

## SECTION 9—Death Benefits

### In General

Section 9 provides death benefits to certain survivors and dependents where a work-related injury causes an employee's death. 33 U.S.C. §909. Section 9 states that where a death is work-related, the compensation due is known as “a death benefit,” and it is payable in specified amounts to specified survivors.

The provision that benefits are payable only for deaths related to an employee's employment is the same as that in effect prior to the 1972 Amendments to the Act. Under the 1972 Amendments, death benefits were payable to certain survivors of persons who either died as a result of a work-related injury or who were permanently totally disabled due to a work-related injury at the time of death even if the death was unrelated to the employment injury. Retroactive application of this provision to persons disabled by pre-1972 injuries where death occurred post-amendment was declared constitutional by the First, Second, Third, Fourth, Fifth and Ninth Circuits. *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1<sup>st</sup> Cir. 1979); *State Ins. Fund v. Pesce*, 548 F.2d 1112 (2d Cir. 1977); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, 8 BRBS 464 (3d Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, OWCP*, 539 F.2d 378, 4 BRBS 245 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977); *Travelers Ins. Corp. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5<sup>th</sup> Cir. 1981); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 10 BRBS 517 (9<sup>th</sup> Cir. 1979). *See also Casteel v. St. Louis Shipbuilding & Steel Co.*, 6 BRBS 388 (1977), *aff'd*, 583 F.2d 876, 9 BRBS 730 (8<sup>th</sup> Cir. 1978), where a similar award was allowed under Section 8(d) to survivors of a decedent who was permanently partially disabled. The 1984 Amendments repealed the unrelated death provision. Thus, a claimant whose decedent was permanently totally disabled prior to 1984 but who died from an unrelated cause after the enactment of the 1984 Amendments is not entitled to death benefits. *Close v. Int'l Terminal Operations*, 26 BRBS 21 (1992).

These holdings are premised on the concept that death benefits are separate and distinct from the right to disability benefits. The right to death benefits does not vest until the time of death. *See Int'l Mercantile Marine Co. v. Lowe*, 93 F.2d 663 (2d Cir.), *cert. denied*, 304 U.S. 565 (1938); *see also Barszcz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2<sup>d</sup> Cir. 2007); *Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984); *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76 (4<sup>th</sup> Cir. 1950).

It follows from this premise that a death benefits claimant must separately establish her entitlement to benefits pursuant to Section 9, although certain elements of entitlement may be linked. *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001) (*see discussion, infra* at Section 9(g)). Thus, stipulations entered into in the disability claim are not

binding in the death claim and collateral estoppel will not apply to issues that were not actually litigated in the prior claim. *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff'd*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005).

The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of death benefits. *Spence v. Terminal Shipping Co.*, 7 BRBS 128 (1977), *aff'd sub nom. Pennsylvania Nat'l Mutual Casualty Ins. Co. v. Spence*, 591 F.2d 985, 9 BRBS 714 (4<sup>th</sup> Cir. 1979), *cert. denied*, 444 U.S. 963 (1975); *Marshall v. Looney's Sheet Metal Shop*, 10 BRBS 728 (1978), *aff'd sub nom. Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5<sup>th</sup> Cir. 1981).

Section 20(a) presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was employment-related. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). In *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, dissenting), a majority of the Board held that the administrative law judge erred in not applying the Section 20(a) presumption where claimant suffered from chronic obstructive pulmonary disease (COPD) potentially related to his employment and alleged that this condition hastened his death due to renal cancer. The Board remanded for the administrative law judge to apply the presumption to the COPD, determine whether it was related to his employment and then determine whether the death was work-related under the maxim that "to hasten death is to cause it." *Id.*, 14 BRBS at 603. *See also* 33 U.S.C. §§902(2), 920(a).

An award for scheduled permanent partial disability benefits may be made following an employee's death under Section 8(d). Such an award is not a claim for death benefits and can be received concurrently with Section 9 death benefits. *Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984), *rev'g* 15 BRBS 475 (1983).

A separate claim for death benefits must be filed in order to receive benefits under Section 9. *Almeida v. General Dynamics Corp.*, 12 BRBS 901 (1980). The Section 9 claim must comply with Section 13 and thus must be filed within the specified time period for traumatic injury or occupational diseases after the claimant is aware or should have been aware of the relationship between the death and employment, or within one year of the last payment of death benefits. 33 U.S.C. §913(a), (b)(2); *Stark v. Bethlehem Steel Corp.*, 6 BRBS 600 (1977). *See Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22 (1983); Section 13 of the desk book. Section 9 refers to "a death benefit;" thus, the Board affirmed a finding that a widow's claim was timely filed under Section 13 because it was filed while voluntary Section 9 death benefits were being paid to her two minor children. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). *See also Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999)(employer allowed a credit under Section 14(j)

for overpayments to child who was found not entitled to benefits against the amount due the widow as only one “death benefit” is involved).

In determining employer’s entitlement to a credit under Section 3(e) for payments received by a widow under a state workers’ compensation act or under Section 33(f) for third-party recoveries, only that portion of the other award attributable to death benefits may offset the widow’s award. *See Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991) (Section 33); *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990) (Section 3(e)). Additional cases on this issue are digested below and addressed in Sections 3 and 33 of this desk book.

