2 (2005).

[2] The Massachusetts Academy of Trial Attorneys.

[3] The claim was not filed by the child's mother, but by the employee's mother as administratrix of his estate. The insurer does not challenge her standing. See G. L. c. 152, § 39, which provides, in pertinent part:

> The compensation payable in case of the death of the injured employee shall be paid to his legal representative. . . .
> [and]
> When the appointment of a legal representative of a deceased employee . . . or dependent who is a minor . . . is required to comply with this chapter, the insurer shall furnish or pay for legal services rendered in connection with the appointment of

whether a daughter not conceived on the employee's injury date, but *in utero* at the time of her father's work-related death, may qualify as a dependent under the provisions of G. L. c. 152, § 32. The claimant attempted to establish dependency by utilizing the conclusive presumption in § 32(c).[5] The judge found § 32(c) inapplicable to the facts of the case. We agree. However, we recommit the case for further proceedings under the catchall dependency in fact provision of the final paragraph of § 32.[6] We also award § 33 burial benefits, and a § 13A(5) attorney's fee, as the claimant did establish the employee's death by suicide was work related under § 26A,[7] a determination that is unchallenged.

The employee injured his back at work when he fell down a flight of stairs

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such legal representative. . . .

[4] The claimant also sought § 33 burial benefits, and a § 13A attorney's fee; insurer's counsel, at oral argument, agreed these benefits should have been ordered once the judge found the employee's death was related to the industrial accident.

[5] General Laws c. 152, § 32(c), 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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> . . .
>
> (c) Children under the age of eighteen years . . . upon the parent with whom they are living at the time of the death of such parent, there being no surviving dependent parent. . . . Children, within the meaning of this paragraph, shall also include any children of the deceased employee *conceived but not born at the time of the employee's injury*, and the compensation provided for by this chapter on account of any such children shall be payable from the date of their birth.

(Emphasis added.)

[6] "In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact as the fact may be at the time of the injury, or at the time of his death . . . ."

[7] General Laws c. 152, § 26A, provides in pertinent part:

> Dependents shall not be precluded from recovery under this chapter . . . for death by suicide of the employee, if it be shown by the weight of the evidence that due to

on January 3, 1996. He underwent surgery, but his unremitting pain kept him out of work. (Dec. 634.) In 1996, about six months after his industrial accident, the employee met and commenced a romantic relationship with Serenity Stearns. In early 2000, they were engaged and living together in his mother's summer home in New Hampshire, and Ms. Stearns was pregnant with their child. (Dec. 635.) As a result of the unbearable pain related to his work injury, and his unsoundness of mind, the employee committed suicide on February 8, 2000. (Dec. 636-637, 645-646.) The employee's daughter was born on May 24, 2000. (Dec. 637.)

The judge concluded the employee's death by suicide was within the scope of § 26A, rendering such death compensable. (Dec. 645.) However, the judge determined that Victoria Paige Kerstgens, whose status as the employee's biological daughter is not challenged, was not entitled to § 31 benefits as she was not a child "conceived but not born at the time of the employee's injury," as required by § 32(c). (Dec. 644.)

As the case was tried pursuant to the "conclusive presumption" of dependency provision of § 32(c), the judge correctly concluded the employee's daughter did not qualify as a dependent under that specific provision. That subsection confers the conclusive presumption of dependency on posthumous children conceived as of the date of the employee's work injury. There is nothing in the language of § 32(c) indicating that a child conceived in the time between the employee's work injury and the resulting death is conclusively presumed dependent. Subsection (c) of § 32 plainly does not apply to the present claim.

However, under the circumstances presented by this case, the analysis does not end with that determination. The issue below should not have been limited to whether Mr. Kerstgens's daughter *automatically* qualified as a dependent under § 32(c) by virtue of having been "conceived but not born at the time of the employee's injury," for the parties agreed that she was not. The issue on appeal is:

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the injury, the employee was of such unsoundness of mind as to make him irresponsible for his act of suicide.

can a daughter not conceived on her father's date of injury, but *in utero* on his date of death, qualify as a dependent under the last paragraph of § 32? We think she can. For those claimants[8] who do not fit into one of the conclusive presumption subsections of § 32,[9] the statute, in its final paragraph, allows claimants to establish dependency, in whole or in part, as a matter of fact. See footnote 6, supra.

