

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Estate of Louis Joseph Mason, Jr.

Opinion No. 19-21WC

v.

By: Stephen W. Brown
Administrative Law Judge

Capital Candy Company Inc.

For: Michael A. Harrington
Commissioner

State File No. LL-52420

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Ronald A. Fox, Esq., for Claimant
Tammy B. Denton, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's widow entitled to a lump sum of 330 weeks of death benefits at the maximum compensation rate, less sums already received?
2. If not, is she entitled to weekly death benefits at the maximum compensation rate?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts ("CSUMF")

- Claimant's Exhibit 1: First Report of Injury (Form 1)
- Claimant's Exhibit 2: Report of Fatal Accident (Form 4)
- Claimant's Exhibit 3: Vermont Certificate of Death for Louis Joseph Mason, Jr.
- Claimant's Exhibit 4: New Hampshire Certificate of Marriage between Louis Joseph Mason, Jr., and Victoria Ann Grappone
- Claimant's Exhibit 5: Agreement for Compensation in Fatal Cases (Form 23), approved on October 2, 2018
- Claimant's Exhibit 6: Vermont Certificate of Birth for Victoria Grappone
- Claimant's Exhibit 7: Form SSA-1099/Social Security Benefit Statement reflecting Victoria Grappone's Income from the Social Security Administration in 2016
- Claimant's Exhibit 8: July 22, 2020 Emails Between Ronald A. Fox, Esq., and Michael E. Krogman
- Claimant's Exhibit 9: August 18, 2020 Letter from Tammy B. Denton, Esq. to Ronald A. Fox, Esq.
- Claimant's Exhibit 10: Notice and Application for Hearing (Form 6)
- Claimant's Exhibit 11: October 16, 2020 Letter from Tammy B. Denton, Esq. to Department of Labor

Defendant's Statement of Undisputed Material Facts ("DSUMF")

- Defendant's Exhibit 1: First Report of Injury (Form 1)
- Defendant's Exhibit 2: Report of Fatal Accident (Form 4)
- Defendant's Exhibit 3: Agreement for Compensation in Fatal Cases (Form 23), approved on October 2, 2018
- Defendant's Exhibit 4: New Hampshire Certificate of Marriage between Louis Joseph Mason, Jr., and Victoria Ann Grappone
- Defendant's Exhibit 5: Statement of Dependent's Survivorship Benefits
- Defendant's Exhibit 6: Notice of Change in Compensation Rate (Form 28), for Fiscal Year 2020
- Defendant's Exhibit 7: Notice of Change in Compensation Rate (Form 28), for Fiscal Year 2021
- Defendant's Exhibit 8: Form SSA-1099/Social Security Benefit Statement reflecting Victoria Grappone's Income from the Social Security Administration in 2016
- Defendant's Exhibit 9: Certificate of Dependency and Concurrent Employment (Form 10)
- Defendant's Exhibit 10: Minimum and Maximum Compensation Rates: Annual Change
- Defendant's Exhibit 11: September 11, 2018 Letter from Ronald A. Fox, Esq. to Department of Labor, enclosing Entry of Appearance

BACKGROUND:

There is no genuine issue as to the following material facts:

1. As of August 21, 2018, Louis Joseph Mason, Jr. ("Decedent") was Defendant's employee.
2. On that date, he was making a work-related delivery when he fell down a flight of stairs. He died that same day from his resulting injuries. (CSUMF 1; DSUMF 1-2, 4; Claimant's Exhibits 1-3; Defendant's Exhibits 1-3).
3. At the time of his death, Decedent was married to Victoria Grappone. She was then 64 years old and his sole dependent. Decedent had no children under the age of 18 at the time of his death. (CSUMF 4, 6; DSUMF 9; Claimant's Exhibits 2, 6; Defendant's Exhibits 3, 9).
4. Mrs. Grappone had been receiving Social Security benefits since approximately 2016 and was receiving them at the time of Decedent's death. (CSUMF 7; DSUMF 8; Claimant's Exhibit 7; Defendant's Exhibit 8).
5. At the time of Decedent's death, the maximum weekly compensation rate for workers' compensation benefits was \$1,311.00. (DSUMF 10; Defendant's Exhibit 10).
6. Defendant's workers' compensation carrier for this claim is Nationwide Agribusiness Insurance NAIC ("Nationwide") (CSUMF 2-3; DSUMF 3; Claimant's Exhibits 3 and 4; Defendant's Exhibit 4).

