IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARY HIRNEISEN,	)	
	)	
Claimant,	)	
	)	
v.	)	C.A. No. 04A-05-008 RRC
	)	
CHAMPLAIN CABLE CORP., formerly known as HAVEG INDUSTRIES, Inc.	)	
	)	
Employer.	)	
	)	

Submitted: February 2, 2005
Decided: April 29, 2005

On Claimant's Appeal from the Decision of the Industrial Accident Board.
AFFIRMED.

On Employer's Motion to Strike.
GRANTED in part. DENIED in part.

MEMORANDUM OPINION

Thomas C. Crumpler, Esquire, and David A. Arndt, Esquire, Jacobs & Crumplar, P.A., Wilmington, Delaware, Attorneys for Claimant.

Anthony M. Frabizzio, Esquire, and Stephen J. Milewski, Esquire, Heckler & Frabizzio, P.A., Wilmington, Delaware, Attorneys for Employer.

COOCH, J.

INTRODUCTION

Mary Hirneisen[1] ("Claimant"), widow of John P. Hirneisen ("Employee") and Executrix of his estate, filed a Petition to Determine Compensation Due with the Industrial Accident Board ("Board") against Champlain Cable Corp., formerly known as Haveg Industries, Inc., ("Employer") seeking benefits in the form of medical expenses related to Employee's lung cancer, burial expenses and death benefits pursuant to 19 *Del. C.* §2330 ("Compensation for death"). Employee had worked for Employer for approximately 40 years before he voluntarily retired in 1981. Claimant alleged in her petition that Employee's lung cancer was the result of exposure to asbestos while Employee was working for Employer (therefore, a compensable occupational disease). After initially denying any liability, Employer conceded that Employee had contracted an occupational disease. Employer agreed to compensate Claimant for Employee's medical and burial expenses; however, Employer refused to provide death benefits pursuant to 19 *Del. C.* §2330. The Board denied Claimant's petition for death benefits under §2330 because Employee had voluntarily retired and

[1] This case was original captioned *John P. Hirneisen v. Hercules, Inc.*. The name of the employer was changed by stipulation of the parties to *Champlain Cable Corp., formerly known as Haveg Industries.* The Court, sua sponte, has also changed the name of the appellant to more accurately reflect the real party in interest.

was not receiving nor entitled to receive wage replacement benefits at the time of his death thereby disqualifying his widow from benefits.

The issue for this Court to decide is whether the Board correctly ruled that a surviving spouse is not entitled to death benefits pursuant to 19 *Del. C.* §2330 when the employee/decedent was not working or eligible for Workers' Compensation benefits under Title 19 at the time of death where the employee died as a result of an occupational disease. The Court holds that the Board's interpretation of 19 *Del. C.* §2330 was correct when it ruled that Claimant was not eligible for benefits.

FACTS

Employee died in March 2003 from lung cancer caused by his occupational exposure to asbestos.[2] Employee worked for Employer from 1940 until 1981 when he voluntarily retired.[3] Upon retirement, Employee received a pension from Employer and did not seek further employment. Employee had opted at the time of his retirement to receive a single life annuity pension that would cease upon his death. Both Employee and

[2] Industrial Accident Board Decision at 2 (hereinafter "IAB Decision at _.").

[3] Employee originally went to work for Haveg Industries, Inc in 1940. In 1964, Hercules Inc. acquired Haveg, which operated as a subsidiary of Hercules until 1980. In 1973, Haveg became a self-insurer for Workers' Compensation purposes. Hercules sold the assets of its Haveg operation to Amatek in 1980. Under the terms of the sale, Amatek took over responsibility for employee pensions and Hercules, through Champlain Cable, retained all asbestos-related liability. IAB Hearing Transcript at 17-22.

Claimant received social security retirement benefits based on their respective work histories.

Claimant testified that Employee had retired because he was eligible to retire and that in essence he had removed himself from the workplace.[4] Employee never filed a Workers' Compensation claim, or any type of legal claim, against Employer related to his asbestos exposure.[5]

PART 1: CLAIMANT'S APPEAL FROM THE DECISION OF THE BOARD.

I. THE BOARD'S DECISION

The Board's Findings of Fact and Conclusions of Law were brief and are set out *in toto*:

> This is the Petition of Claimant's widow for spousal death benefits. According to 19 *Del. C.* §2330(a)(2): a surviving spouse

---

[4] IAB Hearing Transcript at 10. The testimony on this point was as follows:

Employer's Counsel:	"Your husband retired from Amatek in 1981?
Claimant:	"Right."
Employer's Counsel:	"And he was 62 years old at that time?"
Claimant:	"Yes.
Employer's Counsel:	"And was that, why did he retire at that time? Was that the plan to retire when he was 62 years old?"
Claimant:	"Yeah, because he was 62."
Employer's Counsel:	"And that was the time, was that the age that you could retire with whatever benefits you would get?"
Claimant:	"Right. Because I was working."

