COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL

EMPLOYEE: Frank Eifler
CLAIMANT: Evelyn Eifler
EMPLOYER: Flintkote, Inc.
INSURER: American Mutual/Mass. Insurers Insolvency Fund
BOARD NO.: 00754295

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)
APPEARANCES
Michael McDeavitt, Esq. for the widow at hearing;
David J. McMorris, Esq., for the widow on appeal
David Cronin, Esq. for the insurer at hearing;
Timothy F. Nevils, Esq., for the insurer on appeal

Smith, J. Evelyn Eifler, the claimant widow of Frank Eifler, appeals from a decision denying her claim for § 31 dependency benefits and § 30 medical benefits, but awarding burial expenses. **1** The judge held that the widow was not entitled to dependency benefits because her husband voluntarily retired before the symptoms from his work-related asbestosis became apparent. He further held that the claim for medical bills was barred by the statute of limitations. Because we conclude that these holdings are contrary to the applicable law, we reverse those portions of the decision and award § 31 widow's benefits and § 30 adequate and reasonable medical and hospital services needed for treatment of the employee's asbestosis.

The underlying facts are not in dispute. Frank Eifler was last exposed to asbestosis during his employment for Flintkote on February 15, 1966. (Dec. 10, 17.) His average weekly wage on that date was $92.31. (Agreed upon Statement of Facts dated August 27, 1998.) Flintkote was then insured by American Mutual. (Dec. 7.) That insurer subsequently became insolvent and has been represented in this proceeding by the Massachusetts Insurers Insolvency Fund. (Dec. 1.) After leaving the

employ of Flintkote, Eifler worked for various employers until 1975 when he became self-employed. He retired from all forms of employment in 1982 at the age of 63. (Dec. 6.) Three years after his retirement he was diagnosed with asbestosis, causally related to exposure to asbestos in the 1960's. By at least February 20, 1985, Eifler was aware of the causal connection between his disability and employment at Flintkote. Id. He did not file any claims for weekly compensation or medical benefits.

Eifler died on March 15, 1994 as a result of pulmonary asbestosis. (Dec. 6.) Eifler's widow filed the pending claims after his death. (Dec. 7.) The insurer raised a statute of limitations defense. Although the judge found the defense barred the medical claim, he ruled that the widow's rights did not vest until the date of death; therefore her claims for dependency benefits and burial expenses were not barred by the statute of limitations. However, the judge declined to award § 31 dependency benefits on other grounds. He reasoned that since Eifler had retired in 1982, he had effectively withdrawn from the labor market and was earning no wages in the 52 weeks prior to the time his disease became incapacitating; Eifler was not an employee in service of another at the time of his incapacity and subsequent death, as defined by § 1(4). (Dec. 11.) The judge concluded that the claim for § 31 dependency benefits was moot, "since no wages were lost as a result of his accepted industrial injury at any time pertinent to this claim." Id. He further explained: "When Mr. Eifler became incapacitated thirty years after his industrial exposure, his actual loss of earnings was non-existent, since he had voluntarily retired from the workforce twelve years prior to his becoming incapacitated." (Dec. 15.) "An 'average weekly wage' has no meaning if it does not 'produce an honest approximation of [the employee's] probable future earning capacity.' As of March 7, 1994, when Mr. Eifler was admitted to the Hart County Hospital for this condition, he had no probable future earning capacity since he was then age 74 and had been voluntarily

retired from all employment for twelve years." Id. To award benefits based upon his last wages "would produce an irrational result that the Legislature did not intend- replacement of 'lost wages' to an individual who was no longer working by his own volition and was receiving both pensions and Social Security benefits. Section 35E of the 1991 reforms was crafted specifically to prevent such 'stacking' of benefits." Id. For these reasons, the judge declined to apply the statutory formula for calculating average weekly wages in latent injury cases, as set forth in G.L. c. 152, § 35C and its implementing regulation, 452 Code Mass. Regs. § 2.03. (Dec. 16.)

The judge concluded as a fact that Mr. Eifler experienced no period of incapacity from earning his usual wages that is causally related to this industrial injury, since he voluntarily retired before the symptoms of this injury appeared. On the date that Mrs. Eifler became potentially entitled to § 31 benefits, Mr. Eifler had earned no wages during the prior 52-week period, due to his voluntary retirement from the workforce. (Dec. 17-18.) Therefore the judge concluded as a matter of law that he could not award § 31 widow's dependency benefits. (Dec. 19.)

