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DEPENDENCY BENEFITS UNDER THE MASSACHUSETTS WORKMEN'S COMPENSATION ACT

MARCEL S. KISTIN*

I. INTRODUCTION

The difficulty of anticipating future manifestations and complexities of a problem is inherent in the process of drafting effective legislation. Framing the provisions for dependency benefits under the Workmen's Compensation Act presented this difficulty in acute form. The Massachusetts legislature was faced with the formidable task of anticipating an infinite variety of marital, parental and familial relationships and applying to these relationships equitable dependency benefit provisions. Omissions and inequities were practically inevitable whether the legislature decided to meet the challenge in detail or to formulate simple general principles. The legislature apparently chose the latter course:

> The Legislature may well have thought that it was not wise to attempt at first to provide a specific rule for every possible case, but simply to provide a few general rules easily understood and easy of application and, as experience dictated from time to time, to make changes.[1]

Probably close to ten per cent of all workmen's compensation cases decided by the Massachusetts Supreme Judicial Court have involved questions of dependency. After fifty years of experience and after many changes in the statute, dependency compensation remains one of the most complex areas in the field of workmen's compensation; there are still many omissions, inequities and unsolved problems. This article attempts a clarification and a critical analysis of the law of dependency benefits.

II. GENERAL SUMMARY

The major provisions for dependency benefits under the Workmen's Compensation Act are set forth in sections 1(3), 31, 32 and 35A of Chapter 152 of the Massachusetts General Laws.[2]

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[1] Murphy's Case, 218 Mass. 278, 281, 105 N.E. 635, 636 (1914).

[2] See also Mass. Gen. Laws Ann. ch. 152, §§ 26A, 27, 33, 36A, 41-44, 48, 49, 50, 66, 67 (1957), as amended, Mass. Gen. Laws Ann. ch. 152, §§ 33, 66 (Supp. 1963). See especially Mass. Gen. Laws Ann. ch. 152, § 1(4)(d) (1957), last paragraph: "employee" means "dependents" when employee is dead.

Section 1(3) defines "Dependents," states the two general categories (next of kin and family membership) into either of which the qualifying claimant must fall and provides that the claimant must be dependent for support upon the employee's earnings.

Section 31 generally sets forth the amounts of total and partial benefits payable to dependents of a deceased employee.

Section 32 designates certain persons conclusively presumed to be total dependents of deceased employees and provides for partial and total dependency in fact.

Section 35A provides for total dependency benefits to injured employees, designates certain persons conclusively presumed to be dependents and provides for dependency in fact.

To qualify for dependency benefits a claimant must establish by affirmative evidence either conclusive dependency or dependency in fact. Conclusive dependents are always total dependents; dependents in fact may be either partial or total dependents. The Act provides for partial dependency only in the case of deceased employees. Injured employees are entitled to dependency benefits only for those who are totally dependent upon them for support either as conclusive dependents or as dependents in fact.

Conclusively presumed dependents were provided for in order to reduce litigation.[3] Conclusive dependents include those persons who are normally next of kin or members of the employee's family and who are usually dependent for support upon the employee's earnings in fact.

Those claimants who are not conclusive dependents must show the general qualifications set forth in section 1(3), *i.e.*, that they are next of kin or members of the employee's family. In addition they must show evidence of dependency in fact.

Dependency compensation is not vested. Upon the death of the recipient, the benefits cease and do not pass to his estate or next of kin.[4]

III. Next of Kin

A. *Definition*

"Next of Kin" means that ". . . the dependent should be in the same degree of kinship as the statutory heir or heirs." "Next of kin" is not ". . . the equivalent of dependent next of kindred which would embrace all dependents without regard to the degree." It refers ". . . to

[3] Report of the Commission on Compensation for Industrial Accidents (July 1, 1912).

[4] Bartoni's Case, 225 Mass. 349, 353, 114 N.E. 663, 665 (1916); Murphy's Case, 224 Mass. 592, 594, 113 N.E. 283, 285 (1916).

those who are nearest in degree by consanguinity."[5] A spouse does not qualify as next of kin in Massachusetts.[6]

B. *Next of Kin Excludes Other Kindred*

The next of kin take to the exclusion of those of a lower degree of kinship.[7] There may be more than one next of kin if they are of the same degree of kinship. In the case of deceased employees, the dependents in fact of equal kinship share in the absolute sum as provided for in the last paragraphs of sections 31 and 32. In the case of injured employees, section 35A provides for weekly benefits to be paid for each dependent in fact.

The rights of those claiming as next of kin were first discussed in detail by the court in *Kelley's Case*,[8] in which a deceased employee, a minor, was survived by a non-dependent father and by a partially dependent older half-brother. The claimant half-brother could not qualify as a dependent member of the employee's family because the employee lived in the claimant's house and was in fact a member of the claimant's family. The court held that, since the employee's father was living, the half-brother was not next of kin and therefore could not qualify as a dependent under the Act. That the claimant was not a member of the employee's family was obvious, but, since this was the first case under the statute in which the issue arose, the deprivation of the dependent relative of benefits merely because a non-dependent next of kin also survived called for some explication by the court.

After defining "next of kin" and ruling that they exclude other kindred, the court in *Kelley's Case* discussed with much insight the hardship that could result in those cases where the claimant who is truly dependent fails to qualify as next of kin. The court indicated that an indigent, totally dependent mother who was not living with her deceased son at the time of his death would not qualify for benefits if the deceased employee left non-dependent children. The mother would not be a member of the employee's family since she did not live with him, and she would not qualify as next of kin because the employee's children, who were his next of kin, survived. The court also pointed out prophetically that, under this rule, a dependent sister

[5] Kelley's Case, 222 Mass. 538, 541, 111 N.E. 395, 396 (1916).

[6] Agricultural Nat'l Bank v. Schwartz, 325 Mass. 443, 446, 91 N.E.2d 195, 197 (1950); Bailey v. Smith, 222 Mass. 600, 111 N.E. 684 (1916); Haraden v. Larrabee, 113 Mass. 430, 431 (1873). See Annot., 32 A.L.R.2d 296, 303-04, 317 (1953). The statement in Murphy's Case, supra note 4, at 595, 113 N.E. at 285, in a dictum, that the minor children were next of kin "as well as the widow" is, no doubt, a loose formulation and would not be authority for the proposition that a widow is next of kin.

[7] Kelley's Case, supra note 5. Caliendo's Case, 219 Mass. 498, 107 N.E. 370 (1914) is anomalous and is disposed of in Kelley's Case.

[8] Supra note 5.

may not be entitled to benefits where non-dependent parents are alive. This hypothetical example materialized in *Cowden's Case*,[9] decided within a short time after *Kelley's Case*.

In *Cowden's Case* the deceased employee lived in a boarding house with his half-sister and was her sole support. The claimant half-sister was precluded from dependency benefits because the employee's father (who was not dependent on the employee) survived and was next of kin. The case is particularly striking because the father, although legally next of kin, was not the employee's natural father, but had adopted the employee after marrying his mother.

These old cases in which a non-dependent next of kin precludes a deserving dependent kin of lower degree from receiving dependency benefits are difficult to reconcile with the humanitarian purpose of the Workmen's Compensation Act.[10] It is doubtful whether these old cases would be followed today.

In a closely analogous situation in *Gillard's Case*,[11] decided some seven years after *Kelley's Case*, the court found minor children to be conclusive dependents despite the fact that their mother survived but did not claim. The employee had died in 1918 when there were no provisions for additional payments to a widow for minor children and when, under the rule in *McNicol's Case*,[12] the widow would receive the entire death benefit. Here both the widow and children claimed, but the widow withdrew her claim during the trial before the board. The court stated:

> It seems pretty clear that dependent minor children are conclusively presumed to be wholly dependent upon the father with whom they live in the absence of a claim by a widow.[13]

Since the widow survived, the children could not properly be called conclusive dependents under a strict reading of section 32(c). The mere fact that their mother was living would seem to preclude the children under this section. The court, however, here carried the rule, first suggested in *Murphy's Case* and later established in *Bartoni's Case*[14] a step further. Bartoni's rule, later enacted into law, was that a minor child may succeed to the widow's benefits when she dies while receiving compensation; *Gillard's Case* holds that children may take even when the widow still lives, but does not press her claim.

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[9] 225 Mass. 66, 113 N.E. 1036 (1916).

[10] Young v. Duncan, 218 Mass. 346, 349, 106 N.E. 1, 3 (1914); Gould's Case, 215 Mass. 480, 483, 102 N.E. 693, 694 (1913).

[11] 244 Mass. 47, 138 N.E. 384 (1923).

[12] 215 Mass. 497, 102 N.E. 697 (1913).

[13] Gillard's Case, supra note 11, at 56, 138 N.E. at 388.

[14] Supra note 4.

Gillard's Case probably indicated more pointedly than any other Massachusetts case that the court would support the proposition that potential claimants of higher priority who do not claim do not exclude actual dependents of lower priority. This proposition should be equally applicable to cases where next of kin do not claim. In such cases, dependent kin of lower degree should in all justice, consistent with the basic intent of the statute, be allowed the dependency benefits.

A situation similar to the one in *Gillard's Case* arose more recently in *Shaw's Case*[15] in which the employee's mother claimed as a partial dependent in fact and the surviving wife made no claim. The insurer contended that the claimant mother should not receive benefits because the wife, although she did not claim, was a conclusive dependent thus precluding the dependent in fact mother. Generalizing the point, the defense was that a higher priority potential claimant automatically excludes an actual claimant of lower priority. The board disposed of the insurer's defense on the ground that there was insufficient evidence to support the contention that the wife was a conclusive dependent. On appeal the court affirmed this finding and, therefore, did not have to decide what effect a supported opposite finding would have had on the mother's claim. But it is significant that the court did not let it rest there. Referring to the unproved dependency status of the wife, the court said, "The point, *if material,* was open." (Emphasis supplied.) This means that, even if the insurer could prove the wife's conclusive dependency status, there would still be a question as to whether it would defeat the mother's claim since the wife was not a claimant.

A careful analysis of the insurer's position in *Shaw's Case* demonstrates the injustice of allowing such a strictly technical, dog-in-the-manger type of defense, the only effect of which can be to defeat the ultimate legislative objective of providing benefits to deserving dependents.

The insurer's frank intent was to exclude the dependent mother merely by interposing the theoretical possibility of a claim by the wife as a conclusive dependent. The insurer, as revealed in the record, was well aware of the fact that the wife had absolutely no intention of filing a claim. In a hypothetical case, if a potential claim by the wife were a serious possibility, a defense such as the one in *Shaw's Case* would be too risky financially and would not be proffered. By such a defense the insurer might well alert an unknowing potential claimant to a valuable claim. As a practical matter the insurer would do better with a partial than with a conclusive, total dependent. Although the insurer could not produce sufficient evidence to prove the wife's con-

[15] 340 Mass. 717, 166 N.E.2d 718 (1960).

clusive dependency in *Shaw's Case*, there was theoretically nothing to prevent the wife from coming in later, assuming no problem of late claim or prejudice to the insurer,[16] proving just cause or desertion and collecting dependency benefits back to the date of death. As of the date of the wife's award, benefits to the mother would necessarily end. The insurer would thus have made two inconsistent payments up to the time of the board's award to the wife and, in addition, would pay a higher rate to the wife thereafter. Furthermore, the insurer would not be entitled to reimbursement by the mother. The mother could protect the amount paid her by the insurer by securing a decree in the superior court under sections 8 and 11, thus making her award *res judicata* even after the award to the wife.

From the insurer's viewpoint, it may seem unfair to be exposed to double payments until the time the higher priority dependent files a claim. However, if such a claim is filed six months or more following the employee's death, the insurer can defend against the claim under sections 41 and 49. From the viewpoint of the lower priority claimant, it is unfair permanently to deny him dependency benefits in this situation and thereby allow the insurer a windfall, especially when there are at least two possible claimants and in view of the fact that the danger to the insurer of double payments is limited to a period of six months or less.[17] Since workmen's compensation follows equity,[18] it would seem fair to allow a lower priority claim when a potential higher priority claimant does not file a claim. Under equity principles more harm would be done to the lower priority claimant by allowing the insurer's defense of a potential higher priority claimant than is done the insurer by denying such a defense.

IV. MEMBERS OF THE EMPLOYEE'S FAMILY

A. *Definition*

" 'Family' in its usual sense means 'the collective body of persons who live in one house, and under one head or management.' "[19] "The word 'family' has been frequently a subject for interpretation. While in its ordinary and primary sense the term signifies persons living in one house, still it is often used in common speech as including husband and wife."[20] "In view of the purpose sought to be accomplished by the workmen's compensation act, . . . the wife of an employee

16 Mass. Gen. Laws Ann. ch. 152, §§ 41 and 49 (1957).

17 As, for example, by the widow's remarriage within the six month period.

18 Humphrey's Case, 226 Mass. 143, 145, 115 N.E. 253, 254 (1917); Pigeon's Case, 216 Mass. 51, 54, 102 N.E. 932, 934 (1913); Gould's Case, supra note 10, at 483, 102 N.E. at 694.