[5] Further facts relating to Employee's activities in retirement are not herein set forth since, as explained *infra*, the Court holds (contrary to Claimant's position) that the Board correctly interpreted and applied the applicable death benefits statute, 19 *Del. C.* §2330, and because Claimant has not otherwise taken issue with Employer's position that substantial evidence exists to support the Board's decision.

is entitled to 66 2/3% of Claimant's wages if there are no children or one child living. Also, a "surviving spouse" is one either (a) living with the deceased at the time of death, (b) receiving or had the right to receive support at the time of death, or (c) was deserted by the deceased prior to and continued to the time of death. *See* 19 *Del. C.* §2330(d).

In cases considering the effect of pensions on Worker's Compensation benefits, courts have held that retirement benefits are considered earnings. *See General Motors Corp. v. Willis*, 2000 WL 1611067 at *3 (Del. Super.). Also, it has been decided that retirement, in the traditional sense without accompanying disability, can disqualify an employee from receiving workers' compensation benefits. *See Chrysler Corp. Kaschalk*, 1999 WL 458792 at *3 (Del. Super.)(citing *Sharpe v. W.L. Gore & Assoc.* 1998 WL 438796 (Del. Super.).

The Board finds Mrs. Hirneisen is not entitled to spousal benefits. Claimant voluntarily retired from Ametek in 1981. At the time of his death, Claimant was not receiving any wage replacement benefits. Although Hercules conceded his death was the result of an occupational exposure, and subsequently paid burial and medical benefits to Claimant, the Board finds this does not translate to Claimant's spouse receiving an automatic entitlement to survivor's benefits. Claimant was not receiving wages at the time of his death. His economic fortunes were not impacted in any manner. Claimant had fully removed himself from the labor market without any accompanying medical disability. He, in essence, retired from active labor. The evidence before the Board indicated that he never worked again.

Claimant freely chose to receive a non-contributory pension benefit that would terminate upon his death. Because Claimant was not receiving nor was entitled to receive wage replacement benefits, his spouse was not entitled to wage replacement benefits at the time of his death. In so finding, the Board determines that the survivor's benefits section of the Workers' Compensation Act is implicated only when the decedent was entitled to wage replacement benefits at the time of his death. Accordingly, Mrs. Hirneisen cannot meet her burden to establish an entitlement to spousal benefits under the Workers' Compensation Act. Her petition is, therefore, DENIED.[6]

[6] IAB Decision at 3-4.

II. STANDARD OF REVIEW

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from a decision of an administrative agency, the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error.[7] When the issue raised on appeal is exclusively a question of the proper application of the law, the review by this Court of such legal determination is *de novo*.[8] "A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it. [Citation omitted]. A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous."[9]

---

[7] *Jackson v. Ametek, Inc./Haveg Division*, 2003 Del. Super. LEXIS 346 *4-5.

[8] *Darling v. Sara Lee Corp.*, 2004 Del. Super. LEXIS 219 *4.

[9] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1998).

III. CONTENTIONS OF THE PARTIES

A. Claimant's argument.

Claimant argues that the Board misinterpreted 19 *Del. C.* §2330 as to her claim by "requir[ing] a new condition - - that the decedent also had to be working at the time of his death"[10] or alternatively by requiring that "the decedent [had to be] on work-related disability at the time of his death" in order for Claimant to be eligible for death benefits.[11] Claimant concedes that "one can[not] start to get total disability benefits, whether for an occupational disease or an accident, where one has voluntarily removed himself from the workforce and is not seeking work."[12] Claimant contends, however, that, unlike disability benefits, "[death] benefits are not benefits for the inability to work" nor are death "benefits paid to the deceased or his estate, but rather to a statutory class of beneficiaries for the significant loss that they sustained as a result of the death of a member of the family."[13]

---

[10] Claimant's Opening Brief at 10.

[11] Claimant's Reply Brief at 3.

[12] *Id.* at 10.

[13] *Id.* at 10.

Claimant contends that the Board incorrectly assumed that §2330 benefits are designed as wage replacement benefits.[14] Claimant relies on the fact (admitted by Employer) that Employee's death was caused by an occupational disease. Claimant argues that the Board committed an error of law requiring reversal of the Board's decision.

B. Employer's response.

Employer responds that the Board did not misinterpret 19 *Del. C.* §2330 as to Claimant's petition but that the Board made a fact specific ruling that "the decedent was not receiving any wage replacement benefits or wages at the time of his death as he fully removed himself from the labor market without any accompanying disability."[15] Employer concedes that under §2330, "where the employee is not actively working, but is receiving total disability benefits related to the injury, then death benefits can be awarded"; however, Employer argues that "[i]n [the instant case], the [Employee] was not working, was not receiving any wages from [Employer] and was not receiving any total disability related to any work related occupational diseases at the time of his death."[16] Employer contends that

[14] *Id.* at 16.

[15] Employee's Response Brief at 9.

[16] *Id.* at 10.

because Employee was not receiving any wages and was not receiving any total disability related to any work related occupational diseases at the time of his death, the Board correctly ruled that Claimant was not entitled to §2330 benefits. Employer contends that even though §2330 does not specifically indicate that the employee be working or receiving work related disability benefits at the time of death, it does . . . define compensation in terms of "wages."[17] Employer further argues that substantial evidence supports the Board's decision. Claimant does not dispute the existence of substantial evidence, but implicitly takes the position that this Court's consideration of whether substantial evidence exists is unnecessary given the Board's supposed erroneous legal interpretation of §2330 that the decedent was not entitled, as a matter of law, to "wage replacement" benefits.