Where a case involves entitlement to permanent total disability benefits, followed by death due to a work injury, and employer establishes it is entitled to Section 8(f) relief on both claims, employer’s liability is limited to a total of 104 weeks. *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982), *aff’d*, 705 F.2d 562, 15 BRBS 130(CRT) (1<sup>st</sup> Cir. 1983); *Sawyer v. Newport News Shipbuilding & Dry Dock*, 15 BRBS 270 (1982). *See* Section 8(f).

Prior to the 1984 Amendments, the Act did not allow settlement of death claims. *DuPuy v. Director, OWCP*, 519 F.2d 536, 2 BRBS 115 (7th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976); 33 U.S.C. §908(i)(1982) (amended 1984). The 1984 Amendments to Section 8(i) provide that survivors' claims may be settled. 33 U.S.C. §908(i)(1). However, as only claims in existence may be settled, *see* 20 C.F.R. §702.241(g), a widow may not waive her rights to death benefits in a settlement prior to the employee’s death. *Cortner v. Chevron Int’l Oil Co., Inc.*, 22 BRBS 218 (1989). Similarly, a worker’s spouse is not a “person entitled to compensation” under Section 33(g)(1) prior to the employee’s death because she cannot satisfy the prerequisites for compensation entitlement prior to the death. Accordingly, the worker’s spouse does not forfeit the right to death benefits under the Act if he or she enters into a third-party settlement without employer’s approval prior to the worker’s death. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

## Digests

### In General

The Board affirmed the administrative law judge's finding that the widow's claim was timely filed under Section 13 because it was filed while voluntary Section 9 death benefits were being paid to her two minor children. Section 9 provides for “a death benefit,” and there is no requirement in Section 13 that payments to a specific survivor toll time limits only with regard to that individual. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

The Board affirmed the administrative law judge's determination that claimant was not entitled to Section 10(f) adjustments on her death benefits, finding Dr. Thompson's opinion sufficient to support the administrative law judge's finding that decedent's death was not causally related to his employment. Section 10(f) provides adjustments only for "deaths arising out of injuries under this Act" and benefits here are premised on decedent's permanent total disability at the time of death under the 1972 Act. *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988).

The Board held that where the employee died in 1965, but his widow did not become aware of the relationship between his death and employment until 1982, the administrative law judge erred in using his average weekly wage from 1965. Decedent's average weekly wage was properly based on the national average weekly wage pursuant to the 1984 Amendments to Section 10 since the timely claim was pending on the date of enactment. The Board further held that Section 9, as amended in 1972, rather than the Act at the time of death in 1965, applied to determine the benefits due. The Board reasoned that the right to death benefits did not arise in 1965, the date of death, as the relationship between the employee's death and his occupational asbestos exposure was not determined until 1982. Moreover, under the law in effect prior to the 1984 Amendments, claimant would have been entitled to no compensation as he was retired at the time of death. Thus, the Board concluded that the cause of action for death benefits accrued on September 28, 1984, the enactment date of the 1984 Amendments. *Taddeo v. Bethlehem Steel Corp.*, 22 BRBS 52 (1989).

The Board rejected employer's contention that a widow's claim for death benefits under Section 9 abates if she dies prior to the adjudication of her claim, holding that entitlement should not be affected by the delays inherent in the administrative process. The widow's rights vested upon her husband's death. The Board thus affirmed the administrative law judge's finding that the award of survivor's benefits which accrued between the date of the employee's death in 1979 and her death in 1984 passed to the widow's estate rather than abating upon her death. *Hickman v. Universal Maritime Serv. Corp.*, 22 BRBS 212 (1989).

Where the administrative law judge had the option of awarding death benefits based on either decedent's having died from an asbestos-related condition or his having been permanently totally disabled at the time of his death due to a work-related back injury, the Board, in a case of first impression, affirmed the administrative law judge's award of death benefits based on decedent's permanent total disability at the time of his death. Where both theories are applicable, as in this case, there is no language in the Act that affords priority to one theory of recovery or the other, and here the administrative law judge found that awarding death benefits based on decedent's having been permanently totally disabled at the time of his death was in claimant's best interest, in that her recovery was greater than it would have been had benefits been awarded based on decedent's work-related death. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on*

*recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

The Board held that where the employee's death occurred after the enactment date of the 1984 Amendments, *i.e.*, September 24, 1984, the provisions contained in Section 9 as amended in 1984 applied to claim for death benefits; accordingly, in such cases, death benefits are awardable only where a work-related injury causes death. The Board distinguished *Lynch*, 22 BRBS 351, *infra*, and *Holden*, 23 BRBS 416, *infra*, as those cases followed holdings that due to the repeal of the 1928 District of Columbia Workmen's Compensation Act in 1982, the 1984 Amendments do not apply. In this case, Section 9 as amended in 1984 is applicable. Thus, the Board rejected claimant's contention that since decedent's injury occurred under the pre-Amendment Act, the General Savings Statute entitled her to the rights and benefits afforded claimants covered under Section 9 as amended in 1972. Therefore as it was uncontroverted that the employee's death in 1986 was unrelated to his employment with employer, claimant was not entitled to death benefits under Section 9, as amended in 1984. The Board also rejected claimant's contention that she was denied due process of law because decedent's agreement to a third-party settlement was premised in part on the guarantee that claimant would be entitled to death benefits. The right to death benefits cannot arise prior to death, and here, the 1984 Amendments eliminated such a right to recovery. *Close v. Int'l Terminal Operations*, 26 BRBS 21 (1992).

