COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 005307-06**

Merrily Harris	Claimant
Jay Harris (deceased)	Employee
Plymouth County Sheriff's Department	Employer
Plymouth County	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Koziol)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Michael E. Kiernan, Esq., for the employee
Robin G. Borgestedt, Esq., for the self-insurer at hearing
Isabel N. Eonas, Esq., for the self-insurer at hearing and on appeal

HORAN, J. The self-insurer appeals from a decision awarding the claimant § 31 benefits following the employee's death on October 31, 2010.[1] We affirm.

We begin by reciting the material facts and the pertinent procedural history of this case. In so doing, we take judicial notice of the board file. Rizzo v.

[1] The judge also awarded § 33 burial benefits, which was unnecessary, as the self-insurer did not appeal from the conference order awarding those benefits. See G. L. c. 152, § 10A(3), which provides, in pertinent part:

> Any party aggrieved by an order of an administrative judge shall have fourteen days from the filing date of such order within which to file an appeal for a hearing pursuant to section eleven.
>
> . . .
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> *Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings*, except that a party who has by mistake, accident or other reasonable cause failed to appeal an order within the time limited herein may within one year of such filing petition the [director] of the department who may permit such hearing if justice and equity require it. . . .

(Emphasis added).

M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

The employee worked for the self-insurer as a case worker. On March 30, 2006, he suffered work-related injuries to his neck and back. The self-insurer accepted the case and paid the employee § 34 benefits for various closed periods of incapacity until his death on October 31, 2010. (Dec. 4.) The employee died from acetylsalicylic acid toxicity, caused by excessive aspirin ingestion. (Dec. 6.) The claimant was married to, but living apart from, the employee at the time of his death. They last lived together in September, 2010. (Dec. 6.)

The claimant filed a claim seeking benefits under § 31 (dependency benefits) and § 33 (burial benefits). At the conference before a different judge, the self-insurer denied the claimant's entitlement to those benefits. (Conference Memorandum 8/28/12.) The judge ordered the self-insurer "to pay the claimant burial/funeral expenses under M.G.L. c.152, § 33, at the maximum statutory rate," but denied the claim for § 31 benefits. (Conference Order 8/31/12.) Only the claimant appealed the conference order. Thereafter, pursuant to § 10A(3), the self-insurer sought permission to file a late appeal, which was denied.[2] (Dec. 2.)

At the hearing, the claimant argued that because the self-insurer failed to appeal the conference order awarding burial benefits, the causal relationship between the employee's work-related injury and his death was established. Stated another way, the claimant contends that because an award of § 33 burial benefits is proper only when an employee's death is work-related, an unchallenged § 33 award establishes that fact as a matter of law. Once causation is established, the only remaining issues are: 1) whether the claimant qualifies as the employee's dependent, in whole or in part; and 2) the amount of the § 31 benefit due. See G. L. c. 152, §§ 31 and 32.

[2] In light of our holding, we need not address whether the self-insurer's request to file a late appeal estops it from arguing, on appeal, that it did not have to appeal the conference order to defend the § 31 claim on causal relationship grounds at the hearing.

Relying on G. L. c. 152, § 10A(3), the judge agreed with the claimant, concluding that, "an unappealed conference order binds the parties to all matters covered by it." (Dec. 8.) The judge also rejected the self-insurer's argument "that section 33 burial expenses are to be paid in all cases involving indemnity benefits irrespective of whether" the employee's death is work-related. (Dec. 9.) Accordingly, at hearing the judge addressed only whether the claimant was dependent upon her husband at the time of his October 31, 2010 work-related death. The judge concluded the claimant was "living apart [from her husband] for justifiable cause" at the time of his death, and awarded her § 31 benefits in the amount of $723.54 per week, from October 31, 2010 and continuing. (Dec. 10-12.)

On appeal, the self-insurer does not contest the judge's finding that the claimant was living apart from the employee for justifiable cause when he died. See G. L. c. 152, § 32(a). Rather, it advances several arguments challenging the judge's refusal to permit it to litigate the issue of the causal relationship between the employee's injury and his death. For the following reasons, we find the self-insurer's arguments unavailing, and affirm the decision.