7. Attorney Ronald Fox entered his Notice of Appearance on Mrs. Grappone's behalf in this workers' compensation matter on September 11, 2018. (DSUMF 13; Defendant's Exhibit 11).
8. On September 28, 2018, Nationwide began paying death benefits to Mrs. Grappone at a weekly compensation rate of \$438.76, calculated from Decedent's pre-injury average weekly wage. (DSUMF 5; Defendant's Exhibit 5).
9. On October 2, 2018, the Department approved an Agreement for Compensation in Fatal Cases (Form 23), which called for Mrs. Grappone to receive weekly death benefits. The approved Form 23 provides in relevant part as follows:

It is agreed that employee's average weekly wage for the twenty-six weeks before the injury was \$657.81 and that [Mrs. Grappone is] entitled to 66 2/3 percent of said average weekly wage: the sum of \$438.76 beginning September 28, 2018 and continuing until a change in the condition of dependency occurs, after which the amount due weekly shall be redetermined. The period of payment shall not exceed the limits set forth in 21 VSA § 635, as amended.

(CSUMF 5; DSUMF 14; Claimant's Exhibit 5; Defendant's Exhibit 3).

10. There is no assertion of any fraud or material mistake of fact relating to the approved Form 23. (DSUMF 15). The parties have not agreed to any lump sum payment of death benefits, and no agreement for a lump sum payment of death benefits has been presented to or approved by the Department. (DSUMF 12).
11. On July 1, 2019, a cost-of-living adjustment ("COLA") raised Mrs. Grappone's weekly death benefit amount to \$452.80. (DSUMF 6; Defendant's Exhibit 6). Similarly, on July 1, 2020, a COLA increase raised the weekly death benefit to \$469.55, which is the rate currently being paid as of the parties' submissions in this case. (DSUMF; Defendant's Exhibits 5 and 7).
12. In July 2020, Nationwide's adjuster Michael Krogman and Attorney Fox exchanged emails regarding the amount of death benefits owed to Mrs. Grappone. (CSUMF 8; Claimant's Exhibit 8). Specifically, Attorney Fox argued that because Mrs. Grappone was entitled Social Security benefits, she was due a lump sum payment equal to 330 weeks times the then-current maximum compensation rate with credit for payments already made. (*Id.*).
13. In August 2020, Defendant's attorney, Tammy Denton, wrote to Attorney Fox disputing his legal contentions as to that entitlement. (CSUMF 9; Claimant's Exhibit 9). Mrs. Grappone subsequently filed a request for a hearing as to the amounts she was

entitled to receive, and Defendant filed its response through counsel. (CSUMF 10-11; Claimant's Exhibits 10-11). The instant cross motions ensued.

CONCLUSIONS OF LAW:

Summary Judgment Standard

1. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). Summary judgment is appropriate only when the facts in question are clear, undisputed, or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). Where the parties have filed cross motions, each party is entitled to the benefit of all reasonable doubts and inferences when the opposing party's motion is being judged. *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990).

Weekly Death Benefits Under Vermont's Workers' Compensation Act

2. When an injured worker dies from a work-related injury, Vermont's Workers' Compensation Act requires the employer to pay death benefits to certain identified dependents or, if there are none, to the worker's personal representative. Those benefits include funeral and burial expenses, out-of-state transportation to the burial site up to specified monetary amounts, and weekly compensation based on the deceased employee's average weekly wages for specified periods of time. *See* 21 V.S.A. §§ 632-637.
3. Where, as here, an employee dies from a work-related injury with a surviving spouse and no dependent children, the employer must pay the surviving spouse weekly benefits equal to $66 \frac{2}{3}$ percent of the injured worker's average weekly wage, subject to annual COLAs as well as minimum and maximum weekly compensation rates. 21 V.S.A. §§ 632(1); 650(a) and (d). The duration of such weekly death benefits to a surviving spouse is as follows:

(1)(A) Spouse. To a spouse until:

- (i) sixty-two years of age if at that time the spouse is entitled to benefits under the Social Security Act as amended or thereafter at such time as the spouse is entitled to benefits under the Social Security Act as amended; or
- (ii) remarriage; or
- (iii) death, whichever occurs first.