19 Cowden's Case, supra note 9, at 67, 113 N.E. at 1037.

20 Newman's Case, 222 Mass. 563, 568, 111 N.E. 359, 362 (1916).

may be found to be a member of his family even if not actually living with him at the time of the injury."[21]

B. *"Members of the Employee's Family" Liberally Interpreted*

Dependents who claim as members of the employee's family are accorded much more liberal treatment under the Act than those who must compete as his next of kin. The reason, apparently, is that there is much greater freedom of interpretation in the phrase "members of the employee's family" than within the rigid bounds of the phrase "next of kin."

A wife who is living apart from her husband and, therefore, not conclusively presumed to be his dependent, may yet qualify as a dependent member of his family and receive dependency benefits.[22] It is also possible for a married daughter to qualify as her father's partial dependent (both as his next of kin and as a member of his family) even if she lives with her husband in her father's home.[23] Furthermore, a person may qualify as a dependent of a deceased employee (as a member of his family) although there is neither marital nor blood relationship of any kind between them.[24]

C. *Illegitimate Children*

It is clear that illegitimate children in Massachusetts do not qualify as "children" under the conclusive presumption provisions of sections 32 and 35A, nor do they qualify as next of kin. However, they may qualify as members of the employee's family.[25] Since family membership is the basis, it is equally clear that illegitimate children who live apart from the employee cannot qualify as dependents.[26]

Gritta's Case enunciates the humanitarian principle upon which illegitimate children are endowed with dependency status:

> Considerations of public policy which would prevent a wrongdoer from participating in the benefits of the act ought not to apply to innocent children born out of lawful matrimony; they are not responsible for their existence or status, they have committed no wrong, and they must be supported as the death of the employee has taken from them the care and

[21] Ibid.

[22] Ibid. See also Gallagher's Case, 219 Mass. 140, 106 N.E. 558 (1914); Nelson's Case, 217 Mass. 467, 105 N.E. 357 (1914). In all three of these cases, the husband and wife were living apart and the court remanded for findings of dependency in fact.

[23] Belanger's Case, 274 Mass. 371, 174 N.E. 497 (1931).

[24] Peterson's Case, 270 Mass. 309, 169 N.E. 779 (1930).

[25] Gritta's Case, 236 Mass. 204, 127 N.E. 889 (1920); Horovitz, Workmen's Compensation 300 (1944).

[26] Olson's Case, 247 Mass. 570, 142 N.E. 808 (1924); Broadbent's Case, 240 Mass. 449, 134 N.E. 632 (1922).

maintenance which they had previously received from him as the head of the family.[27]

In *Gritta's Case* the mother of the illegitimate children had left a husband in Italy who was in jail for life and she believed that her marriage ceremony with the employee in this country was legal. Although the mother was not a dependent because she was not the legal wife of the employee (she was not next of kin and public policy precluded her status as a member of the employee's family), their children were in this case awarded dependency benefits as members of the employee's family.

Moore's Case[28] presents an interesting contrast to *Gritta*. In *Moore's Case*, the employee lived and cohabited with a Mary Lacey for about nine years. She was separated but not divorced from her husband who appeared occasionally to visit his own daughter, Flora, for whom he also contributed board money. During the time the employee lived and cohabited with Mrs. Lacey, she had six illegitimate children, the claimants in this case, fathered by him. But in this case the principle of protecting innocent illegitimate children, as set forth in *Gritta's Case*, was held not applicable, and the children were denied dependency compensation.

Certainly from the viewpoint of the innocent illegitimate children, it is difficult to distinguish *Gritta's Case* from *Moore's Case*. The court points out that the employee in *Moore's Case* could not have been the head of the family based on kinship or marriage. The same is true in *Gritta's Case*. According to the court, there was a moral obligation on the employee to support his illegitimate children in *Gritta's Case*; the identical obligation can be said to exist in *Moore's Case*. The employees in both cases clearly met their obligations to their illegitimate children and supported them and made homes for them. Although the evidence in *Moore's Case* shows that the employee turned over "much the larger part of his earnings to Mrs. Lacey," that she had no other income except the money she got for Flora's board from her legal husband and that the employee behaved in other respects as the father and family head, the court nevertheless found no evidence that the employee managed the affairs of the household. Notably, the question of who managed the household is not raised by the court in *Gritta's Case*. The court then proceeded to the conclusion in *Moore's Case* that on all the facts the status of the employee was no more than that of a boarder whose very substantial contributions from his earnings merely paid for his board and for his illicit relations with Mrs. Lacey. The very same conclusion might have been reached by

[27] Gritta's Case, supra note 25, at 207, 127 N.E. at 890.
[28] 294 Mass. 557, 3 N.E.2d 5 (1936).

this reasoning in *Gritta's Case*. Finally the court invoked the doctrine that neither spouse may testify as to non-access. Perhaps, this is technically more difficult to overcome for the claimants in *Moore's Case*.

The result in *Moore's Case* was that the innocent illegitimate children either had to suffer deprivation because of the wrongdoing of their parents, or apply for public charity, or the innocent and legal husband had to be saddled with the responsibility of supporting six children born to his wife by another man. The latter, in fact, was the conclusion of the court:

> And, whatever was the effect of the misconduct of Mrs. Lacey on the duty of her husband to support her, for aught that appears he was legally bound to support the claimants though they were living apart from him. . . . He could not, as a matter of law, abandon his duty to support them.[29]

The significant distinction between the two cases is that in *Gritta's Case* the husband was in jail for life in Italy and the wife went through a marriage ceremony in good faith with the employee; in *Moore's Case* there was not a good faith marriage ceremony and the legal husband was on the scene. For the young claimants in *Moore's Case* this distinction does not explain away the humanitarian doctrine of *Gritta's Case*.

It is to be hoped that *Moore's Case* would not be rigidly followed today. The more recent trend is to recognize illegitimate children as "children" for purposes of workmen's compensation (thus conclusive dependents under the Massachusetts Act).[30] Where the courts have not gone quite so far, it has at least been held that even where a woman knows her cohabitation is illicit (as in *Moore*), the children qualify as members of the employee's family.[31]

D. *A "Wife" Under an Invalid Marriage*

Both *Moore* and *Gritta* are clear as to the status of the mother of the illegitimate children. Public policy prevents a wrongdoer from participating in the benefits of the Act and this includes the mother in *Gritta* as well as in *Moore*. Neither is next of kin and neither can be given the status of a family member under public policy.

Something should be said, however, on behalf of the mother in *Gritta's Case*. She had gone through a marriage ceremony with the

[29] Id. at 561, 3 N.E.2d at 7. It has been suggested that the husband in Gritta's Case fared far better in jail in Italy than the husband in Moore's Case who suddenly found himself the father of six more children by another man.

[30] 2 Larson, Workmen's Compensation Law § 62.22 (1952).

[31] Id. at § 62.23.

employee in the good faith belief that it was legal. The "good faith" element has been held a basis for allowing the "wife" dependency benefits as a member of the employee's family.[32]

E. *The Family Abode*

One of the problems that arose in both *Cowden's Case*[33] and *Peterson's Case*[34] was whether a boarding house was a proper family abode as a factor in determining whether the employee was head of a family. By defining the family as ". . . the collective body of persons who live in one house and under one head or management," the court, in the context of *Cowden's Case,* seemed to reject the boarding house as a suitable abode. In *Peterson's Case,* however, decided some fourteen years later, the court reached back to a dictum in *Nelson's Case,*[35] decided two years before *Cowden,* as support for the acceptance of the boarding house as a family abode.

The dictum from *Nelson's Case,*[36] relied upon in *Peterson's Case,* concerned itself with a husband-wife relationship. There is obviously a difference between husband and wife on the one hand (*Nelson's Case*) and a brother-sister relationship (*Cowden's Case*) or non-relatives (*Peterson's Case*) on the other hand. Clearly, wherever husband and wife live, there is a family. Even so, the court in *Peterson's Case,* quoting from *Nelson's Case,* stated, " 'The matrimonial abode may be a roof of their own, a hired tenement, a boarding house, a rented room, or even a room in the house of a relative or friend, however humble or temporary it may be.' "[37] On this basis the court supported the finding of a family of non-relatives in a boarding house.

Thus, the dictum from *Nelson's Case,* combined with the holding in *Peterson's Case,* undoubtedly establish the acceptability of a boarding house or some similar informal living arrangement as a family abode and, at least implicitly, overrule whatever contrary inference exists in *Cowden's Case.*

V. CONTRIBUTION, OBLIGATION, NEED AND EARNINGS—PREREQUISITES FOR DEPENDENCY IN FACT

A. *Generally*

In all cases not covered by the provisions for conclusive dependency, where the claimant must rely upon proof that he is a

[32] Ibid. See also Van Bibber's Case, 343 Mass. 443, 179 N.E.2d 253 (1962); Craddock's Case, 310 Mass. 116, 37 N.E.2d 508 (1941); Mass. Gen. Laws ch. 207, § 6 (1932), a statutory good faith provision.
[33] 225 Mass. 66, 113 N.E. 1036 (1916).
[34] Supra note 24.
[35] Supra note 22, at 469, 105 N.E. at 358.
[36] Ibid.
[37] Peterson's Case, supra note 24, at 312, 169 N.E. at 780.

dependent in fact, either as a next of kin or a member of the employee's family, generally it must also be shown that contributions were made by the employee to the dependent, that there was an obligation (either moral or legal) by the employee to support, that there was need for support by the dependent and that the source of the dependent's support was the employee's earnings as distinguished from other sources of income.

B. *Contributions by the Employee; Generally, Dependent in Fact Must Have Received Support Prior to Injury*

In cases of dependency in fact, the court generally requires evidence that the claimant actually received support prior to the injury.[38] "A simple expression of purpose to contribute to support, unaccompanied by any actual contribution after reasonable opportunity, would not constitute dependency."[39]

In *DiClavio's Case*[40] there was no conclusive dependency, and since there was no finding that the wife received any support from the employee, there was no dependency in fact. In *Gorski's Case*[41] the employee left his home in Poland and came to Massachusetts seven months before he died in an industrial accident. He had started working about one or two months before his death, but sent no money out of his earnings to his wife. He had previously sent to his wife some money he had obtained from his son. The employee owned a home in Poland where his wife was living and where she was operating his farm with the assistance of a hired man. Although there was also evidence that he intended to have his wife join him later, the court found no dependency in fact.

The contribution requirement is liberally applied on appropriate facts, however, and the court found in *McMahon's Case*[42] that even a minimal payment of $27 out of the employee's total annual income of $818 was sufficient to meet the requirement of past support. Dependency status may even be awarded when there is no contribution out of current earnings. In *Freeman's Case*[43] the minor employee died before his first pay day on a new job, but had declared his intention to send to his mother money from his earnings, and it was, indeed, his filial duty to do so. The court upheld a finding of partial dependency and an award of compensation to the mother. The deceased employee had made previous contributions to his mother from

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[38] Freeman's Case, 233 Mass. 287, 123 N.E. 845 (1919).
[39] Id. at 290, 123 N.E. at 846.
[40] 293 Mass. 259, 199 N.E. 732 (1936).
[41] 227 Mass. 456, 116 N.E. 811 (1917).
[42] 229 Mass. 48, 118 N.E. 189 (1918).
[43] Supra note 38.

earlier jobs in the year preceding death. In *Hassan's Case*[44] the employee attempted to send $500 to his wife and children in Syria during the year prior to his death. Because of the state of international affairs, transmission of the money was impossible. The court allowed the finding of partial dependency in fact to stand, but denied recovery because there was in fact no contribution.

A strict requirement of actual contribution may work undue hardship. One who is clearly a dependent, but has not received support, for one good reason or another, in the year prior to death, as in *Hassan's Case*, may be in at least as deserving a position and be at least as much dependent as one who has received a minimal contribution. It seems perfectly reasonable to interpret the statutory words "who were dependent" as including, in appropriate cases, those who have not, as well as those who have, received contributions. It is notable, in this connection, that under the provisions of conclusive dependency a wife who has not received any support for extended periods of time from the husband who deserted her or whom she left for justifiable cause would, nevertheless, qualify for dependency benefits. At least, in such cases the legislature recognized, in theory, a dependency status without any actual support contributions. In cases of dependency in fact, contributions by the employee are, along with other evidence, indicia of dependency, but they should not be considered absolute prerequisites.[45]

C. *Employee Must Be Under Moral or Legal Obligation to Support Claimant*

Where there is no conclusively presumed dependency, it must appear that the employee is under a moral or legal obligation to support the claimant. In *Cowden's Case*,[46] in addition to the fact that she was not next of kin and was living with her half-brother in a boarding house, the half-sister did not qualify as his dependent because the court found no obligation by the half-brother to support her. Furthermore, the claimant was supported by the half-brother for only three months, while her father, who maintained a suitable home, had repeatedly asked her to come to live with him and, as a father, had both a legal and a moral obligation to support her.