The self-insurer maintains the judge's conference denial of the § 31 claim meant that she was denying the causal relationship between the employee's injury and his death. This argument overlooks two important facts. One, the judge also ordered § 33 burial benefits; two, causal relationship is but one element of a § 31 claim.

Section 33 benefits may only be awarded when there is a causal relationship between the employee's injury and death. See discussion, infra. Section 31 benefits are not automatically due upon a finding of causation alone. The claimant must also establish dependency, an issue clearly contested by the self-insurer throughout this case. Had the claimant failed to appeal the conference order, she would have been deemed to have "accepted" the denial of her claim, and the award of burial benefits. G. L. c. 152, § 10A(3)(n.1, supra); Giraldo's

Case, 85 Mass. App. Ct. 1109 (2014)(Memorandum and Order Pursuant to Rule 1:28)(rejecting argument that unappealed conference order should not be given preclusive effect); Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415 (2009)(same). Conversely, the self-insurer's failure to appeal the conference order signaled its acceptance of the award of burial benefits, and the denial of the dependency claim. Because only the claimant appealed, she was relieved of the burden of proving the elements of her § 33 claim. As causation is an essential element of § 33 and § 31, the judge properly barred litigation of that issue at the hearing, and addressed dependency only.

The self-insurer notes that § 33 does not explicitly state that burial benefits are awardable only when the employee's death results from an industrial injury. Rather, the statute provides that, "[i]n all cases, the insurer shall pay the reasonable expenses of burial, not exceeding 8 times the average weekly wage in the commonwealth as determined pursuant to subsection (a) of section 29 of chapter 151A." Focusing on the introductory phrase, "in all cases," the self-insurer argues the statute obligates the payment of burial benefits in *every* case when an employee dies while indemnity benefits are being paid. To read § 33 in isolation would support this proposition, but we cannot view the lack of a specific reference to causation in the statute to mean that the legislature intended that insurers and self-insurers pay burial benefits to injured workers who die from *non*-work-related causes. In fact, the sections of the act providing for the payment of medical benefits, and for compensation for bodily loss of function and disfigurement, also do not explicitly provide that those benefits are payable only for work-related conditions. See G. L. c. 152, §§ 30 and 36; footnote 3, infra.

We cannot ignore the larger context of chapter 152, which sets forth the rights of employees whose injuries arise "out of and in the course of" their employment. G. L. c. 152, § 26. Section 26 also provides that those injured on the job, "be paid compensation by the insurer or self-insurer, as hereinafter

provided. . . ." Section 33 is among those benefit sections that follow.[3] Therefore, we reject the self-insurer's argument that § 33 lacks a causation element. We conclude that its failure to appeal the conference order awarding burial benefits established, as a matter of law, the causal relationship between the employee's injury and his death.

Finally, without citation to any authority, the self-insurer avers it did not waive the issue of causation by failing to appeal the conference order because it had agreed to its terms at the conference. This does not alter the application of G. L. c. 152, § 10A(3), or otherwise excuse the self-insurer from appealing the conference order. Had the self-insurer wished to pay for the burial benefits voluntarily − to spare itself the expense of appealing a conference order − it should have offered to pay those benefits without prejudice under G. L. c. 152, § 19. In fact, our review of the record reveals the self-insurer had previously utilized § 19 to pay for the employee's contested medical treatment. (§ 19 Agreement Approved 8/3/2010.)

We affirm the decision. Pursuant to § 13A(6), the self-insurer shall pay employee's counsel a fee in the amount of $1,618.19, plus necessary expenses.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **December 16, 2015**

[3] We note that §§ 30 and 36 also follow, and that we have held proof of causal relationship is required to qualify for these benefits. See, e.g., Kennedy v. City of Chicopee School Dept., 23 Mass. Workers' Comp. Rep. 107, 110 (2009)(§ 36 benefits); Gajda v. Specialty Minerals, Inc., 18 Mass. Workers' Comp. Rep. 68, 72 (2009)(§ 30 benefits).