COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 071727-69**

Patricia Keaney	Employee
New England Deaconess Hosp.	Employer
Commercial Union Ins.	Insurer/Petitioner
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Long)

The case was heard by Administrative Judge Solomon.

APPEARANCES
John J. Canniff, Esq., for the insurer
Judith A. Atkinson, Esq. for the Workers' Compensations Trust Fund at hearing
Michael D. Ververis, Esq., for the Workers' Compensation Trust Fund on appeal

KOZIOL, J. This case concerns cross-appeals by the insurer and the Workers' Compensation Trust Fund (WCTF) from a decision denying the insurer's claim for full reimbursement of cost of living adjustments (COLA) paid to the employee, and ordering the WCTF to pay the insurer partial reimbursement of those payments "pursuant to § 35C using the post-1986 reimbursement factor." (Dec. III, 9.)[1] We reverse the judge's decision.

[1] Three separate adjudicators have issued hearing decisions regarding this board file. The first two decisions concerned the employee's underlying claims. Both of those decisions have been raised by the WCTF as supplying the grounds for its denial of the insurer's request for full reimbursement of COLA paid to the employee. Prior to the 1985 Reform Act's reorganization of what was then known as the Division of Industrial Accidents, St. 1985, c. 572, § 3, hearings were conducted by "single members" of the industrial accident board. The first decision, issued by single member, Joseph J. Pulgini, on January 20, 1978, is hereinafter referred to as "Dec. I." The second decision, issued on September 11, 1990, by Judge Richard S. Tirrell, is hereinafter referred to as "Dec. II." The third decision concerned the insurer's COLA reimbursement request. That June 9, 2017, decision, issued by Judge Dianne L. Solomon, is the decision on appeal in this case and hereinafter it is referred to as "Dec. III."

As discussed herein, we deny and dismiss the WCTF's appeal. We agree with the insurer that, as a matter of law, the judge erred by denying the insurer full reimbursement of COLA paid to the employee as statutorily required for the employee's November 20, 1969, injury. G. L. c. 152, § 34B(c). We also reverse the judge's decision regarding the proper base benefit that the insurer should be using to calculate COLA, and order the WCTF to fully reimburse the insurer for the COLA payments made to the employee from October 1, 2005, through September 30, 2009, as requested in its claim.

The present case was tried on a "joint stipulation of facts" and accompanying joint exhibits. (Dec. III, 1.) The lengthy procedural histories regarding both the employee's underlying claim and the past disputes between the insurer and the WCTF were central to the judge's findings and analysis supporting her rulings. Those underlying proceedings are also central to the parties' arguments on appeal. Consequently, we must recite both procedural histories in detail.

1. Procedural History of Employee's Claims.

The employee worked as a registered dietician and sustained a work-related head injury on November 20, 1969. She claimed the injury resulted in bilateral hearing loss. The employee missed no time from work, but filed a claim for loss of function for causally related hearing loss. That claim became the subject of a hearing decision issued by single member Joseph J. Pulgini, on January 20, 1978. (Trust Fund and Insurer's Additional Joint Stipulation to the DIA Reviewing Board, September 10, 2018.) The single member determined the employee's progressive hearing loss was causally related to the accident of November 20, 1969, but denied her claim for loss of function benefits because he found her hearing loss had not progressed to the point where benefits for loss of function could be awarded. Id. (Dec. I, 37.) Neither party appealed from that decision. The employee's hearing loss continued to progress. In 1986, the employee entered into an agreement with the insurer for payment of loss of function benefits for her bilateral hearing loss. (Dec. III, Ex. 4.)

The employee did not miss any time from work as a result of her hearing loss until September 27, 1987, when it progressed to the point where she could no longer work. The employee then filed a claim seeking payment of § 34 benefits from September 27, 1987, and continuing, claiming entitlement to those benefits pursuant to G.L. c. 152, § 35C.[2] (Dec. III, Ex. 2.) The employee's claim was the subject of a hearing decision issued by Judge Tirrell on September 11, 1990; however, the decision makes no mention of § 35C. Instead, Judge Tirrell stated the employee sought §34 benefits "as well as the benefit of Section 51A of the Act." (Dec. II, 3, 9; Dec. III, Ex. 4.) Although the judge made subsidiary findings of fact that would support the application of § 35C,[3] the decision made no ruling on that claim. (Dec. II, 9-10.) Instead, the judge awarded the employee enhanced benefits pursuant to G.L. c. 152, § 51A,[4] resulting in the employee receiving § 34 benefits at the rate of $474.47 per week, the State Average Weekly Wage (SAWW) announced on October 1, 1989, which was in effect on the date of decision.[5]

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[2] General Laws, Chapter 152, § 35C, states, 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 . . . first became eligible for benefits under section . . . thirty-four, . . . the applicable benefits shall be those in effect on the first date of eligibility for benefits.
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> For purposes of adjustments to compensation under sections thirty-four B . . . for employees subject to this section, the first date of eligibility for benefits rather than the date of injury shall be used for purposes of computing such supplemental benefits.

[3] In his general findings, the judge found, " [m]ore than 5 years have elapsed between her injury of November, 1969 and the onset of disability in September, 1987." (Dec. II, 9; Dec. III, Ex. 4.)

[4] General Laws, Chapter 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 the compensation provided by statute on the date of the decision, rather than the date of injury.

[5] The parties did not stipulate to the employee's average weekly wage on the date she was no longer capable of working, September 27, 1987, (Dec. III), and Judge Tirrell's decision does not state what the employee's average weekly wage was on that date. (Dec. II.) Nonetheless, both

(Dec. II, 9; Circular Letter 246a [corrected version] issued November 18, 1989.) The insurer did not appeal that decision.

The employee exhausted her § 34 benefits and filed a claim for § 34A permanent and total incapacity benefits. Pursuant to a December 29, 1994, conference order, Judge Solomon ordered the insurer to pay the employee § 34A permanent and total incapacity benefits at a rate of $515.92 per week, from September 27, 1992, and continuing, based on an average weekly wage of $942.30. (Dec. III, Ex. 5.) The insurer appealed, and the parties resolved their dispute by entering into a Form 113, Agreement to Pay Compensation, whereby the insurer agreed to pay the employee § 34A benefits at a rate of $474.47 per week, and to pay the employee COLA pursuant to § 34B, "effective 10-1-92." (Dec. III, Ex. 6.) The § 34A rate agreed to by the parties was the rate set forth in Judge Tirrell's hearing decision awarding § 34 benefits pursuant to § 51A.[6] (Dec. II, 9; Dec. III, Exs. 4, 6, 10, Stip. 9.)