IV. DISCUSSION

A. Introduction.

The question before this Court is whether the Board correctly ruled that a surviving spouse is not entitled to death benefits pursuant to 19 *Del. C.* §2330 when the employee/decedent was not working or eligible for Workers' Compensation benefits under Title 19 at the time of death where

---

[17] Employer's Response Brief at 15.

the employee had died as a result of an occupational disease caused by that employment. This appears to be an issue of first impression.

While it is true that the Workers' Compensation Act is "interpreted liberally so as to effectuate its remedial purpose,"[18] this Court must apply the statute as it is written and give meaning to the statute accordingly. As neither party has argued that 19 *Del. C.* §2330 is ambiguous (nor does this Court) "there is no need for judicial interpretation, and the plain meaning of the statutory language controls."[19]

B. The effect of voluntary, "traditional" retirement upon the eligibility of benefits under 19 *Del. C.* §2330.

Section 2330 of Title 19 determines the amount of compensation for death due to a work accident and to whom it should be paid. Specifically, §2330(a) states, "[i]n case of death, compensation shall be computed on the following basis and distributed to the following persons" and then lists eight different scenarios of possible survivors of an employee.[20] The remaining

---

[18] *Konstantopoulos v. Westvaco Corp.,* 690 A.2d 936, 939 (Del. 1996).

[19] *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1998).

[20] §2330(a)(1)-(8) provides;

> (1) To the child or children if there is no surviving spouse entitled to compensation, 66 2/3% of the wages of the deceased, with 10% additional for each child in excess of 2, with a maximum of 80% to be paid to their guardian;
>
> (2) To the surviving spouse, if there are no children, 66 2/3% of wages provided that the minimum amount payable shall not be less than $ 15 per week;

parts of the section give further guidance as to how compensation should be determined based on a number of different situations not applicable or set forth here. The statute is silent as to whether voluntary retirement should or should not be a factor to be used in determining potential eligibility where the decedent died from an occupational disease, but was not receiving disability benefits at the employee's death.

This Court has held that retirement may disqualify an employee from receiving Workers' Compensation benefits.[21] In *Chrysler Corp. v. Kaschalk*, the employee "worked for Chrysler from 1964 until his retirement . . . at age 54 . . . During that period, [the employee] injured his back at least twice."[22]

---

(3) To the surviving spouse, if there is 1 child, 66 2/3% of wages;

(4) To the surviving spouse, if there are 2 children, 70% of wages;

(5) To the surviving spouse, if there are 3 children, 75% of wages;

(6) To the surviving spouse, if there are 4 or more children, 80% of wages;

(7) If there is no surviving spouse or children, then to the parents, or the survivor of them, if actually dependent upon the employee for at least 50% of their support at the time of the worker's death, 20% of wages;

(8) If there is no surviving spouse, children or dependent parent, then to the siblings, if actually dependent upon the decedent for at least 50% of their support at the time of the worker's death, 15% of wages for 1 sibling, and 5% additional for each additional sibling, with a maximum of 25%, such compensation to be paid to their guardian.

[21] *Chrysler Corp. v. Kaschalk*, 1999 Del. Super. LEXIS 138 *9 (holding that "[r]etirement can [under appropriate circumstances] disqualify an employee from receiving worker's compensation benefits).

[22] *Id.* at *2.

"At some time in the early 1990's, [the employee] stopped working on the assembly line and, instead, began driving cars from one area of the plant to a staging area."[23] The employee "retired from Chrysler but he did not do so on doctor's orders or in consultation with [his treating doctor]."[24]

The *Kaschalk* Court affirmed the Board's decision granting the employee's petition to determine additional compensation due for partial disability. The Court noted that "[t]he Board found that [the employee] did not retire in the traditional sense [but rather] because his back condition rendered him incapable of continuing to perform his job."[25] The *Kaschalk* Court held that

> [t]he premise of Chrysler's argument . . . is whether the Board found [the employee] retired, not because of back problems but because he was eligible at 54 with thirty years at Chrysler. Had the Board found his retirement was in the "traditional" sense, Chrysler's argument would have validity and the Board would have committed an error of law in awarding him benefits. A reading of the Board's decision, however, indicates that the Board was aware that "traditional" retirement meant disqualification from benefits.[26]

---

[23] *Id.* at *2.

[24] *Id.* at *3.

[25] *Chrysler Corp. v. Kaschalk*, 1999 De. Super. LEXIS 138 *7.

[26] *Id.* at *9.

The *Kaschalk* Court held that "[the employee] had not removed himself from the job market and had not 'retired' in a way which would disqualify him from benefits."[27] *Kaschalk* stands for the proposition that voluntary retirement, in the "traditional" sense, *i.e.*, removing oneself permanently from the workplace, can potentially disqualify a claimant from receiving Workers' Compensation benefits.

