COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 052565-91**
William P. Haines (deceased)	Employee
Evelyn Haines	Claimant
Middlesex Hospital	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy,[1] Horan and Fabricant)

APPEARANCES
Ronald S. Barnes, Esq., for the claimant
Arthur Jackson, Esq., for the self-insurer

McCARTHY, J. The claimant appeals from a decision denying her continuing § 31 survivor's benefits, based on the administrative judge's finding that she was "fully self-supporting," and therefore not entitled to further payment of § 31 benefits, beyond the amount represented by two-hundred fifty times the state average weekly wage on the date of the employee's work-related injury in 1991. The judge concluded that the claimant's pension should be considered in determining her entitlement to continuing benefits. For the reasons that follow, we reverse the decision.

The parties stipulated that the employee's death was related to his work injury, that his average weekly wage was $624.57, and that the claimant's $67,773.72 annual pension, earned through more than forty years of work for the Town of Billerica, would render her "fully self-supporting" under § 31, if it were included in the analysis under that section.[2] The issue at hearing was whether the claimant's pension was to be included in

[1] Judges Carroll, Horan and Fabricant comprised the original panel. Upon her appointment as Senior Judge, Judge Carroll removed herself from the panel and was replaced by Judge McCarthy. She was not present at oral argument and took no part in the panel deliberations.

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

> 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

the § 31 calculation of "fully self-supporting." (Dec. 516.) The judge denied her claim for further § 31 benefits, concluding that the claimant's pension was to be included in the § 31 fully self-supporting analysis. (Dec. 526.) We disagree with every facet of the judge's reasoning, which we now discuss.

> The legal analysis starts with the language of G. L. c. 152, § 38:
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> > 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.

In Wilson's Case, 67 Mass. App. Ct. 1 (2006), the Appeals Court reasoned that pension payments were, in fact, "benefits derived from any other source" within the § 38 exclusion, relative to the "fully self-supporting" analysis:

> Section 38 categorizes the types of benefits or monies that shall be excluded from the "self-supporting" analysis under § 31. The legislative policy advanced by § 38 was discussed by the Supreme Judicial Court in Mizrahi's Case, 320 Mass. 733 (1947). The court explained that "benefits," as used in § 38, was a term of art that referred to "any sick benefits or other benefits to which [the employee or dependent] might be entitled from such source as fraternal orders, benefit associations, *pension plans governmental or otherwise*, and the like." Id. at 737. "In that field [i.e., the realm of sick benefits, pensions, and other benefits from membership associations] it [§ 38] should be broadly construed." Ibid.
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> . . .
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> Payments derived from a tort settlement (or judgment) are not the product of a benefit scheme to which the employee (or claimant) contributed.

Wilson, supra at 6-7 (emphasis added.) The judge cited to the last sentence of the above language of Wilson, but missed the distinction the court made with regard to pension payments leading up to that conclusion. (Dec. 523.) Without that distinction, the

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> hundred and fifty plus any costs of living increases provided by this section . . . except that after a dependent unmarried 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.

holding of Wilson – that a tort settlement is not a benefit entitlement and therefore not within the scope of § 38 – is cut from its conceptual moorings. The judge's decision, while purporting to follow in Wilson's wake, drifts off in the opposite direction. (Dec. 524-525.)

The decision on review goes awry in one important premise. It distinguishes the claimant's pension from the employee's pension for purposes of § 38: "In this case the claimant's income earned by her own efforts of many years, and not derived from the employee, is at issue." (Dec. 525.) In so doing the judge seemingly ignores the plain provision of the definition of "employee" in G. L. c. 152, § 1(4). The pertinent § 1(4) language is: "Any reference to an employee who has been injured shall, when the employee is dead, also include his . . . dependents . . . to whom compensation may be payable." We see no basis for avoiding or ignoring this definition in § 38's reference to "the injured employee." The claimant's pension benefits are indistinguishable from the pension benefits of the employee by reference to § 1(4). The judge's interpretation creates the very distinction that Wilson explicitly refutes, as noted in the quotation above. The distinction between the employee's and the claimant's pension benefits posited by the judge simply does not exist under § 1(4). While the Legislature could amend § 38 to remove that necessary equation, it is not a proper matter for judicial redress. See also Sicard v. General Electric Co., 20 Mass. Workers' Comp. Rep. 121, 124-125 (2006), (applying § 38, reviewing board reversed same judge's denial of benefits for period in which employee received short term disability benefits for unrelated condition).

We also disagree with the judge's assertion that Mizrahi's Case, supra, is consistent with using the claimant's pension benefits for the § 31 "fully self-supporting" calculation. (Dec. 525.) The court in Mizrahi barred double compensation, in reference to "benefits" that derived from the "same injury or incapacity." Id. at 737. Mizrahi specifically construed the scope of § 38 to e*xclude* pension benefits. Id. Wilson, supra, simply followed Mizrahi. Rather than follow the higher court authority, the judge here followed his own *reversed* decision in Sicard.

The result we reach today is consistent with the Supreme Judicial Court's most recent pronouncement on the construction of § 31. In McDonough's Case, 448 Mass. 79 (2006), the court concluded that § 31 was not a strict wage replacement statute, because it provided survivors with a minimum weekly compensation of $110, even when the employee had no wages to replace at the time of his death:

> [T]he mere fact that our interpretation does not equate with a strict wage replacement scheme does not require us to deviate from the plain language of § 31. The minimum payments described in § 31 are not altered by considering their place in a larger statutory scheme that has the over-all goal of wage replacement. Although this particular exception may be at odds with that over-all goal, the wording of § 31 itself is clear that nothing is to prevent a surviving spouse from receiving at least the minimum benefit.

Id. at 84. Just as in McDonough, we have before us in the present case the plain language of §§ 38 and 1(4) that points inexorably to the result we reach: the claimant's rights are exactly those of the decedent employee's under § 1(4). The claimant's pension "benefits" under § 38 are therefore to be excluded from § 31's "fully self-supporting" calculation. The judge's reasoning – which we surmise was based on public policy concerns against "double recovery," see Mizrahi, supra – fails to account for this plain language and is therefore contrary to law.

The decision is reversed. The claimant is hereby awarded § 31 benefits as claimed, based on the stipulated average weekly wage of $ 624.57.

So ordered.

Filed: ***June 5, 2007***

William A. McCarthy Administrative Law Judge	Mark D. Horan Administrative Law Judge	Bernard W. Fabricant Administrative Law Judge