In a case arising in the Fourth Circuit, where decedent had an 18 percent permanent partial disability due to asbestosis and died from a cerebellar hemorrhage, with interstitial lung disease and asbestosis listed as "other significant conditions," the Board followed the holding in *Woodside*, 14 BRBS 601, that "to hasten death is to cause it." The Board noted that in a black lung case, *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993), the court adopted this rule. The Board rejected employer's attempts to have the rule abandoned or narrowed. Thus, as asbestosis played some role in decedent's death, the administrative law judge's award of death benefits was affirmed. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). See *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998) ("hastening" standard applied in Section 8(f) context).

In this case, decedent left three dependent children, each of whom was initially entitled to benefits pursuant to the formula discussed in Section 9(c) of the Act. Two of the children ultimately settled their claims prompting the third child, claimant, to argue that he is entitled to an increased share of the death benefit based on the fact that the other two children had settled their respective claims. The Board, reiterating that there is to be one death benefit paid pursuant to Section 9 of the Act, held that employer is not required to increase the payment of the death benefit to another eligible claimant not involved in the settlements and who remains entitled to a share of the death benefit. Moreover, the Board stated that the non-settling claimant's entitlement to benefits cannot be offset by

the proceeds received by other settling claimants. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

### **Permanent Total Disability and Unrelated Death**

The Board affirmed the administrative law judge's finding that the U.S. Department of Labor had jurisdiction to adjudicate this claim. Although decedent's death occurred after the effective date of the 1979 D.C. Workers' Compensation Act, claimant's cause of action for death benefits was preserved under the General Savings Statute since employer became liable for death benefits in 1975 when decedent became permanently totally disabled by his work-related injury. Also, it was irrelevant under Section 9 as amended in 1972 that decedent's death was unrelated to his work disability since he was permanently totally disabled at the time of his death. *Lynch v. Washington Metro. Area Transit Auth.*, 22 BRBS 351 (1989).

The Board held that the 1928 D.C. Act applied in the instant case given the fact that claimant had no other remedy available to her, *citing Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990). In light of *Gardner*, the Board stated that its decision in *Lynch*, 22 BRBS 351, a case with similar facts, could not be the basis for its decision in this case. The Board stated that: a) since decedent's death was unrelated to the work injury there was no remedy for claimant under the new 1982 D.C. Act; b) since at the time of decedent's death he was permanently totally disabled and had no employment contacts with D.C. after 1982, there is no subject matter jurisdiction under the new D.C. Act; and c) since the injury that caused decedent's death occurred in Washington, D.C. and his death was unrelated to the injury, it would not be covered under any other state workers' compensation act. In light of the above factors, therefore, and because claimant had a remedy under Section 9 of the 1972 Longshore Act, the Board affirmed the deputy commissioner's award under the 1928 Act. Finally, the Board noted that this remedy is available to claimant only because the 1984 Amendments, which eliminated recovery for deaths unrelated to the work injury do not apply to D.C. Act cases. *Holden v. Shea, S & M Ball Co.*, 23 BRBS 416 (1990), *aff'd sub nom. Shea, S & M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991).

The D.C. Circuit affirmed the Board's decision that a widow of an employee who was injured and permanently totally disabled while the 1928 Act was in effect but who died of causes unrelated to that work-related injury after the 1979 D.C. Act went into effect was entitled to death benefits under the 1928 Act. *Shea, S & M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991).

The Board held that Section 9 as amended in 1984 was not applicable where the employee's death occurred prior to September 28, 1984, and affirmed an award of benefits payable to the Special Fund where a permanently totally disabled employee died

of unrelated causes and left no statutory survivors. *Swasey v. Willamette Iron & Steel Co.*, 20 BRBS 52 (1987).

Under the pre-1984 Amendment Act, the employee's survivor was entitled to death benefits if the employee's death was due to a work-related injury or the employee was permanently totally disabled due to work-related injury prior to death. Since death was due to a non work-related heart attack, and the Board reversed the administrative law judge's finding that the employee's condition was permanent at the time of his death, it also reversed the award of death benefits. *Dixon v. John J. McMullen & Assocs., Inc.*, 19 BRBS 243 (1986).

The Board affirmed the administrative law judge's finding that at the time of his death, the employee's work-related leg disability was permanent and total based upon Dr. Bhupathi's opinion and employer's failure to introduce evidence of suitable alternate employment. The Board therefore affirmed the award of death benefits. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989).

The Board reversed an administrative law judge's finding that the employee's back disability was temporary at the time of his death and remanded for a determination as to the extent of the employee's permanent disability. The Board rejected the administrative law judge's conclusion that it was not possible to determine the extent of a deceased employee's disability following his death or for employer to establish the existence of suitable alternate employment subsequent to his death. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988).

The Board affirmed the administrative law judge's finding that claimant was not entitled to death benefits under Section 9, as amended in 1972, where the employee died from causes unrelated to his work injury and claimant failed to satisfy her burden of proving that decedent's work-related injury resulted in permanent total disability at the time of his death. Decedent settled his claim based on permanent partial disability prior to his death and none of the medical reports establish that decedent could not perform his usual longshore employment due to his work-related injury at the time of his death. *Abercrombia v. Chaparral Stevedores*, 22 BRBS 18 (1988), *aff'd on recon.*, 22 BRBS 18.4 (1989).