This Court further explained the effect of retirement upon the eligibility of Workers' Compensation benefits in *General Motors Corp. v. Willis.*[28] In *Willis*, the employee was injured in 1992 and received temporary total disability benefits until 1999; during this time GM was unable to find a job for the employee because of the employee's injury.[29] In 1999, the employee was 55 years old and had worked for GM for 30 years; he was eligible to retire and collect pension benefits.[30] It was undisputed that the retirement was voluntary and not a disability retirement.[31] The employee,

---

[27] *Id.* at *10.

[28] *General Motors Corp. v. Willis*, 2000 Del. Super. LEXIS 335.

[29] *Id.* at *1-2.

[30] *Id.* at *2.

[31] *Id.* at *2.

subsequent to retiring from GM worked at another job, presumably at a lower wage.[32]

This Court explained in *Willis* that "[r]etirement, in a traditional sense, can disqualify an employee from receiving workers' compensation benefits. [Citation omitted.] This is especially true where an employee does not look for work after his retirement and where the Claimant is content with his or her retirement lifestyle."[33] The *Willis* Court held that "[w]here an employee voluntarily takes retirement but does not intend to remove himself or herself from the job market, the employee can collect partial disability benefits stemming from a pre-retirement industrial accident."[34] The Court in *Willis* reversed the Board's decision denying partial disability benefits to the employee because he had voluntarily retired. The Court noted that

> [t]he Board considered several factors in determining that [the employee]was entitled to partial disability benefits and pension benefits. The Board noted that [the employee] is 55 years old which is significantly below the usual retirement age of 65. [The employee] sought employment and actually attained employment prior to the hearing date. He is no longer capable of working at his

[32] *General Motors Corp. v. Willis*, 2000 Del. Super. LEXIS 335 *3.

[33] *General Motors Corp. v. Willis*, 2000 Del. Super. LEXIS 335 *7 citing *Chrysler Corp. v. Kaschalk*, 1999 Del. Super. LEXIS 138 *9 and *Brown v. James Julian, Inc.* 1997 Del. Super. LEXIS 487 *7.

[34] *Id.* at *7.

> previous job at GM and he has experienced a loss of earning capacity as a result of his work injury.[35]

The *Willis* Court held that "[t]aking those factors into consideration, the Board correctly opined that simply because an individual takes a voluntary retirement does not automatically preclude receipt of partial disability benefits if an employee wishes to continue working and actively seeks, and obtains, employment after retirement."[36]

None of the cases cited by Claimant, Employer or the Board dealt specifically with the effect of voluntary retirement upon death benefits under §2330 where the death was caused by an occupational disease and the Court has found no such case. *Willis* and *Kalchalk* were cases where voluntary retirement could have prevented the employees from receiving partial disability benefits, depending on the particular facts. However, 19 *Del. C.* §2328 "Compensation for death or disability from an occupational disease" provides that

> [t]he compensation payable for death or disability total in character and permanent in quality resulting from an occupational disease shall be the same in amount and duration and shall be payable in the same manner and to the same persons as would have been entitled thereto had the death or disability been caused by an accident arising out of and in the course of the employment.

---

[35] *Id.* at *9.

[36] *Id.* at *9-10.

> In determining the duration of temporary total and/or temporary partial and/or permanent partial disability, and the duration of such payments for the disabilities due to occupational diseases, the same rules and regulations as are applicable to accidents or injuries shall apply.

This section indicates that the General Assembly intended for compensation for death or disability from an occupational disease to be administered the same way, at least to the extent possible, as an accident arising out of and in the course of the employment. This Court's holdings in *Willis* and *Kaschalk*, that voluntary retirement can be used as a factor to disqualify a claimant from Workers' Compensation benefits, are analogous cases in the instant case involving death benefits.

Claimant concedes, and this Court agrees, that "one can[not] start to get total disability benefits, whether for an occupational disease or an accident, where one has voluntarily removed himself [or herself] from the workforce and is not seeking work."[37] Employee had not petitioned for any type of Workers' Compensation benefits while still working. Additionally, for reasons unclear from the record (but perhaps there were good reasons), Employee had not petitioned for any type of Workers' Compensation benefits after he retired. Presumably, if Employee had sought medical benefits under the Workers' Compensation Act while he was alive he would have been eligible for those medical benefits due to his occupational disease.

However, Employee was not legally eligible for partial or total disability benefits at the time of his death, whether due to an occupational disease or an accident arising out of and in the course of the employment. Employee was not entitled to disability benefits; therefore, his spouse was not entitled to death benefits because under §2328 "compensation payable for death . . . resulting from an occupational disease . . . shall be payable . . . to the same persons as would have been entitled thereto had the death . . . been caused by an accident arising out of and in the course of the employment" and Claimant's action is a derivative claim.

