COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 000328-97**

Joseph McDonough (deceased)	Employee
Martha McDonough	Claimant
Boston Edison	Employer
Boston Edison	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein & Carroll)

APPEARANCES
Franklin Lewenberg, Esq., for the employee
Michael A. Fager, Esq., for the self-insurer

LEVINE, J. The self-insurer and the widow of the deceased employee ("claimant") both appeal from a decision in which an administrative judge (1) found that the self-insurer was liable for the decedent's asbestosis disease, but (2) denied and dismissed the claim for § 31 death benefits. The self-insurer challenges the judge's finding of a work-related asbestosis condition. We summarily affirm the decision as to the judge's determination of the self-insurer's liability for that condition.[1] The judge denied claimant's § 31 claim because the employee had voluntarily retired before onset of the asbestos-caused symptoms and he had no earnings in the year preceding his death.

[1] Without objection, several witnesses testified to the presence of asbestos in the workplace. See, e.g., February 13, 1998 Tr. pp. 31, 34, 35, 48-49, 51, 60, 68, 71-72. See Freyermuth v. Lutfy, 376 Mass. 612, 620 n. 8 (1978) (unobjected to hearsay evidence "was entitled to be considered and given its appropriate evidentiary value"); O'Kane v. Travelers Ins. Co., 337 Mass. 182, 184 (1958) (unobjected to evidence entitled to its probative force). Contrast Patterson's Case, 49 Mass. App. Ct. __, __ (slip opinion February 18, 2000) (none of the sources relied on by the impartial physician "provided an iota of expert or admissible evidence regarding the actual, as opposed to the hypothesized, presence of latex or any other asthma-causing substances in the hospital . . . . As such [the impartial physician's opinion] was merely an unsubstantiated opinion based on assumed facts not established by the admissible evidence").

We agree with the claimant that the denial of § 31 benefits is contrary to law, because the judge failed to apply the conclusive presumption of dependency, even though he had found it applicable. We reverse the denial of § 31 benefits, and order that such benefits be paid at the rates mandated by § 35C and 452 Code Mass. Regs. § 3.02.

The employee worked for the employer from 1961 until he retired on November 30, 1991. (Dec. 5.) The employee was exposed to asbestos while performing his regular work duties, repairing cars and trucks. (Dec. 5, 6-7.) Four and one half years after his retirement, the employee was diagnosed with a metastatic adenocarcinoma in his right lung and asbestosis. The employee died on May 10, 1996. (Dec. 5-6.) The judge determined, based on air quality testing in December 1978 which detected no asbestos fibers, that the employee's harmful exposure had occurred prior to that date. (Dec. 7.) The judge concluded that the employee's death was causally related to his exposure to asbestos at work prior to December 1978. As such, the judge awarded the claimant § 33 burial expenses and § 30 benefits for the employee's medical care prior to his death. (Dec. 10.)

The judge addressed the widow's claim for § 31 death benefits as follows:

> I find that, while [the employee] indeed suffered an industrial injury prior to December 1978, he was not disabled, incapacitated, or in need of medical treatment during the latency period typically associated with asbestos-related diseases, and that he retired in 1966 [sic] from all employment prior to becoming disabled and/or in need of treatment for that injury. At the time of his death, [the employee] was not an "employee" under the definition of Section 1(4) of the Statute and did not receive any wages under the definition of Section 1(1) during the 52 weeks previous to his becoming incapacitated. Since [the employee] did not have any "earnings" as an employee in the service of another at the time of his death, there was no loss of wages. Based on these facts, I would normally find that [the widow] was not, at that time, wholly dependent upon the earnings of her husband, and consequently is not entitled to weekly compensation under Section 31 of the Statute. However, the "conclusive presumption" of dependency as defined in Section 32 of the Statute dictates that she was dependent on his wages, which I find were zero.
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> . . .
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> I find that [the widow], . . . while conclusively presumed to be dependent upon [the employee's] earnings at the time of his death, is not entitled to weekly

> benefits under Section 31 since there were no lost wages as a result of this injury and his death.

(Dec. 10-11, 16.)[2]

We are compelled by our recent decision in Eifler v. Flintkote, Inc., 13 Mass. Workers' Comp. Rep. ___ (1999), to reverse the denial of § 31 benefits. Eifler held that § 32(a)

> creates a conclusive presumption of dependency for a widow . . . who was living with her husband at the time of his death . . . . Section 31 makes no provision for further inquiry about dependency . . . . [T]here is no provision under the act for . . . inquiry . . . 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.

Id. at __. In an early case, the Supreme Judicial Court explained conclusive dependency under the Act, construing statutory language that has never changed:

> [I]t is the situation arising from the existence of a common home, a place of marital association and mutual comfort, broken up or put in peril of hardship or extinction by the husband's death, which is protected by the conclusive presumption of dependency established beyond the peradventure of dispute by the statute. Under such circumstances the widow is given the benefit of an irrefutable assumption that she was supported by the husband. . . . The English act makes dependency a question of fact in all cases. [Citations omitted.] *Our act makes an exception by fixing an absolute presumption of dependency (without regard to what the fact really is) in favor of a wife and of a husband when there is an actual living together. . . . [O]ur act says that where there is a real living together the fact of dependency shall not be inquired into; it shall be set at rest by a conclusive assumption.*

Nelson's Case, 217 Mass. 467, 469-470 (1914)(emphasis added). See P.J. Liacos, Massachusetts Evidence § 5.8.1 (6th ed. 1994)(conclusive presumption is a rule of substantive law removing the issue from the area of evidence and proof.) Eifler, supra.

