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## WORKPLACE INJURIES

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### Applying the Increased Dependency Rate

Retroactivity issues involving the amended rate of compensation for dependent benefits remain

When a worker dies, the issue of dependency benefits must be considered. A claim for dependency benefits arises only if the death is related to work causes. This differs from payments made to dependents for unpaid, accrued benefits due and owing to the deceased at the time of death, which are payable regardless of whether the death was from work causes.

The initial questions, therefore, are: (1) was the death due to a work-related injury, and (2) did the worker have any dependents? If the answer to both questions is yes, there is the potential for a dependency claim.

Rule 34:15-13 sets forth the criteria for determining who is considered a dependent for workers' compensation purposes. For example, a spouse or any natural child under 18 years of age residing in the home is presumed a statutory dependent. However, other relatives or children residing outside of the home do not have that same presumption. In addition to setting forth those criteria, the statute also sets forth the computation of compensation once dependency has been established. In this regard, practitioners must determine the correct benefit rate in light of the amendment to the statute on January

14, 2004.

Rule 34:15-13 was amended to allow dependent children and spouses living with the decedent at the time of death compensation based upon 70 percent of the worker's wages at death for one or more dependents. Prior to the 2004 amendment, the statute provided for a sliding scale of dependency rates, based on the number of dependants. The old method of calculation increased from 50 percent of wages for one dependent to up to 70 percent of wages for five or more dependents. The 2004 amendment provides for 70 percent of wages regardless of the number of dependents. Of course, this means an increase in dependency benefit paid by carriers.

Once a practitioner has confirmed dependency status and that benefits are payable, the practitioner is confronted with the issue as to whether the 2004 rate increase applies to their particular case. We know that the amendment applies to claims and deaths occurring after 2004. However, the statute is silent as to the issue of retroactivity. Is the increase retroactive to death and claims prior to the 2004 amendment? For instance, would the statute apply to a claim filed before but pending at the time of the amendment? Would the increased rate apply to claims filed after the amendment for deaths occurring prior to the amendment? Of course, the defense would not favor retroactive

application as we would be required to only pay in accordance with the sliding scale under the pre-amendment statute. However, petitioners favor retroactivity as they would be entitled to 70 percent of petitioner's wages regardless of the number of dependents.

The issue of retroactivity was most recently addressed by the Appellate Division under a group of consolidated cases, including the matter of *Cruz v. Central Jersey Landscaping*, 393 N.J. Super 34 (App. Div. 2007). The Appellate Court held that "the revised formula should be applied in pending cases to calculate death benefits for dates on and after the effective date of the amendment, January 14, 2004." With such a holding, the increased rate would apply to all claims filed before but pending on January 14, 2004. If the claim was resolved prior to the amendment, there is no issue.

Under *Cruz*, the increase would not be limited to claims filed on or after January 14, 2004. It does not matter what the law was at the time of death or filing of the petition so long as the claim was pending at the time of the amendment. Questions have arisen as to whether such an application is correct. Should someone whose claim was filed during the pre-amendment period be entitled to an increased benefit rate just because their claim was not resolved before January 14, 2004? Should someone filing for benefits for a death occur-

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ring prior to January 14, 2004, be entitled to an increased benefit rate?

The facts of the cases consolidated under *Cruz* involve deaths prior to the amendment with the claims being filed prior thereto as well. In two of the cases, the lower court paid at the sliding scale rate until January 14, 2004, then switched to 70 percent thereafter. In the remaining two cases, the lower court only applied the rate applicable at the time of death and filing without permitting an increase after January 14, 2004. Accordingly, the petitioners sought retroactive increases from the date of the amendment and thereafter. To the contrary, the employers seek to have the benefits limited to the rate at the time of death. What is the correct application?

Under the decision in *Cruz*, the petitioners are entitled to an increase in

benefits from January 14, 2004, and thereafter. The majority of the Appellate Court reasoned that the legislative history, as well as the beneficial purpose of the act and amendment, supports such an application. However, the *Cruz* decision has not resolved the issue.

It is anticipated that the decision will be appealed to the Supreme Court of New Jersey to decide the correct application and interpretation of the amendment to the statute. The *Cruz* decision presents practical concerns for respondents. Such an application would mean that petitioners currently receiving benefits at the time of the amendment for claims filed prior to that time would be entitled to an increase in benefits. As such, respondents would be responsible for paying a retroactive

increase to petitioners from January 14, 2004, and thereafter. Another question is whether the increased rate applies to claims closed after, but pending on, January 14, 2004. If so, a flood of petitions to reopen those claims can be anticipated.

So what should respondent carriers do with respect to these cases? Pending confirmation as to the status of the issue within the Supreme Court, the trend among defense firms and carriers is to take a precautionary approach. Specifically, closed claims are remaining closed, and the rate of compensation remains the same on existing claims as practitioners keep a watchful eye on this issue. For up-to-date information from the New Jersey Division of Workers' Compensation, visit [www.nj.gov/labor/wc/wcindex.html](http://www.nj.gov/labor/wc/wcindex.html). ■