C. Defining the term "wages" as used in 19 *Del. C.* §2330.

Claimant has argued that this Court should not rely upon the use of the term "wages" as used in the Workers' Compensation Act as determinative of the General Assembly's intent that §2330 death benefits were designed as wage replacement benefits. Claimant's argument that "wages" in §2330 means "level of wages," *i.e.*, how much a spouse will receive independent of income loss due to the death of an employee, is not supported by case law. This Court has held that the "controlling factor [of

[37] Claimant's Reply brief at 10.

the Workers' Compensation Act] is the legislative intent to compensate the employee for his loss of earning capacity."[38]

In *Furrowh v. Abacus Corp.*, a Workers' Compensation case in which the main issue was the proper construction of 19 *Del. C.* §2302(b*)* in its application to a part-time employee, the Delaware Supreme Court held that "the object of the [Workers' Compensation Act] is to compensate for the inroad upon the full-time earning capacity of the victim of industrial mishap."[39] This Court concludes that §2330 specifically equates compensation with wages, and not "level of wages," with the result (as the Board held) that "wages" as used in §2330 means "wage replacement benefits."

D. IAB compensation agreements and IAB decisions in which the applicability of 19 *Del. C.* §2330 was not contested.

Claimant has also relied on several Board-approved agreements for compensation for death that granted benefits to the surviving spouse of an employee who contracted mesothelioma as a result of exposure to asbestos;

---

[38] *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 836 (Del. 1975).

[39] *Furrowh v. Abacus Inc.*, 559 A.2d 1258, 1260 (Del. 1988) (quoting *Fitzgerald v. Roy's Flying "A", 266 A.2d 193,* (Del. Super. 1970) *aff'd*, Del. Supr., No. 86, 1970 (*per curiam*) (Nov. 9, 1970) (ORDER); *see Hacker v. Newell/Kirch*, 2003 Del. Super. LEXIS 188 (holding that "the purpose of the workers compensation statute is to compensate the employee for lost earning capacity").

Charles Mason/DuPont, IAB Agreement to Compensation (April 5, 1984),[40] *Raymond George/DuPont,* IAB Agreement to Compensation (September 21, 1994),[41] *Walter Niblett/DuPont*, IAB Agreement to Compensation (October 5, 2000),[42] and *Kenneth Kolb/DuPont* IAB Agreement to Compensation (June 7, 2002)[43]. In all four cases the Claimant and Employer apparently entered into an agreement for such compensation without any rulings by the Board as to the legal merits of the parties' positions.

Claimant also relies on four decisions of the Board in which death benefits for asbestos-related cancer that manifested after the employee's retirement were granted; *Thorpe v. DuPont*, IAB Hearing No. 940753 (August 23, 1996),[44] *Warrington v. City of Wilmington*, IAB Hearing No. 1086575 (March 11, 1998),[45] and *Watts v. A.C.S., Inc.*, IAB Hearing No. 1209195 (April 2, 2003).[46] Apparently in *Thorpe, Warrington* and *Watts* the

---

[40] Claimant's Appendix and Compendium of Unreported Authorities for Opening Brief at A-193 (hereinafter "Claimant's Appendix at _.").

[41] *Id.* at A-195.

[42] *Id.* at A-207.

[43] Claimant's Appendix at A-202.

[44] *Id.* at A-109.

[45] *Id.* at A-123.

[46] *Id.* at A-133.

granting of death benefits was not contested by the employer. While cases from the Board may be instructive, they are not binding. This Court declines to follow these cases as in all of the claims the award of death benefits was seemingly not contested for whatever reason.

Lowman v. Connectiv Power, IAB Hearing No. 1188166 (October 30, 2003) was also cited by Claimant as supporting her position. The three *Lowman* decisions (IAB Hearing No. 1188166 (November 16, 2001), *Lowman v. Conectiv Power Delivery*, C.A. No. 01A-12-003, Alford, J. (Nov. 1, 2002) (ORDER) and the subsequent Board decision cited by Claimant, IAB Hearing No. 1188166 (October 30, 2003)) when read *in toto* appear distinguishable from the instant case.[47] In *Lowman*, the employee had worked for the employer from 1960 until 1994 when he retired.[48] The employee developed health problems in 1998 and was diagnosed with lung cancer in 1999.[49] In April 2001, the employee filed a Petition to Determine Compensation Due seeking medical and disfigurement benefits.[50] The

[47] Claimant's Appendix at A-157.

[48] *Lowman v. Conectiv Power Delivery*, C.A. No. 01A-12-003, Alford, J. (Nov. 1, 2002) (ORDER) (holding that the Board did not commit an error of law by finding that the claimant was not barred by the applicable statute of limitation and that the claimant had provided adequate notice of the claim to the employer).

[49] *Id.*

[50] IAB Hearing No. 1188166 (November 16, 2001) at 2.

Board held that the employee's lung cancer was due to his occupational exposure to asbestos dust while working for the employer.[51] Having found that the employee had suffered a compensable occupational disease, the Board than held that the employee's claim was not barred by the Statute of Limitations. The Board found that the employee, as a reasonable person, did not recognize the probable compensable nature of his lung cancer until such time as would not implicate the Statute of Limitation.[52] The employer appealed the Board's decision to this Court, solely on the issue of whether the Board erred as a matter of law in finding that the employee's claim was not barred by the Statute of Limitation.[53] The Court affirmed the decision of the Board in November 2002 .

