No. 33043 – *Patricia E. Fitzgerald v. Earl L. Fitzgerald*

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Albright, Justice, dissenting:

The majority adopted a misadvised approach in responding to the certified question that raised the issue of whether a permanent total disability ("PTD") award includes, as part of the award, an element for pain and suffering in the context of applying equitable distribution principles in a divorce proceeding. Given the clear absence of any statutory language in the statutes pertaining to equitable distribution that would include an award of PTD benefits as separate property,[1] the majority could have simply concluded that

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[1]Separate property is defined as

> (1) Property acquired by a person before marriage;
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> (2) Property acquired by a person during marriage in exchange for separate property which was acquired before the marriage;
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> (3) Property acquired by a person during marriage, but excluded from treatment as marital property by a valid agreement of the parties entered into before or during the marriage;
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> (4) Property acquired by a party during marriage by gift, bequest, devise, descent or distribution;
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> (5) Property acquired by a party during a marriage but after the separation of the parties and before ordering an annulment, divorce or separate maintenance; or
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> (6) Any increase in the value of separate property as defined in subdivision (1), (2), (3), (4) or (5) of this section which is due to inflation or

(continued...)

the Legislature has failed to identify PTD awards, or any portion thereof, as constituting separate property. The law of this state undisputedly "expresses a marked preference for characterizing the property of the parties to a divorce action as marital property." Syl. Pt. 3, in part, *Whiting v. Whiting*, 183 W.Va. 451, 396 S.E.2d 413 (1990). Had the majority simply relied upon the limited exclusions provided by the Legislature to marital property and concluded that PTD awards do not come within the definition of separate property, less long-term damage to the law of this state would have resulted. *See* W.Va. Code § 48-1-237. Instead, the majority has severely and unnecessarily muddied the analytical waters of this state's workers compensation law.

While the better approach would have been to refrain from invading an area better addressed by the Legislature, the inconsistencies between the reasoning employed by the majority in this case and that previously relied upon in prior decisions addressing equitable distribution compels further discussion of the issue of whether PTD benefits may intrinsically be designed to include an element for pain and suffering. Despite the absence of determinative statutory language, this Court determined through decisional law that the portion of a personal injury award that is designated as compensation for "pain, suffering,

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[1](...continued)
to a change in market value resulting from conditions outside the control of the parties.

W.Va. Code § 48-1-237 (2001).

disability, disfigurement, or other debilitation of the mind or body" "constitutes the separate nonmarital property of an injured spouse." Syl. Pt. 1, in part, *Hardy v. Hardy*, 186 W.Va. 496, 413 S.E.2d 151 (1991). This principle was relied upon to include moneys awarded from a tort settlement or verdict award for loss of consortium as the separate property of the noninjured spouse, provided the noninjured spouse can demonstrate the existence of such noneconomic damages through the introduction of competent evidence. *See* Syl. Pt. 4, *Huber v. Huber*, 200 W.Va. 446, 490 S.E.2d 48 (1997); Syl. Pt. 4, *Hardy v. Hardy*, 186 W.Va. 496, 413 S.E.2d 151.

In determining whether the principle first announced in *Hardy* regarding the separate nature of pain and suffering awards in a personal injury suit should be extended to workers' compensation lump sum awards for PTD benefits, the majority flatly announced that PTD awards are "not considered to be an award for the injured employee's pain and suffering." Certainly, the entirety of the award is not designed to be an award for pain and suffering.[2] But, rather than recognize that, while perhaps not subject to precise calculation, a workers compensation PTD award intrinsically contains an element intended to compensate an injured worker for noneconomic damages, the majority opted to categorically

[2]Instead of addressing the query of whether a portion of a PTD award is intended to compensate an injured worker for pain and suffering, the majority reformulated the four certified questions and turned the issue into an "all or none" proposition.

eliminate the possible existence of such an inherent noneconomic element as part of the award.