In *Peterson's Case*,[47] the dependent was not related to the employee by either blood or marriage. The dependent and her husband had taken over the care and upbringing of the employee when he was

[44] 240 Mass. 355, 134 N.E. 260 (1922).

[45] For further discussion of the nature of contributions in computing dependency benefits, see Part VIII, D, 2, infra.

[46] Supra note 33.

[47] 270 Mass. 309, 169 N.E. 779 (1930).

twelve years old although his natural mother was still alive; in fact, she survived him. After the dependent's husband died and she had lost all her property, the employee, now about eighteen or nineteen, went to work and undertook to support and provide a home for the dependent. The employee's moral obligation to support in this case was so compelling that his status as head of the family was recognized by the court although he and the claimant were not related by blood or marriage and were living in a boarding house at the time of his injury and death.

These two cases present an interesting contrast. In *Cowden's Case*, a blood relative was disqualified as a dependent partly because her dependent father and next of kin survived. The father, however, was not a blood relative of the employee; the father had married the employee's mother when the employee was a child and later adopted the employee. In *Peterson's Case*, a non-relative qualified as a dependent (member of employee's family) although the employee's mother and next of kin survived him. If there is a moral obligation to support a non-relative, as in *Peterson's Case*, there certainly is a moral obligation to support a half-brother, as in *O'Flynn's Case*.[48]

Peterson's Case, perhaps, represents the outside limit to which the court will go in finding a moral obligation to support as a basis for awarding dependency compensation. *Roney's Case*[49] is just over the line. There the claimant was the divorced wife of the employee's cousin. The claimant was not well and had to give up working. She was in need of support for herself and her children. The employee set up a home in which he supported her and her children for "undefined periods." They lived thus for twenty-seven years. On the findings there was no illicit relationship, so this was not the reason for denying compensation. The court said that the facts did not warrant a finding that the employee assumed an obligation to support on a ground favored by the law. Although the obligation to support was voluntary in both *Peterson* and *Roney*, the employee in *Peterson's Case* had a moral obligation in view of the care and support the claimant had provided for him when he was growing up. There was no similar or comparable past history in *Roney*.

The fact that the employee in *Roney*, having undertaken the obligation, maintained it for twenty-seven years and behaved in many respects as family head, was insufficient to elevate the undertaking to the level of a moral obligation. In her testimony, the claimant said that "she thought it was a pretty good proposition when she went to live with Mr. Roney to have him supply a home and give her the money. It was contemplated that she would manage the household

[48] 232 Mass. 582, 122 N.E. 767 (1919).
[49] 316 Mass. 732, 56 N.E.2d 859 (1944).

and he would have a home."[50] The court held, "[I]t would not follow that her position was other than that of a housekeeper."[51]

Where there is no kinship and no obligation to support "on a ground favored by the law," there is usually found a housekeeper-boarder relationship as in *Roney* and *Moore*.[52] In *Herrick's Case*,[53] on the other hand, a daughter, who frankly became a housekeeper for her father, was found to be his dependent. When his wife died, his daughter, who was well capable of earning a living, gave up a good job to take care of him. She thus became a dependent and his obligation to support her under these circumstances overrides her frank undertaking of the housekeeper's role.[54] Here the family unit was maintained and the obligation of the father to support was therefore "on a ground favored by the law" as contrasted with relationships contrary to public policy, as in *Moore*,[55] or voluntary, mutually convenient relationships as in *Roney*[56] and *Mahoney*,[57] where the claimant was neither next of kin to the employee nor a member of his family.

Where a parent does not qualify as a conclusive dependent upon a minor child, the obligation of the child to support the parent is based on the rule that the parent is legally entitled to the wages of the minor child.[58]

D. *Claimant Must Be in Need of Employee's Support*

> Though proof that a person could not have subsisted without aid from the employee is not essential to establish the existence of a relation of dependency . . . , dependency implies some degree of need.[59]

[50] Id. at 741, 56 N.E.2d at 865.

[51] Id. at 743, 56 N.E.2d at 865-66.

[52] Moore's Case, supra note 28. See also Mahoney's Case, 228 Mass. 555, 117 N.E. 794 (1917) (employee lived with sister and her son).

[53] 217 Mass. 111, 104 N.E. 432 (1914).

[54] The father had the obligation to support his daughter who was his next of kin and a member of his family; the daughter needed support having given up her livelihood to discharge her filial duty. See also Kenney's Case, 222 Mass. 401, 111 N.E. 47 (1916) (the court found an obligation to support a sister who gave up her job to keep house for her brother).

[55] Supra note 28.

[56] Supra note 49.

[57] Supra note 52.

[58] Sanborn's Case, 303 Mass. 225, 21 N.E.2d 248 (1939); Cammick's Case, 259 Mass. 209, 155 N.E. 870 (1927); Dembinski's Case, 231 Mass. 261, 120 N.E. 856 (1918); Gove's Case, 223 Mass. 187, 111 N.E. 702 (1916); Tornroos v. Auto Car Co., 220 Mass. 336, 107 N.E. 1015 (1915); Murphy's Case, 218 Mass. 278, 105 N.E. 635 (1914).

[59] Ferriter's Case, 269 Mass. 267, 270, 168 N.E. 747, 748 (1929). See also Mosesso's Case, 327 Mass. 525, 99 N.E.2d 859 (1951); Hoehn's Case, 326 Mass. 509, 95 N.E.2d 550 (1950); Connors's Case, 295 Mass. 106, 3 N.E.2d 31 (1936); Cammick's Case, supra note 58; Fierro's Case, 223 Mass. 378, 111 N.E. 957 (1916); Caliendo's Case, 219 Mass. 498, 107 N.E. 370 (1914).

A daughter, over eighteen but physically incapacitated, could certainly show need and total dependency although she had saved one hundred dollars and had worked for two weeks in a period of three years prior to the employee's death.[60] Even a thirty-one year old unmarried daughter, who, after working for eight years, lost her job about a year prior to her father's death qualified as a dependent.[61] A sister of a deceased employee qualified as a partial dependent although she had a substantial bank account and an interest in productive real estate.[62]

However, dependency on the employee for business expenses or for payment of employee's board is not sufficient to meet the "need" requirement.[63] Nor may a claimant ". . . refrain from the use of resources, including the ability to work, reasonably available to him for his support under all the circumstances of the case and thereby make himself 'dependent' upon the person who actually supports him."[64]

Providing money for a college education is not of itself support and, consequently, does not alone meet the need requirement in determining dependency.[65] However, money for a vacation can be part of support and, hence, can be a factor in establishing the need requirement.[66]

E. *Dependency Must Rest Upon Employee's Earnings*

The claimant must be ". . . dependent upon the *earnings* of the employee. . . ." (Emphasis supplied.)[67] Support of the dependent must come from the earnings of the employee and not from any other assets or income of the employee in order for the claimant to qualify for benefits.[68]

Where total dependency is in issue, the house in which the claimant lives must be shown by affirmative evidence to be maintained out of the earnings of the employee.[69] Even if the employee built a house and paid taxes for it out of his earnings, the ownership of the house in his wife's name has been held to destroy her total dependency

60 Carter's Case, 221 Mass. 105, 108 N.E. 911 (1915).

61 Herbert's Case, 283 Mass. 348, 186 N.E. 554 (1933).

62 Kenney's Case, supra note 54.

63 Merchant's Case, 282 Mass. 36, 184 N.E. 390 (1933); Doherty's Case, 277 Mass. 339, 178 N.E. 515 (1931).

64 Ferriter's Case, supra note 59, at 270-71, 168 N.E. at 748. See also DiClavio's Case, supra note 40.

65 DiClavio's Case, supra note 40.

66 Ressi's Case, 243 Mass. 528, 137 N.E. 703 (1923).

67 Mass. Gen. Laws ch. 152, § 1(3) (1932).

68 Merchant's Case, supra note 63; Derinza's Case, 229 Mass. 435, 118 N.E. 942 (1918); Gorski's Case, supra note 41.

69 Diana's Case, 335 Mass. 757, 142 N.E.2d 358 (1957); Cellurale's Case, 333 Mass. 37, 127 N.E.2d 787 (1955); Derinza's Case, supra note 68.

status.[70] Although she can still qualify as a partial dependent, this latter result does seem harsh where nominal ownership of property is involved.

VI. Non-Resident Aliens

Whether non-resident aliens are eligible for dependency benefits was decided for the first time on its merits in *Derinza's Case*.[71] There had previously been at least three cases before the court in which eligibility of non-resident aliens was assumed without the question having been raised.[72] *Derinza's Case* expressly settled the matter: "There is in the words of our act no exclusion from its benefits of those dependents who are non-resident aliens. . . ."[73]

Although nothing is said in our Act regarding either inclusion or exclusion of non-resident aliens, the holding in *Derinza's Case* follows the general intent of the drafters of the original Act. In a legislative document prepared in 1910 for the purpose of explaining to the public what benefits would be available and who would be eligible, the original drafters of the Act wrote: "Non-resident aliens shall be entitled to payments as dependents of a deceased employee."[74] The specific reference to dependents of a "deceased" employee in this early document is understandable in view of the fact that the provision for benefits to dependents of injured employees was not enacted until 1945.

VII. Conclusive Dependents

A. *General Summary*

It has already been pointed out that conclusively presumed dependents were provided for under the law to reduce litigation and to grant dependency benefits to those normally dependent upon the employee without requiring proof of their dependency.[75] But the question whether claimants in various situations qualify as conclusive dependents has itself been a fruitful source of litigation.

All the provisions for benefits to dependents of injured employees appear in section 35A, including the provisions for conclusive dependency. Provisions for dependents of deceased employees appear in sections 31 and 32. Section 31 generally provides for the benefits to be paid, and section 32 designates those who are to receive benefits and includes the provisions for conclusive dependency. Sections 31 and

[70] McDonald's Case, 229 Mass. 454, 118 N.E. 949 (1918).

[71] Supra note 68.

[72] Gorski's Case, supra note 41; Fierro's Case, supra note 59; Caliendo's Case, supra note 59.

[73] Supra note 68, at 441, 118 N.E. at 945.

[74] Tentative Synopsis and Draft of a Proposed Act Providing for Payments in Case of Accidents to Employees (December 17, 1910).

[75] See text accompanying note 3, supra.

32 must be read together. Conclusive dependency ". . . is not affected by the wealth or poverty of the dependent."[76]

Persons designated as conclusive dependents are the same under the provisions of section 32 for deceased employees and section 35A for injured employees:

(1) A wife upon a husband with whom she lives at the time of his injury (35A) or his death (32);
(2) A husband (under certain conditions discussed below) upon a wife with whom he lives at the time of her injury (35A) or her death (32);
(3) Children under eighteen (or over eighteen if physically or mentally incapacitated) living with the employee at the time of his (or her)[77] injury (35A) or death (32);
(4) A parent upon an unmarried child under eighteen.

B. *Conclusive Dependents Exclude Dependents in Fact*

The rule was established early in workmen's compensation history in Massachusetts that a conclusive dependent takes to the exclusion of a dependent in fact.[78] The statute as originally passed provided in what is now section 31[79] that dependency compensation be paid to ". . . the dependents of the employee, wholly dependent upon his earnings for support." This would appear to mean that *all* those wholly dependent were entitled to compensation. There appeared, however, to be qualifying provisions in section 32. After setting forth who shall be conclusive dependents, the last paragraph of section 32 reads in part as follows:

> *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 . . . ; and *in such other cases,* if there is more than one person wholly dependent the death *benefit shall be divided equally among them.* . . . (Emphasis supplied.)

It was only in section 32 and in the context of "such other cases," that is, dependents in fact, that provision was made for an equal division. Reading these two original sections together it was, therefore, not clear whether the legislative intent was to divide equally the de-

[76] Cronin's Case, 234 Mass. 5, 6, 124 N.E. 669, 670 (1919).

[77] Use of the word "his" in the statute, unless clearly limited in context to masculine also includes the feminine. Brown's Case, 322 Mass. 429, 430, 77 N.E.2d 649, 650 (1948), citing Mass. Gen. Laws ch. 4, § 6 (1932).