It appears from the Board's October 30, 2003 decision that in December 2002, the employee's spouse, who subsequently became his Executrix, filed a Petition to determine Additional Compensation Due for permanent impairment pursuant to 19 *Del. C.* §2326.[54] Presumably, this

---

[51] *Id.* at 8.

[52] IAB Hearing No. 1188166 (November 16, 2001) at 11.

[53] *Lowman v. Conectiv Power Delivery*, C.A. No. 01A-12-003, Alford, J. at 3 (Nov. 1, 2002) (ORDER).

[54] IAB Hearing No. 1188166 (October 30, 2003).

must be a mistake, as the employee did not die until April 2003, after the filing of the petition seeking compensation for permanent impairment. The inference to be drawn from the employee's date of death and the filing of the petition for §2326 benefits is that the employee originally filed the petition seeking permanent impairment and his Estate, through his Executrix/spouse, continued the action after his death.[55] A second petition was filed in May 2003 seeking compensation for death benefits pursuant to §2330 and burial expenses pursuant to §2331. The petition came before the Board in October 2003. The *Lowman* Board awarded the employee's estate permanent impairment benefits.

In addition, the Board also awarded the employee's widow death benefits under §2330; it noted that the employer did not present any case law to support its argument that the widow was not entitled to §2330 benefits. The Board held that "this factual situation [the facts of the employee's case] encompasses the intent of the [Workers' Compensation Act], namely, to compensate a surviving spouse for the loss of support resulting from a work-related death."[56] The wording of the Board's decision seems to indicate that the Board equated death benefits under §2330 with wage replacement

[55] IAB Hearing No. 1188166 at 2 (October 30, 2003).

[56] *Id.*

benefits.

Even though permanent impairment benefits under §2326 are not dependent on a showing of the loss of actual earning power, this Court held in *DiSabatino & Sons v. Apostolico* that "scheduled losses to the body [under §2326] ha[ve] been said to be based upon a presumption that the nature of a scheduled injury is such that the reduction in the earning *capacity* will continue into the future whether or not an actual wage loss is incurred."[57] The *DiSabatino* Court quoted *Larson's* for an analysis of permanent impairment benefits under §2326:

> Scheduled benefit payments are not dependent on actual wage loss. Evidence that claimant has had actual earnings, or has even been regularly employed at greater earnings than before, is completely immaterial.
>
> This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law -- that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proven one based on the individual's actual wage-loss experience. []Workmen's Compensation Law Larson, §58.10.[58]

The case law is clear that the intent of the Workers' Compensation Act, is to compensate a surviving spouse for the loss of support resulting from a work-related death.

---

[57] *DiSabatino & Sons v. Apostolico*, 260 A.2d 710, 713 (Del. Super. 1969), *aff'd* 269 A.2d 1084 (Del. 1970).

[58] *Id.*

It is not clear from either *Lowman* Board's decisions or this Court's order on the *Lowman* appeal whether the employee had voluntarily retired in the "traditional" sense; therefore, it cannot be determined if *Lowman* in effect followed the *Willis* and *Kaschalk* Courts' holdings that voluntary retirement may disqualify an employee from receiving partial or full Workers' Compensation disability benefits. This Court presumes that permanent impairment benefits were awarded in *Lowman* according to the precepts of *Willis* and *Kaschalk* under the particular facts of *Lowman*. In any event, this Court is not bound by *Lowman* and must necessarily undertake an independent legal analysis in the instant case.

F. Jurisdictions that have statutes that specifically entitle a spouse to an independent claim for death benefits.

Claimant cited this Court's recent holding in *DelPizzo v. Agilent Technologies*[59] for the proposition that that this Court has "often turned to *Larson's*[60] and [to] precedent from other states with similar compensation statutes for guidance."[61] While it is true that this Court has had occasion to examine other jurisdictions' handling of similar compensation statutes, the

---

[59] *DelPizzo v. Agilent Technologies, Inc.*, 2004 Del. Super. LEXIS 391.

[60] Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law (2003).

[61] Claimant's Reply brief at 13.

cases cited by Claimant ultimately do not support Claimant's position. In addition, *Larson's* does not directly address the issue in this case.

In *Johnson v. City of Lake Charles*,[62] relied upon by Claimant, the employee worked for the Lake Charles Fire Department before retiring. Almost twenty-five years after his retirement, the employee was diagnosed with lung cancer, from which he subsequently died. The City of Lake Charles did not dispute the workers' compensation judge's determination that the employee died from a compensable occupational disease. Rather, it asserted that the workers' compensation judge erred in concluding that the employee's wife was entitled to weekly death benefits where her husband had retired and was receiving no active wages at the time of his death. The litigation was governed by the provisions of *La.R.S. 33:2581*, the so-called Firefighter's Heart and Lung Statute.[63] The Louisiana Court of Appeals held

---

[62] *Johnson v. City of Lake Charles*, 883 So. 2d 521 (La. Ct. Ap. 2004).