In reaching its conclusion that PTD awards lack any element intended to compensate an injured workers for pain and suffering, the majority suggests that this Court's earlier recognition to the contrary in *State ex rel. Boan v. Richardson*, 198 W.Va. 545, 482 S.E.2d 162 (1996), has been "implicitly modified." In *Boan*, this Court acknowledged that "[w]hile the amount of [workers' compensation] . . . payments is, in fact, based on the injured worker's past employment, the benefits are also defined and limited by additional factors such as the average wages in the State" and that such payments in PTD cases serve to "compensate for more than lost wages because . . . they stand in lieu of a myriad of damage elements recognized in the tort system . . . ." 198 W.Va. at 550-51, 482 S.E.2d at 167-68. The majority's conclusion that subsequent decisions of this Court have altered this position that "workers' compensation benefits for permanent total disability are more than simply a wage replacement system" is simply not true.[3] *Id*. at 550, 482 S.E.2d at 167.

At best, the decisions the majority relies upon in its attempt to refute *Boan* merely recognize that our workers' compensation statutes do not recognize as a separate

[3]*See Fitzgerald v. Fitzgerald*, __ W.Va. __, n.9,__ S.E.2d __ , n.9, No. 33043 (filed November 30, 2006) and cases cited therein.

element of recovery any noneconomic damage elements such as pain and suffering.[4] The stating of the obvious – that workers' compensation is provided in lieu of tort damages – does not squarely address the issue at the forefront of this discussion: whether a lump sum PTD award, necessarily encompasses, to some extent, an amount for pain and suffering based on its "in lieu of" tort recovery nature. I submit that it does.

In *Crocker v. Crocker*, 824 P.2d 1117 (Okla. 1991), the Oklahoma Supreme Court explained that the analytical approach for determining whether a workers' compensation award is marital or separate property derives from how personal injury awards are treated in divorce actions. *See id.* at 1121 n.11. While the majority does not describe its approach to the issue as being analytical – one which seeks to determine the *underlying nature of a workers' compensation award* as a means of deciding whether the same is separate or marital property – this is the approach it employed.[5] Importantly, in those states applying the analytic approach where the workers' compensation scheme directly

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[4]*See Zelenka v. City of Weirton,* 208 W.Va. 243, 247-48, 539 S.E.2d 750, 754-55 (2000) (recognizing that fact that workers' compensation does not expressly provide compensation for damage elements such as pain and suffering "'does not require conclusion that there has been no recovery of benefits . . . in lieu of damages recoverable in a civil action'"); *Brooks v. City of Weirton,* 202 W.Va. 246, 513 S.E.2d 814 (1998) (discussing rejection of notion that failure of workers' compensation to provide full panoply of available tort damages required conclusion that claim was not "'covered'" by worker's compensation).

[5]*See generally Crocker,* 824 P.2d 1119-1123 (discussing four approaches to identifying workers' compensation awards as either marital or separate property: mechanistic approach; case by case approach; unitary approach; and analytic approach).

compensates the injured employee for disfigurement and/or loss of use of a limb, such amounts are clearly treated as separate property. *See id.; Kirk v. Kirk*, 577 A.2d 976,979 (R.I. 1990); *Doucette v. Washington*, 766 A.2d 578, 584-85, n.12 (Me. 2001) (discussing separate property nature of permanent impairment compensation versus long term earnings replacement); *see also* Syl. Pt. 4, in part, *Staton v. Staton*, 218 W.Va. 201, 624 S.E.2d 548 (2005) (holding that "[b]enefits that actually compensate for disability are separate property because such monies are personal to the spouse who receives them"). And, as recognized above, where pain and suffering awards are separately identifiable, those amounts, as well as amounts intended to compensate for disability and the loss of ability to conduct a normal life, are included in the injured spouse's separate property. *See Crocker*, 824 P.2d at 1121, n.11.