21 V.S.A. § 635(1)(A) (citations omitted).

4. Additionally, “in no event shall the spouse receive less than a sum equal to 330 times the maximum weekly compensation except when the compensation terminates by reason of death.” 21 V.S.A. § 635(1)(B).
5. The Department’s Workers’ Compensation Rules generally require the employer and injured worker’s dependents or personal representative to enter into an Agreement for Compensation in Fatal Cases (Form 23) and submit that Form with supporting documents to the Department for review and approval. Workers’ Compensation Rules 10.1910-10.1911. Once approved, such an agreement

... constitutes a binding and enforceable contract. Absent evidence of fraud or material mistake of fact, the parties will be deemed to have waived their right to contest the material portions thereof.

Workers’ Compensation Rule 10.1912.

6. The parties in this case followed the process set forth above, and the Department approved the Form 23 that they presented on October 2, 2018. *See* Background, ¶ 9.

The Parties’ Contentions

7. Mrs. Grappone seeks a lump sum equal to 330 weeks of death benefits at the maximum compensation rate, less amounts already received. She argues that her statutory entitlement to weekly compensation under 21 V.S.A. § 635(1)(A) terminated once she became eligible for Social Security benefits, and therefore, her entitlement to weekly death benefits ended for a reason other than her own death. It follows, in her view, that she is presently entitled to receive a sum not less than 330 times the maximum compensation rate under 21 V.S.A. § 635(1)(B). In the alternative, she argues that if she is not entitled to a lump sum, then she should be entitled to weekly benefits at the maximum compensation rate.
8. Defendant disagrees and argues, *inter alia*, that the terms of the approved Form 23 control, including its provisions concerning the calculation and frequency of death benefit payments. Defendant argues that under the express terms of the approved Form 23, payments are to be issued weekly in specified amounts until there is a change in her dependency status, which has not happened. Because I find that this argument is meritorious and resolves the parties’ entire dispute, I need not address Defendant’s alternative arguments.

The Approved Form 23 Controls the Payment of Death Benefits

9. The approved Form 23 in this case calls for Defendant to pay Mrs. Grappone weekly benefits

...until a change in the condition of dependency occurs, after which the amount due weekly shall be redetermined. The period of payment shall not exceed the limits set forth in 21 VSA § 635, as amended.

Background, ¶ 9 (emphasis added).

10. There is no contention or evidence that any party was unaware of Mrs. Grappone's age when Defendant began paying her weekly death benefits. Nor is there any suggestion that Mrs. Grappone hid her receipt of Social Security benefits before Defendant began to pay her weekly death benefits.¹ Neither party alleges any fraud or material mistake of fact of any kind. See Background, ¶ 10. As such, the parties are bound by the approved Form 23's terms and have waived their right to contest its material provisions. See Workers' Compensation Rule 10.1912.
11. Under Vermont law, "[a] contract is interpreted foremost to give effect to the parties' intent, which is reflected in the contractual language, if that language is clear." *B & C Mgmt. Vermont, Inc. v. John*, 2015 VT 61, ¶ 11. Vermont courts interpret the terms in contracts "according to their plain, ordinary and popular meaning." *Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Homes, Inc.*, 2015 VT 52, ¶ 16. These same principles apply to the interpretation of statutes.²
12. The preposition "until" appears both in the text of Section 635 and the approved Form 23. That word is "used as a function word to indicate continuance (as of an action or condition) to a specified time."³ The word "until" implies that an action shall continue "until" some new condition materializes. If no new condition materializes, then the action must continue indefinitely. Thus, if weekly payments are to continue "until" there is a change in a widow's dependency status or some other stated condition, those payments would continue indefinitely if no such change ever materializes.
13. In this case, Mrs. Grappone was over 62 years old when her husband died in August 2018, and she had been receiving Social Security benefits since at least 2016. She began receiving weekly death benefits in September 2018, and the Department

¹ Attorney Fox acknowledges that he was unaware of Mrs. Grappone's receipt of Social Security benefits at the time of Decedent's death. However, Mrs. Grappone was certainly aware that she was receiving these benefits, as evidenced by her receipt of a Form SSA-1099 for those benefits. See generally Background, ¶ 4 and Defendant's Exhibit 8. Defendant does not contend that Mrs. Grappone improperly withheld any information relating to her receipt of such benefits.