[78] McNicol's Case, 215 Mass. 497, 102 N.E. 697 (1913); Coakley's Case, 216 Mass. 71, 102 N.E. 930 (1913).

[79] Section numbers used herein refer to the earlier (and differently numbered) as well as to the present sections.

pendency benefits only among dependents in fact. If this was the intent, what was to be done about a case with two or more conclusive dependents?

Under the original statute a child under eighteen was a conclusive dependent *if there was no surviving parent.* Nor was there any provision until 1922 for paying a surviving widow any additional sum for children of the employee. Thus, in *McNicol's Case,*[80] where a widow and her child survived, the question of dependency benefits for the child was raised for the first time. The widow was clearly a conclusive dependent under section 32. The child was just as clearly *not* a conclusive dependent under the same section. The child could no doubt qualify as a total dependent in fact. The court held that where there was a surviving husband or wife, he or she was a conclusive dependent and no one else shared in the dependency benefits. The resulting general rule was that where there was a conclusive dependent, dependents in fact were excluded from benefits.

In *McNicol's Case* the court reasoned that the conclusively dependent parent excluded the dependent-in-fact child because in other parts of the statute (sections 31 and 33) the ". . . use of the plural word 'dependents' finds ample justification in the many conceivable instances where several persons may be entitled to share in the payments where there is no surviving husband or wife." The court did not consider, however, the possibility of an orphaned child who might qualify as a conclusive dependent of the deceased employee even when he leaves a wife. The child in such a case would be the issue of a former marriage, the former wife having predeceased the employee. There would thus be both a surviving wife and an orphaned child, both of whom would qualify as conclusive dependents. This is precisely what happened in *Coakley's Case*[81] shortly after the decision in *McNicol's Case.* Here the issue was sharply raised as to division between two conclusive dependents.

The widow in *Coakley's Case* had two children of her own by her former marriage. These children could qualify as members of the employee's family and dependents in fact, but not as conclusive dependents. There was also a surviving child of the widow and the deceased employee who, like the child in *McNicol's Case,* could qualify as a dependent in fact, but not as a conclusive dependent. Finally there was a child of the employee by a former marriage who was living with the employee at the time of his death (the mother of the child having predeceased the employee). Under the statute, this latter child and the widow were both conclusive dependents. The court, relying

[80] Supra note 78.
[81] Supra note 78.

on *McNicol*, held that the conclusive dependents exclude the dependents in fact. It then proceeded to divide the benefits between the widow and the child despite the gap in the statute regarding division among conclusive dependents and despite the formulation in *McNicol* that others share only "where there is no surviving husband or wife."

The court in *Coakley's Case* pointed out that there was no express statutory provision for sharing benefits among conclusive dependents and then justified the division between the mother and the orphaned child:

> It is true that no express provision is made for a case like the present where there is more than one person beside orphaned children conclusively presumed to be wholly dependent. But the act should be interpreted broadly in harmony with its main aim of providing support for those dependent upon a deceased employee. Reading the section as a whole the purpose appears to be, though disclosed in language not completely free from obscurity, to divide the payments equally among those conclusively presumed to be wholly dependent. This is manifest by express words when there are two or more orphaned children. Equal division is provided also when, in case there is no one conclusively presumed to be wholly dependent and dependency is determined as a fact, more than one is found to be wholly dependent.[82]

In summary, *Coakley's Case* argues that the statute should be interpreted broadly to provide benefits for dependents; that section 32 used the plural word "children" in sub-paragraph (c) and is thus an express provision for sharing benefits among conclusive dependents at least in that category; that equal division is provided for when there are several dependents in fact and that the statute, therefore, was intended to provide that where there are two or more conclusive dependents in any category they should share benefits despite the absence of any express statutory provision to this effect.

While agreeing that all conclusive dependents should share, based on a broad interpretation of the statute, it seems reasonable to argue, based on the same broad interpretation, that the legislature intended under the original statute that *all* persons wholly dependent whether conclusive or in fact, should share equally in the death benefits. Section 31 said simply that death benefits should be paid to those wholly dependent. The only difference between conclusive dependents and dependents in fact is that the latter must, and the former need not, prove their dependency. The only reason for establishing a category

[82] Coakley's Case, supra note 78, at 73, 102 N.E. at 931-32.

of conclusive dependents is to avoid litigation.[83] It does not seem reasonable to exclude dependents in fact merely because they must prove their dependency. That dependents in fact are referred to in section 32 as "other cases" and "such other cases" may have been nothing more than the result of the rhetorical necessity of identifying two separate dependency categories. While it is true that section 32 appears in "language not completely free from obscurity," it is also true that the legislature in that section expressly excluded partial dependents when total dependents survived. This is the only express exclusion in the statute. If it so intended, the legislature could just as easily have inserted an express exclusion for dependents in fact when conclusive dependents survived. Furthermore, the legislature, by the use of the plural, clearly implied division of benefits for conclusively dependent "children" under section 32(c). Since there was still no express provision for division among all categories of conclusive dependents, even though the court in *Coakley's Case* found legislative intent to do so, it would seem just as reasonable to say that the legislature intended division among all total dependents, conclusive and in fact.

It is difficult to understand why one who is designated a conclusive dependent should enjoy greater rights than one who is equally, and perhaps more, dependent although designated "dependent in fact." Indeed, it may even be more logical to conclude that one who is put to the task and successfully proves total dependency should enjoy at least as much right under the statute as a conclusively presumed dependent who may in fact not be at all a dependent in the literal sense of that word.

In any event, the twofold holding in *Coakley's Case* was clear. The mother and orphan were both conclusive dependents and, as such, they shared in the benefits. There were also children in that case who were dependents in fact who did not share because the conclusive dependents excluded them. The exclusionary rule was thus established.

The practical effect of *Coakley's Case* was to give to the widow five dollars per week for herself and her child by the employee and to give to the employee's child of a former marriage five dollars for herself.[84] The distribution was obviously inequitable. In 1914, the following year, the statute was amended to enact the holding in *Coakley's Case* that conclusive dependents should share. To remedy the inequitable distribution in that case the amendment also provided that the spouse, the children of the spouse and the employee, and the employee's children of a former marriage should all share the benefits equally, the surviving wife or husband to take the same share as a

[83] Report of Commission on Compensation for Industrial Accidents (July 1, 1912).
[84] The maximum for dependents was then a total of ten dollars weekly.

child. Under this provision the widow and the child by the employee in *Coakley's Case* would each have received one-third of the dependency benefits (instead of one-quarter) and the orphan the remaining third.

The 1914 amendment had the appearance of implementing the exclusion of dependents in fact by conclusive dependents. It provided, "The death benefit shall be divided between the surviving wife or husband and all the children of the deceased employee." This could perhaps mean that the entire death benefit should thus be divided, leaving nothing for "all other cases" *i.e.*, dependents in fact. On the other hand, this new amendment, under the rubric of conclusive dependents, provided for sharing by children of the employee who were not conclusive dependents with those who were (the surviving parent and children of a former marriage). The wording of section 32(c) makes it clear that the children of the employee living with him are conclusive dependents only if there is no surviving parent. In other words, they are *not* conclusive dependents when a parent survives, but they do share in benefits when there are conclusively dependent children of a former marriage. Thus, the 1914 amendment in effect ignored the boundaries between the different dependency categories in order to accomplish a just result.

In 1922 another significant amendment was enacted, this time to section 31. This amendment generally provided additional benefits to the widow up to a certain maximum when there were children, under eighteen, of the widow and the deceased employee. Again, as in 1914, the 1922 amendment had a double aspect. The increasing differences in the benefit payment provision between conclusive and in-fact dependents could be said to confirm the legislative intent that they should be separate categories and that the one should exclude the other. On the other hand, it was again clear, as it was in 1914, that benefit payments were being provided for children who were not conclusive dependents, along with benefit payments for the conclusively dependent widow. Furthermore, the 1922 amendment enacted the rule in *Bartoni's Case*[85] in which the court, without benefit of express statutory authority, awarded compensation to a child to succeed a deceased widow who had been receiving dependency benefits. The court in *Bartoni's Case* held that the child of a deceased widow takes as if he were the only surviving next of kin. This is language applicable to dependency in fact rather than conclusive dependency.

In a word, the 1914 amendment, *Bartoni's Case* and its enactment into the 1922 amendment were all designed to achieve a more equitable payment and distribution of benefits among dependents regardless of rigid categories. This is consistent with the benevolent purpose

[85] 225 Mass. 349, 114 N.E. 663 (1961). The rule in Bartoni's Case followed the dictum in Murphy's Case, 224 Mass. 592, 113 N.E. 283 (1916).

of the statute; the exclusionary rule in favor of conclusive dependents is not.

Many states apparently follow the exclusionary rule in one form or another.[86] The better rule, permitting a just division of benefits among dependency categories, is applied in some states either by statute or decision. In Kentucky, for example, with dependency provisions very much like those in Massachusetts and without express statutory authority, it has been held repeatedly that dependency benefits may be apportioned among the several dependency categories. As between conclusive and total dependents in fact, the benefits are equally divided.[87] As between partial and total dependents, the division is on the basis of the proportion of earnings contributed to the partial dependents.[88]

> If the employee was, in his lifetime, contributing to the support of more than one dependent of different degrees, why should his death work a preference in favor of one or of a single class to the exclusion of all others, provided they all come within one or the other of the classes named in the act?[89]

California and Ohio exemplify states with statutory provisions allowing their compensation commissions to reapportion death benefits among dependency categories as may be just and equitable and in accordance with needs.[90]

C. *Conclusive Dependency of Wives and Widows*

1. *Generally*

Under section 32(a), a widow is a conclusive dependent if she was living with the employee at the time of his death. It is no impediment to her qualifications as a conclusive dependent if her marriage was invalid when it took place, but became valid prior to the employee's death by operation of the law of marriage and divorce.[91] The widow is also a conclusive dependent under section 32(a) if she was living apart for justifiable cause or because her husband had deserted her. This latter provision is apparently based on the theory that during

[86] 2 Larson, Workmen's Compensation Law § 64.30 (1952); 9 Schneider, Workmen's Compensation Law § 1907 (1950).

[87] Ritchie v. Katy Coal Co., 313 Ky. 310, 231 S.W.2d 57 (1950); Franklin Fluorspar Co. v. Bell, 247 Ky. 507, 57 S.W.2d 481 (1933).

[88] J. F. Hardymon Co. v. Kaze, 241 Ky. 252, 43 S.W.2d 678 (1931); Noe v. Noe, 229 Ky. 490, 17 S.W.2d 405 (1929).

[89] Penn v. Penn, 183 Ky. 228, 232, 209 S.W. 53, 55 (1919).

[90] Cal. Lab. Code § 4704; Ohio Rev. Code Ann. § 4123.59 (Baldwin Supp. 1963).

[91] Van Bibber's Case, 343 Mass. 443, 179 N.E.2d 253 (1962); Craddock's Case, 310 Mass. 116, 37 N.E.2d 508 (1941); Mass. Gen. Laws ch. 207, § 6 (1932).

his lifetime and until his death he was under a continuing obligation to support which the wife could, presumably, enforce through the courts. Until the employee's death, the wife would, in this sense, be a dependent although living apart and not receiving support. It would be unfair to deprive her permanently of this dependency status upon his death.

On the other hand, under section 35A, the wife of an injured employee does not qualify as a conclusive dependent if living apart from her husband for any reason at the time of the injury. Here the wife continues to have her legal remedies against her injured husband (e.g., separate support) and, furthermore, she may, under the last paragraph of section 35A, secure direct dependency payments after establishing herself as a dependent in fact. Presumably this provision for separate dependency benefits and her other legal remedies were considered by the legislature sufficient protection for the wife without the need for granting her conclusive dependency status, even in cases of desertion and living apart for justifiable cause when the husband survives and is collecting compensation. It would seem just as reasonable, however, to grant conclusive dependency in these circumstances, as in death cases, instead of placing upon the wife the heavier burden of proving dependency in fact. Wives, deserted or living apart for just cause, who must prove dependency in fact may be unfairly excluded if there is another conclusive dependent [e.g., a child under section 35A(c)] or may find it impossible to prove all the necessary elements of dependency in fact. Such a wife could, presumably, be called upon to prove contributions from her husband's earnings[92] when his refusal to meet his obligation to support her was precisely the reason for her living apart.