At all times relevant to the present dispute, the employee received §34A benefits paid at the base rate of $474.47 per week, plus weekly supplemental COLA payments, which the insurer consistently calculated using the 1989 COLA multiplier. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(judicial notice taken of board file); (Insurer's Hearing Br. to Judge Solomon [6/29/11] at 10.)

2. Procedural History of Insurer and WCTF Disputes.

On April 12, 1995, notwithstanding its failure to appeal from Judge Tirrell's hearing decision awarding the employee benefits pursuant to § 51A, the insurer filed a

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the insurer and the WCTF's arguments are based on the foundation that the employee's average weekly wage as of September 27, 1987, exceeded the SAWW on both the date she left work, September 27, 1987, and the date of Judge Tirrell's decision, September 11, 1990.

[6] On September 11, 1990, both § 34 and § 34A benefits were payable at the rate of two-thirds of the employee's average weekly wage, which, pursuant to § 51A was capped by the SAWW in effect on the date of the decision. In 1991, the legislature reduced the weekly benefits payable under § 34 to 60% of the employee's average weekly wage. G.L. c. 152, § 34, as amended by St. 1991, c. 398, § 59.

claim against the WCTF for § 35C reimbursement, pursuant to G.L. c. 152, §65(2)(b).[7] (Dec. III, Ex. 7.) The WCTF contested that claim. On November 9, 1995, Judge Solomon issued a conference order denying the insurer's claim for § 35C reimbursement, and the insurer appealed. Id. No hearing decision was issued. Instead, on May 3, 2004, Judge Solomon approved the parties' §19 agreement, which resolved the matter. Pursuant to that agreement, the WCTF paid the insurer $100,000.00 "in full satisfaction of any claims for reimbursement under § 35C already paid or that might be paid in the future." (Dec. III, 7.)

Between October 1, 1992, through September 30, 2005, a period of thirteen years, the WCTF fully reimbursed the insurer for the COLA payments it made to the injured employee pursuant to G.L. c. 152, § 34B(c). Thereafter, from October 1, 2005, through September 30, 2009, the WCTF unilaterally began to remit only partial reimbursement to the insurer. It asserted the insurer used the wrong base benefit to pay the employee, as well as the wrong COLA multiplier, alleging that pursuant to § 35C, both the base benefit and COLA multiplier must be based on the first date of the employee's eligibility for weekly benefits, September 27, 1987. It further claimed that the employee's entitlement to benefits pursuant to § 35C also tied the insurer's reimbursement request to the September 27, 1987, date, thereby bringing its reimbursement claim into the so-called "middle act" class, entitling it to only partial reimbursement of COLA. G. L. c. 152, § 34B(c).

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[7] G.L. c. 152, § 65(2)(b), states:

> There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: . . . (b) reimbursement of adjustments to weekly compensation pursuant to section thirty-five C . . . .

Pursuant to 452 Code Mass. Regs. § 3.02(3), "For purposes of M.G.L. c. 152, § 65(2)(b), 'adjustments to compensation pursuant to M.G.L. c. 152, § 35C' shall mean any increase in benefits paid to an employee as a result of the applicability of the first subsection of M.G.L. c. 152, § 35C."

The insurer filed the present action on June 14, 2010, seeking full reimbursement of COLA paid to the employee from October 1, 2005, through September 30, 2009. (Dec. III, Ex. 9.) The matter proceeded to a conference before Judge Solomon, at which time the WCTF further argued, in the alternative, that the insurer was not entitled to any reimbursement whatsoever, because the employee was not entitled to any benefits under the Act. Rizzo, supra. In support of this alternate argument, the WCTF asserted the single member's January 20, 1978, decision determined that there was no causal relationship between the employee's November 20, 1969, injury and her hearing loss. Pursuant to a conference order issued February 4, 2011, Judge Solomon denied the insurer's claim, and the insurer appealed.

In her hearing decision, the judge found that, 1) the WCTF had a right to challenge the hearing decision of Judge Tirrell, (Dec. III, 4-6); 2) Judge Tirrell erred as a matter of law in awarding the employee benefits pursuant to G.L. c. 152, § 51A, (Dec. III, 4, 5-6); 3) "the insurer is to be paid by the Trust Fund partial COLA reimbursement pursuant to § 34B(c) based on an adjusted benefit pursuant to § 35C," (Dec. III, 7, 8); and, "in the alternative," as a result of the insurer's position taken in the earlier dispute against the WCTF, seeking § 65(2)(b) reimbursement of adjusted benefits paid pursuant to § 35C, the insurer was judicially estopped from disputing the WCTF's payment of partial COLA reimbursement pursuant to § 35C. (Dec. III, 4-7, 8.) The judge made no findings or rulings regarding the WCTF's argument that single member Pulgini's decision relieved it from any obligation to pay reimbursement in this case because there was no causal relationship between the employee's November 20, 1969, injury and her hearing loss. (Dec. III, Ex. 1.)

3. The WCTF's Appeal.

As a threshold matter, we note that the WCTF's appeal only takes issue with Judge Solomon's failure to address its argument that no reimbursement was owed to the

insurer for the COLA paid to the employee.[8] The parties' September 10, 2018, "Joint Stipulation" completely eliminates the factual foundation upon which the WCTF's appeal sits. (WCTF br. 1-29.) Nonetheless, the WCTF never filed a written withdrawal of its appeal. Accordingly, we must hereby dismiss the appeal as it lacks merit. In doing so, we remind litigants that they are required to file department forms in order to document significant changes in the procedural posture of a case, such as the withdrawal of an appeal pending before this body. (Form 109, "Notification of Withdrawal of Claim or Complaint.")