[63] *La.R.S. 33:2581* provides that

> Any disease or infirmity of the heart or lungs which develops during a period of employment in the classified fire service in the state of Louisiana shall be classified as a disease or infirmity connected with employment. The employee affected, or his survivors, shall be entitled to all rights and benefits as granted by the laws of the state of Louisiana to which one suffering an occupational disease is entitled as service connected in the line of duty, regardless of whether the fireman is on duty at the time he is stricken with the disease or infirmity. Such disease or infirmity shall be presumed, prima facie, to have developed during employment and shall be presumed, prima facie, to have been caused by or to have resulted from the nature of the work performed whenever same is manifested at any time after the first five years of employment.

that "[the Firefighter's Heart and Lung Statute] clearly provides that a firefighter's survivors 'shall be entitled to all rights and benefits as granted by the laws of the state of Louisiana to which one suffering an occupational disease is entitled as service connected in the line of duty, regardless of *whether the fireman is on duty at the time he is stricken* with the disease or infirmity.'" The comparable Delaware statute, 19 *Del. C.* §2328 "Compensation for death or disability from an occupational disease" does not contain language similar to the "regardless of the time [the employee] is stricken with the disease or infirmity" in the Louisiana statute. *Johnson* is therefore distinguishable.

While some other jurisdictions may allow a surviving spouse to be eligible for death benefits, even when the employee had voluntarily retired, the potential eligibility of the spouse is built into the governing statute, unlike §2330. *Larson's* states that (considering cases that have held that a surviving spouse is entitled to death benefits even when the decedent had voluntarily retired) "[t]he dependent's right to death benefits is created directly by statute: it is not derived from the rights of the deceased employee."[64] The same is true in Delaware: whatever rights a decedent's spouse may have are "created directly" by §2330. Delaware does not follow

[64] 5 Larson's at §98.01[1].

the proposition that death benefits are independent claims of the surviving spouse from the deceased employee.[65]

F. Conclusion

In *Moore v. Chrysler*, the Delaware Supreme Court was presented with a somewhat analogous case to the instant case. The *Moore* Court found that

> [t]he employee was accidentally injured in [June 1962] in the course of his employment, as the result of which his left leg was amputated in [October 1962]. He died in [August 1963], death being caused by cancer unrelated to the injury. Compensation for temporary total disability was paid for the period [June 1962 to August 1963]. No claim was made by the employee for scheduled compensation, under 19 *Del.C.* § 2326, for the permanent injury of loss of the leg.[66]

The Supreme Court affirmed the denial of permanent impairment benefits under §2326 because under the applicable version of §2326 "liability for compensation ended if the employee died from a cause other than the industrial accident."[67] The *Moore* Court noted that

> "[w]e reach our conclusion in this case reluctantly. The humane purposes of the [Workers' Compensation Act] . . . lead to a sympathetic view of [the surviving spouse's] position. But there are no rights to [workers'] compensation except those found within the Statute itself. We are unable to find within the governing

---

[65] *Id.*
[66] *Moore v. Chrysler*, 233 A.2d 53, 54 (Del. 1967).

[67] *Id.* 19 *Del. C.* §2326 had been amended in 1964 to allow a claim where the employee died from an unrelated cause to not abate.

Statute the right here claimed by [the employee's widow].[68]

This Court affirms the decision of the Board in this case denying §2330 "death benefits" to Claimant because Employee had voluntarily retired in a "traditional" sense (thereby removing himself from the workforce) and not due to his work related injury. This Court, like the *Moore* Court, has "a sympathetic view of [Claimant's] position." As the Delaware Supreme Court has held, "[a] reviewing court [construing a statute] may accord due weight, but not defer, to an agency interpretation of a statute administered by it."[69] This Court has "accord[ed] due weight" to the Board's interpretation of §2330, but the Court has not deferred to the Board. The plain meaning of §2330 compels this Court to hold that the voluntary retirement and removal from the workplace of a decedent/employee may potentially disqualify a surviving spouse from eligibility for benefits under 19 *Del. C.* §2330 even where the death was caused by an occupational disease.[70]

---

[68] *Id.* at 55.

[69] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1998).

[70] The parties and the Court agree that §2330 does not explicitly address the issue in this case. The establishment of any policy in this State regarding a spouse's entitlement to death benefits pursuant to §2330 under the factual circumstances of this case is, of course, within the province of the General Assembly. As the Delaware Supreme Court noted in *Kofron v. Amoco Chemicals Corp.*, 441 A.2d 226 (Del. 1980), "[i]n view of the magnitude of the asbestosis problem and the proliferation of workers' claims in this area,

PART 2: EMPLOYER'S MOTION TO STRIKE

I. CONTENTIONS OF THE PARTIES

A. Employer's Argument

Employer argues that several portions of Claimant's Reply Brief and related submissions should be stricken because these portions were either not presented to the Board or were not raised in Claimant's Opening Brief. First, Employee seeks to strike what it categories as two new arguments, titled Argument II and Argument IV, in Claimant's Reply Brief. Argument II states: "The Hirneisen Board's Decision unfairly burdens and discriminates against occupational disease widows and is thus contrary to both the express language and purpose of the Delaware Workers' Compensation Statute." Argument IV states: "The Hirneisen Board's Decision is contrary to *Larson's* and jurisdiction with similar Statutes." Employee argues that these arguments were not raised in Claimant's

---

we believe that any changes in the [Workers' Compensation Act] must come from the Legislature, whence it came and which, because of increasing informational input from both employer and employee lobbies, is perhaps best equipped to grapple with this issue."