The evidence adduced at hearing could support a finding that, at the time of his death, the employee's unborn child was in part dependent upon his earnings.[10] This is because the employee's fiancée, the child's mother, may be found to have been supported by the employee prior to his death. The employee was living with his fiancée in a house provided by the employee's mother. The employee was receiving weekly workers' compensation benefits, and it might also be found that

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[8] Some may inquire why the legislature would choose to grant a conclusive presumption of dependency to children *in utero* on the employee's date of injury, but not grant that same benefit to those conceived but not born at the time of the employee's death. We offer one rationale. Oftentimes, the stress caused by an injury, and resultant litigation, can lead to strained interpersonal relationships that end in separation or divorce. The division of couples under these circumstances may result in children being conceived and born, with other partners, after the employee's date of injury. These children may not in fact be living with the employee on the date of his/her death, and may not in fact be supported by the employee. In fact, a male employee may never become aware of such a pregnancy. The legislature could have chosen to grant a conclusive presumption of dependency only to children *in utero* on the date of injury by reasonably concluding that such children would more likely than not be *in fact* dependent upon the injured worker *at that time* – as compared to those *in utero* only at the time of the employee's work-related death.

[9] See P.J. Liacos, Massachusetts Evidence § 5.8.1 (7th ed. 1999)(conclusive presumptions "are not presumptions at all but rules of substantive law removing the issue from the area of evidence and proof," citing G. L. c. 152, § 32 as an example).

[10] See G. L. c. 152, § 1(3), defining "Dependents" as "members of the employee's family . . . who were wholly or partially dependent upon the earnings of the employee for support at the time of the injury or at the time of his death." The word "earnings," in this context, must be viewed to include support provided by the receipt of weekly workers' compensation benefits, as the statute contemplates dependency at the time of death, a date which, as here, may occur long after the employee's date of injury, and long after the employee has actually "earned" wages. See Louis's Case, 424 Mass. 136, 140 (1996)(weekly partial incapacity benefits treated as earnings for purposes of computing average weekly wage at time of subsequent injury).

these payments were used to support the mother of his later-born child. In other words, the employee could be found to have supported, at least in part, his unborn daughter by supporting, in part,[11] the child's mother "at the time of his death . . . ." G. L. c. 152, § 32.

In Nelson's Case, 217 Mass. 467 (1914), the court remanded, for a determination of dependency *in fact*, a claim on behalf of a widow living separately from her deceased husband. The case had only been tried – and lost – on the issue of the § 32(a) conclusive presumption's application.[12] Id. at 470. The court described the scope and practical effect of § 32(a), and distinguished cases, like that at bar, not fitting the conclusive presumption mold:

> Our act . . . fix[es] an absolute presumption of dependency (without regard to what the fact really is) in favor of a wife and of a husband when there is an actual living together. Each is conclusively presumed to be totally dependent upon the other. It might be extremely difficult to measure the extent of dependency where the wife was earning something beside keeping the house and performing ordinary wifely duties. Therefore our act says that where there is a real living together the fact of dependency shall not be inquired into; it shall be set at rest by a conclusive assumption. . . . There may be instances where there is a total dependency although there is a temporary separation of husband and wife. There may be a physical dissociation and a breaking up of the home with a definite purpose to resume the normal conditions of married life. The act provides for these cases by requiring dependency to be determined in accordance with the truth.

Id. at 469-470. Then the court did something directly applicable to the present case: it remanded the case for a determination on the issue of factual dependency as contemplated by the last paragraph of § 32.[13] Id. at 470. "It follows that the

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[11] Serenity Stearns was working at the time of the employee's death; accordingly, she was not "wholly dependent" on the employee. (Dec. 635-636.)

[12] "A wife upon a husband with whom she lives at the time of his death." The language remains unchanged to this day.

[13] The only distinction being the 1950 addition of the phrase "or at the time of his death" to § 32 regarding the time for determining factual dependency. St.1950, c. 738, § 4.

Industrial Accident Board should have ascertained the extent of dependency as a fact . . . and should not have applied the conclusive presumption of subsection (a). The case should be remanded to that board for a further hearing." Id. at 470.