The widow appeals, raising three issues. First she argues that the judge exceeded the scope of his authority in raising the issue of § 35E *sua sponte*. We do not find that this argument is factually based. Claims against successive insurers, such as the one here, are treated as constituting a single proceeding. Borstel's Case, 307 Mass. 24, 27 (1940). The claim against Flintkote was consolidated for conference and hearing with claims against B.F. Goodrich, insured by Arrow Mutual Liability Insurance Company and Kemper Insurance. Arrow Mutual denied the claim specifically on § 35E grounds. (Insurer's Notification of Denial, dated March 20, 1995.) The § 35E defense was maintained at conference. (Temporary Conference memorandum, File No. 007543-95, dated July 12, 1995.) At conference, Kemper also asserted a § 35E defense. (Temporary Conference memorandum, File No. 007544-

95, dated July 12, 1995.) Having been raised by two of the insurers, the § 35E issue was properly before the judge.

However, at hearing, the widow did not assert a claim for § 34 or 35 benefits to which a § 35E defense would attach. Her claim was merely for dependency benefits and medical expenses. (Employee's Exhibit 1.) Section 35E by its terms does not apply to claims for § 30 medical expenses or § 31 survivors' dependency benefits. The judge erred in relying on § 35E to deny the widow's claims.

As the second issue, the widow claims that she is entitled to widow's benefits as a matter of law even though her husband had retired from the labor market and was earning no wages at the time of his incapacity and subsequent death. We agree that the wording of § 31 compels this result. Moreover, we find the result sensible in light of § 35C, the latent injury provision of the Workers' Compensation Act.

We begin by reviewing the elements of proof in § 31. Where the statutory language is clear, we must give it by its plain and ordinary meaning. Letteney's Case, 429 Mass. 280, 284 (1999). Section 31 provides: "If death results from the injury, the insurer shall pay the following dependents of the employee . . . wholly dependent upon his . . . earnings for support at the time of his or her injury, or at the time of his . . . death, compensation as follows. . . . To the widow. . . a weekly compensation equal to two-thirds of the average weekly wages of the deceased employee. . . provided that in no instance shall said widow . . . receive less than one hundred and ten dollars per week. . ." In order to recover benefits under § 31, a widow must establish that 1) the death was caused by the work injury and 2) she was dependent upon the employee either at the time of the injury or at the time of his death. Section 32 of the Act creates a conclusive presumption of dependency for a widow, who was living with her husband at the time of his death, which lasts until she exhausts her initial entitlement under § 31. **2** There is no dispute that Mrs. Eifler has satisfied both these elements of proof.

Section 31 makes no provision for further inquiry about dependency. A widow may be an heiress and thus be utterly independent of the payments provided by the Act. But there is no provision for that adjudication of fact during the period of conclusively presumed dependency. Similarly, there is no provision under the act for the inquiry that the judge performed, about the extent of the widow's reliance on the employee's earnings at the time his latent injury manifested itself in disability. The employee's retirement prior to his disability is immaterial to the entitlement provided the widow by § 31. Whatever incongruity there may be in making payments to a widow who is presumed to be dependent on a deceased spouse, when in fact she is not, is a matter for the legislature and not for the courts. See Bott's Case, 230 Mass. 152, 155 (1918) (widow's benefits continued after remarriage because Act, as then constituted, did not provide for their termination). The judge erred as a matter of law in requiring proof of the widow's actual dependency at the time the injured worker's latent injury became apparent.

Ordinarily a widow's compensation is based upon the wages paid at the time the injury occurred. Letteney's Case, 429 Mass. 280, 282 (1999). Here the date of injury is February 15, 1966. However, there is a special rule for determining the average weekly wages where a worker has continued to be employed and experiences the disabling effects of the injury, or dies, years later. The typical example of such an injury is asbestos exposure, the ill effects of which may become apparent only decades later. Id. This is such a case.

Section 35C provides that "the applicable benefits shall be those in effect on the first date of eligibility for benefits." The quoted phrase is interpreted by our regulation. 452 Code Mass. Regs. § 3.02(1) provides: "For purposes of M.G.L. c. 152, § 35C, applicable benefits on the first date of eligibility for benefits shall be based on the employee's average weekly wage as of such first date of eligibility for benefits, or, *if the employee is not employed on that date*, it shall be based on the employee's

average weekly wage as of the employee's last date of employment." (Emphasis supplied.) By using the employee's last wage, when the employee is no longer employed at the time the disability manifests itself, the regulation implements the purpose of § 35C, to ameliorate the effects of the passage of time.

Section 35C and its implementing regulation presume that over time higher wages are earned through the accrual of seniority and as a result of inflation. However, as made clear in Letteney's Case, the selection of the wages to be employed in the benefit calculation is not tightly connected with a wage replacement theory. Wages from self-employment, out-of-state employment and other excluded employment, not within the Commonwealth's workers' compensation system, are excluded from the calculation of the employee's average weekly wage under § 35C, even though they may be a more current, and thus more accurate, indication of future earning capacity. Id. at 286.