Opening Brief and should not be allowed to be raised for the first time in a reply. Employee also seeks to strike three affidavits that were included in the reply but had not been presented to the Board. These affidavits were from attorneys familiar with asbestos litigation in Delaware.[71] Finally, Employee argues that three cases (*DelPizzo v. Agilent Technologies*, *Johnson v. City of Lake Charles*, and *Thompson v. Ohio Edison Company*) cited by Claimant in her Reply Brief should also be stricken because these cases had not been cited previously.

B. Claimant's response.

Claimant contends that Arguments II and IV are not new arguments but are "either arguments made in the Opening Brief or reiterated and/or are [their] direct responses to arguments made in [Employer's] Answering Brief.[72] Claimant also contends that the three affidavits should be allowed

[71] The three affidavits are: 1) Affidavit of Thomas C. Crumplar (affiant states that the firm of Jacobs & Crumplar, P.A. has filed "seventeen Workers' Compensation claims which involved death claims for asbestos-related cancer" since 2000 and "thirteen of those claims involved deceased plaintiffs who were retired or not working at the time of their asbestos related deaths . . . [and] their widows were not receiving wage replenishment benefits"), 2) Affidavit of Richard T. Wilson (affiant states that the Law Offices of Peter G. Angelos has filed twelve asbestos-related Workers' Compensation claims and ten of those "claims involved claimants who were retired or not working at the time of the filing of their asbestos related claims."), and 3) Affidavit of Thomas C. Crumplar (affiant states that the law firm of Jacobs & Crumplar, P.A. has filed eighteen Workers' Compensation claims and/or Third Party lawsuits where there was a widow's claim due to asbestos-related lung cancer and/or mesothelioma and whose employment at Haveg, Industries was an alleged cause of their fatal disease.").

[72] Claimant's Response to Employer's Motion to Strike at 4.

because they "specifically . . . respond to an argument raised for the first time . . . in [Employee's] Answering Brief that 'Cases such as these [referring to the instant case] are rare'."[73] Last, Claimant responds that two of the cases (*DelPizzo* and *Johnson*) cited by Employer to be stricken could not have been included in Claimant's Opening Brief because the two cases were decided after the Opening Brief was filed. Claimant conceded that she could have cited *Thompson* in her Opening Brief, as it had been decided prior to the filing of her brief, but that the case was not found until it was revealed during a later search.

II. DISCUSSION

As Claimant acknowledges, there is "the well established rule and practice that counsel should not hold matters in reserve for reply briefs and reply briefs should consist of materials necessary to respond to the answering brief."[74] Insofar as Employer seeks to strike affidavits submitted with the Reply Brief, Superior Court Civil Rule 72(g) provides that "[a]ppeals shall be heard and determined by the Superior Court from the record of proceedings below, except as may be otherwise expressly provided

---

[73] *Id.* at 2.

[74] Claimant's Response to Employer's Motion to Strike at 2.

by statute."[75] This Court has held that in an appeal from an administrative board decision evidence that was not produced at the initial hearing below cannot now be considered in the Court's review of the Board's decision.[76] However, under Rule 72 a new argument is not created by the use of different language.[77]

This Court holds that Arguments II and IV from Claimant's reply brief should not be stricken as these two arguments are not "new" but are extensions of arguments already made by Claimant. The Court also holds that the three cases cited for the first time by Claimant in her reply should not be stricken. *DelPizzo* was decided before Claimant filed her Opening Brief and *Johnson* was decided approximately two weeks before Claimant filed her Opening brief; however, *Johnson* is a case from another jurisdiction.[78]

However, this Court holds that the three affidavits should be stricken. Claimant argues that the affidavits are submitted to respond to Employer's

---

[75] Superior Court Civil Rule 72(g).

[76] *Bey v. Murphy Marine Servs.*, 2002 Del. Super. LEXIS 290 (holding that "the evidence Claimant urges the Court to consider was not produced at the initial hearing below, and therefore cannot now be considered in the Court's review of the Board's decision").

[77] *Young v. Saroukos*, 189 A.2d 437 (holding "[a] new issue is not created upon appeal merely by the use of a different terminology").

[78] *DelPizzo* was decided on November 16, 2004 and *Johnson* was decided on September

claim that "cases such as [the instant case] are rare." However, the affidavits do not contain factual information such that the Court can determine their applicability to the present set of facts. Further, this Court holds that to the extent these affidavits present factual evidence they should have been presented to the Board as support for Claimant's petition so as to give both the Board and Employer the opportunity to respond, if either so desired.

CONCLUSION

For the foregoing reasons the decision of the Industrial Accident Board denying 19 *Del. C.* §2330 "death benefits" to Claimant is **AFFIRMED** and Employer's motion to strike is **GRANTED in part and DENIED in part.**

IT IS SO ORDERED.

_____

oc: Prothonotary
cc: The Industrial Accident Board

9, 2004. Claimant's Opening brief was filed on September 21, 2004.