The facts here are in line with the Nelson court's rationale for remanding a case for trial on the issue of factual dependency. The dissent's view that "*expressio unius est exclusio alterius*"[14] should operate to prevent us from permitting a child not conceived on the date of injury to ever qualify as a dependent ignores the plain meaning of the statute's last paragraph.[15] It also ignores the long held view of this Commonwealth to afford posthumous children legal recognition. See, e.g., G. L. c. 190, § 8 ("Posthumous children shall be considered living at the death of their parent"). The point is, as in Nelson, when the facts of a claimant's situation do not fit within the conclusive presumption provisions of § 32, that claimant is nonetheless entitled to attempt proof of dependency in fact, even if it involves a recommittal for that purpose.[16]

Accordingly, we recommit this case for findings on the issue of factual dependency "in part" under the last paragraph of § 32. Pursuant to G. L. c. 152, § 13A(5), claimant's counsel is awarded a fee of $4,592.74, plus necessary expenses. See footnote 4, supra.

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[14] "The expression of one thing is the exclusion of another."

[15] We note § 32(c) also establishes the dependency of a child "living at the time" of the employee's work-related death. Therefore, the dissent's view, read together with §§ 31 and 32, produces an incongruous result: a child *in utero* on the date of injury is a dependent, a child living at the time of the employee's death (and either living with the employee or legally entitled to support from him/her) is a dependent, but under *no* circumstances can a child *in utero* conceived *between* these dates be a dependent. The dissent's logic would also preclude dependency of a child upon an employee who dies (in part as a result of complications from her industrial injury) during childbirth. A child taken, for example, in an emergency caesarian after the mother's death would not be an eligible dependent, under the dissent's rationale, unless that child was also *in utero* on her mother's injury date.

[16] See G. L. c. 152, § 11C: "The reviewing board may, when appropriate, recommit a case before it . . . for further findings of fact."

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: May 22, 2006

COSTIGAN, J., concurring in part and dissenting in part. I agree with my colleagues that § 33 burial expenses and an attorney's fee under § 13A(5) should have been awarded below. I also agree that the administrative judge correctly ruled the employee's daughter was not a conclusively presumed dependent under § 32(c). We are bound by the plain language of the statute which limits that presumption to a child conceived but not born on the date of the parent employee's injury. Long-established rules of statutory construction prohibit the expansion of that presumption to include children conceived but not born at the time of the parent employee's death. "*Expressio unius est exclusio alterius*."[17] Ianelle v. Fire Comm'r of Boston, 331 Mass. 250, 252 (1954). "Neither the 'beneficent design' of workers' compensation generally nor the ameliorative nature of one of its provisions may trump the plain meaning and purpose of the statute." McDonough's Case, 440 Mass. 603, 608 (2003). As the claim of conclusively presumed dependency was the only § 32 claim presented to the judge, I would affirm his decision on that issue.

I disagree with the majority's holding that this case should be recommitted to the administrative judge for another trial to address an entirely different claim than was litigated before him: whether the employee's unborn child was a dependent *in fact* on the date of the employee's death by suicide. In my view, it is a quantum

[17] See footnote 14, supra.

leap of surmise, and contrary to what legislative history reflects,[18] to theorize that the legislature may have limited the conclusive presumption of dependency to children *in utero* as of the date of the employee's injury, but not the date of death, by "reasonably concluding that such children would more likely than not be *in fact* dependent upon the injured worker *at that time* – as compared to those *in utero* only on the date of the employee's work-related death." See footnote 8, supra. The biological dependency of an unborn child on its mother is obvious, but the dependency contemplated in § 32 is of a different ilk.

The majority suggests that the employee's daughter might have been a dependent in fact on the date her father died, even though she was *in utero*. In my opinion, as a matter of law, an unborn child cannot be dependent *in fact* on the earnings of the parent employee on either the date of injury or the date of death.[19]

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[18] Several sections of c. 152, dealing with dependency death benefits, were amended in 1950. In April 1950, the legislature amended §§ 32(c) and (d) to confer the conclusive presumption of dependency on "children of the deceased employee conceived but not born at the time of the employee's injury. . . ." Four months later, in August 1950, § 31 was amended to add the phrase, "or at the time of his death," to the dates on which whole dependency was to be determined, and § 1(3), setting forth the definition of "Dependents," was amended to add that same phrase to the dates on which whole or partial dependency was to be determined. The legislature could have, but did not, add to §§ 32(c) and (d), the phrase "or at the time of his death," as a second date on which children *in utero* could be conclusively presumed dependent on the earnings of the deceased employee – a provision the legislature had added to two other sections of the statute only four months prior.

