EILEEN FOLEY, Widow of MICHAEL FOLEY,
(Appellant)

v.

THERMAL ENGINEERING INTERNATIONAL, INC.
(Appellee)

and

AMERICAN HOME ASSURANCE CO.
(Insurer)

Argued: May 21, 2014
Decided: January 13, 2015

PANEL MEMBERS: Hearing Officers Pelletier, Greene, and Knopf
BY: Hearing Officer Knopf

[¶1] Eileen Foley appeals from a decision of a Workers' Compensation Board hearing officer (*Collier, HO*) denying her Petition for Award-Fatal. Ms. Foley contends that the hearing officer erred when construing 39-A M.R.S.A. § 215(2) (Supp. 2014) to require dependency status on the date of injury as opposed to the date of death, as a prerequisite for receipt of death benefits. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Michael Foley suffered a work-related injury on April 7, 2005, while working for Thermal Engineering International, Inc., at the Seabrook Nuclear

Power Plant in Seabrook, New Hampshire. At that time, Mr. Foley was not married and had no dependents. He received incapacity benefits commencing May 2, 2005. On July 2, 2008, Mr. Foley settled his case with Thermal Engineering and its insurer and released all claims related to the 2005 work injury, pursuant to New Hampshire's workers' compensation laws.

[¶3] Mr. Foley and Eileen (Kelly) Foley had a son on November 2, 2006. The Foleys subsequently married on May 9, 2008. Mr. Foley died in July of 2009 from an overdose of a combination of legal and illegal drugs. Ms. Foley filed a Petition for Award of Compensation-Fatal on March 22, 2010, against Thermal Engineering, seeking death benefits pursuant to section 215.

[¶4] In a decree dated August 30, 2013, the hearing officer found that as of the date of the work injury, Ms. Foley was not married to Mr. Foley and his son had not been born; therefore they were (1) not his dependents as defined in the Act, *see* 39-A M.R.S.A. § 102(8), and (2) not entitled to death benefits under section 215.[1] Both parties filed Motions for Further Findings of Fact and Conclusions of Law, which the hearing officer denied. Ms. Foley now appeals.

[1] Because the resolution of the dependency issue was determinative, the hearing officer did not reach the issues of whether (1) Mr. Foley's death was causally related to the work injury and (2) Ms. Foley's claim remains viable post-settlement.

II. DISCUSSION

[¶5] Ms. Foley contends that the hearing officer erred when determining that she and her son were not entitled to death benefits because they were not "dependents" on the date Mr. Foley suffered his 2005 work injury. Her appeal requires us to construe the meaning of "dependent" in section 215(2).

[¶6] Section 215 provides, in relevant part:

> **1. Death of employee; date of injury prior to January 1, 2013.** If an injured employee's date of injury is prior to January 1, 2013 and if death results from the injury of the employee, the employer shall pay or cause to be paid to the dependents of the employee who were wholly dependent on the employee's earnings for support at the time of the injury, a weekly payment . . . for a period of 500 weeks from the date of death. . . .
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> **2. Death of an injured employee.** The death of the injured employee prior to the expiration of the period within which the employee would receive weekly payments ends the disability and all liability for the remainder of the payments that the employee would have received in case the employee had lived is terminated, but the employer is liable for the following death benefits in lieu of any further disability indemnity.
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> > **A.** If the injury received by the employee was the proximate cause of the employee's death and the deceased employee leaves dependents wholly or partially dependent on the employee for support, the death benefit is equal to the full amount that the dependents would have been entitled to receive under subsection 1 if the injury had resulted in immediate death. Benefits under this paragraph are payable in the same manner as if the injury resulted in immediate death.

[¶7] The term "dependent" is defined in 39-A M.R.S.A. § 102(8) (Supp. 2012),[2] which provided, in relevant part:

> **8. Dependent.** "Dependent" means a member of an employee's family or that employee's next of kin who is wholly or partly dependent upon the earnings of the employee for support at the time of the injury. The following persons are conclusively presumed to be wholly dependent for support upon a deceased employee:
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> > **A.** A wife upon a husband with whom she lives, or from whom she is living apart for a justifiable cause or because he has deserted her, or upon whom she is actually dependent in any way at the time of the injury. A wife living apart from her husband must produce a court order or other competent evidence as to separation and actual dependency;
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> . . . .
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> > **C.** A child, including an adopted child or a stepchild, under the age of 18 years, or under the age of 23 years if a student or over the age of 18 years but physically or mentally incapacitated from earning, who is dependent upon the parent with whom the dependent is living or upon whom the dependent is actually dependent in any way at the time of the injury to the parent, there being no surviving dependent parent. For the purposes of this paragraph, "child" includes any dependent posthumous child whose mother is not living. If there is more than one child dependent, the compensation must be divided equally among them.

[¶8] When we construe provisions of the Workers' Compensation Act:

> ". . . our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent

[2] Title 39-A M.R.S.A. § 102(8) has since been amended. P.L. 2013, ch. 63, §§ 1-3 (changing, among other things, the statute's references from "wife" and "husband" to "spouse."

> results." *Id.* We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co.*, 507 A.2d 581, 583 (Me. 1986). "If the statutory language is ambiguous, we then look beyond the plain meaning and consider other indicia of legislative intent, including legislative history." *Damon v. S.D. Warren Co.*, 2010 ME 24, ¶ 10, 990 A.2d 1028. "Statutory language is ambiguous if it is reasonably susceptible of different interpretations." *Id.*

Graves v. Brockway-Smith Co., 2012 ME 128, ¶ 9, 55 A.3d 456.