In concluding that the nature of the workers' compensation award is solely wage replacement, the majority acts in contravention of the long-standing purpose of workers' compensation law. As we announced in *McVey v. Chesapeake & Potomac Telephone Co.*, 103 W.Va. 519, 138 S.E. 97 (1927), the purpose of the original legislation was "to relieve the employer from any and all civil responsibilities at common law, growing out of or in any way connected with the injury or death of an employee in the service of an employer who had fully complied with the requirements of the act." *Id.* at 523, 138 S.E. at 98; *accord Makarenko v. Scott*, 132 W.Va. 430, 55 S.E.2d 88 (1949). By eliminating the

civil remedy option to seek redress under tort law, the Legislature must have intended to encompass within an award of workers' compensation some measure of recovery for those damages that might otherwise be recovered through access to the court system. To suggest, as does the majority, that "in lieu of" necessarily means that the workers' compensation cannot include any element of tort-based recovery within its structure of awards seems illogical.

What the majority fails to appreciate is that the manner in which a workers' compensation award is calculated (i.e. based, *in part*, on wages) is not solely determinative of the underlying nature of the workers' compensation award. The workers' compensation system was originally, and continues to this day, to be propelled by the bargain struck that "in exchange for extending statutorily designated benefits for workplace injuries, an employer gains a guarantee that this statutory system of recovery is the exclusive means for compensating his/her employees, barring any statutory exceptions." *Bias v. Eastern Ass'd Coal Corp.*, __ W.Va.__, __ S.E.2d __ , No. 32778, slip op. at 1 (June 8, 2006) (Albright, J., concurring, in part, dissenting, in part). The "bargain which undergirds the workers' compensation system" extends broad immunity to the employer from tort-based recovery for work-related injuries while granting enhanced certainty of compensation to employees free of the burden of overcoming the common-law defenses that often prevented recovery. *Id.* The fact that one objective of the workers' compensation system is to immunize an employer

from tort-based actions, however, does not compel the conclusion that the award is not intended to compensate an injured employee in some fashion for the pain and suffering that he or she experienced as a result of the injury. Only by viewing the workers' compensation award as inherently including as part of the award moneys intended to compensate the injured employee for the pain and suffering associated with the injury, does the system withstand scrutiny in terms of serving as a beneficial trade for the elimination of an injured worker's access to the courts for tort-based recovery.

Commentators have recognized the difficulty in trying to carve out the pain and suffering element in personal injury awards. *See Doucette,* 766 A.2d at 584, n.11 (citing American Law Institute's comment "recognizing that precisely accurate allocations are often not possible" with regard to nonspecific personal injury awards but noting that "dissolution court presented with this question must resolve it on the basis of the evidence then available"). Just as personal injury awards are not always easily divisible, so too is the case with trying to identify that portion of a PTD lump sum award that was intended to compensate the injured worker for the pain and suffering associated with his or her injury. The fact that such amount is not easily gleaned or identifiable does not make its existence less certain.[6]

[6]The circuit court took a stab at identifying that portion of the workers' compensation award that was attributable in this case to pain and suffering and opined that the amount was 25%. Clearly, the calculation of any such amount would be better addressed (continued...)

By eliminating, in wholesale fashion, the principle that some portion of a PTD award is designed to compensate an injured employee for pain and suffering, the majority has embarked on a path destined to ultimately impair the structural integrity of the workers' compensation system. If one accepts the majority's position that there is no element of compensation inherent to the workers' compensation system for pain and suffering, the quid pro quo bargain nature of the system appears less certain and arguably is markedly tipped against the employee. And, if the balance intended to be achieved by the system is upset, it will not be long before the argument is raised that the workers' compensation schema is not "an adequate substitute remedy for that which might be available in the tort system." *Boan,* 198 W.Va. at 551, 482 S.E.2d at 168. If the foundational basis for the workers' compensation system is attacked by demonstrating the absence of the quid pro quo bargain, the inevitable conclusion that follows is that a violation of due process has resulted by denying an injured worker the right to seek redress for his or her injuries within the court system. Based on my conclusion that the approach adopted by the majority has weakened the very structure of the workers' compensation system and assuredly set in place the framework for such awards to be attacked on constitutional grounds in the future, I must respectfully dissent.

I am authorized to state that Justice Starcher joins in this dissenting opinion.

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[6](...continued)
by the Legislature in the absence of any specific factors for arriving at such a figure.