

[J-134-98]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JANE E. DRAKE,	:	No. 0015 W.D. Appeal Dkt. 1998
	:	
Appellee,	:	Appeal from the Order of Superior Court
	:	at No. 0501PGH96 date February 14,
v.	:	1997, affirming the Order entering final
	:	decree of the Washington County Court of
	:	Common Pleas, Civil Division, at No. 93-
	:	4568 dated February 14, 1996.
JAMES G. DRAKE,	:	
	:	
Appellant.	:	
	:	SUBMITTED: June 29, 1998
	:	
	:	
	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE

DECIDED: FEBRUARY 25, 1999

Here, the majority posits that, pursuant to subsection 3501 (a)(8), it is irrelevant whether a settlement or award is for disability payments, personal injuries, lost wages, or future earnings. Instead, the majority reasons that the timing of the right to receive the award is the pivotal factor in the determination of whether or not the award is marital property. I respectfully dissent because I do not believe that a workers' compensation commutation award which represents future earnings is marital property subject to equitable distribution.

Pennsylvania's Divorce Code provides:

3501. Definitions

(a) General rule.--As used in this chapter, "marital property" means all property acquired by either party during the marriage, including the increase in value, prior to the date of final separation, of any nonmarital property acquired pursuant to paragraphs (1) and (3), except:

. . .

(8) Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received.

23 Pa. C.S. § 3501.

In Moore v. Moore, 710 A.2d 633 (Pa. Super. 1998), the Superior Court refused to interpret subsection 3501 (a) (8) to include a workers' compensation commutation award as marital property. In Moore, the husband was injured at work and received a one-time lump sum payment. The trial court found that the proceeds of the worker's compensation commutation award were marital property subject to equitable distribution. The Superior Court reversed, finding that the benefits in question were paid in lieu of future earnings and, consequently, did not constitute marital property. Id. at 635.

I am persuaded by the reasoning of Moore. The portion of a workers' compensation commutation award which represents the injured employee's loss of ability to work in the future, often long past the date of separation, should not be subject to equitable distribution. A spouse has no right to the other spouse's earnings after the marriage ends; therefore, the spouse should have no right to a workers' compensation commutation award that is intended as a substitute for those future earnings.

As the majority points out, courts in other jurisdictions which have addressed this issue have reached similar conclusions. See Weisfeld v. Weisfeld, 545 So.2d 1341 (Fla. 1989) (portion of worker's compensation award for future loss of earnings and loss of earning capacity and future medical expenses are the separate property of the injured spouse); Miller v. Miller, 739 P.2d 163 (Alaska 1987) (a workers' compensation disability award is marital property only to the extent that it compensates for loss of earnings during the marriage; to the extent that the award compensates for loss of post-divorce earnings,

it must be considered separate property, even if the compensable injury occurred during the marriage); Cook v. Cook, 102 Idaho 651, 637 P.2d 799 (1981) (lower court erred in treating the defendant's right to receive future workmen's compensation benefits as community property because benefits beyond an amount attributable to lost earning power during the marriage constitute the separate property of the injured spouse); Cummings v. Cummings, 540 A.2d 778 (Me. 1988) (the circumstance that future workers' compensation payments are made in a single, lump-sum award does not alter the fact that the award compensates for lost earnings that have accrued after the dissolution of the marriage; therefore, the award is a non-marital asset); Queen v. Queen, 308 Md. 574, 521 A.2d 320 (1987) (only the portion of husband's workmen's compensation award compensating for loss of earning capacity during the marriage is marital property subject to equitable distribution).

Here, the commutation award consisted of benefits at the rate of \$93.93 per week for a period of 447.1 weeks extending from December 7, 1989 to July 3, 1998. Thus, the commutation award was to compensate appellant for the decrease in his earning capacity for a period which extended beyond the date of separation, which occurred in July, 1993.

For the aforementioned reasons, I dissent and would reverse the Superior Court and remand for a determination of what portion of the award represented the husband's future earnings after the date of separation in order to exclude that portion from the equitable distribution.

Mr. Justice Zappala joins this dissenting opinion.