4. The Insurer's Appeal.

The insurer argues it is entitled to full reimbursement of COLA paid to the employee because her November 20, 1969, injury occurred "before October first,

[8] Throughout the litigation before Judge Solomon, and in its brief on appeal, the WCTF affirmatively represented that Joint Exhibit 1 was the actual decision of single member Pulgini. (Dec. III, Ex. 1.) The WCTF maintained this representation, despite the lack of both a signature by the single member and an official stamp at the end of the document; a noticeable difference in typeface between the document and the signed cover letter; and Judge Tirrell's express findings citing page 37 of the single member's decision as establishing a causally related hearing loss, (Dec. II, at 1-2, Employee's Ex. B, p. 37), whereas the unsigned document the WCTF claimed was single member Pulgini's decision was only four pages in length. (Dec. III, Ex. 1; Dec. II, 2.) Despite these discrepancies, both parties agreed to admit the four page unsigned decision as the actual decision of the single member, entering it as a joint exhibit at hearing. (Dec. III, Ex. 1.)

The Department's official file in OnBase, does not contain the decisions of the single member or the decision of Judge Tirrell and its exhibits. After the reviewing board made inquiries to the Department's keeper of the records seeking the original decisions, (O.A. Tr., 6-7, 11-12), the WCTF, at oral argument, and for the first time, informed this board that it had recently found, in its file, the single member's actual signed and date stamped decision, and that the WCTF's reliance upon the unsigned version was error. (O.A. Tr. 5.) The WCTF now asserts that this document is the actual decision of the single member, and that it "establishes causation," (O.A. Tr., 5), and also determined that "the insurer is entitled to benefits." (O.A. Tr., 9.). The WCTF asked the reviewing board to "uphold Judge Solomon's finding, that they're entitled to partial reimbursement." Id. at 9. Having failed to obtain authentication from the Keeper of the Records of the Department regarding this newly produced document, the reviewing board declined to accept the document at Oral Argument, but allowed the parties additional time to submit a written stipulation of fact regarding the WCTF's revelation. On September 10, 2018, the parties submitted the following stipulation: "The employee is entitled to receive workers' compensation benefits under c. 152 pursuant to Administrative Judge [sic] Joseph J. Pulgini's signed and attached Hearing decision dated 1/20/1978."

nineteen hundred and eighty-six," and, thus, full reimbursement of COLA benefits paid by the insurer is required by the plain language of § 34B(c). G.L. c. 152, § 34B(c). The judge determined that § 35C applied to this case and that "under § 35C, the legislature 'redefines the date of injury for the purposes of calculating cost of living adjustments'. See Favreau, supra, at 261. The insurer should thus receive partial COLA reimbursement pursuant to 34B(c) based on an adjusted benefit under § 35C." (Dec. III, 7.) Even if we were to assume the judge correctly determined the WCTF may properly assert that § 35C applies to this case, which we do not, we agree with the insurer that the judge erred by ordering partial reimbursement.

As noted by the Supreme Judicial Court, "[s]ince its first enactment in 1911, St. 1911, c. 751, Part V, of our workers' compensation law was conceived as a system of insurance to replace in part the wages lost by workers or their dependents as a result of injuries suffered in connection with their work." Letteney's Case, 429 Mass. 280, 282 (1999). The statutory provisions at issue in this case, § 34B, § 35C and § 65(2)(a), were all enacted as part of the Reform Act of 1985.

The appellate courts have discussed the purposes of §§ 34B and 35C, and have described the problems that those statutory provisions were intended to remedy. "The evident purpose of the cost of living adjustment under § 34B is to protect an individual's economic position 'by acting as a buffer against the erosion of inflation.' " Camara's Case, 71 Mass. App. Ct. 8, 11 (2007), quoting from Sliski's Case, 424 Mass. 126, 135 (1997).[9]

[9] We set forth the relevant provisions of § 34B:

> October first of each year shall be the review date for the purposes of this section. Any person receiving or entitled to receive benefits under the provisions of . . . 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 have his weekly benefits adjusted, without application, in accordance with the following provisions. . . .
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> (a) The director of administration shall determine the percentage change between the average weekly wage in the commonwealth on the date of the injury and the average weekly wage in the commonwealth on the review date. For purposes of this section, no increase

Sections 34B(a) and (b) describe which employees are entitled to COLA, prescribe the method of calculating COLA, and provide three operative terms that are necessary to our analysis. Those terms are the *base benefit* (the weekly § 34A payment the employee is receiving without adjustment); the *adjusted benefit* (the total benefit the employee is entitled to receive after the COLA adjustment); and, the *supplemental benefit* (the COLA itself, which is the difference between the adjusted benefit and the base benefit). Reimbursements of supplemental benefits paid to the employee are discussed in § 34B(c). The plain language of the first paragraph of § 34B and § 34B(c) makes clear that the insurer's obligation to pay COLA is entirely separate and distinct from the WCTF's obligation to reimburse the insurer for COLA payments made. Indeed, all insurers must pay eligible employees COLA "without application," making COLA a mandatory obligation that insurers must honor unless certain statutory exceptions apply. None of those exceptions apply to this case. G.L. c. 152, § 34B. However, pursuant to § 34B(c), the amount of COLA reimbursement due an insurer under § 65(2)(a),[10] is

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> in the average weekly wage in the commonwealth shall exceed the lesser of the following: (i) the percentage change in the most recent annual consumer price index calculated by the Bureau of Labor Statistics of the United States Department of Labor for the northeast region for all urban consumers; (ii) five percent.
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> (b) The . . . permanent and total disability benefit under section thirty-four A that was being paid prior to any adjustments under this section shall be the base benefit. The base benefit shall be changed on each review date by the percentage change as calculated in paragraph (a); the resulting amount shall be termed the adjusted benefit and is the amount of benefit to be paid on and after the review date. If the adjusted benefit is larger than the base benefit, the difference shall be termed the supplemental benefit . . . .
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> (c) The supplemental benefits under this section shall be paid by the insurer concurrent with the base benefit. Insurers shall be entitled to quarterly reimbursements for supplemental benefits, pursuant to section sixty-five, for cases involving injuries that occurred on or before October first, nineteen hundred and eighty-six, and for those occurring thereafter, to the extent such supplemental benefits are due to the increase of greater than five percent in the average weekly wage in the commonwealth for any single year. . . .

G.L. c. 152, § 34B, added by St. 1985, c. 572, §43A. Amended by St. 1986, c. 662, § 30; St. 1991, c. 398, §61.

[10] General Laws, Chapter 152, § 65(2)(a) states:

wholly dependent upon the employee's date of injury. As the judge observed, "Section 34B(c) provides for insurers to be fully reimbursed for § 34B COLA benefits paid to the employee with an injury date [on or] prior to the October 1, 1986 effective date of § 34B. Only a modest, partial reimbursement (for COLA adjustments greater than 5%) is available to insurers for injuries . . . after October 1, 1986." (Dec. III, 4.) Moreover, "this partial reimbursement effectively ended with the change in law in 1991 when the COLA was capped at 5% per year." Id. at 4 n.2.