In any event, when there is clearly a separation between an injured employee and his wife, she does not qualify as a conclusive dependent, but may qualify as a dependent in fact.[93] Where there are only temporary separations due to moving, travel or other transient reasons not basically causing a break or interruption in the marriage and mutual home, the same rules apply to wives of injured employees as apply to widows.[94]

2. *Widows as Conclusive Dependents*

The original enactment of section 32(a) simply provided conclusive dependency of a widow who was living with the employee at the time of his death. *Gallagher's Case*[95] raised for the first time

92 See Part V, B and E, supra.

93 Newman's Case, 222 Mass. 563, 111 N.E. 359 (1916).

94 See this part, section 5, infra.

95 219 Mass. 140, 106 N.E. 558 (1914).

the question of conclusive dependency status for a widow who was living apart from her husband for justifiable cause and receiving support under a court order. The original statute said simply and clearly "with whom she lives at the time of his death." Thus, the court had no choice but to hold that there was no conclusive dependency. Within less than two years, in 1914, the legislature added the present provision in section 32(a) that a widow living apart for justifiable cause or because she was deserted qualifies for conclusive dependency.

The justice of the new provision was obvious. Widows covered by the provision were spared the burden of proving dependency in fact by being entitled to the preferred conclusive dependency status. But now these widows had a new burden: to prove that they were deserted or were living apart for just cause; this created a new body of law.

The importance for the widow living apart to secure conclusive dependency status is that otherwise she has to prove dependency in fact and also the degree of her dependency, whether total or partial. If she is not a conclusive dependent she may be entirely excluded if there is a conclusive dependent in the picture, for example, a child by a former marriage.[96] If there is no conclusive dependent, and she can show only partial dependency, she might be completely excluded by the presence of total dependents in fact, for example, a totally dependent mother, under the last paragraph of section 32.

There is, therefore, a high premium on proving conclusive dependency. Where the widow living apart cannot show desertion or just cause, she can qualify as a conclusive dependent only if she can show that although not living with the employee at his death, the separation was temporary or one more apparent than real, and that there was really a "home with a life in it."[97]

Thus, two lines of cases have followed the 1914 amendment to section 32(a): cases involving "justifiable cause" and "desertion" and cases involving the definition of "separation" or "living apart."

3. *Living Apart for Justifiable Cause or Desertion*

It is necessary to show affirmatively that there was a living apart for just cause or desertion and the burden is on the claimant widow.[98] The first case to come before the court under the new provision for justifiable cause was *Newman's Case*. The court made it clear at the outset that:

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[96] Coakley's Case, supra note 78.

[97] Nelson's Case, 217 Mass. 467, 469, 105 N.E. 357, 359 (1914).

[98] Shaw's Case, 340 Mass. 717, 166 N.E.2d 718 (1960); Cellurale's Case, supra note 69; Allen's Case, 318 Mass. 640, 63 N.E.2d 356 (1945); Craddock's Case, supra note 91; DiClavio's Case, 293 Mass. 259, 199 N.E. 732 (1936); Fierro's Case, supra note 59.

> These words have acquired a peculiar and appropriate meaning in the law. . . . [S]he does not live apart from him for justifiable cause if there is no failure of marital duty on his part.[99]

Here there was a separation by mutual agreement because the employee did not earn enough to support his wife and provide a home, but his earnings at his death had doubled, yet they still lived apart. *DiClavio's Case*[100] was similarly a case of living apart by mutual consent for financial reasons, and this, the court said, was not a failure of marital duty and not a separation for just cause. In *Newman's Case* the rule is certainly understandable particularly because the employee was earning twice as much as at the time of separation. In *DiClavio's Case* the rule is clearly applicable on two grounds: the employee and his wife (who remained in Italy) had been separated about twenty-four years at his death, the original separation being by mutual consent for financial reasons, and the wife did not sustain the burden of proving separation for just cause at the time of death. But where the wife separates from her husband, as in *Veber's Case*,[101] because the employee is physically and mentally incapable of performing remunerative work to provide for wife and child, the application of the rule in *Newman's Case* seems harsh. There would appear to be more than merely a mutual agreement to separate for financial reasons in *Veber's Case*; there would seem to be something more accurately described as a failure of marital duty. The court evidently considered it necessary, however, to apply the *Newman* rule narrowly. It almost appears necessary to show an intentional refusal by the employee to fulfill his marital duty in order for the widow to sustain a claim of desertion or justifiable cause.

The original separation by the wife from the employee need not have been for justifiable cause; the widow may claim just cause if it arises during the separation and if she shows that this cause was the reason for continued separation at the employee's death. In *DiClavio's Case*[102] the husband left the wife in Italy in 1909 for financial reasons and by mutual consent. They never saw each other again and he died twenty-four years later in 1933. Meanwhile, about a year or two after arriving in this country, he met another woman and lived with her intermittently for about twenty-two years until his death. Within two years after he started living with her, they had an illegitimate son. The court said in effect that if the legal wife could sustain the burden of proving that her husband's subsequent adultery was the reason for

99 Supra note 93, at 566-67, 111 N.E. at 361.
100 293 Mass. 259, 199 N.E. 732 (1936).
101 224 Mass. 86, 112 N.E. 485 (1916).
102 Supra note 100.

continuing living apart, she would thereby show just cause and qualify as a conclusive dependent.

The same general proposition was set forth in *Broadbent's Case.*[103] In this case the wife had refused to accompany her husband from England to the United States. They lived apart for twenty years until his death and the wife made no effort to communicate with her husband during this period. Her reason for refusing to accompany him was that prior to his departure, he had improper relations with other women, struck her, ill-treated her and earned too little to support the family. She had continued to live with him, however, and the board found condonation; the court affirmed the finding. Added to all this, however, the wife had said she would accompany him to this country if he would alter his ways, and he replied that he would do as he saw fit. There was also the even more important allegation that the wife discovered in 1906, approximately nine years after his departure, that he had entered into a bigamous marriage. On all of these facts, and particularly her discovery of his bigamous marriage, the court said that, if believed, it could have been found that she was living apart for justifiable cause. The board apparently chose not to believe that she had discovered his bigamous marriage prior to his death or that she continued to live apart because of it, and the court could not say, as a matter of law, that the findings of the board were erroneous. Both *DiClavio* and *Broadbent* indicate the need for substantial and convincing evidence to prove just cause arising after initial separation without just cause.

The wife's behavior after being deserted or after leaving her husband for just cause may be relevant on the question whether at the time of his death she was still living apart for desertion or just cause. The insurer will, of course, raise the question of the wife's behavior when it might tend to show that living apart from her husband at his death was motivated by interests other than his desertion or her just cause for separation.[104] Specifically, the situation may be one in which the wife has a good claim for conclusive dependency based on just cause or desertion, but there is ample credible evidence that she was guilty of adultery prior to his death. We find no decided cases that raise the issue directly, but *Thurman's Case*[105] at least suggests the factual situation. The wife in that case had left her husband, taking their young daughter with her, because he had refused to support them. At the time of the employee's death, the wife was living in adultery. The daughter claimed as a conclusive dependent under section 32(d)

[103] 240 Mass. 449, 134 N.E. 632 (1922).

[104] At the present writing there is just such a case being litigated before the Industrial Accident Board.

[105] 259 Mass. 222, 156 N.E. 28 (1927).

on the ground that her father was legally bound to support her although they were living apart; the board so found. The wife in *Thurman's Case* did not make a claim for dependency, although she had originally separated from her husband for just cause. So far as the husband's behavior alone was concerned there was nothing to preclude the wife's status as a conclusive dependent if she had filed a claim. So far as the wife was concerned she would not be benefited because of her illicit conduct, but rather, because of her husband's conduct constituting just cause for leaving him. The public policy which prevents a wrongdoer from participating in the benefits of the Act would thus not apply here.[106] The question would then resolve itself to the factual one of whether she was living apart for the initial just cause or the current adulterous relationship. If the wife offered credible evidence, which was believed by the board, tending to prove that, entirely apart from her admitted misconduct, she was prepared to return to her husband at any time until his death, it seems that an award of conclusive dependency would have to stand as a matter of law. There seems to be no legal reason to the contrary, especially in view of the express statutory provision in section 32(a) that the board's findings in such matters are final.[107]

4. *Findings of the Board Are Final*

The final sentence in section 32(a) reads as follows: "The findings of the [Industrial Accident Board] . . . upon the questions of such justifiable cause and desertion shall be final." The purpose and effect of this statutory provision is not entirely clear, unless it means that the board's findings on these questions will somehow be given more than ordinary recognition. The court in *Broadbent's Case*[108] makes a reference to this provision, thus recognizing its existence, and then adds that there must be evidence to support the board's findings. It is axiomatic that the board's findings under any section of the act must stand if there is any evidence to support them.[109]

5. *"Living Apart" Defined*

When the wife is not living with the employee at his death and there is clearly no separation for just cause or desertion, the wife must show that there was only a temporary living apart, or infrequent

106 Moore's Case, 294 Mass. 557, 3 N.E.2d 5 (1936); Gritta's Case, 236 Mass. 204, 127 N.E. 889 (1920).

107 "Misconduct after the abandonment would not bar her right to participate in the award as his wife." Ritchie v. Katy Coal Co., supra note 87, at 314, 231 S.W.2d at 59.

108 Supra note 103.

109 This rule is repeated in innumerable compensation cases. See, e.g., Pigeon's Case, 216 Mass. 51, 52, 102 N.E. 932, 933 (1913).

separations involving family necessity and that there was, overall, a living together within the meaning of the statute.

Living together means maintaining a family relationship.

> There may be temporary absences and incidental interruptions arising out of changes in the house or town of residence, or out of travel for business or pleasure. But there must be a home and a life in it.[110]

> A living together . . . imports actual enjoyment of the marriage relation. . . . It cannot be stretched to include prolonged absences. . . .[111]

Both sections 32(a), for conclusive dependency of the wife of a deceased employee, and 35A(a), for conclusive dependency of the wife of an injured employee, use the same phrase "with whom she lives" and the same standards of "living together," no doubt, apply to both types of cases. The same standards also apply to "with whom he is living," in section 35A(b), and to "with whom he lives," in section 32(b), with respect to husbands as conclusively presumed dependents.

A separation for about seven months with unknown sums sent by the employee on two occasions to the wife who was running a farm in a foreign country where she had hired a man to help on the farm, was not a living together as contemplated by section 32(a).[112] When the separation lasts over thirteen months there is also no living together, even though there is a genuine purpose to resume cohabitation.[113] Certainly a separation of about three and a half years from the wife in a foreign country is too long to justify a "living together" and conclusive dependency.[114]

Thus, as a general rule, prolonged absence is not a "living together" under the statute. This general rule must, however, be tempered by a reasonable recognition of life's exigencies and the demands of economics, health and marital duty. There must also be a recognition of the basic purpose of providing benefits to dependents and that denying a wife conclusive dependency may deprive her of any dependency if there is a conclusive dependent in the picture, even if the wife is in fact dependent.

Having separated for financial reasons and continuing to live separately, although the husband earns twice as much at his death,

[110] Nelson's Case, supra note 97, at 469, 105 N.E. at 358.
[111] McDonald's Case, supra note 70, at 455, 118 N.E. at 950.
[112] Gorski's Case, 227 Mass. 456, 116 N.E. 811 (1917).
[113] McDonald's Case, supra note 70.
[114] Mooradjian's Case, 229 Mass. 521, 118 N.E. 951 (1918).
[115] Newman's Case, supra note 93.

is certainly not a living together.[115] Similarly, in *Breakey's Case*,[116] where the employee lives with his mother since his marriage, maintains a household for her and gives her money, and where his wife lives apart and works there is, obviously, no living together, even though he gives his wife a weekly sum. Here the mother defeated the wife's claim for conclusive dependency and they both qualified as partial dependents in fact. But where the husband, as in *Allen's Case*,[117] finds it necessary to work in another city and returns weekends to his family, there is not a living apart and there is a conclusive dependency for the wife. In *Gilson's Case*[118] the employee lived in harmony with his wife for three years before his death, spent three days of every weekend with her and had supper and breakfast with her daily. Four nights each week he stayed with his aged and infirm mother who lived alone and took care of her by making her fires and preparing her breakfast. Here there was also a living together and conclusive dependency for the wife.

