COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 105105-86**

Lewis Block (Deceased)	Employee
Newton Nissan	Employer
Liberty Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and McCarthy)

APPEARANCES
James W. Stone, Esq., for the employee
Ralph J. Cafarelli, Esq., for the insurer

LEVINE, J. The employee's widow appeals from the decision of an administrative judge ordering that the application of both § 51A and § 34B not result in a maximum benefit that exceeds the state average weekly wage. We affirm the decision.

The widow's claim for compensation was denied after a § 10A conference. Thereafter, the widow appealed to a hearing de novo. (Dec. 1.) The parties entered several stipulations. (Dec. 2-4.) The stipulations describe the posture of this case. The employee, Louis Block, suffered a fatal heart attack at work on September 8, 1986. The insurer did not pay benefits. By an April 25, 1990 hearing decision, an administrative judge ordered the insurer to pay § 31 weekly benefits to the widow; pursuant to § 51A, the judge also ordered that the benefits be paid based on the state average weekly wage (SAWW) in effect on the date of the decision.[1] In 1991, the insurer commenced payments of § 34B cost of living

[1] General Laws c. 152, § 51A, states:

> 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 compensation provided by statute on the date of the decision, rather than the date of injury.

adjustment (COLA) benefits.[2] (Dec. 2.)

The parties agree that the multiplier[3] used to determine the COLA percentage in this case is the date of death, September 8, 1986, which is also the date of injury, see Marrone v. General Elec. Co., 11 Mass. Workers' Comp. Rep. 266, 268 (1997), and that that multiplier is applied to the base benefit as determined by § 51A, which is the compensation rate on April 25, 1990, the date of the decision. However, the result of this calculation will give the widow a weekly benefit that exceeds the current SAWW. The insurer argues that the administrative judge was correct in ruling that the widow's benefit cannot exceed the SAWW. The employee contends that the judge was wrong and that she is entitled to the benefit determined by the accepted calculation even though it exceeds the SAWW.

We agree with the insurer that the widow's weekly benefits cannot exceed the current SAWW. General Laws c. 152, § 31, is clear; it states: "If death results from the injury, the insurer shall pay compensation . . . [t]o the widow . . . a

---

[2] The version of G. L. c. 152, § 34B, in effect on September 8, 1986, the date of injury (death), and applicable to this case, reads in pertinent part as follows:

> October first of each year shall be the review date for the purposes of this section.
>
> Any person receiving or entitled to receive the benefits under the provisions of section thirty-one or section thirty-four A whose benefits are based on a date of personal injury at least twenty-four months prior to the review date shall be paid, without application, a supplement to weekly compensation. . . . The supplemental benefits shall be paid in accordance with the following provisions: -
>
> (a) The director of administration shall determine the percentage increase between (i) the average weekly wage in the commonwealth . . . on the date the deceased worker was injured and (ii) the average weekly wage in the commonwealth on the review date. . . .
>
> (b) The death benefit under section thirty-one . . . shall be the base benefit. The base benefit shall be increased on each review date by the percentage increase in the average weekly wage in the commonwealth as calculated in the paragraph (a) . . . .

[3] I.e., the percentage increase as determined by § 34B(a).

weekly compensation equal to two-thirds of the average weekly wages of the deceased employee, but not more than the average weekly wage in the commonwealth. . . ." In DeFayette v. Gerald E. McNally Constr. Co., 11 Mass. Workers' Comp. Rep. 568 (1997), we addressed the issue of the propriety of weekly benefits exceeding the SAWW, where both § 34B and § 51A apply. Our view on that issue has not changed: Section 31 of

> the Act provides for compensation to be paid only up to a maximum weekly compensation rate, one hundred percent of the [SAWW. See also] G.L. c. 152, § 1(10)[4]. . . . [If the widow's position is adopted, t]he result reflects the overlay of the similar obsolescence-avoiding functions of §§ 34B and 51A. It is a [windfall] result we cannot condone, because it is a rate of compensation payment that is unauthorized by the Act. We read the word "maximum" [as appearing in § 1(10)] to mean what it says.

DeFayette, supra at 572. Other aspects of the DeFayette decision may now be of dubious merit, see Taylor's Case, 44 Mass. App. Ct. 495 (1998), but the principle against weekly benefits exceeding the SAWW remains sound.[5] Therefore, we affirm the decision.[6]

---

[4] In § 1(10), "Maximum weekly compensation rate" is defined as "one hundred per cent of the average weekly wage in the commonwealth. . . ."

[5] In reaching this conclusion we need not consider whether COLA is "compensation." Compare Armstrong's Case, 416 Mass. 796, 800-801(1994)(COLA not compensation for purposes of § 28) with Barbosa's Case, 47 Mass. App. Ct. 236 (1999)(COLA treated as compensation subject to § 15 reimbursement analysis). We do not accept that the Legislature intended the various inflation-defeating sections, such as §§ 34B and 51A (see McLeod's Case, 389 Mass. 431, 435[1983]), to be stacked to produce weekly payments, no matter how characterized, that exceed the SAWW.

[6] The DeFayette case reported in 11 Mass. Workers' Comp. Rep. was never appealed to the Appeals Court because its disposition by the reviewing board was a recommittal for further action. 11 Mass. Workers' Comp. Rep. at 374. After recommittal, the case was eventually settled. An earlier case between the same parties was summarily affirmed by the reviewing board. DeFayette, supra at 569. On appeal of that case to the Appeals Court, the reviewing board's decision was affirmed both by a single justice (No. 96-J-296) on November 5, 1997 and by a three judge panel by a memorandum and order pursuant to Rule 1:28. DeFayette's Case, 47 Mass. App. Ct. 1109 (1999). These appellate decisions did not address the issue presented in the instant case.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

FEL/kai
Filed: **April 12, 2001**