Section 35C,[11] was also enacted as part of the Reform Act of 1985, and by St. 1985, c. 572, § 66, the legislature made § 35C applicable even where the date of injury was prior to the effective date of its enactment. G.L. c. 152, § 35C, added by St. 1985, c. 572, §45. Section 35C was enacted to benefit injured workers by "revers[ing] the effect of [the court's] holding in Squillante's Case," which required payment of the employee's workers' compensation benefits based on the employee's wages at the time of his injury, not the date he first became incapacitated from the injury, which, in Mr. Squillante's case, occurred twenty-nine years later. Letteney's Case, supra at 282-283, citing Squillante's Case, 389 Mass. 396, 397 (1983).

> Section 35C was obviously meant to mitigate the rigors of [the rule in Squillante's Case] and to calculate [the injured worker's] lost earning capacity in terms of what he was earning at the time of his disability – in the language of the statute, at the time of his eligibility, which with the passage of time, the accrual of seniority, and the effect of inflation is likely to be considerably higher [than the injured worker's earnings at the time of the injury].

Letteney's Case, supra at 283. Thus, § 35C provides a means to avoid obsolescence in workers' compensation rates where a period of five or more years passes between the employee's date of injury and the date she "first became eligible for benefits under section . . . thirty-four, thirty-four A, or section thirty-five." G. L. c. 152, § 35C. Where

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> (2) There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: (a) reimbursement of adjustments to weekly compensation pursuant to section thirty-four B;

[11] The relevant portions of § 35C appear supra note 2.

such a gap exists between the injury and its disabling effect, § 35C relieves the employee from being confined to the antiquated benefit rate and structure in existence on the employee's date of injury, by resetting the benefit rate to that in effect on the date the employee became incapacitated for the first time.[12]

Insofar as the interplay between §§ 34B and 35C is concerned, the second paragraph of § 35C alters the method of calculating COLA from that prescribed by §§ 34B(a)-(b), by tying the base benefit and adjusted benefit available in any given year to the date the employee became eligible for benefits, rather than her date of injury.

> Under § 35C, the applicable date for purposes of the § 34B cost of living adjustment is the date on which the benefits are determined, rather than the date of the injury. The essential point is that in order to maintain the purchasing power of benefits once awarded, the cost of living adjustment under § 34B should be applied to such benefits as of the date on which they are established.

Camara, supra at 12.

To illustrate how the calculations are made, we refer to the Department's "Calculation of COLA Multipliers and Reimbursement Factors" table corresponding to the period of October 1, 2005 through September 30, 2006, the first year the WCTF began partially reimbursing the insurer for COLA benefits.[13] Circular Letter 320, Table

[12] Using the facts of this case, the beneficial effect § 35C would have on the employee's compensation rate is readily apparent. The parties stipulated that the employee's average weekly wage on the date of her injury, November 20, 1969, was $235.00 per week, yielding a maximum compensation rate of $ 65.00 per week, without the benefit of § 35C. (Dec. III, 6.) The parties have not provided a stipulation regarding the employee's average weekly wage on the date she became eligible for benefits, September 27, 1987. (Dec. III, 3 Stip. 12.) Nonetheless, Judge Solomon's December 29, 1994, conference order awarding § 34A benefits to the employee indicated her average weekly wage was $942.30, (Dec. III, Ex. 5), which would yield a § 34A rate of $628.21 per week. Because $628.21 exceeds $383.57, which was the State Average Weekly Wage (SAWW) in effect on September 27, 1987, the date the employee first became eligible for § 34 benefits, the employee's weekly benefit, through application of § 35C, would be capped at the $383.57, SAWW. G.L. c. 152, §34, as amended by St. 1985, c. 572, § 43; Circular Letter 225, issued October 13, 1986.

[13] By Circular Letter, issued in conjunction with the announcement of the SAWW each October first, the Department provides a table for use in "Calculation of COLA Multipliers and Reimbursement Factors," along with instructions on how to use the table.

I, (October 1, 2005). Column 1 provides the employee's year of injury, or, if § 35C applies, her first date of eligibility for benefits; Column 2 provides the SAWW for each year; and Column 5 provides the COLA multiplier to use for pre-1991 injuries. Using the 1986 SAWW (corresponding to the employee's first date of eligibility for benefits, September 27, 1987) of $383.57 and the COLA multiplier from Column 5 of 2.4808, the adjusted benefit would be $951.41 per week. Column 5 also provides the COLA reimbursement factor that insurers use for injuries occurring before October 2, 1986. Thus, for the class of cases where the injury occurred on or before October 1, 1986, the reimbursement factor *is the same* as the COLA multiplier, providing full reimbursement of COLA. Column 11 however, provides the COLA reimbursement factor in cases where the injury occurred after October 1, 1986. For example, injuries occurring on or later than October 2, 1986, have a reimbursement factor of .3757 in Column 11, which is appreciably lower than the 2.4808 reimbursement factor in Column 5. Circular Letter 320, Table I, (October 1, 2005).

Relying on dicta in Favreau v. Perini/Kiewit/Atkinson, 20 Mass. Workers' Comp. Rep. 257, 261 (2006), the judge found, "under §35C, the legislature 'redefines the date of injury for purposes of calculating cost of living adjustments,' " and she reasoned that as a result, the "redefined injury date" is also used for purposes of calculating the insurer's COLA reimbursement amount. (Dec. III, 7.) Thus, where the employee became eligible for weekly benefits after October 1, 1986, the reimbursement factor in Column 11 of Table 1 must be applied. Id. The judge erred.

First, our statement in Favreau has been taken out of context as the statement concerned § 51A of the Act, not § 35C. In Favreau, we said, "[t]hat the legislature did not redefine the date of injury for the purpose of calculating cost-of-living adjustments on a § 51A adjusted base benefit can only support our conclusion that Downey was wrongly decided as to this issue." Id., at 261.[14] Second, even if the judge reasonably inferred that

[14] In Downey v. Blue Cross/Blue Shield, 7 Mass. Workers' Comp. Rep. 376, 382 (1993), we held that where § 51A adjusts the employee's benefit, the base benefit becomes the rate in effect on the date of the judge's decision and, although not specifically stated in § 51A, in order to

we were comparing § 51A to § 35C, and that § 35C does in fact "redefine" the employee's date of injury for purposes of calculating COLA, such inferences are incorrect. Simply put, § 35C does not "redefine" the date of injury; rather, it redefines the method of calculating base benefits for all purposes, and adjusted benefits where COLA applies.