## Offsets

The Board held that the administrative law judge erred in awarding employer a credit under Section 3(e) for amounts specifically awarded under Connecticut law for decedent's lifetime claim for disability benefits against Section 9 benefits awarded to claimant, decedent's widow. *Pigott v. General Dynamics Corp.*, 23 BRBS 30 (1989); *Accord Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

In third-party cases involving a credit for the recovery against compensation due under Section 33(f), employer is only entitled to offset the widow's third-party recovery against her entitlement to death benefits, and it bears the burden of proof on this issue. *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991). The decision in *Force* has been followed by the Fourth and Fifth Circuits and the Board. *See Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78(CRT) (5th Cir. 1994); *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992), and discussion in Section 33.

Where claimant-widow received increased compensation payments on behalf of her son for the period her son attended a non-accredited high school after he reached the age of eighteen, the Board ruled that any overpayments employer made to claimant on behalf of her son may be credited against its future compensation liability to claimant, pursuant to Section 14(j). Contrary to claimant's contention, the Board held that Section 9(b) provides for the payment of one death benefit where a decedent is survived by a spouse, including additional compensation for surviving children, and thus, this case does not contain two separate death claims and employer is entitled to a credit for its advance payment of compensation under the Act. *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

The Second Circuit reversed the Board's holding that the entire net proceeds of an unapportioned state workers' compensation settlement covering both disability and death benefits may be credited against an award of death benefits under the Longshore Act. The basis for the Board's holding was that both the state and Longshore Act cases were related to the same injury--decedent's asbestosis that resulted in disability and death; the Board stated that the state settlement had resolved all claims for disability and future claims for death and that decedent had previously claimed and been awarded disability benefits and that his widow was currently claiming death benefits under the Longshore Act. The court rejected the Board's reasoning, and interpreted Section 3(e) to limit the allowable credit to amounts paid for the same injury, death or disability *currently* being claimed under the Longshore Act. The court further held that, consistent with Section 7(c) of the APA, the party claiming a Section 3(e) credit bears the burden of proof on allocation of the state settlement. The case was remanded for a determination of the amounts paid to settle the state disability claim and the future death claim, with employer

bearing the burden of proof on the allocation of the state settlement. *Barszcz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2<sup>d</sup> Cir. 2007).

In this case, decedent left three dependent children, each of whom was initially entitled to benefits pursuant to the formula discussed in Section 9(c) of the Act. Two of the children ultimately settled their claims prompting the third child, claimant, to argue that he is entitled to an increased share of the death benefit based on the fact that the other two children had settled their respective claims. The Board, reiterating that there is to be one death benefit paid pursuant to Section 9 of the Act, held that employer is not required to increase the payment of the death benefit to another eligible claimant not involved in the settlements and who remains entitled to a share of the death benefit. Moreover, the Board stated that the non-settling claimant's entitlement to benefits cannot be offset by the proceeds received by other settling claimants. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

In a case arising under the DBA, the Board affirmed the administrative law judge's finding that employer is liable to claimant Lily, decedent's putative wife whom he "married" in California in 1996, and with whom he was living and had two minor children, and not to his "legal" wife Shahira whom he married years earlier in Jordan, despite the alleged reaffirmation of his marriage to her in 2005. As Shahira does not satisfy any of the elements of being a widow under Section 2(16) of the Act and is not entitled to death benefits, employer is not entitled to a credit for benefits it voluntarily paid to Shahira against its liability to Lily and her minor children. *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).

## Funeral Expenses

Section 9(a) provides for the payment of reasonable funeral expenses not exceeding \$3,000. 33 U.S.C. §909(a). Prior to the 1984 Amendments, this amount was \$1,000. This subsection contemplates payment to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to \$3,000.

The definition of the term “compensation” in Section 2(12) specifically includes funeral benefits. Nonetheless, the Board held that payment of funeral expenses was not considered payment of “compensation” for purposes of whether a claimant was a “person entitled to compensation” under the Board’s pre-1984 construction of Section 33(g). *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212, 223 (1982), *aff’d mem.*, 729 F.2d 777 (5<sup>th</sup> Cir. 1984). The holding in *Kahny* was overruled following the 1984 Amendments to Section 33(g). *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting). Thus, where compensation is barred by Section 33(g), funeral benefits may also be forfeited.

## Digests

The Board held that the administrative law judge erred in assessing funeral expenses against the Special Fund pursuant to Section 8(f). Section 8(f) is only intended to limit employer's liability for periodic payments of compensation and funeral expenses are not included within the class of compensation for which the Special Fund could be liable under Section 8(f). The Board therefore held that employer was liable for these expenses. *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988); *see also Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

Interest is due on untimely paid funeral expenses, as funeral expenses are included in the term "compensation." 33 U.S.C. §902(12). *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

## Survivors

Section 9(b) provides a formula for benefits for surviving spouses and children of deceased employees. Initially, the subsection states that if there is a widow or widower and no children of the deceased, the widow or widower is entitled to 50 percent of the decedent's average weekly wage, payable "during widowhood, or dependent widowerhood."

