CASE NO. 03206 CRB-08-95-11
CLAIM NO. 800013578 : COMPENSATION REVIEW BOARD

LEANDER JORDAN
CLAIMANT-APPELLEE : WORKERS' COMPENSATION
CROSS-APPELLANT COMMISSION

v.

: AUGUST 18, 1998

GENERAL DYNAMICS CORP./
ELECTRIC BOAT DIVISION
EMPLOYER

and

CIGNA PROPERTY & CASUALTY CO.
INSURER

and

AETNA CASUALTY & SURETY
INSURER
RESPONDENTS-APPELLANTS
CROSS-APPELLEES

APPEARANCES:

The claimant was represented by Nathan Shafner, Esq., O'Brien, Shafner, Stuart, Kelly & Morris, P.C., 475 Bridge St., P. O. Drawer 929, Groton, CT 06340.

The respondents were represented by Richard Stabnick, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Blvd., Glastonbury, CT 06033-4412.

These Petitions for Review from the November 9, 1995 Finding and Award of Compensation by the Commissioner acting for the Eighth District was considered September 20, 1996 by a Compensation Review Board panel consisting of the Commission Chairman Jesse M. Frankl and Commissioners George A. Waldron and Robin L. Wilson.

OPINION

JESSE M. FRANKL, CHAIRMAN. The claimant and the respondents have both petitioned for review from the November 9, 1995 Finding and Award of Compensation by the Commissioner acting for the Eighth District. The respondents argue that the trial commissioner improperly awarded the claimant benefits by retroactively applying § 31-310c C.G.S., while the claimant argues that the commissioner appropriately applied that statute, but should have awarded COLAs in addition to the base compensation rate. The issues before us in this matter have been settled by the recent decision of our Supreme Court in Green v. General Dynamics Corp., 245 Conn. 66 (1998), and we need only apply that decision to the undisputed facts of this case to resolve these appeals.

The claimant in this matter is Georgia Jordan, the dependent widow of the decedent Leander Jordan, who died on March 21, 1981 as a result of compensable mesothelioma caused by workplace asbestos exposure. The decedent was employed by the respondent General Dynamics from 1959 through January 31, 1978, when he voluntarily retired while still in good health. He was diagnosed with mesothelioma on December 15, 1980, which satisfies the definition of an occupational disease under § 31-275(15) of the Workers' Compensation Act.

The trial commissioner ruled that, under Orcutt v. Ohmweave Co., 8 Conn. Workers' Comp. Rev. Op. 125, 822 CRD-2-89-2 (Aug. 2, 1990), the claimant's compensation rate should be computed based on the wages that the decedent last earned while there was a contractual relationship between the parties. He determined that the claimant's average weekly wage was $231.66 during the last 21 weeks of his employment, and ordered that the respondents pay the claimant two-thirds of that amount

as required by § 31-306(b)(2)[1] retroactive to the date of the decedent's death. The trier did not accept the respondents' argument that, because the decedent earned no wages during the 26 weeks immediately preceding incapacity, his widow was only entitled to the statutory minimum of $20 per week under § 31-306(b)(2) as a compensation rate. He also declined the claimant's request that he address the issues of interest or cost-of-living adjustments, stating that they could resubmit those issues if his decision was upheld after appellate proceedings were concluded. Both parties filed appeals from his decision.

Section 31-310c, which was enacted by the legislature in 1990 and took effect on October 1 of that year, provides in relevant part:

> [I]n the case of an occupational disease which manifests itself at a time when the worker has not worked during the twenty-six weeks immediately preceding the diagnosis of such disease, the claimant's average weekly wage shall be considered to be equivalent to the greater of (1) the average weekly wage determined pursuant to section 31-310 and adjusted pursuant to section 31-307a or (2) the average weekly wage earned by the claimant during the fifty-two calendar weeks last worked by the claimant, which wage shall be determined in accordance with said section 31-310 and adjusted pursuant to said section 31-307a."

In Green v. General Dynamics Corp., supra, our Supreme Court decided that this statute has retroactive effect because it merely clarifies the law in § 31-310 that existed before it was passed. Id., 78. Section 31-310 provided at the time of the decedent's injury that "[w]hen the employment previous to injury . . . is computed to be less than a net period of two calendar weeks, his weekly wage shall be considered to be equivalent to the average

[1] At the time that symptoms of the claimant's occupational disease first manifested themselves in 1980, § 31-306(b) provided in relevant part: "Compensation shall be paid on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease as follows: . . . (2) To those wholly dependent upon the deceased employee at the time of his injury, a weekly compensation equal to sixty-six and two-thirds per cent of the average weekly earnings of the deceased at the time of his injury but in no case more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred or less than twenty dollars weekly."

weekly wage prevailing in the same or similar employment in the same locality at the time of injury . . . ."

The Court held that the complete retirement of the employee in Green at the time his occupational disease first manifested itself in July 1989 did not prevent his widow from collecting weekly death benefits. "[W]e conclude that the provisions of § 31-310c applying the greater sum of calculations based on the prevailing wage when the occupational disease is diagnosed or the wage resulting from use of the last twenty-six weeks of employment would apply in the case of an occupational disease diagnosed in 1989." The reasoning of the Court in Green is equally applicable to the facts of the instant case. The formula in § 31-310c should be applied to the claimant's compensation rate here, even though the decedent was first diagnosed with mesothelioma in 1980.

It does not appear that the trial commissioner considered both alternatives listed in § 31-310c when he determined the claimant's compensation rate. Instead, it appears that he only considered the average weekly wage of the decedent during his last period of employment with the respondent. Therefore, it will be necessary to remand this case to the Eighth District for a hearing on the appropriate figure to be used in setting the claimant's compensation rate, including cost-of-living adjustments as per § 31-307a, in accordance with this decision and Green. The issue of interest under § 31-300 on account of delay in the payment of benefits not due to the fault of the employer may be raised at that time as well. Under § 31-310c(b), the claimant is entitled to interest on "the amount of [the] award affirmed on appeal and not paid to the claimant during the pendency of such appeal," which is $154.43 per week plus COLAs as ordered in ¶A of the trial

commissioner's award. At minimum, the claimant will be entitled to that amount after the proceedings on remand.

Commissioners George A. Waldron and Robin L. Wilson concur.