Likewise, the judge erred in concluding that § 35C also affects or alters the insurer's reimbursement rights. That conclusion ignores the fact that an insurer's obligation to pay COLA is entirely separate and distinct from the WCTF's obligation to reimburse the insurer for COLA paid to the employee. While § 35C's calculation method provides instruction on how to determine the employee's base benefit and adjusted benefit under § 34B, it is silent as to the insurer's right to reimbursement under § 34B(c). Indeed, the insurer's reimbursement rights are mentioned only in §§ 34B(c) and 65(2)(a),[15] and neither provision states that the application of § 35C has any effect whatsoever on those rights. Thus, the only way to reach the conclusion drawn by the judge is to find that the legislature, by expressly resetting the benefit rate and altering the

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avoid a windfall to the employee the multiplier to use for calculating COLA should be the one that corresponds to the base benefit rate on the date of decision, not the date of injury. This method of calculating COLA where §51A applied, directly conflicted with our later decision in Block v. Newton Nissan, 15 Mass. Workers' Comp. Rep. 143, 144-145 (2001)(calculating COLA by using date of injury multiplier and date of decision benefit rate, which resulted from application of § 51A, thereby yielding an adjusted weekly benefit that exceeded the current SAWW or "a rate of compensation unauthorized by the Act" requiring capping of adjusted benefit at current SAWW). In Favreau, we reconciled the conflict between our decisions in Downey and Block by stating that we would follow Block and "overturn Downey with regard to its analysis of §§ 34B and 51A." Favreau, supra at 261. Consequently, where § 51A applies, we use the COLA multiplier corresponding to the employee's date of injury and avoid a windfall to the employee by capping the adjusted benefit at the current SAWW.

[15] Similarly, nothing in § 35C discusses the insurer's right to reimbursement of the difference between the rate the insurer must pay the employee under § 35C and the rate the employee would receive based solely on her date of injury, yet § 65(2)(b) allows for reimbursement of the adjustment in the base benefit. G.L. c. 152, § 65(2)(b); 452 Code Mass. Regs. §3.02(3)("[f]or purposes of M.G.L. c. 152, § 65(2)(b), 'adjustments to compensation pursuant to M.G.L. c. 152, § 35C' shall mean any increase in benefits paid to an employee as a result of the applicability of the first subsection of M.G.L. c. 152, § 35C"). By St. 1989, c. 565, the legislature made § 65(2)(b)'s reimbursement provisions effective regardless of the date of such injury.

method of calculating COLA in §35C, altered the statutory language of § 34B(c) by implication, which is a result that "is contrary to conventional rules of statutory interpretation." Favreau, supra at 261 citing Taylor's Case, 44 Mass. App. Ct. 495, 500 (1998)(use of provision elsewhere in c. 152, but not in section under examination, militates against borrowing that provision for use in that section).

We also note that § 34B(c) does not use the term "date of injury" when discussing the reimbursement rights of the insurer in § 34B(c). Instead, it states, "Insurers shall be entitled to quarterly reimbursements for supplemental benefits, pursuant to section sixty-five, for cases *involving injuries that occurred on or before October first, nineteen hundred and eighty-six*." [Emphasis added]. Even if § 35C applied to this case, the employee's injury still must be considered to have "occurred on or before October first, nineteen hundred and eighty-six;" otherwise, the basic prerequisite for applying § 35C, i.e., that at least five years have passed between the "injury" and the date the employee became eligible for benefits, could not have been met on September 27, 1987.

Lastly, in fashioning §§ 34B, 35C and 65, we think the legislature intended to alter the benefit structure for employees who fit the statutory prerequisites for entitlement to the benefit enhancing provisions of § 35C, but did not intend to alter the rights of the insurer to reimbursement pursuant to §§ 34B(c) and 65(2)(a). As we have previously observed,

> In 1985 . . . the legislature enacted § 34B providing COLA payments for employees receiving § 34A benefits. G.L. c. 152, § 34B, added by St. 1985, c. 572, § 43A. By St. 1986, c. 662, § 53, § 34B was made applicable to all such claims, regardless of the date of injury. COLA benefits are due "without application," and have but two statutory exceptions [not relevant here]. . . . COLA must be paid when due and cannot be separated from, or taken out of, the payment of weekly benefits. . . .
>
> The legislature recognized the plight of insurers that had not contemplated the payment of COLA when writing policies in effect before its date of enactment. By St. 1989, c. 565, the legislature made § 65(2)(a)'s reimbursement provisions for §§ [sic] 34B benefits effective 'regardless of the date of such injury.' Thus the unanticipated losses created by the 1985 Reform Act's enactment of this particular benefit enhancing provision, are eligible for reimbursement from the WCTF.

Pastore v. Polaroid Corp., Inc., 30 Mass. Workers' Comp. Rep. 215, 223 (2016)(footnote omitted). This is certainly the case here, where the insurer's policy dates back to 1969, over fifteen years prior to the passage of the 1985 Reform Act. Nothing in § 35C operates to ameliorate the situation, as any COLA payment whatsoever is a loss the insurer could not have possibly anticipated in 1969. Thus, even where § 35C applies, the insurer's reimbursement rights remain grounded in the employee's date of injury, in this case, November 20, 1969. Accordingly, pursuant to § 34B(c), the insurer is entitled to full reimbursement of the COLA paid to the employee regardless of whether § 35C applies or not.