[19] Nelson's Case, supra, cited by the majority in support of recommittal on the issue of dependency in fact, is readily distinguishable, in that the widow who failed to prove conclusively presumed dependency was, at all relevant times, *alive*. Moreover, the majority's citation to G. L. c. 190, § 8, for the proposition that "[p]osthumous children shall be considered living at the death of their parent," is misleading. That intestacy statute deals with "[i]nheritance or succession by right of representation . . . the taking by the descendants of a deceased heir of the same share or right in the estate of another person as their parent would have taken if living. . . ." The posthumous children provision is an expression of the legislature's intent to preserve wealth for cosanguineous descendants. Woodward v. Commissioner of Social Sec., 435 Mass. 536 (2002). It has nothing to do with dependency in fact under our workers' compensation statute. Lastly, the *amicus curiae* cites cases from other jurisdictions which do recognize children *in utero* at the time of death as dependents for workers' compensation benefits. However, those cases are

What the majority fails to recognize is that factual dependency under § 32(e) is not measured against both parents, or even derivatively, as the majority suggests, against the mother, but only against the parent who is the employee for purposes of c. 152. If, as the majority holds, a child *in utero* can be factually dependent, then there would be no reason to deny § 31 benefits to that unborn child before it is born, thereby affording it a greater recovery than the legislature has given to a conclusively presumed dependent child *in utero*, for whom benefits are payable only from the date of its birth.

If, as the majority maintains,[20] the employee's death presents potential claims of partial dependency in fact by both Serenity Stearns, see footnote 11, supra, and the couple's unborn daughter, Ms. Stearns's factual partial dependency on the employee, would have to be determined first, based on "the fact as the fact may be at the time . . . of his death," G. L. c. 152, § 32(e), as they did not even meet until some six months after he was injured. (Dec. 635.) Only upon that determination can the judge address the supposed factual partial dependency of the child *in utero*, as any "dependency" the unborn child had was derivative in nature. The majority acknowledges as much. See page 4, supra. Ms. Stearns, however, has

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distinguishable because they construe statutes that specifically provide for that class of dependents. Our statute does not.

[20] I disagree with the majority's statement that the workers' compensation benefits the employee was receiving prior to his death are the equivalent of "earnings" for purposes of determining factual dependency under § 32(e). Even assuming, for argument's sake, that they may be considered "earnings," the record is devoid of any evidence the employee was using those benefits to support his fiancée and their unborn child. To the contrary, Ms. Stearns testified that after the couple moved to New Hampshire, she was employed full-time as a pre-school teacher, (Tr. 49, 60), but the employee did not work. The employee's mother testified his workers' compensation checks were always sent to her house, (Tr. 33), but nothing in the record reflects what she did with the checks. She did testify she gave the couple one of her credit cards to use to pay for groceries, heat and any necessary repairs while they were living in New Hampshire. (Tr. 28.) There is ample evidence the employee's *mother* was supporting the couple by allowing them to use her vacation home, and by paying many of their living expenses, but that does not mean the employee himself was in any way providing financial support to his fiancée and their unborn child.

never filed such a claim, and although she testified as a witness, she was not a party to the case tried below. Thus, in my view, the judge was not, as the majority posits, obliged to consider the applicability of the "dependency in fact" provisions of § 32(e) to either Ms. Stearns or, derivatively, to her unborn child.

Beyond the facts of this case, societal changes and scientific advances present a myriad of potential dependency issues our statute does not currently address, let alone resolve. The field of reproductive science, in this age of *in vitro* fertilization, frozen embryos and surrogate mothers, has progressed beyond what the legislature could have envisioned in 1950. However, I respectfully suggest that it is up to the legislature to determine what protections and benefits should be afforded to posthumous children. "The 'time tested wisdom of the separation of powers' requires courts to avoid 'judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions.' " Goodridge v. Department of Pub. Health, 440 Mass. 309, 380 (2003), (Cordy, J., dissenting), quoting Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 539, 540 (1996), cert. denied, 520 U.S. 1131 (1997), quoting Commonwealth v. A Juvenile, 368 Mass. 580, 595 (1975). See also, Bursey's Case, 325 Mass. 702, 707 (1950). The majority holds that an unborn child can be a dependent in fact under § 32(e). I think that "[f]or us to insert such additional language requires a far clearer legislative directive." Slater's Case, 55 Mass. App. Ct. 326, 330 (2002).

In my view, the administrative judge correctly decided the § 32(c) dependency claim litigated before him. As we have rectified the judge's failure to award § 33 burial expenses and a legal fee, recommittal for a new trial to address a claim not previously asserted is not only unnecessary, it is contrary to law. Therefore, I respectfully dissent from the majority's holding in that regard.

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Patricia A. Costigan
Administrative Law Judge

Filed: May 22, 2006