Harrington's Case[119] falls somewhere between the latter situation and *Breakey's Case*,[120] in which the original ceremony and weekly payments to the wife were the only things left of the marriage. In *Harrington* the husband and wife spent weekends together, but each worked and had separate abodes in different cities. The wife would have lived with her husband if he had steady work and could pay the bills. "The 'home and a life in it,' however, approached the vanishing point. But it could have been found that there was still a 'matrimonial abode'. . . ."[121]

In *Lopes' Case*[122] the husband was the claimant. He was totally disabled and, with his wife's consent, lived in the Cape Verde Islands. He had been living there for about ten months. Before her death he arranged to return to the family home which she had maintained during his absence. "Here it could be found that there was 'a home and a life in it' which was carried on in Falmouth by the wife during the temporary absence of her husband because of illness."[123]

In summary, *Allen's Case* says that economic necessity causing brief separation is not a living apart; *Harrington's Case*, one involving economic necessity and two separate abodes, holds that the standard of living together was barely met by the weekends spent together; *Gilson's Case* says that brief separations because of filial duty is

116 235 Mass. 460, 126 N.E. 769 (1920).
117 Supra note 98.
118 254 Mass. 460, 150 N.E. 183 (1926).
119 297 Mass. 125, 7 N.E.2d 732 (1937).
120 Supra note 116.
121 Harrington's Case, supra note 119, at 128, 7 N.E.2d at 733.
122 332 Mass. 39, 123 N.E.2d 217 (1954).
123 Id. at 41, 123 N.E.2d at 218.

not a living apart; finally, there is not a living apart even after a separation for ten months due to illness when a home was being maintained and plans were made for rejoining the home, as in *Lopes' Case.*

D. *Husbands as Conclusive Dependents*

The surviving husband is a conclusive dependent of the deceased wife (employee) under section 32(b) provided he lives with her at the time of her death.

Although husbands are not normally dependent upon their wives and thus might not be expected to come within the theory of conclusive dependency, the legislature, in this instance, grants the wife who shares in the breadwinning function the same employee status as the husband. The legislature no doubt had in mind that where the wife has to leave home to work, there is generally a need for and a dependency upon her earnings, and when the working wife dies, there is both a permanent loss of her earnings and an additional financial burden upon her husband in providing for management and maintenance of the family. When the wife leaves home and subjects herself to the risks of industry it is reasonable to require industry to insure her loss to the family.

Under section 35A(b), dealing with injured employees, a husband qualifies as a conclusive dependent only if he is mentally or physically incapacitated. When the wife is an injured employee, she receives compensation for both herself and her children under section 35A(c). The need for providing conclusive dependency status to the husband (if he is not incapacitated) does not exist as it does in the case of a deceased wife.

E. *Children as Conclusive Dependents*

1. *Generally*

Section 32(c) provides that children under eighteen living with the employee at his death are conclusive dependents if there is no surviving parent.[124] Under the same section, orphaned children of a former marriage are also conclusive dependents even if the employee leaves a wife.

Injured employees were not entitled to any benefits for their dependents until 1945. In that year section 35A was enacted, applying the provisions of section 32 to injured employees. Section 35A provides conclusive dependency for children living with or apart from the employee at the time of his injury. This provision corresponds to sections 32(c) and 32(d) relating to children of deceased employees.

[124] The child must be under eighteen at the employee's death and does not qualify if he reaches eighteen between injury and death. Rossi's Case, 240 Mass. 136, 133 N.E. 566 (1921).

To qualify as a child under sections 32 and 35A, a person must be under eighteen or, if over eighteen, be mentally or physically incapacitated. Sections 32(c) and (d) and section 35A(c) provide dependency benefits from birth for children conceived, but not yet born, at the time of the injury or death of the employee.

In the case of injured employees, the dependency benefits for children under section 35A(c) are generally paid directly to the employee in addition to his regular weekly compensation. The Industrial Accident Board may, however, in its discretion, order payments made directly to the dependent child, presumably through the other parent or guardian. This might occur when there is reason to believe that the employee would not use the money for the benefit of the dependent child.

Reading sections 32(c) and 31 together, a surviving dependent parent receives the benefits for both parent and child. Payments due to children of a former wife or husband are paid to their guardians or legal representatives for the benefit of such children. Where there is no surviving parent, or where he or she dies during the payment of death benefits, the amount that would be payable to the surviving parent is paid, under section 31, in equal amounts to the children. However, if the surviving parent remarries, all payments under the previous arrangements cease and payments are then made to each child at a specified rate.[125]

2. *Children Living Apart from Employee*

Sections 32(c) and 32(d) read together provide that *any* child living apart from the employee at death, whether a child of the last or a former marriage, must show that the employee, at the time of his death, was legally bound or ordered by law, decree or order of court or other lawful requirement to support such child. Paragraphs (c) and (d) of section 32 appear "in language not completely free from obscurity" and it is essential to read them together and to be aware that (d) modifies (c).

In order clearly to understand the combined provisions of section 32(c) and (d), it is necessary to follow and understand the case and legislative history of these two subsections. The 1914 amendment to section 32(c) which followed *Coakley's Case*,[126] provided for the equal division of benefits among the widow, all children of the widow and employee and the employee's children of former marriages. But there was no provision in section 32(c) applicable to children living apart from the employee. In fact, there was no provision anywhere in the statute prior to 1919 as to such children. It

[125] Twelve dollars weekly under the present statute.

[126] Supra note 78.

was clear, however, under section 32(c) that a child without a surviving parent had to be living with the deceased employee to qualify as a conclusive dependent. No such restriction appeared as to children of a former marriage.

In *Holmberg's Case*,[127] the employee left a widow, their child and a child by a former marriage living apart from the employee. The court affirmed a decision awarding conclusive dependency to the child of the former marriage on the ground that there was nothing in section 32(c) requiring the child of a *former marriage* to live with the employee at his death as distinguished from the child of the last marriage. In *Gavaghan's Case*,[128] a case in which the child was over eighteen and married but physically incapacitated by total blindness, the court cited *Holmberg's Case* and held that the widow had to share the dependency benefits with this married child. The court said:

> In the case of a child of a former wife or husband the Legislature considers neither the wealth, poverty, residence nor legal rights to support of that child, and concerns itself only with the question: Is the child under eighteen years of age, and if over, is he or she "physically or mentally incapacitated from earning?" If under eighteen years of age or physically or mentally incapacitated from earning, the child is conclusively presumed by the terms of the act to be wholly dependent for support on the deceased employee.[129]

Both *Holmberg* and *Gavaghan* involved children of former marriages living apart from the employee at death and both were awarded conclusive dependency. By contrast, in *Moran's Case*[130] which was decided after *Holmberg* and *Gavaghan* but before the enactment of section 32(d), the court held that an under eighteen child of the *current* marriage, although deserted by the father and living apart for justifiable cause, was not a conclusive dependent. The court felt that the provision making widows conclusive dependents when living apart for just cause was not applicable to a child.

Then came the addition of section 32(d) in 1919. Despite all the difficulties encountered in the division of benefits arising out of *Coakley's Case*,[131] it is interesting to note that in enacting section 32(d), providing for a new category of conclusively dependent children, the legislature made no express provision for division of benefits between these children and those covered under section 32(c). The holding in *Coakley's Case*, and the phrase "the death benefit shall be

[127] 231 Mass. 144, 120 N.E. 353 (1918).
[128] 232 Mass. 212, 122 N.E. 298 (1919).
[129] Id. at 213-14, 122 N.E. at 298.
[130] 234 Mass. 152, 125 N.E. 157 (1919).
[131] 216 Mass. 71, 102 N.E. 930 (1913).

divided between the surviving wife and husband and all the children of the deceased employee" in section 32(c), however, are ample support for the proposition that children living apart share equally with those living with the employee at his death.

In any event, section 32(d) was no doubt enacted precisely because of the holdings in *Holmberg* and *Gavaghan*. The decisions in these cases revealed the possibility of inequitable divisions of dependency benefits. For example, under section 32(c) a needy widow and child could be required to share with a child of a former marriage who was living apart and who had no real need. Furthermore, as in *Moran's Case*, a truly needy child of the last marriage could be deprived of benefits entirely if living apart from the employee for any reason, even desertion by the employee. Section 32(d) was therefore intended to strike at both of these inequities at once. Under this new section, the children in *Holmberg* and *Gavaghan* would have to show that the employee was legally bound to support them before they could qualify as conclusive dependents. The child in *Moran's Case* though living apart, could secure benefits by showing the employee's legal obligation to support. As the court pointed out in *Johnson's Case*,[132] section 32(d) modified section 32(c) as to all children living apart from the employee at death.

Section 32(d), in its original form, brought with it almost as many problems as it solved. The enactment merely said that there was conclusive dependency if the employee "was at the time of his death legally bound to support" the child. The difficulty arose with the phrase "legally bound to support" and the court looked to established common law to determine the relationship between custody of children and the resulting obligation to support them.

In the period of twenty-eight years between the enactment of section 32(d) in 1919 and its amendment in 1947, the court made it clear that: (1) in all cases the guiding principle was that where there was no custody, there was no obligation to support, including for example, the case of children declared neglected and placed in the custody of the department of welfare;[133] (2) there was certainly no legal obligation to support in the case of a child of divorced parents in the custody of the mother under a decree which made no provision for the child;[134] and (3) the employee was not "legally bound to support" even where the divorce decree ordered him to pay a weekly sum such as three dollars[135] or twelve dollars[136] for support of the child. In such

132 318 Mass. 741, 64 N.E.2d 94 (1945).
133 Smith's Case, 322 Mass. 186, 76 N.E.2d 315 (1947).
134 Gillander's Case, 243 Mass. 5, 136 N.E. 646 (1922).
135 Miller's Case, 244 Mass. 281, 138 N.E. 254 (1923).
136 Johnson's Case, supra note 132.

cases the obligation of the employee was limited by decree and did not bring him within the unlimited legal obligation intended by the statute.

Horovitz, writing prior to the 1947 addition of section 32(d), pointed out in his well known treatise on workmen's compensation that:

> In Massachusetts the child collects if the mother, wrongfully deserted by the husband, takes the child and later lives in adultery, but not if a mother, virtuous or otherwise, has custody by divorce decree, the theory being that the decree places the legal duty of support on the mother and relieves the father—a theory that often places on charity a liability that the insurer should bear.[137]

Section 32(d) was amended in 1947 expanding the phrase under discussion to read: "legally bound or ordered by law, decree or order of court or other lawful requirement to support such children." Under this provision, the children in the *Miller*[138] and *Johnson*[139] cases who were covered by weekly support payments under divorce decrees would qualify as conclusive dependents. The child in *Gillander*[140] would not qualify because there was neither obligation nor decree nor any other lawful requirement to support. The child in *Smith's Case*[141] would qualify because there was at least the lawful requirement that a father should support his child.

The court in *Smith's Case* explained the purpose of the 1947 amendment:

> The Legislature has recognized the hardship that has resulted to children living apart from their father in depriving them of the benefits of the workmen's compensation act because their custody has been taken from him, and has ameliorated to some extent this unfortunate situation by amending clause (d) . . . .[142]

It is historically fair to assume, as suggested in this quotation from *Smith's Case*, that the liberalizing 1947 amendment, applicable to death cases, was conceived and grew out of the *Gillander* and *Miller* cases, and perhaps similar cases that never reached the Supreme Judicial Court.

No decided cases of children of injured, as distinguished from de-

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137 Horovitz, Workmen's Compensation 301-02 (1944).
138 Supra note 135.
139 Supra note 136.
140 Supra note 134.
141 Supra note 133.
142 Id. at 189-90, 76 N.E.2d at 317.

ceased, employees which raise the same problem as in *Gillander* and *Miller* can be found. The curious fact, however, is that the liberalizing phrase added to section 32(d) in 1947 had already appeared about a year earlier in section 35A(c) with respect to children of injured employees. The original section 35A which appeared in 1945 was a brief section providing dependency compensation for injured employees for the first time. The section merely said that dependency compensation would be paid ". . . for each person wholly dependent as defined in section thirty-two . . . ," thus merely importing that provision of section 32. In 1946 came the more liberal provision in paragraph (c) of an expanded section 35A applicable to children separated from injured employees. A year later came the amendment to section 32(d), which was in turn enacted almost verbatim as it appeared in section 35A(c).

VIII. Limits, Computation and Distribution of Dependency Benefits

A. *Cessation of Widow's Benefits Upon Re-Marriage*

Under the present statute a widow receives weekly benefits up to a maximum total of fourteen thousand dollars. She receives this statutory maximum even though she is fully self-supporting. Thereafter she continues to receive weekly benefits only for such periods as she is not in fact fully self-supporting. At any time after the death of her husband, her benefits cease if she remarries.[143] This latter provision for cessation of benefits upon remarriage has been criticized as being contrary to public policy on the ground that it stands as an inducement to widows to live in sin in order to secure continuing benefits.[144] Various changes have been suggested to remedy this situation including the payment of a lump sum upon re-marriage. Such lump sum payments are in effect in some states.[145]

B. *Continuation of Widow's Benefits After Statutory Maximum*

1. *Procedure for Benefits Beyond Statutory Maximum*

It is not clear under the statute whether a widow is required to file a claim for further death benefits after the maximum statutory benefits of fourteen thousand dollars have been paid. The current

143 Provisions under section 31 are, since 1945, generally applicable to the "widower" and "husband" as well as to the widow, except that after the statutory maximum has been paid there is no provision for further benefits to the widower as there is in the case of the widow.