[¶9] Because Mr. Foley's death occurred several years after the work injury and he had been paid workers' compensation benefits, there is no dispute that section 215(2)(A) applies to Ms. Foley's claim, and section 215(2)(B) would apply to their son. The hearing officer construed "dependent" in section 215(2) consistently with the definition in section 102(8), which requires familial status *at the time of the injury*. Because Mr. and Ms. Foley were not married and their son was not yet born at the time of the injury, the hearing officer concluded that neither was a dependent, and denied the petition for death benefits under section 215(2).

[¶10] In *Cribben v. Central Maine Home Improvements*, 2000 ME 124, ¶¶ 5-6, 754 A.2d 350, the Law Court construed the statutory language in former 39 M.R.S.A. § 58-A, a precursor to section 215(1), as requiring dependency at the time of injury to establish entitlement to death benefits, and held that a child born after an employee's date of injury but before the date of death was not entitled to receive those benefits.

[¶11] Ms. Foley asserts that *Cribben* does not govern because section 215(2) applies here, and former section 58-A had no counterpart to section 215(2). She contends that the language of section 215(2), unlike section 215(1), provides for benefits to persons who are dependent on the employee at the time of the employee's death rather than at the time of the employee's injury. She bases her argument on the Legislature's decision to exclude the language that explicitly requires dependency "at the time of injury" from section 215(2)(A). In addition, Ms. Foley attaches meaning to the Legislature's use of the expression "leaves dependents" in section 215(2), arguing that an employee would *leave* a dependent at the time of death, not at the time of injury (when death is delayed).

[¶12] Further, according to Ms. Foley, the definition of dependent in section 102(8) is not determinative. Rather, she argues that the purpose of that subsection is to define the financial circumstances under which a person qualifies as a dependent. In Ms. Foley's view, the reference to "the time of injury" is incidental and does not control the interpretation of section 215(2)(A).

[¶13] We disagree with Ms. Foley's contentions. Section 215(2) must be read in the context of the entire statutory scheme of which it is a part, which includes the definitional section. Her characterization of section 102(8) as merely defining financial qualifications for dependency status is without basis. The phrase "at the time of the injury" is repeated in each paragraph in section 102(8),

including the final paragraph, which begins: "In all other cases, questions of total or partial dependency must be determined in accordance with the fact as the fact was *at the time of injury*." (Emphasis added.) The statute plainly requires dependency status to be determined at the time of the employee's injury.

[¶14] Ms. Foley also argues that the text of section 215(2) was added long after the enactment of 102(8), and therefore the Legislature did not intend to link sections 102(8) and 215(2). We reject this argument as well. The former Act provided for death benefits under 39 M.R.S.A § 58-A, and contained a definition of "dependent" similar to that in section 102(8).[3] Section 58-A was repealed and

[3] Title 39 M.R.S.A. § 58-A provided:

> If death results from the injury, the employer shall pay the dependents of the employee, dependent upon the employee's earnings for support at the time of his injury, a weekly payment equal to 2/3 of his average gross weekly wages, earnings or salary, but not more than the maximum benefit under section 53-B, . . .

At the time of repeal, "dependents" was defined, in relevant part, as:

> "Dependents shall mean members of an employee's family or next of kin who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
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> > **A.** A wife upon a husband with whom she lives, or from whom she is living apart for a justifiable cause or because he has deserted her, or upon whom she is actually dependent in any way at the time of the injury. . . .
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> > **C.** A child or children, including adopted and stepchildren, under the age of 18 years, . . . upon the parent with whom he is or they are living, or upon whom he is or they are actually dependent in any way at the time of the injury to said parent, there being no surviving dependent parent. . . .
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> > . . . .

replaced with section 215 in the 1992 Act. P.L. 1991, ch. 885, §§ A-7, A-8. The 1992 Act revised section 58-A and added subsection 2 to section 215; thus sections 102(8), 215(1) and 215(2) all appeared in the 1992 Act.[4] Because the definition provision and the death benefit provision were enacted together as part of the whole statutory scheme, Ms. Foley's argument is without merit.[5]

III. CONCLUSION

[¶15] The hearing officer did not err when referring to the definitional section and accordingly construing the meaning of "dependent" in section 215(2) as requiring familial status as of the date of the employee's injury.

The entry is:

The hearing officer's decision is affirmed.

> In all other cases questions of total or partial dependency shall be determined in accordance with the fact, as the fact may have been at the time of the injury. . . .

39 M.R.S.A. § 2(4) (1989).

[4] Section 215(2) was amended in 2007 to remove the provision that allowed employers to take a credit against death benefits for indemnity payments made to the employee before death, P.L. 2007, ch. 361 § 1, and section 215(1) was amended in 2011 to reflect a change in the compensation rate effective after January 1, 2013, P.L. 2011, ch. 647, § 13.

[5] Ms. Foley raises a final argument by analogy to 39-A M.R.S.A. § 201(5) (Supp. 2014), that Mr. Foley's death was a "subsequent work injury" causally related to the 2005 work injury, which would make Ms. Foley and their son dependents as of the date of injury consistent with section 215(1) and authorize payment of death benefits. The hearing officer did not address this issue, but because it was raised in Ms. Foley's proposed findings of fact, it was arguably preserved. This argument is equivalent to an assertion that Mr. Foley suffered a second work injury on July 20, 2009. Because no petition was filed alleging that date of injury, the claim was not before the hearing officer and is not before us. *See Jackson v. Pratt-Abbott Cleaners*, Me. W.C.B. No. 14-13, ¶¶ 14-15 (App. Div. 2014).

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2014).

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