A literal reading of this subsection thus would require a widower, unlike a widow, to show dependency in order to receive death benefits. However, the Board has suggested that such unequal treatment is unconstitutional as a violation of the equal protection clause, and that the proper remedy would be to delete the word "dependent" from the section altogether. *Andersen v. American President Lines, Inc.*, 11 BRBS 757, 766, n.7 (1980). In *Andersen*, the Board dismissed employer's challenge to the constitutionality of such unequal treatment for want of proper standing. *Accord Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

Upon remarriage, widows/widowers receive a lump sum payment equal to two years of benefits. Following a widow/widower's death or remarriage, children of decedent share in equal parts  $66 \frac{2}{3}$  percent of decedent's average wage, unless only one child remains, in which case he/she receives 50 percent of such wages. Any increase to the children as a result of the widow/widower's remarriage accrues immediately upon the remarriage. *American Mutual Liability Ins. Co. v. Smith*, 766 F.2d 1513, 17 BRBS 139(CRT) (11<sup>th</sup> Cir. 1985), *aff'g Da'Ville v. Movable Offshore, Ltd.*, 16 BRBS 215 (1984).

The Board has also held that Section 9(b) must be read in conjunction with Section 9(e) of the Act which provides minimum benefits. *See infra*. *See also Dunn v. Equitable Equipment Co.*, 8 BRBS 18 (1978); *Lombardo v. Moore-McCormack Lines, Inc.*, 6 BRBS 361 (1977); *Gray v. Ferrary Marine Repairs*, 5 BRBS 532 (1977).

Section 9(c) provides a benefit formula where there are surviving children but no surviving spouse identical to that provided in Section 9(b) where the spouse dies or remarries.

Section 9(d) provides that if there is no surviving spouse or child or if the amount payable to the surviving spouse or children totals less than  $66 \frac{2}{3}$  percent of decedent's average weekly wage, then benefits may be paid to other dependents. Parents, grandparents, grandchildren, brothers and sisters of decedent may be considered "other dependents" if they establish that at the time of decedent's injury, they were dependent at least in part upon the decedent for the maintenance of their accustomed standard of living. *Fino v. Bethlehem Steel Corp.*, 5 BRBS 223 (1976). *See Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22, 27 (1983). In addition to these specific relatives, the Act states that "any other persons who satisfy" the definition of the term 'dependent' under the Internal

Revenue Code definition, 26 U.S.C. §152, may receive benefits. *Fino*, 5 BRBS 223. Grandchildren, brothers, sisters, and such “other persons” receive 20 percent during dependency, and parents and grandparents are entitled to 25 percent.

Section 9(f) provides that all questions of dependency are determined as of the “time of injury.” Frequently, the date of “injury” is also the date of death. However, in a case where the date of injury and death were not the same, the Board held that the definition of “injury” in Section 2(2) of the Act should be applied to the Section 9(f) requirement. *Henderson v. Kiewit Shea*, 39 BRBS 119 (2006). The Board reasoned in *Henderson* that Section 2(2) defines “injury” as “accidental injury or death arising out of and in the course of employment,” and therefore held that an individual must establish his dependency on the decedent at the time of the work-related death.

The Act does not require that the amount of benefits awarded to a dependent be comparable to the amount which decedent actually contributed to the dependent. *Dunn v. Equitable Equipment Co.*, 8 BRBS 18 (1978). The Fifth Circuit has defined dependency under the Act by looking to its common meaning, *e.g.*, not self-sustaining, relying on for support, helping to maintain the dependent in his customary standard of living. *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397, 399 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Texas Employers Ins. Ass’n v. Shea*, 410 F.2d 56 (5th Cir. 1969); *Standard Dredging Corp. v. Henderson*, 150 F.2d 78, 80 (5th Cir. 1945). The Board has adopted this approach and has held that the term dependent does not require an examination of state law. *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120 (2002); *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985). Partial dependency is sufficient. *Texas Employers Ins. Ass’n v. Sheppard*, 62 F.2d 122 (5th Cir. 1932). A claimant may have been dependent on the decedent even if he also was dependent upon others. *Ingalls Shipbuilding Corp. v. Neuman*, 322 F.Supp. 1229 (S.D. Miss. 1970), *aff’d*, 448 F.2d 773 (5th Cir. 1971). The administrative law judge must make the determination as to dependency based on all the circumstances of a particular case. *Duck*, 36 BRBS at 126.

The terms “child,” “widow,” “widower,” “parent” and “student” are defined in Sections 2(14)-2(16) and 2(18). These sections specify survivors who must establish dependency, consistent with Section 9. However, a married child or a child, grandchild, brother or sister over 18 who is not a student must be “wholly dependent” upon the employee. 33 U.S.C. §902(14).

The Section 20(a) presumption is not available to aid a claimant in establishing his/her status as a beneficiary. *Meister v. Ranch Restaurant*, 8 BRBS 185 (1978), *aff’d mem.*, 600 F.2d 280 (D.C. Cir. 1979).

Where there are no survivors or dependents, Section 44(c)(1) requires that \$5,000 in death benefits be paid into the Special Fund. *Andrews v. Alabama Dry Dock & Shipbuilding*, 17 BRBS 209 (1985); *Surgnier v. Army & Air Force Service*, 5 BRBS 669

(1977). An analogous provision is contained in Section 8(d) for payment to the Special Fund where an employee entitled to unpaid scheduled permanent partial disability benefits dies without survivors. *See Wilson*, 16 BRBS 22.