Here the medical disability became apparent in 1985, three years after Eifler retired. Applying § 35C and its implementing regulation, the applicable average weekly wage is that paid Eifler by his last Massachusetts employer. According to the statement of earnings admitted as Employee Exhibit 6, Eifler's last Massachusetts employer was Flintkote. The parties have stipulated that the average weekly wage in this 1966 employment was $92.31. (Agreed Statement of Facts, dated August 27, 1998.) Thus, curiously, despite § 35C, here the average weekly wage coincides with the wages paid as of the date of injury.

Section 35C does allow the widow to receive those benefits provided by the version of § 31 in effect on the date that she first became eligible for widow's benefits, to wit: the date of her husband's death, on March 15, 1994. **3** Under the 1994 version of § 31, the widow is entitled to receive a minimum benefit of one hundred and ten dollars per week. This amount is then adjusted for costs of living increases, pursuant to § 34B.

Special rules govern which version of G.L. c. 152, § 34B applies. When § 34B was amended in 1991, the legislature deemed the amendment to be substantive, and thus applicable only to injuries occurring after its effective date. St. 1991, c. 398, § 106. Here the employee died after 1991, but was injured years before. Thus, the 1991 version of § 34B is inapplicable to this case. The COLA provisions that apply are set forth in St. 1985, c. 572, § 43A, as amended by St. 1986, c. 662, § 30. **4** However, § 35C overrides that portion of § 34B, which bases the COLA calculation on the date of injury. It provides that "[f]or purposes of adjustments to compensation under sections thirty-four B . . . , the first date of eligibility for benefits rather than the date of injury shall be used for purposes of computing such supplemental benefits." G.L. c. 152, § 35C, added by St. 1985, c. 572, § 45 (emphasis supplied). The first date of the widow's eligibility for benefits was the date of her husband's death, March 15, 1994. The COLA adjustment begins on the review date, which is twenty-four months after the date of death, to wit: October 1, 1996. G.L. c. 152, § 34B first paragraph.

As the final issue, the widow contends that the judge erred in barring the claim for medical services because there was no time limit within which a claim for medical services had to be brought. We agree. The judge applied the current version of § 41, as amended by St. 1985, c. 572, § 50. However, by § 65 of that chapter, the amendment was made applicable only to injuries occurring after its effective date. The injury here was in 1966. Therefore we look to the prior version of § 41, which was enacted by St. 1965, c. 487, § 1. That version provides, in pertinent part: "No proceedings for compensation for an injury shall be maintained . . . unless the claim for compensation with respect to such injury has been made within one year after its occurrence . . . " This statute of limitations was tempered by § 49, which provided in pertinent part: "Failure to make a claim within the time fixed by section forty-one shall not bar proceedings under this chapter if it is found that it was

occasioned by mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay." G.L. c. 152, § 49, as amended by St. 1953, c. 314, § 6. **5** As the judge found that the insurer was not prejudiced by the delay, (Dec. 11, 18), the claim for medical services is not barred by the statute of limitations. The judge erred in so ruling.

We reverse the judge's denial of the widow's claims for §§ 30 and 31 benefits. We award the widow § 31 benefits from the date of death at the rate of one hundred and ten dollars per week, commencing March 15, 1994 and continuing, plus COLA as discussed above. Pursuant to G.L. c. 152, § 50, the insurer shall pay interest at the rate of ten per cent per annum on these sums due from the date of receipt of the notice of the widow's claim by the department, March 13, 1995, to the filing date of this decision. We further generically award the widow payment of reasonable and necessary medical expenses for treatment of the employee's asbestosis. **6** Interest shall be due only on medical bills that were attached to the claim. See G.L. c. 152, § 7G and its implementing regulation, 452 Code Mass. Regs. § 1.07 (2)(c).

So ordered.

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Suzanne E.K. Smith
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

FILED: December 13, 1999

1 The case was consolidated for hearing with claims against B.F. Goodrich fortwo dates of injury: January 15, 1964 insured by American Mutual Liability, Board No. 007543-95, and July 30, 1951, insured by Kemper Insurance Company, Board No. 007544-95. The administrative jduge denied by the B.F. Goodrich clais. No error is asserted by the employee regarding those denials. Those insurers have chosen not to participate in this appeal.

2 Section 31 caps benefits based upon presumed dependency. After the dependent unremarried widow has received the maximum payments, she "shall continue to receive further payments but only during such periods as . . . she is in fact not fully self-supporting." G.L. c. 152, § 31, fourth paragraph. Section 31 describes this maximum payment as follows:

The total payments due under this section shall not be more than the average weekly wage in effect in the commonwealth at th etime of the injury as determined according to the provisions of subsection (a) of section twenty-nine of chapter one hundred and fifty-one A, and promulgated by the deputy director of employment and training on or before the October first prior t othe date of the injury multiplied by two hundred and fifty plus any costs of living increases provided by this section . . . .

G.L. c. 152, § 31, fourther paragraph, as amended by St. 1990, c. 177, § 347. The statewide average week;ly wage on October 1st prior t oEifler's February 15, 1966 date of injury of was