Upon finding liability for the industrial injury and death and upon finding that the widow satisfied the prerequisites of §32(a), the judge should have turned directly to § 31:

[2] The insurer does not challenge the judge's finding that the widow is entitled to the conclusive presumption of total dependency under § 32(a): "A wife upon a husband with whom she lives at the time of his death . . . . "

"If death results from the injury, the insurer shall pay the following dependents of the employee . . . . To the widow or widower, so long as he or she remains unmarried, a weekly compensation equal to two-thirds of the average weekly wages of the deceased employee . . . ." Instead, the judge went astray by inquiring into the facts of dependency. That inquiry is immaterial to the present case. The only question remaining for the judge to determine was, "How much?" We therefore reverse the denial of § 31 benefits, and turn to the question of the appropriate compensation rate under § 31.

It is undisputed that the employee's average weekly wage at the time of his retirement in 1991 was $1,077.88. (Dec. 5.) The judge's findings, that the employee's last exposure to asbestos could have occurred no later than December 1978, triggers the application of § 35C. Section 35C provides, in pertinent part: "When there is a difference of five years or more between the date of injury and the initial date on which the injured worker or his survivor first became eligible for benefits under section thirty-one . . . , the applicable benefits shall be those in effect on the first date of eligibility for benefits." As the widow's eligibility for benefits commenced as of the May 10, 1996 date of death, there was greater than a five year's difference between the latest possible exposure (date of injury -- "prior to December 1978" [Dec. 10]), and the 1996 death. 452 Code Mass. Regs. § 3.02(1) provides: "For the 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 added.)[3] In the ordinary course, the widow's § 31 compensation rate, as per § 35C, would be capped at

[3] The Supreme Judicial Court's decision in Letteney's Case, 429 Mass. 280 (1999), supports an award of § 31 benefits in the present case. In Letteney, the court held that the rate of § 31 compensation, adjusted pursuant to § 35C, cannot be based on self-employment and out-of-state earnings of the employee at the time of his death, because such earnings are outside the Massachusetts workers' compensation system. Id. at 285. Nowhere in the opinion is there indication that the status of having no earnings under c. 152 at the time of death should bar recovery under § 31. Indeed, the court in effect treated the employee as if he had no earnings on the date of death. We see no distinction between earnings from sources not recognized by c. 152, and the present employee's lack of earnings at the time of his death. Eifler, supra at ___.

the state average weekly wage on the date of death (eligibility), which, in 1996, was $604.03 per week. See §31(widow's compensation is "equal to two-thirds of the average weekly wages of the deceased employee, but not more than the average weekly wage in the Commonwealth").

However, since the self-insurer has made no payments on this claim until the issuance of the present decision, § 51A applies to further adjust the widow's benefits. Section 51A provides: "In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury." As a result, the widow is not presently capped at the 1996 state average weekly wage, but is entitled to receive the full two thirds ($718.59) of the employee's average weekly wage ($1,077.88) available under the current rates of compensation.[4] The § 51A adjustment should apply to the entire retroactive part of the award -- back to May 10, 1996 -- as a consequence of the self-insurer's delaying payment and disputing the claim. See Conte v. P.A.N. Constr. Co., 13 Mass. Workers' Comp. Rep. 101, 103-104 (1999), quoting Madariaga's Case, 19 Mass. App. Ct. 477, 482-483 (1985)(§ 51A indicates legislative effort in part to encourage insurers to make prompt determination and payment of undisputed compensation). Compare Hanson's Case, 26 Mass. App. Ct. 988, 989 (1988)(on the date of the employee's injury the maximum compensation rate was ninety-five dollars; the maximum was subsequently raised, and this increase, by reason of the application of § 51A, permitted the employee to receive benefits of $189.13 [two thirds of his average weekly wage on the date of injury] instead of the ninety-five dollar maximum in effect on the date of injury).

Finally, we note that the widow is entitled to a § 34B cost of living adjustment commencing with the review date of October 1, 1998, using the multiplier applicable on

[4] The current cap -- state average weekly wage -- is $749.69. See Department Circular Letter No. 300.

the first day of eligibility, May 10, 1996, pursuant to the second paragraph of § 35C.[5] See Department Circular Letter Nos. 296 and 300.

The decision is reversed, and the self-insurer is ordered to pay the claimant § 31 benefits as set out above. In addition, the self-insurer shall pay interest on the entire award in accordance with the provisions of § 50, and an attorney's fee under § 13A(6) in the amount of $1,000.00.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **April 5, 2000**

[5] "For purposes of adjustments to compensation under section[] 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." § 35C.