### Digests

The Board held that employer lacked standing to challenge the constitutionality of Section 9(b), since employer does not have an identity of interest with the person whose rights would be violated (an unidentified widower). *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

The Board held that Section 2(11), stating that "death" for purposes of "a right to compensation means only death resulting from an injury," could not be construed as limiting compensation for death to only a situation where the death was work-related, given that Section 9, as amended in 1972, which was applicable in this case, provided that an employee's death was also compensable where he died from causes unrelated to his work injury but had been permanently and totally disabled by the work injury as of the time of his death. The Board accordingly held that the deputy commissioner did not err in imposing a Section 44(c)(1) assessment on employer despite the fact that claimant's death was not work-related, since both prerequisites to Section 44(c)(1) applicability -- a compensable death and the absence of any survivor eligible to receive death benefits-- have been met in this case. *Swasey v. Willamette Iron & Steel Co.*, 20 BRBS 52 (1987).

The Board affirmed the administrative law judge's finding that claimant, who was 18 years old and not a student, was not a "child" within the meaning of Section 2(14), which requires that such adult children be "wholly dependent" on the employee and incapable of self-support due to physical or mental disability. Claimant here was not "wholly dependent" on the employee at the time of the injury pursuant to Section 9(f) because part of her support was derived from public welfare funds. *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

The administrative law judge rationally found that decedent's acknowledged illegitimate child was dependent upon decedent based on evidence establishing that decedent made regular payments to the child for her support and gave her gifts. The Board noted that "dependency" means not self-sustaining, relying on for support, or relying on for contributions to meet the reasonably necessary expenses of living. *Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988).

Where decedent's son, age 34, had been afflicted with polio, lived at home, and was incapable of self-support, and where decedent had paid for almost all of his son's living expenses, the Board held that the administrative law judge properly found that the son was wholly dependent upon decedent and incapable of self-support, and therefore was a "child" within the meaning of Section 2(14) entitled to death benefits under Section 9(b).

In so holding, the Board noted its agreement with the administrative law judge's finding that the son's receipt of Social Security benefits in the amount of \$97.33 a month was an inconsequential amount of independent income, insufficient to preclude him from being "wholly" dependent on decedent. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

As neither decedent's mother nor sister resided with, or received financial support from him, they were not entitled to recovery under the Act as dependents. *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995).

The Board reversed the administrative law judge's finding that decedent's adult disabled daughter was not a "child" within the meaning of Section 2(14). The administrative law judge concluded that the daughter was not "wholly dependent" on decedent at the time of his injury pursuant to Section 9(f) because the funds expended by decedent for his daughter's support were repaid after his death. The Board held that the administrative law judge's characterization of the support as a loan was not supported by substantial evidence and that, moreover, if, at the time of decedent's injury, the daughter was wholly dependent on the monies received from decedent to meet the necessities of life, this "wholly dependent" status would be unaffected by any promise to repay the funds. The Board further reversed the administrative law judge's alternate finding that the daughter would have lost her status as a "child" under the Act at the time, subsequent to decedent's death, that she received money from the sale of her house and Social Security disability benefits. The Board held that once "wholly dependent" status is established, as of the time of decedent's injury, a wholly dependent individual may lose her status as a "child" only through a change in her capacity for self-support. *Lucero v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 261 (1990), *aff'd mem. sub nom. Kaiser Aluminum & Chemical Corp. v. Director, OWCP*, 951 F.2d 360 (9th Cir. 1991).

The Board reversed the administrative law judge, holding that pursuant to Section 2(16), an employee's surviving widow (or widower) is entitled to death benefits pursuant to Section 9 if she (or he) was married to decedent at the time of his death. Under those circumstances, contrary to the administrative law judge's finding, claimant is not required to show that she (or he) was dependent upon decedent at any time, rendering Section 9(f) inapplicable. The Board noted that Section 2(16) is to be interpreted as providing alternative bases for status as a widow/widower. *Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991).

The Board affirmed the administrative law judge's finding that claimant was ineligible to recover death benefits as a widow under Section 9(b). The Board first held that the administrative law judge properly applied Louisiana state law to determine claimant's marital status, as opposed to federal common law. Next, as it was undisputed that claimant and decedent lived together but did not formally participate in a marriage

ceremony, under Louisiana law, claimant failed to establish that she was decedent's wife at the time of his death. The Board, however, vacated the administrative law judge's finding that claimant could not recover benefits as a dependent under Section 9(d) of the Act, and remanded the case for the administrative law judge to consider whether claimant satisfied the requirements for dependency under Section 152 of the Tax Code, as incorporated into the Act by virtue of Section 9(d), keeping in mind that Section 9(f) requires dependency issues to be determined as of the time of death. *Angelle v. Steen Production Service, Inc.*, 34 BRBS 157 (2000).

In a case arising in Louisiana, where there is no civil or criminal prohibition against adultery between adults and cohabitation is not prohibited, the Board affirmed the administrative law judge's finding that claimant, decedent's live-in girlfriend, was not precluded from receiving death benefits in addition to those received by the widow, as an "other dependent" pursuant to Section 9(d). Moreover, the Board affirmed the administrative law judge's finding that the claimant received over one-half of her support from the decedent, was a member of his household, and had her principal place of abode in decedent's home. Thus, the Board affirmed the administrative law judge's finding that claimant was entitled to death benefits as decedent's dependent pursuant to Section 9(d). *Reed v. Holcim, (US) Inc.*, 40 BRBS 34 (2006), *vacated and remanded mem.*, 291 F. App'x 647 (5<sup>th</sup> Cir. 2008).