² See *T.C. v. L.D.*, 2020 VT 19, ¶ 4 ("In construing a statute, the court's primary objective is to effectuate the Legislature's intent. The first step in doing so is to examine the plain language of the statute.... When legislative intent is clear from the statutory language, we accept the plain meaning, our inquiry is at its end, and courts enforce the statute according to its terms.") (citations and punctuation omitted).

³ Merriam-Webster.com Dictionary, "until," available at <https://www.merriam-webster.com/dictionary/until> (last accessed September 27, 2021, at 12:26 p.m.).

approved the Form 23 in October 2018. For almost two years, she received weekly benefits without objection and while represented by counsel, until Attorney Fox requested a lump sum payment on her behalf in July 2020. *See* Background, ¶¶ 2-9.

14. There is no contention or evidence that Mrs. Grappone was receiving Social Security benefits without being entitled to them before the Form 23's approval. As such, her entitlement to Social Security benefits was not a "change in [her] condition of dependency" under the terms of the approved Form 23. *Cf.* Background, ¶ 9. Instead, it was an existing status that predated the Form 23. Nor is there any evidence that she has died, remarried, or had any other change in her condition of dependency after the Form 23's approval.
15. For these reasons, the plain language of the approved Form 23 does not support any change in the frequency, format, or amount of agreed-upon death benefits in this case.

The R. P. Decision

16. Mrs. Grappone cites the Department's decision in *R. P., Estate of R. P., H. P. v. Vermont Asbestos Group, Inc. and St. Paul Travelers Insurance Company*, Opinion No. 02-07WC (January 23, 2007), for the general proposition that a dependent spouse receiving social security benefits is, as a matter of law, entitled to 330 weeks of death benefits at the maximum compensation rate. Defendant accurately notes that the computation of death benefits was not identified as an issue for adjudication in *R. P.*, and there is no reference in that opinion to either party arguing that issue. The Department identified the following five issues for adjudication in *R. P.*:

1. Did R. P. (Claimant) suffer a work-related injury to his lungs as a result of his work for Vermont Asbestos Group?
2. If so, was R. P. disabled from work as a result of his work-related lung injury?
3. Did R. P. suffer any permanent impairment as a result of his work-related lung injury?
4. Was R. P. permanently and totally disabled from work as a result of his work-related lung injury, and, if so, what was the duration of his permanent total disability?
5. Was R. P.'s death on August 31, 2006 caused by his work-related lung injury?

See id.

17. After finding the employee's death compensable, the Department in *R. P.* ordered death benefits payable to his widow as follows:

39. R. P.'s widow, H. P., was his only dependent at the time of his death on August 31, 2006. She is 67 years old, and receives social security benefits.
40. Under 21 V.S.A. § 635, Mr. P's widow is entitled to 330 weeks of compensation times the maximum weekly compensation "except when the compensation terminates by reason of death." The maximum weekly compensation as of the date of death, August 31, 2006, was \$974.00. Therefore, Mrs. P. is entitled to weekly benefits for 330 weeks from that date forward unless she dies before that time expires.
41. Mr. P's dependent widow has an independent right to the death benefits, separate and apart from Mr. P's estate's independent right to Mr. P's workers' compensation benefits that had accrued (and therefore vested) prior to the date of his death.

Id., Conclusions of Law Nos. 39-41.