144 See 2 Larson, Workmen's Compensation Law § 64.40, at 131 (1952); citing Gaudreau v. Eclipse Pioneer Div. of Bendix Air Corp., 137 N.J.L. 666, 61 A.2d 227 (1948) in which a widow living with a man without benefit of marriage is not deprived of dependency benefits. Note also that prior to 1922, death benefits to widows continued even after remarriage. Bott's Case, 230 Mass. 152, 119 N.E. 755 (1918).

145 See, e.g., Ark. Stat. Ann. § 81-1315(d) (1947); Colo. Rev. Stat. Ann. § 81-11-4 (1953).

practice of the Industrial Accident Board requires that the widow must make a claim and meet the burden of proving further entitlement. There is some doubt as to the validity of this practice.

The statute states that the widow ". . . shall continue to receive further payments . . ." if she is unmarried and not fully self-supporting. The statute continues:

> Either party may request hearings at reasonable intervals . . . on the question of granting such payments, or on the question of restoration of such payments, or on the questions of the discontinuance of such payments.[146]

A hearing for "discontinuance of such payments" can only mean that payments shall previously have been made before they can be discontinued. It may be as consistent an interpretation of this provision that payments "shall continue" uninterrupted after the maximum, until a hearing and a discontinuance, as an interpretation that at reasonable intervals after payments beyond the maximum the insurer may have a hearing for discontinuance. In either case it is not clear whether payments shall continue after the maximum until a hearing to discontinue, or whether payments stop automatically after the maximum until a hearing to continue payments.

Whatever the meaning of this statutory provision, the current practice of automatic cessation of benefits and the requirement that the widow request a hearing for further payments frequently creates hardship. Under the present practice, the insurer is required to give notice to the board that payments are about to reach the maximum.[147] The board in turn notifies the widow. If the insurer inadvertently fails to give notice, or if the widow, as frequently occurs, misunderstands the significance of the notice, an interval occurs from the time payments stop to the time the widow files a claim and establishes her entitlement, often with serious financial distress.

It would seem much more consistent with the humanitarian purpose of the statute to require the insurer to request a hearing and secure a decision before discontinuance of payments. The insurer keeps careful records, knows when the maximum will be reached and can easily request a hearing long enough in advance to avoid any possibility of payments beyond the statutory maximum when the widow may not be entitled to such payments.

2. *"In Fact not Fully Self-Supporting"*

The Massachusetts Supreme Judicial Court has never been called upon to interpret the so-called "widows for life" provision of section

[146] Mass. Gen. Laws Ann. ch. 152, § 31 (Supp. 1963), end of second paragraph.

[147] Massachusetts Industrial Accident Board Circular Letter No. 96 (March 18, 1955).

31. Under this provision the widow continues to receive benefits ". . . during such periods as . . . she is in fact not fully self-supporting," even after the statutory maximum has been paid.

The words "in fact" present the initial problem. May the Industrial Accident Board take the extreme position that a widow is in fact fully self-supporting if she is mentally and physically competent and able to work even though unemployed? May the board thus find in the words "in fact" a legislative intent that the widow has a duty to apply her ability and competency in order to make herself fully self-supporting? Analysis of these two words in the context of the provision itself and in the statute as a whole clearly compels a negative answer to both of these questions.

The legislature well could have provided that the widow receive continuing benefits "during such periods as she is not fully self-supporting," thus omitting the words "in fact" and allowing the board wider discretion in the interpretation of this provision. The deliberate insertion of these two words, however, manifests its intent to limit the board's determination to the clear and simple meaning of these words and to the facts at the time of the determination, to simplify the widow's burden of proof and to protect her from over-interpretation and repeated and harassing litigation.

The standard of "incapacity for work" is employed in sections 34, 34A and 35 as a basis for the payment of compensation to injured employees. The legislature, though obviously aware of this standard, deliberately chose not to apply it to the widow's benefits provision. By the use, instead, of the words "in fact fully self-supporting," the legislature clearly intended that the unemployed widow need show nothing more than her unemployment in order to continue to receive benefits after the statutory maximum had been reached. Substantial and lasting security will be thus provided for the widow during those periods following the payment of the statutory maximum when she is not, for whatever reason, *in fact* fully self-supporting.

The interpretation of the entire "widows for life" provision becomes somewhat more involved, however, when the widow is employed after the statutory maximum is reached. This raises the problem of interpreting the words "*fully* self-supporting." How much must a widow earn to be fully self-supporting? Also, is the same standard of living to be applied to every widow for the purpose of invoking the phrase "fully self-supporting?"

The modest compensation paid to widows ($35 weekly under the present statute) could not have been designed to set the standard of living for widows. The words "fully self-supporting" obviously mean that a widow may work to supplement her small compensation allowance; the combined income providing a more decent standard of living.

If the purpose of the statute is not to be defeated, only when a widow's income, apart from compensation, reaches a level commensurate with a reasonably decent standard of living may compensation be discontinued. Here, also, as in the case of the unemployed widow, no consideration should be given to the question of whether the widow is *capable* of being fully self-supporting. The only question is whether she is *in fact* fully self-supporting. The widow may, as a matter of choice, not work at all or she may earn a small supplemental income, yet still retain her benefits under the Act.

A widow left with minor children has a legal and moral obligation to support these children and "fully self-supporting", therefore, must at least be earnings sufficient to support the children as well as herself at a decent standard of living. In cases involving the payment of partial compensation, the Massachusetts Supreme Judicial Court emphatically asserts the parent's obligation to support minor children and holds that this obligation is part of the parent's total requirement for self-support. In the case of a mother who had a ". . . duty to furnish reasonable support to the minor child, amounts expended by her for such support were expended for her own purposes. . . ."[147a]

To have any meaning, "fully self-supporting" must be determined in the light of current living costs. The board, therefore, should take judicial notice of current living costs in determining whether a widow is fully self-supporting. On the lowest conceivable level, a decent standard of living must mean at least a subsistence standard plus a reasonable allowance for some of the amenities of life enjoyed by the widow prior to the death of the employee.

The legislature could not have intended to impose the same standard for every widow. The statute as a whole recognizes and provides in several instances for varying standards of living. The employee's average weekly wage determines the rate of total compensation for injured employees and death benefits for dependents in fact. The average wage also determines the rate of partial compensation. Dependency compensation for injured employees is paid over and above regular compensation up to an amount equal to the average weekly wage. In all these instances average weekly wages represent various standards of living. Therefore, widows accustomed to higher standards of living should be allowed higher earnings before being deprived of their compensation benefits. The legislature could not have meant to depress all widows to the lowest common denominator in living standards.

No consideration should be given to any ratio between the amount of compensation received and the amount the widow earns in determining whether the widow is self-supporting. Fixed compensation rates naturally lag considerably behind rising living costs. Thus, depending

[147a] Correia's Case, 275 Mass. 340, 342, 175 N.E. 731, 732 (1931).

on current living costs, widows must be permitted to earn increasingly larger wages over and above compensation rates, and should be in fact fully self-supporting from these earnings before losing their compensation benefits.

There are no decided cases on the question of whether "fully self-supporting" is determined solely by measurement of income from employment earnings. The court would probably hold that a widow may continue to receive dependency benefits after the statutory maximum has been reached even if she receives gifts and contributions from relatives and friends sufficient to support her fully. It is not clear whether a widow who can support herself fully from income from investments and securities may receive benefits after reaching the statutory maximum. It may be argued that since dependency under section 1(3) is based on earnings, fully self-supporting must mean fully self-supporting from earnings to be consistent with the pattern of the act.

C. *Effective and Limiting Dates*

1. *Status: Conclusive or in Fact*

Rights under the Workmen's Compensation Act are fixed as of the date of injury.[148] Dependency *status*, however, is determined by the date of the injury or the date of death, depending upon the applicable statutory provisions. Having determined dependency status, dependents' rights are then determined as of the date of injury.

For living employees, the date of injury determines conclusive dependency status and dependency in fact under section 35A, as well as fixing the amounts to be paid. In death cases, however, the date of injury fixes the *amounts* of dependency benefits to be paid, but dependency *status* is determined either at the time of injury or at the time of death. Conclusive dependency status for wives, husbands and children is determined at the time of death.[149] For parents of unmarried children under eighteen conclusive dependency status is determined at the time of injury resulting in death.[150] Similarly, if a parent, conclusively or in fact dependent upon a deceased child, should die, the surviving parent succeeds to the rights of the deceased parent if the child was living with the surviving parent at the time of the injury resulting in the child's death.[151]

Dependency in fact status in death cases under section 32 ". . .

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[148] Brophy's Case, 327 Mass. 557, 99 N.E.2d 922 (1951); Smith's Case, supra note 133; Beausoleil's Case, 321 Mass. 344, 73 N.E.2d 461 (1947); Sanborn's Case, 303 Mass. 225, 21 N.E.2d 248 (1939); Crowley's Case, 287 Mass. 367, 191 N.E. 668 (1934); Ressi's Case, supra note 124.

[149] Mass. Gen. Laws Ann. ch. 152, § 32(a)-(d) (1957).

[150] Mass. Gen. Laws Ann. ch. 152, § 32(e) (1957).

[151] Ibid.

shall be determined . . . as the fact may be at the time of the injury, or at the time of his death . . . ." When the employee is injured and survives for a period of time, conclusive or in fact dependency status is initially determined under section 35A. At his death the determination shifts to section 32. One who cannot prove dependency in fact at death may still secure death benefits by proving dependency in fact at injury. Dependents in fact continue in this status unless a conclusive dependent appears between the date of injury and date of death, in which case dependents in fact are excluded. This may occur, for example, if the employee has a mother dependent in fact at the time of his injury and he marries after his injury. It may also occur if he has a wife living apart at the time of his injury[152] and a living mother, both being dependents in fact, and the wife rejoins him prior to his death.

Prior to November 6, 1950, section 31 provided death benefits only to those dependent upon the employee "at the time of his injury." On that date the words "or at the time of his death" were added to the first sentence of section 31 covering conclusive dependents and to the first two sentences in the last paragraph of section 31 covering dependents in fact. The same words were also added to the last paragraph of section 32 covering dependents in fact. These words were no doubt added to mitigate the type of ruling made in *Brophy's Case*,[153] that a spouse or other dependent could not secure benefits if the appropriate dependency relationship could not be established at injury, even if it was established at death. By the addition of these words, dependency in fact may be established in death cases either at injury or death, but to take as a conclusive dependent it still remains necessary in most cases[154] to qualify at the time of death. The significant effect of this change was to permit anyone who became dependent after the injury, but before death, to qualify.

2. *Children Under Eighteen*

Sections 31, 32 and 35A provide benefits for children, who are generally defined as being less than eighteen. Section 31 provides:

> If the widow or widower dies, such amount or amounts as would have been payable to or for her or his own use and for the benefit of all children of the employee shall be paid in equal shares to all the surviving children of the employee.

The same provision for division among all the children is made when the employee dies without a surviving wife or husband.

[152] Newman's Case, supra note 93.
[153] Supra note 148.
[154] Mass. Gen. Laws Ann. ch. 152, § 32(a)-(d) (1957); however, see § 32(e).

Canavan's Case[155] answered the question of what happens when children, taking what would be payable to the widow or widower, reach the age of eighteen. The claimant in that case contended that upon reaching eighteen he should continue to receive benefits until he received the maximum that would have been payable to either of his surviving parents. The court denied the claim holding, "The child is eligible to receive his parent's share because he is under eighteen, not because . . . he has taken over any rights his parent had."[156]

D. *Computation and Distribution of Partial Dependency Benefits*

1. *Generally*

There is generally no problem in the determination of amounts to be paid to total dependents. These are absolute amounts specifically set forth in the statute for both injured and deceased employees.[157] In the case of injured employees, there is no partial dependency. Problems of computing dependency benefits arise for the most part in cases of partial dependents of deceased employees.

The determination of *partial dependency status* and the amount of *partial dependency benefits* to be paid is a frequent source of confusion, and the distinction between the two must constantly be kept in mind. One of the several factors[158] determinative of dependency status is whether the dependent received contributions out of the employee's earnings. The amount of dependency benefits is computed on the basis of the percentage of the employee's total earnings contributed to the dependent.

2. *Computation of Partial Dependency Benefits*

Partial dependency benefits are computed on the basis of the percentage of annual earnings of the employee contributed to the partial dependent multiplied by the weekly benefits paid to total dependents.[159] For example, if the employee contributed fifty per cent of his earnings to the partial dependent, and a total dependent would receive thirty-five dollars weekly, the partial dependent will receive seventeen dollars and fifty cents weekly in partial dependency. Under the present statute, there is also a minimum payment of twelve dollars weekly for partial dependents who are next of kin and who have received support contributions during the year preceding death.