However, our resolution of the issue of the proper reimbursement factor does not dispose of the case. The WCTF also denied payment of the insurer's reimbursement requests on the ground that those requests were based on an incorrect base benefit, and hence an incorrect COLA multiplier. As stated supra, the insurer has been paying the employee's COLA based on a base benefit of $474.47, ordered by Judge Tirrell pursuant to § 51A in his 1990 hearing decision, and using the 1989 multiplier, rather than the 1969 multiplier dictated by Favreau. The WCTF argued that Judge Tirrell erred in applying § 51A to this case to find the employee was entitled to a base benefit of $474.47 per week based on the 1989 SAWW in effect on the date of his decision, September 11, 1990. It asserted that § 35C applied to provide the proper base benefit in this case, $383.57 and the 1986 COLA multiplier. The judge agreed with the WCTF, ruling:

> I determine for that for purposes of COLA reimbursement claim, the Trust Fund is not bound by the unappealed 1990 decision to which it was not a party and is not barred in its defense of the insurer's COLA reimbursement claim from raising and litigating the issue of the judge's erroneous application of § 51A, that issue having not been litigated in the previous proceeding. I find that the application by Judge Tirrell of § 51A was an error of law as Section [sic] § 51A was not operable for the employee's date of injury. I conclude that the insurer is to be paid by the Trust Fund partial COLA reimbursement pursuant to § 34B(c) based on an adjusted benefit pursuant to § 35C. In the alternative, I find that the insurer is judicially estopped from disputing the Trust Fund's payment of COLA reimbursement pursuant to § 35(c) [sic].[7]

[7] My decision in no way affects the rights and obligations that the 1990 decision establishes between the employee and the insurer. See Diliberto, *supra*, at 132, N.13[sic].

WHEREFORE IT IS ORDERED PURSUANT TO M.G.L. CHAPTER 152 AS AMENDED:

That the insurer's claim for COLA reimbursement from October 1, 2005, the date claimed, and continuing based on a § 51A base benefit and pre-1986 reimbursement factor is denied.

That the insurer [sic] [WCTF] continue payment of § 34(B) [sic] COLA reimbursement to the insurer pursuant to § 35C using the post-1986 reimbursement factor.

(Dec. III, 8-9; emphasis original.)[16]

The insurer argues that Judge Solomon erred in finding the WCTF was not bound by Judge Tirrell's hearing decision because that finding is contrary to the § 19 agreement entered into by the insurer and the WCTF and approved by Judge Solomon on May 4, 2004, which resolved the insurer's claim seeking § 35C reimbursement. (Ins. br. 12-13.) The insurer argues that by entering into the § 19 agreement and by the WCTF's practice of reimbursing the insurer fully for its COLA payments made to the employee from 1992 through 2004, the equitable defenses of laches and estoppel bar the WCTF from asserting otherwise.

For its part, the WCTF denied the insurer's reimbursement requests on the ground the insurer was using the wrong base benefit and multiplier to calculate the employee's supplemental benefits, which it asserts must be done using the figures associated with § 35C. It asserts that because it was not a party to the employee's underlying claim for § 34 benefits before Judge Tirrell, it cannot be bound by Judge Tirrell's decision and, in any event, the Appeals Court's decision in Aetna Life and Casualty Ins. v.

[16] Diliberto was affirmed by the Appeals Court. Diliberto v. New England Elec. Co., 11 Mass. Workers' Comp. Rep. 123 (1997), aff'd sub nom Aetna Life and Casualty v. Commonwealth, 50 Mass. App. Ct. 373 (2000). Hereinafter, we will refer to the Appeals Court's decision.

Commonwealth, 50 Mass. App. Ct. 372 (2000), allows it to challenge that prior decision. It also asserts that the judge correctly found the insurer, by previously claiming reimbursement under § 65(2)(b) for benefits allegedly owed pursuant to § 35C and resolving that dispute by way of the § 19 agreement, was judicially estopped from arguing § 35C does not apply to this case.

We agree with the insurer but for slightly different reasons.

5. WCTF's Ability to Challenge the Hearing Decision of Judge Tirrell and Judicial Estoppel.

To the extent the judge relied on Aetna Life and Casualty Ins. to allow the WCTF to challenge Judge Tirrell's unappealed hearing decision, she erred by applying that decision beyond its permissible scope. Aetna Life and Casualty Ins. concerned an insurer's request for reimbursement through the second injury fund, under §§ 37 and 65(2)(c), for payments the insurer made to an employee pursuant to a lump sum settlement agreement.[17] Unlike the express right § 37 bestows on the WCTF to challenge

[17] General Laws, c. 152, § 37 states:

> Insurers making payments under this section shall be reimbursed by the state treasurer from the trust fund created by section sixty-five in an amount not to exceed seventy-five percent of all compensation due under sections thirty-one, thirty-two, thirty-three, thirty-four A, thirty-six A, and where benefits are due under any of such sections, section thirty; provided, however, that the insurer is not a self-insurer, a group self-insurer or municipality that has chosen not to be subject to the assessments which fund said reimbursements; and, provided, further, that no reimbursement shall be made for any amounts paid during the first one hundred and four weeks from the onset of disability or death.
>
> There shall be no reimbursement under this section unless the employer had personal knowledge of the existence of such pre-existing physical impairment within thirty days of employment or retention of the employee by such employer from either a physical examination, employment application questionnaire, or statement from the employee. Proof of the pre-existence of such impairment shall be established only by the production of medical records existing prior to the date of employment or retention in employment of the employee. Nothing in this paragraph shall be construed to allow employers to compel an employee or job applicant to disclose any information regarding physical impairments in violation of any applicable law.

lump sum settlement agreements, there is nothing in § 34B(a)-(c) or § 65(2)(a) that allows the WCTF to challenge a judge's rulings contained in an unappealed hearing decision between the employee and the insurer. Nor can the two proceedings be compared. In approving lump sum settlements, judges are charged with ensuring the settlement is in the best interest of the employee, not the insurer. G.L. c. 152, § 48(1). In hearing decisions, the judge is charged with impartially applying the law to the facts he or she finds. G.L. c. 152, § 11B.

Additionally, the judge erred when she found the insurer was judicially "estopped from disputing payment of COLA reimbursement pursuant to § 35C." (Dec. III, 8.) The judge came to this conclusion because she determined that the insurer was acting in a manner contrary to the position it assumed in its prior claim against the WCTF. To recount, that prior claim sought reimbursement for the difference between the employee's base compensation rate on her date of injury and the rate of compensation she would be entitled to on the date she became eligible for benefits, pursuant to §§ 35C and 65(2)(b), and 452 Code Mass. Regs. § 3.02(3). Judicial estoppel requires success on the merits of the prior claim, and the taking of a diametrically opposed position in a future case:

> [T]wo fundamental elements are widely recognized as comprising the core of a claim of judicial estoppel. First, the position being asserted in the litigation must be directly inconsistent, meaning mutually exclusive of, the position asserted in a prior proceeding. . . . Second, the party must have succeeded in convincing the court to accept its prior position.