18. Defendant contends that because the issue of benefit computation was not formally identified as an issue for adjudication, the Department's resolution of that issue in *R. P.* was a "*sua sponte*, misguided, and unsupported Order of benefits," and was in any event *dicta* that should carry no weight in this case.
19. I need not assess whether *R. P.* was correctly decided on its facts, because the facts of this case are not analogous. Specifically, there is no indication in *R. P.* that the employer and the deceased employee's widow ever entered into any agreement for the payment of death benefits, such as a Form 23. Indeed, it would not have made sense for them to have done so before the issuance of that decision, because the employer had denied liability for the deceased employee's death. Here, by contrast, Defendant accepted liability and entered into an agreement with Mrs. Grappone which the Department approved. That agreement's execution and approval occurred after Mrs. Grappone had already been receiving Social Security benefits for approximately two years. *See* Background, ¶¶ 3-9.
20. Because neither party alleges fraud or any material mistake of fact relating to the approved Form 23, they are bound by its terms, including its provision for weekly death benefits in specified amounts, until there is a change in Mrs. Grappone's dependency status. Because there has been no such change, Mrs. Grappone remains entitled to receive weekly payments in the amounts provided in that agreement—no more and no sooner—irrespective of whether she may have been entitled to a lump sum or increased weekly payments in the absence of an approved Form 23.

Requiring Continued Weekly Benefits Does Not Violate Section 635(1)(B)

21. Finally, Mrs. Grappone contends that requiring payments to continue on a weekly basis in the amounts provided in the approved Form 23 would prejudice her statutory entitlement to receive at least 330 times the maximum weekly compensation under 21 V.S.A. § 635(1)(B). That statutory right comes with an important exception, however. It does not apply "...when the compensation terminates by reason of death." *Id.*
22. Thus, if a deceased employee's spouse dies before receiving enough weekly payments to equal at least 330 times the maximum weekly compensation rate, the statute does not entitle him or her to receive the unpaid balance in a lump sum. Weekly payments simply stop.
23. In this case, Mrs. Grappone's receipt of weekly death benefits has not stopped. It is true that her entitlement to Social Security benefits would have terminated her entitlement to continue receiving weekly death benefits in the absence of an approved Form 23 or if she had become entitled to Social Security benefits after the Form 23 approval. However, those are not the facts of this case. She and Defendant agreed, with the Department's approval, that she would continue receiving weekly benefits until there is a change in her dependency status, which has not happened. Thus, there is no reason to stop her weekly benefits now.
24. It follows that until she has survived long enough to receive weekly death benefits that total at least 330 times the maximum weekly compensation rate, she is not assured of her entitlement to receive that amount. Ordering either a lump sum of that amount or increasing her weekly benefit amount to the maximum compensation rate would therefore grant her money to which she is not yet entitled and may never become entitled. As such, it would be inappropriate to alter the existing, agreed-upon, and approved payment regime. Moreover, preserving the status quo will not prejudice any of her rights under Section 635.
25. The result in this case is compelled by its unique facts. The analysis may have differed had Mrs. Grappone sought death benefits under Section 635(1)(B) equal to 330 weeks times the applicable maximum compensation rate based on her entitlement to Social Security benefits before entering into an Agreement for Compensation in Fatal Cases (Form 23). It may also have differed had she contested Defendant's assertion in its Statement of Undisputed Material Facts that there was no material mistake of fact relating to the approved Form 23. However, Mrs. Grappone has expressly "agree[d] that the Form 23 is a binding and enforceable contract" and states that she "merely seeks to enforce the contract as written[.]" *See* Mrs. Grappone's Response to Defendant's Motion for Summary Judgment, p. 1. For the reasons explained in this opinion, I cannot conclude that the contract she seeks to enforce supports the relief she seeks.

ORDER:

For the reasons set forth above, Mrs. Grappone's Motion for Summary Judgment is **DENIED**, and Defendant's Motion for Summary Judgment is **GRANTED** as to the limited issues of whether it is obligated to pay Mrs. Grappone a lump sum or increase her weekly rate of compensation.

Mrs. Grappone remains entitled to weekly death benefits as provided for in the approved Form 23.

To the extent that either party seeks any relief not expressly granted herein, such request stands denied.

DATED at Montpelier, Vermont this 30th day of September 2021.

Michael A. Harrington
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.