In this case, the employee's death due to his 1981 work injury occurred in 2001. The employee's grandson, born in 1985, claimed death benefits as a dependent. The administrative law judge found the grandson was not dependent at the time of injury in 1981 as required by Section 9(f) of the Act. The Board reversed, agreeing with the Director that the definition of "injury" in Section 2(2) of the Act should be applied to Section 9(f)'s requirement that "All questions of dependency shall be determined as of the time of the injury." Section 2(2) defines "injury" as "accidental injury or death arising out of and in the course of employment..." The Board therefore held that an individual must establish his dependency on the decedent at the time of the work-related death. This interpretation avoids disparate treatment that could result depending on whether the injury and death were concurrent or not. *Henderson v. Kiewit Shea*, 39 BRBS 119 (2006).

The Board affirmed the finding that a grandchild of decedent was not within the definition of "child," as the finding that decedent did not stand *in loco parentis* to him was support by the evidence. Thus, claimant had to show that he was dependent on the decedent. The Board vacated the denial of death benefits and remanded the case, as the administrative law judge did not apply case precedent that partial dependence will suffice for an award of death benefits, nor did he discuss all evidence regarding the support decedent provided to his grandson at the time of the former's death. That claimant did not reside with his grandfather does not preclude his continued partial dependence on him. Although the administrative law judge accurately summarized the evidence as

largely non-specific as to time frames, the record contains some specific evidence that the administrative law judge did not discuss. In addition, the administrative law judge should discuss the evidence claimant offered on modification. The Board affirmed the finding that claimant was not “an other dependent” upon his grandfather under 26 U.S.C. §152, as claimant was not a “qualifying child” who had decedent’s residence as his principal place of abode for more than one-half of the taxable year, nor was claimant a “qualifying child or relative” as he did not establish that decedent furnished “over one-half” of claimant’s support. *L.H [Henderson] v. Kiewet Shea*, 42 BRBS 25 (2008).

In this case where the claimant-widow and her partner lived, had children, and owned property together in Oregon and Mexico, the Board affirmed the administrative law judge’s finding that claimant had not “remarried” within the meaning of Section 9(b), and thus retained entitlement to her widow’s benefits. The Board addressed the laws of Oregon and Mexico regarding formal marriage, common-law marriage, and concubinage, and concluded that the administrative law judge properly determined that claimant’s relationship with her partner is not “marriage.” Accordingly, the administrative law judge properly concluded that employer did not establish a change in condition and denied its motion for modification. *A.S. [Schweiger] v. Advanced American Diving*, 43 BRBS 49 (2009) (McGranery, J., dissenting).

The Board held that the administrative law judge erred in applying Section 152 of the Internal Revenue Code to determine whether the decedent’s parents were dependent on him at the time of his death. Rather, the test for dependency for parents turns upon whether the claimants were dependent on the decedent at least in part at the time of the injury for maintenance of their accustomed standard of living. Partial dependency is sufficient and it is appropriate to consider gifts in determining dependence. The administrative law judge found that decedent sent his parents cash and checks every month, helped pay for their food, and helped them repair and maintain their home. In addition, the rent paid by tenants for decedent’s property in Pennsylvania was sent directly to his parents. Decedent also purchased items such as dentures for both of his parents, a computer, appliances for their home, a new roof, and their cell phones. Claimants were listed as dependents on decedent’s tax returns in 2003, 2004 and 2005. The Board held that evidence establishes that the claimants were dependent upon decedent and, thus, reversed the administrative law judge’s finding that the decedent’s parents were not entitled to death benefits pursuant to Section 9(d). *Urso v. MVM, Inc.*, 44 BRBS 53 (2010).

The Board affirmed the administrative law judge’s finding that claimant, who was living with decedent at the time of his death, is not entitled to recover death benefits as a “widow” under Section 9(b), since it is undisputed that claimant and decedent did not participate in a marriage ceremony, which is a requisite for a valid marriage contract in Louisiana. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

The Board affirmed the administrative law judge's finding that claimant, who was decedent's live-in fiancée at the time of his death, is not entitled to death benefits pursuant to Section 9(d) of the Act. The Board affirmed the administrative law judge's finding that claimant did not satisfy the definition of the term "dependent" in Section 152(a) of the IRS Code. The finding that she was not dependent upon decedent for over half of her support in the year preceding his death was supported by substantial evidence. In particular, the administrative law judge relied on evidence establishing that claimant was a college graduate, that she was working at the time of decedent's death, that she maintained her own checking account and credit cards, and that she filed her own tax returns, and thus, was not claimed as a dependent by decedent for the three years prior to his death. The administrative law judge thus found that Ms. Welch's lone statement that she relied on decedent for support was insufficient to establish that she received over half of her support from decedent at the time of his death. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

In this case, decedent left three dependent children, each of whom was initially entitled to benefits pursuant to the formula discussed in Section 9(c) of the Act. Two of the children ultimately settled their claims prompting the third child, claimant, to argue that he is entitled to an increased share of the death benefit based on the fact that the other two children had settled their respective claims. The Board, reiterating that there is to be one death benefit paid pursuant to Section 9 of the Act, held that employer is not required to increase the payment of the death benefit to another eligible claimant not involved in the settlements and who remains entitled to a share of the death benefit. Moreover, the Board stated that the non-settling claimant's entitlement to benefits cannot be offset by the proceeds received by other settling claimants. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

As claimant offered no evidence that he remained a full-time student, his entitlement to death benefits ceased at age 18, and employer is entitled to a Section 14(j) credit for amounts it paid in excess of that due claimant. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

Although employer conceded liability to two "widows" and two children of the decedent under Section 9(b), the Board held that employer had standing to challenge the administrative law judge's decision in this case, as his findings regarding employer's entitlement to a credit for benefits paid and ability to apply for commutation of the benefits was adverse to employer. *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).

