

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS.: 049417-99, 004891-01

Joseph Sullivan (deceased)	Employee
Patricia Sullivan	Claimant
Bennell Contracting Corp.	Employer
Travelers Insurance Co.	Insurer
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION

(Judges Carroll, McCarthy and Fabricant)

APPEARANCES

George F. Leahy, Esq., for the claimant

James A. Garretson, Esq., for the insurer

Judith Atkinson, Esq., for the Trust Fund

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded the claimant § 31 benefits for her husband's 1998 death due to a 1978 industrial injury. For the reasons that follow, we reverse the decision in part, and award the § 31 benefits at the rate of compensation applicable to the February 17, 1978 injury, in addition to cost-of-living adjustments under § 34B based on that date of injury.

Joseph Sullivan was severely burned over the lower half of his body when his truck flipped over while he was plowing snow within the scope of his employment on February 17, 1978. In the course of treatment for his third and fourth degree burns, the employee needed multiple blood transfusions. (Dec. 5.) As a result, the employee contracted hepatitis C with resultant liver and renal problems and multiple bouts of cellulitis for the remainder of his life. On August 20, 1998, the employee died due to multiple organ failure brought on by necrotizing fasciitis as a direct complication from the burns and blood transfusions. (Dec. 6.)

Patricia Sullivan lived with her husband, the employee, until his death, and was wholly dependent upon his earnings. (Dec. 6.) Her claim for death benefits under § 31 yielded a

conference order of payment at the rate of \$150 per week based on an average weekly wage of \$250. Both parties appealed the order. (Dec. 3.)

The primary issue at hearing was the rate of compensation that the claimant was to receive for her § 31 death benefit entitlement. (Dec. 5.) The insurer raised §§ 35B, 35C and 35D in defense of the claim, and put the rate of cost-of-living increases under § 34B in play. (Dec. 3, 9.) The record indicates that on motion by Travelers Insurance Co., the Workers' Compensation Trust Fund was added as a party to the proceeding.

The parties stipulated to the occurrence of the employee's industrial injury on February 17, 1978; the employee's death on August 20, 1998; that § 34 benefits were paid to exhaustion from February 17, 1978 to May 31, 1981 in the amount of \$150 per week; that the employee received a third party settlement from the General Motors Corporation, pursuant to G.L. c. 152, § 15, on April 9, 1981; and that the employee's death was causally related to the severe burns that he had sustained in the work-related accident in 1978. (Dec. 4.) No testimony was taken.

On the basis of the stipulations and the memoranda of the parties, the judge awarded § 31 death benefits from August 20, 2000¹ at the rate of \$150 per week. (Dec. 11.) The judge rejected the application of §§ 35B, 35C and 35D to the claim. (Dec. 8-11.) The judge applied the § 34B cost-of-living adjustment as of his award of benefits commencing on August 20, 2000, but did not identify which multiplier to use in calculating the adjustment. (Dec. 10-11.)

The insurer argues that the judge's award of a \$150 per week rate of compensation under § 31 is error, and that § 35C should have been applied to the widow's claim. The insurer also contends that the judge's findings on the § 34B COLA adjustment were inadequate. The insurer on appeal steps back from its assertion at hearing that §§ 35B and 35D should

¹ The date of death, August 20, 1998, is the correct date on which to commence § 31 death benefits. G.L. c. 152, § 31, provides, in relevant part:

When weekly payments have been made to an injured employee before the employee's death, compensation under this section to dependents shall begin from the date of death of the employee.

Thus, the judge's order of § 31 benefits commencing two years later was error.

apply to the case.² We agree, in part, with the insurer's arguments on §§ 31 and 34B, and reverse the decision as to those issues. We disagree that § 35C applied to this case, and affirm the decision as to that issue.

The judge's award of § 31 benefits at the \$150 maximum rate of compensation, applicable to § 34 benefits on the February 17, 1978 date of injury, was error. As of that date of injury, the § 31 rate of compensation was a flat \$55 per week. See Marrone v. General Elec. Co., 11 Mass. Workers' Comp. Rep. 266 (1997); see also L. Locke, *Workmen's Compensation* § 302 (2nd ed. 1981) (setting out the benefits scale for dates of injury prior to 1981.) "The general rule is that an injury is compensated at the rates provided by statute on the date of injury." Hoffman v. M.B.T.A., 8 Mass. Workers' Comp. Rep. 1, 4 (1994), citing Steuterman's Case, 323 Mass. 454, 457 (1948).

Because the February 17, 1978 date of injury governs the rate of compensation for the payment of the claimant's § 31 benefits, cost-of-living adjustments under § 34B (to the extent they do not reduce any benefits being paid under federal social security law) shall be determined by using the multiplier for that date of injury.³ Marrone, supra at 268. Such cost-of-living adjustments are available "to any person . . . entitled to receive benefits under the provisions of section thirty-one . . . whose benefits are based on a date of personal injury at least twenty-four months prior to the review date." G.L. c. 152, § 34B. In the present case, that review date would be October 1, 1997, making the cost-of-living adjustments available immediately upon commencement of § 31 payments on August 20, 1998.⁴ See Graziano v. Polaroid Corp., 9 Mass. Workers' Comp. Rep. 729, 732 (1995).

² The insurer also argues against the judge's finding of a \$250 average weekly wage in 1978. We need not address that point, due to our disposition of the § 31 benefits rate issue, *infra*.

³ For the purpose of calculating COLA adjustments, the year of injury begins on October 1, making the employee's February 17, 1978 injury subject to the multiplier applicable as of October 1, 1977.

⁴ We note that the version of § 34B applicable to this case is that put into effect in 1986, St.1985, c. 572, § 43A. That version did not contain a maximum COLA adjustment, such as is contained in the 1991 version of § 34B, St. 1991, c. 398, § 61. That newer version caps the base benefit plus supplemental benefit payment at three times the base benefit amount, and was designated as substantive in character. St. 1991, c. 398, § 106.

The judge's denial of the claimant's request for § 35C to apply in this case was correct. The decedent employee received § 34 benefits following the occurrence of his industrial injury in 1978. Section 35C, therefore, necessarily could not apply: "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 . . . the applicable benefits shall be those in effect on the first date of eligibility for benefits." § 35C (emphasis added). The initial date of receipt of benefits here was in 1978. The five year period necessary for application of § 35C was not met. See 452 C.M.R. 3.02(2) ("Payment of benefits under M.G.L. 152, §§ 31, 34, 34A, or 35 within five years of the date of injury shall preclude the applicability of M.G.L. c. 152, § 35C.")

Accordingly, we reverse the decision in part, and order that § 31 benefits of \$55.00 per week be paid from the date of death, August 20, 1998 to date and continuing, see n. 1, supra, along with § 34B COLA adjustments due each year using the multiplier applicable to the February 17, 1978 date of injury and the review date of October 1, 1997.

So ordered.

Martine Carroll
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: April 8, 2005