> The office of legal counsel shall in all instances have the authority to defend claims against the fund. Such office shall have the right to contest any amount accredited to the above named sections which has been redeemed by an insurer by payment of a lump sum settlement pursuant to section forty-eight, but reimbursement shall not require the approval of the lump sum by said office or by the state treasurer. No reimbursement shall be made for payments due during the first one hundred and four weeks from the date of onset of disability or death, whether paid under an agreement, decision, or lump sum settlement. Any petition for reimbursement under this section shall be filed no later than two years from the date on which the benefit payment for which the reimbursement request is being filed was made.

Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640-641 (2005). Here, the insurer actually lost its claim for § 35C reimbursement at the conference when the judge denied its claim. Although the insurer appealed that adverse conference order, the insurer and the WCTF settled the claim before a hearing decision was rendered. Thus, the insurer never succeeded on the merits of its claim, and therefore was not judicially estopped from arguing COLA reimbursement under § 35C did not apply to this case.[18] The judge found, in a footnote, that "the insurer and the Trust Fund entered into an agreement whereby the insurer accepted $100,000 in full satisfaction of any claims for reimbursement under § 35C already paid or that might be paid in the future," and further found, "[c]onsidering the complexity of the issues involved and the uncertainty of the outcome, the insurer was successful in obtaining the significant settlement of $100,000." (Dec. III, 7 & n.6.) Thus, it appears that the judge considered the settlement to be the equivalent of success on the merits. "We decline to identify a settlement as representing success for the purposes of judicial estoppel." East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623 (1996).

In any event, we think the judge erred by determining that the insurer's actions in seeking COLA reimbursement were mutually exclusive of its position taken in the prior claim for § 35C reimbursement. The claim at issue was merely for reimbursement of COLA payments made to the employee pursuant to §§ 34B(c) and 65(2)(a). This is a claim that must be based on the facts. In pursuing its reimbursement request, the insurer must fill out the WCTF's quarterly reimbursement form showing the WCTF what it paid to the employee in base benefits, the COLA multiplier used, the "weekly adjustments paid (supplemental benefits)," the total amount of weekly compensation paid, or the adjusted benefit, the number of weeks it paid this benefit and the "reimbursement due."

[18] Indeed, if the doctrine could be invoked at all, it would be invoked against the WCTF as it prevailed in maintaining § 35C did not apply to this case at the conference on the insurer's reimbursement request; settled the case, which the parties agreed had a total value of over $700,000.00, for $100,000.00; and then took the diametrically opposed position in denying the insurer's request for reimbursement of COLA. (Dec. III, 7.)

(Dec. III, Ex. 9.) As the judge recognized, nothing in her decision alters "the rights and obligations that the 1990 decision establishes between the employee and the insurer." (Dec. III, 8 n. 7.) The WCTF's insistence that the proper base benefit should be $383.57, ignores the reality of the insurer's payment obligation to the employee which was established long before the employee became permanently and totally incapacitated and eligible for COLA, and is an obligation the insurer is now barred from challenging, or altering. Cf. G.L. c. 152, § 16.[19] Indeed, under the 1990 decision, the base benefit the insurer must pay to the employee is $474.47 per week. Thus, § 35C had nothing to do with the insurer's COLA reimbursement request until the WCTF brought it up as a ground to deny the insurer's request that it had been honoring without question for thirteen years, nor could § 35C alter the established fact of the amount of base benefit the insurer was required to pay the employee.

The judge further concluded that because the WCTF was not a party to the underlying claim between the employee and the insurer, it could not be bound by Judge Tirrell's decision. She found Judge Tirrell erred in awarding the employee enhanced base benefits under § 51A because § 51A was enacted five days after the employee's date

[19] General Laws, Ch. 152, § 16 states:

> When in any case before the department it appears that compensation has been paid or when in any such case there appears of record a finding that the employee is entitled to compensation, no subsequent finding by a member or the reviewing board discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res adjudicata as a matter of law, and such employee or his dependents, in the event of his death, may have further hearings as to whether his incapacity or death is or was the result of the injury for which he received compensation; provided, however, that if the board shall determine that the petition for such rehearing is without merit or frivolous, the employee or his dependents shall not thereafter be entitled to file any subsequent petition thereof except for cause shown and in the discretion of the member to whom such subsequent petition may be referred; and, provided further, that, in the event of the death of the employee, such a petition for a rehearing shall be filed within three months from the time of his decease and within one year from the date of the finding terminating his compensation.

of injury, November 20, 1969, and applied only to injuries occurring after its enactment.[20] G.L. c. 152, § 51A, added by St. 1969, c. 833, § 1.

While the WCTF attacked the insurer's failure to appreciate the error in Judge Tirrell's decision, we note that the WCTF only saw fit to raise this argument after it had been honoring and paying the insurer's COLA reimbursement requests in full for a period of thirteen years, based on the base benefit established through Judge Tirrell's decision. It was also eight years after the Appeals Court decided this issue in Phillips's Case, 41 Mass. App. Ct. 612 (1996)(where employee was injured prior to enactment of § 51A, but was entitled to benefits through operation of § 35C, the operation of § 35C did not change employee's date of injury to the date he first became entitled to benefits, so employee could not avail himself of benefit of § 51A, where the insurer made no payments on his claim until the "final decision" on this claim). Most importantly its protestation that it cannot be bound by Judge Tirrell's decision because it was not a party to the litigation rings hollow, where, as a practical matter, it clearly benefitted from the error in Judge Tirrell's decision. Even if the WCTF had been a party to the underlying § 34 action, it would not have been in its interest to appeal from Judge Tirrell's decision awarding benefits under §51A. This is so because § 51A is a statutory provision that imposes no reimbursement obligation upon the WCTF, whereas, if the WCTF had successfully appealed from Judge Tirrell's decision, as it now implies it would have done if it were a party to that case, such a "success" would have exposed the WCTF to larger liability than it currently is being asked to pay. G.L. c. 152, § 65(2)(b); 452 Code Mass. Regs. § 3.02(3). The parties agreed that the potential exposure to the WCTF for reimbursement under § 35C alone would have been in excess of $700,000.00. (Dec. III, Ex. 7.)