In computing partial dependency benefits, it is the percentage that is controlling, and not any absolute amount that the employee

155 331 Mass. 444, 120 N.E.2d 206 (1954).
156 Id. at 447, 120 N.E.2d at 207.
157 Mass. Gen. Laws Ann. ch. 152, §§ 31, 35A (Supp. 1963).
158 See Part V, supra.
159 Mass. Gen. Laws Ann. ch. 152, § 31 (Supp. 1963), last paragraph.

earns or contributes. Partial dependency benefits, based on relatively lower wages and relatively smaller contributions, may be larger than benefits based on higher wages and larger contributions. Thus, if the employee earned fifty dollars weekly and contributed twenty dollars weekly, the dependent would receive benefits of fourteen dollars weekly assuming a thirty-five dollar total rate. If the employee earned one hundred and fifty dollars weekly and contributed thirty dollars, the dependent would receive seven dollars in weekly benefits, *i.e.*, twenty per cent of thirty-five dollars.

If there are insufficient facts in evidence to compute partial dependency, there can be no payment of compensation. In *Hassan's Case*[160] the employee tried to send five hundred dollars to his wife in a foreign country in the year preceding his death. He was unable to do so because of the turbulent international situation. Wife and child were partial dependents in the sense that they had received contributions from the employee in previous years. Since there were no contributions in the year preceding death there could be no computation of entitlement and, consequently, no award.

The amount contributed by the employee must be in evidence in order to compute partial dependency. This amount may be arrived at indirectly by computing the amount by which the dependent's living expenses exceed his income from all other sources.[161]

The earnings from which contributions are made need not have come solely from the last employer of the decedent. Even if the employee died before receiving any pay from his last employer, his partial dependent qualifies if the employee had made contributions out of any earnings received in the year preceding death.[162] These earnings for the year preceding death are taken into account regardless of their source. However, the amount contributed by the employee to the dependent is limited to those contributions made during the same year.[163]

Material contributions, other than cash, would appear to be eligible as contributions for the purpose of establishing dependency. In *McMahon's Case*,[164] in which partial dependency was upheld, the sole contribution was one of twenty-seven dollars given to the dependent to purchase furniture for the household. Since the contribution was made for this specific purpose, it may be reasonable to expect that partial dependency would be upheld if the employee had contributed the furniture instead of the cash to purchase the furniture.

160 Hassan's Case, 240 Mass. 355, 134 N.E. 260 (1922).
161 Ward's Case, 286 Mass. 72, 190 N.E. 25 (1934).
162 Freeman's Case, 233 Mass. 287, 123 N.E. 845 (1919).
163 Hassan's Case, supra note 160.
164 229 Mass. 48, 118 N.E. 189 (1918).

The contemplated result would allow contributions of property associated with the normal maintenance of a person or family, such as furniture, food, clothing or a place to live, to qualify as contributions for the purpose of establishing dependency status. There is language in *McMahon's Case* supporting the inference that contributions other than cash would be recognized if the question were directly presented to the court.[165] Appropriate evidence would, of course, have to appear as to the monetary value of such contributions in order that dependency benefits could be computed in accordance with the requirements of the statute.[166]

Payments to the claimant for business expenses[167] or for education,[168] standing alone, do not qualify as eligible contributions. Nor do they represent an acceptable "need" for determining dependency in fact.[169] However, a payment for the claimant's vacation may qualify both as a "contribution" and a "need."[170] It is inconceivable that business expenses could under any circumstances qualify as a "contribution" or "need." It is reasonable to expect, however, that if payments for education are a part of the general support of the claimant, they would qualify in both categories, just as payments for vacations qualify as part of the general support of the claimant. The "surrounding" circumstances within which contributions are made, determine whether the contributions may be included in the computation of dependency benefits.[171]

It is not settled in Massachusetts whether services performed by the dependent for the claimant qualify as contributions. In *McMahon's Case*[172] such services are mentioned by the court as the setting against which the twenty-seven dollars for furniture was acceptable as a contribution. In an Indiana case, an award of death benefits was upheld where a nineteen year old, who had never worked before and who had made no cash contributions to the claimant, had performed valuable services tilling the soil on his father's farm.[173]

3. *Partial Dependency of Parents Upon Minor Children*

Problems which arose in the earlier cases in proving partial dependency of parents on minor children have been eliminated in large

[165] See also Doherty's Case, 277 Mass. 339, 178 N.E. 515 (1931), in which the court found against the claimant on other grounds, but contributions other than cash are mentioned without rejecting them *per se* as ineligible contributions.

[166] Hassan's Case, supra note 160.

[167] Merchant's Case, 282 Mass. 36, 184 N.E. 390 (1933).

[168] Doherty's Case, supra note 165.

[169] See Part V, D, supra.

[170] Ressi's Case, 243 Mass. 528, 137 N.E. 703 (1923).

[171] Ibid. See also McMahon's Case, supra note 164.

[172] McMahon's Case, supra note 164.

[173] Ritchie v. Indiana State Highway Comm'n, 101 Ind. App. 32, 198 N.E. 125 (1935).

measure by the enactment in 1926 of section 32(e). This subsection makes a parent a conclusive dependent of an unmarried child under eighteen living with the parent at the time of the injury resulting in death. Some of these partial dependency problems may still arise, however, in cases involving minor children *over* eighteen; and in the situations in which the child under eighteen is not living with the parent at the time of injury and the parent continues to support the child while receiving his contributions from earnings. The latter situation generally occurs when the children are living away from home on temporary jobs. The court would either find, by analogy to temporary separation between husband and wife, that there was conclusive dependency and no real living apart,[174] or it would apply the well-established rules of partial dependency.

Under these rules a parent is legally entitled to the wages of a minor child, and the child is obliged to turn the wages over to the parent. At the same time the parent has a legal obligation to support the minor child. The obligation of the parent to support the child exists apart from the right to the child's wages and the child's obligation to turn such wages over to the parent. If the parent can show any dependency upon the child's wages, he qualifies as a partial dependent even if he spends more on the support of the child than he receives from the child. The amount contributed by the parent for the child's support is not deducted from the amount contributed by the child to the parent. The more the parent must contribute to the child's support, the stronger is the proof of his need of the child's financial contribution. If the parent establishes partial dependency, the only remaining question, for purposes of computing the amount of the benefits, is how much the child actually contributed out of his earnings.[175]

4. *Partial Dependency Based on Contribution to the Family Fund*

It is not unusual for wage earners to contribute all or part of their earnings to a general family fund. When the employee dies, partial dependency benefits are based upon the percentage of his annual earnings contributed, multiplied by the amount provided in the statute for total compensation. Together with the problem of proving contribution and earnings, it has been necessary to determine in some cases who is the dependent and in other cases the relative extent of dependency when there is more than one dependent.

[174] Allen's Case, 318 Mass. 640, 63 N.E.2d 356 (1945); Harrington's Case, 297 Mass. 125, 7 N.E.2d 732 (1937); Gilson's Case, 254 Mass. 460, 150 N.E. 183 (1926).

[175] See generally Cammick's Case, 259 Mass. 209, 155 N.E. 870 (1927); Dembinski's Case, 231 Mass. 261, 120 N.E. 856 (1918); Gove's Case, 223 Mass. 187, 111 N.E. 702 (1916); Murphy's Case, 218 Mass. 278, 105 N.E. 635 (1914).

When the contributions of a minor child go into a general family fund the dependency benefits go to the father in the normal family situation. This rule was applied in *Dembinski's Case* in 1918, when the board attempted to award benefits jointly to both parents.[176] With the addition of subsection (e) to section 32 in 1926 the "parent" (in the singular) became a conclusive dependent of a child under eighteen. This meant, in effect, that in cases of children under eighteen, the father received the death benefits. To this extent section 32(e) followed the rule in *Dembinski's Case*.

Concurrently, the problem had arisen as to whether other dependents could succeed the recipient of dependency benefits when the latter died.[177] It seemed as reasonable to have mothers succeed deceased fathers as beneficiaries as it did to have children succeed widows.[178] Consequently, in 1935, this provision was added to the statute.[179] Presently, if the father dies while receiving the death benefits of a child under eighteen, the mother succeeds to the father's rights.

Section 32(e) does not apply when the child is a minor *over* eighteen. However, there cannot be a joint award to both parents because the common law rule applies and the father of the minor receives the full benefits.[180] Whether the mother succeeds to the rights of the father upon his death in the case of minor children over eighteen depends upon whether the court would make a ruling analogous to that in *Bartoni's Case*,[181] involving widows and children. There seems to be no reason why the rule should not apply to such surviving mothers. The court in *Musgrave's Case*,[182] however, held to the contrary.

In *Musgrave's Case* the employee was nineteen years old when he died in an industrial accident. The father was awarded compensation; when he died, the mother succeeded him on an award by the board, affirmed by the Superior Court. The Supreme Judicial Court reversed. In so doing the court reasoned that the rule in *Bartoni's Case* did not apply because the mother was not dependent upon the employee at the time of injury as was the child dependent on the widow in *Bartoni's Case*. There was evidence in *Musgrave's Case* that the employee's contribution was to the family fund, but as a minor

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176 Dembinski's Case, supra note 175.

177 Pagnoni's Case, 230 Mass. 9, 118 N.E. 948 (1918); Bartoni's Case, 225 Mass. 349, 114 N.E. 663 (1916); Murphy's Case, 224 Mass. 592, 113 N.E. 283 (1916).

178 Mass. Gen. Laws Ann. ch. 152, § 31 (Supp. 1963).

179 Mass. Gen. Laws Ann. ch. 152, § 32 (1957), next to last paragraph.

180 Dembinski's Case, supra note 175.

181 Bartoni's Case, supra note 177; Murphy's Case, supra note 177.

182 281 Mass. 416, 183 N.E. 749 (1933).

his wages belonged to the father.[183] Had the employee been over twenty-one the situation would be otherwise. It would also be otherwise if the father had been disabled and unable to earn a living,[184] because then the mother would depend directly upon the employee as did the child in *Bartoni's Case*. Thus precariously do mothers live when their husbands are well and their children are between the ages of eighteen and twenty-one.

Joint awards to parents and other qualified dependents are permissible when the employee at death had passed majority and had contributed out of his earnings to a family fund. Clearly, when the employee is not a minor there is no paternal or parental right to his wages and he may have more than one dependent as in *Osterbrink's Case*[185] and *Ward's Case*.[186]

Since it is often impossible to determine the relative extent of dependency when the employee's contributions are to a family fund, the court allows the award of benefits in equal shares to the dependents. This is an exception to the general requirement that the relative extent of dependency must be shown. The theory appears to be that it is a fair inference that dependents in a family fund arrangement share equally in the fund and are therefore entitled to equal dependency status. This is undoubtedly the law despite the seemingly contrary holding in *Pagnoni's Case*,[187] in which a joint award to the parents was reversed and the case remanded for findings of relative dependence. *Pagnoni's Case* followed closely on *Osterbrink's Case*, both decided in 1918, antedating the decision in *Ward* by sixteen years. Equal shares were upheld for the adult daughters of the employee in *Osterbrink* and for the parents in *Ward*, although there was no evidence of relative dependency in either case. In both cases the employees contributed to family funds.

It is difficult to distinguish *Pagnoni* and *Ward*. In both these cases the claimants were the parents, the employees were living apart from the parents and there were other wage-earning children living with the parents. There was evidence in each of these cases that neither parent had earned any money for at least a year prior to the employee's death. If there is any distinction, it appears in the record and not the reported decisions. In *Pagnoni* there was also some evidence that the father did have some earnings. The board evidently chose to believe the contrary evidence, however, and it was not a question before the court. *Pagnoni* was decided very soon after *Oster-*

183 See cases cited in note 175, supra.
184 Freeman's Case, 233 Mass. 287, 123 N.E. 845 (1919).
185 229 Mass. 407, 118 N.E. 657 (1918).
186 Supra note 161.
187 Supra note 177.

brink but the latter was not cited in the brief for the claimant. The case was not argued as a family fund case and this appears to be the most likely explanation for the holding. The *Ward* and *Osterbrink* cases, however, establish the rule for joint awards in family fund cases without specific proof of relative dependency.

IX. Conclusion

Practitioners in the field of workmen's compensation can no doubt suggest many significant problems not discussed here. The very nature of dependency relationships makes for an infinite variety of possibilities. This article was limited to the problems raised in the decided cases and to some extent to questions not decided, but suggested by these cases. If some few guideposts were raised and if some contribution was made towards clarification, the mission was at least in part successful.

It must be clear that no amount of legislative amendment will fill all the gaps in so complex a field. It must be equally clear that where statutory gaps are encountered in a given case, they must be bridged in decision by the humanitarian purpose of the Workmen's Compensation Act, a purpose so obviously intended by the legislature and so frequently reiterated by the court.