[20] The judge further noted the employee did not claim entitlement to an enhancement under § 51A and only sought entitlement to § 34 benefits by operation of § 35C. While not essential to our discussion, for the sake of clarity, we reiterate that where § 51A applies, it does not need to be claimed by the employee in order to be applied by the judge. Zhang v. Milton Home Health Services, Inc., 19 Mass. Workers' Comp. Rep. 260 (2005).

Lastly, by failing to appeal from Judge Tirrell's decision and compromising its claim against the WCTF under § 65(2)(b), the insurer is required to pay a higher base rate to the employee, which the WCTF has no obligation to reimburse, and this higher base benefit resulted in the insurer paying a lower supplemental COLA benefit than it would have to pay if § 35C applied. Thus, the insurer's COLA reimbursement request is lower than it would be if it paid on a base § 35C rate with COLA. Again, the practical, albeit illogical, implication of the WCTF's argument would result in the WCTF paying a higher amount than the insurer requested it to pay.

Simply put, the WCTF monetarily benefits from the procedural history of this claim. Pursuant to Judge Tirrell's September 11, 1990, hearing decision on the employee's underlying claim for temporary total incapacity benefits, the insurer was ordered to pay the employee § 34 benefits at a rate of $474.47 per week, which was the SAWW in effect on the date of Judge Tirrell's decision by operation of § 51A, and which is the same base rate payable to the employee under § 34A. Circular Letter 246a (corrected version), issued November 18, 1989. The insurer's COLA reimbursement requests at issue in this case, were based on the insurer's payment of COLA to the employee, using $474.47 as the base benefit and using the 1989 multiplier, to determine the adjusted benefit under § 34B.[21] (Insurer's Hearing Br. [6/29/11] at 10; Dec. III, Ex. 9.) Cf. Favreau, supra (where the employee receives benefits pursuant to § 51A, the employee is entitled to COLA calculated by using the multiplier for the date of injury, not the date of the §51A award). Thus, by using the $474.47 base benefit, the insurer's reimbursement requests are actually less than they would be if the § 35C base benefit

[21] The insurer admitted to using the 1989 multiplier, not the multiplier associated with the employee's date of injury in 1969, to calculate COLA from 1992 through 2011. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(judicial notice taken of board file); (Insurer's Hearing Br. [6/29/11] at 10.) At oral argument the insurer expressly stated that it was not challenging Favreau or asking us to revisit our holding in that case. (O.A. Tr. 35-37.) Instead, it advocated using the multiplier from 1986, corresponding to the employee's claim for § 35C, which results in the same adjusted benefit as required by use of the 1969 multiplier. We make no comment on whether this is proper or not, as the insurer's reimbursement request at issue in this case was not based on the use of either multiplier.

advocated by the WCTF were used to calculate COLA. To illustrate, we provide the following examples using the COLA Multipliers and Reimbursement Factors provided by the parties (Dec. III, Ex. 8.)

Beginning October 1, 2005, through September 30, 2006, the insurer was required to pay the employee a base benefit of $474.47, which it multiplied by the figure in Column 5 corresponding to 1989, 2.0052, yielding an adjusted weekly benefit of $951.41. The supplemental benefit/reimbursement was $951.41 - $474.47 = **$476.94** per week. Using the figures advocated by the WCTF, the base benefit of $383.57, multiplied by the figure in Column 5 corresponding to 1986, 2.4804, yields an adjusted weekly benefit of $951.41. However, the supplemental benefit/reimbursement would be $951.41 - $383.57 = **$567.84** per week. As a result, the figures advocated by the WCTF in this appeal would produce a reimbursement to the insurer of an additional $90.90 per week above what the insurer actually requested.

Beginning October 1, 2006, through September 30, 2007, the insurer was required to pay the employee a base benefit of $474.47, which it multiplied by the figure in Column 5 corresponding to 1989, 2.0927, yielding an adjusted weekly benefit of $992.92. The supplemental benefit/reimbursement was $992.92 - $474.47 = **$518.45** per week. Using the figures advocated by the WCTF, the base benefit of $383.57, multiplied by the figure in Column 5 corresponding to 1986, 2.5886, yields an adjusted weekly benefit of $992.90. The supplemental benefit/reimbursement would be $992.91 - $383.57 = **$609.34** per week. As a result, the figures advocated by the WCTF in this appeal would produce a reimbursement to the insurer of an additional $90.89 per week above what the insurer actually requested.

Beginning October 1, 2007, through September 30, 2008, the insurer was required to pay the employee a base benefit of $474.47, which it multiplied by the figure in Column 5 corresponding to 1989, 2.1829, yielding an adjusted weekly benefit of $1,035.72. The supplemental benefit/reimbursement was $1,035.72 - $474.47 = **$561.25** per week. Using the figures advocated by the WCTF, the base benefit of $383.57,

multiplied by the figure in Column 5 corresponding to 1986, 2.7002, yields an adjusted weekly benefit of $1,035.72. The supplemental benefit/reimbursement would be $1,035.72 - $383.57 = **$652.15** per week. As a result, the figures advocated by the WCTF in this appeal would produce a reimbursement to the insurer of an additional $90.90 per week above what the insurer actually requested.

Beginning October 1, 2008, through September 30, 2009, the insurer was required to pay the employee a base benefit of $474.47, which it multiplied by the figure in Column 5 corresponding to 1989, 2.2869, yielding an adjusted weekly benefit of $1,085.07. The supplemental benefit/reimbursement was $1,085.07 - $474.47 = **$610.60** per week. Using the figures advocated by the WCTF, the base benefit of $383.57, multiplied by the figure in Column 5 corresponding to 1986, 2.8289, yields an adjusted weekly benefit of $1,085.08. The supplemental benefit/reimbursement would be $1085.08 - $383.57 = **$701.51** per week. As a result the figures advocated by the WCTF in this appeal would produce a reimbursement to the insurer of an additional $90.91 per week above what the insurer actually requested.

The WCTF is not harmed by paying less than it is advocating, and we know of no equitable reason to grant it relief under the circumstances by allowing it to challenge Judge Tirrell's decision requiring the insurer to pay the employee a larger base benefit. In making reimbursement requests to the WCTF, the insurer may only ask for reimbursement of the amounts that it actually paid the employee pursuant to the operation of § 34B. Accordingly, for the reasons already stated in this decision, the WCTF is ordered to make full reimbursement to the insurer of the COLA paid to the employee as set forth in the insurer's reimbursement requests from October 1, 2005 through September 30, 2009.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: ***December 5, 2018***