In a case arising under the DBA, the Board affirmed the administrative law judge's finding that employer is liable to claimant Lily, decedent's putative wife whom he "married" in California in 1996 and with whom he was living at the time of his death, and not to his arguably "legal" wife Shahira whom he married years earlier in Jordan, despite the alleged reaffirmation of his marriage to her in 2005. The Board held, contrary to

employer's assertions, that a "widow" under Section 2(16) of the Act requires more than just being a lawful spouse of the deceased. In addition to having a legal marriage, to be a "widow" the claimant also must establish that she was either living with or dependent upon the decedent or that she was living apart due to desertion or for another justifiable reason by showing a conjugal nexus or that she was holding herself out as the deserted wife. Because there was no evidence establishing that Shahira satisfied any of the elements of Section 2(16), the Board held that the administrative law judge properly denied her death benefits under Section 9(b). *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).

The Board affirmed the administrative law judge's finding that claimant was ineligible to recover death benefits as a "child" under Section 9(b). Substantial evidence supported the administrative law judge's finding that claimant was not wholly dependent upon the decedent. Claimant received monthly Social Security disability benefits of at least three times greater than the monthly sums he received from decedent. The Board rejected claimant's contention that "public funds" should not be taken into account in addressing the "wholly dependent" clause, as it was unsupported by any citation and is contrary to Board precedent. *Smith v. Mt. Mitchell, LLC*, 48 BRBS 1 (2014).

In this case, where claimant received monthly Social Security benefits in an amount at least three times greater than the monthly sum he received from the decedent, the Board affirmed the administrative law judge's finding that claimant did not establish that he was a "dependent" as defined by Section 152(a) of the Tax Code, which requires that a putative dependent must not have provided over one-half of his own support. The Board thus affirmed the administrative law judge's determination that claimant is not entitled to death benefits as an "other person" who was "dependent" on the decedent within the meaning of Section 9(d). An IRS publication states that Social Security benefits used for one's own support are "self-support." *Smith v. Mt. Mitchell, LLC*, 48 BRBS 1 (2014).

## Maximum/Minimum Benefit

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing death benefits, the average weekly wage of decedent could not be greater than \$105 nor less than \$27, but total weekly compensation could not exceed decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing death benefits, decedent's average weekly wage shall not be less than the national average weekly wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. *See Dennis v. Detroit Harbor Terminals*, 18 BRBS 250 (1986); *Dunn v. Equitable Equipment Co.*, 8 BRBS 18 (1978); *Lombardo v. Moore-McCormack Lines, Inc.*, 6 BRBS 361 (1977); *Gray v. Ferrary Marine Repairs*, 5 BRBS 532 (1977).

In *Director, OWCP v. Rasmussen*, 440 U.S. 29, 9 BRBS 954 (1979), *aff'g* 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), *aff'g Rasmussen v. GEO Control, Inc.*, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to death benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of \$532 per week, two-thirds of decedent's \$798 average weekly wage.

Section 9(e) currently provides that decedent's average weekly wage shall not be less than the national average weekly wage under Section 6, but benefits may not exceed the lesser of the average weekly wage of decedent or the benefit under Section 6(b)(1). 33 U.S.C. §909(e)(1). In the case of an individual who suffers death due to an occupational disease where the injury occurs after retirement, the maximum is one fifty-second of the employee's earnings in the year preceding retirement. 33 U.S.C. §909(e)(2). *See also* 33 U.S.C. §910(i), (d)(2).

## Digests

The Board vacated the administrative law judge's decision denying death benefits where the decedent was a voluntary retiree. Under the 1984 Amendments, the survivor of a voluntary retiree whose occupational disease manifested itself under Section 10(i) more than one year after retirement, and who died from the disease, is entitled to Section 9 benefits based on the national average weekly wage calculated pursuant to Section 10(d)(2). The Board thus remanded the case for computation of this award. *Arganbright v. Maranship Corp.*, 18 BRBS 281 (1986).

The Board held that the 1984 Amendments to Section 10 applied where the widow's claim was pending on the effective date of the amendments. Since death occurred in 1965, the 1984 Amendments to Section 9 did not apply. However, the Board held that the 1972 Amendments to Section 9 were applicable and modified the administrative law judge's award of benefits, holding that claimant was entitled to 50 percent of the national

average weekly wage applicable on March 1, 1982, when claimant became aware of the relationship between her husband's employment and his death. *Taddeo v. Bethlehem Steel Corp.*, 22 BRBS 52 (1989).

The Board has construed Section 10(i) as holding that for claims involving voluntary retirees falling within Section 8(c)(23), the time of injury is determined by the date the *employee* became aware of the work-related *disability*; however, in a Section 9 claim for death benefits, where the decedent was a voluntary retiree, the time of injury is determined by the date the *claimant/survivor* is aware of the work-related death. Accordingly, the time of injury in the latter instance cannot be prior to the employee's date of death and therefore the average weekly wage at the time of death must be used. In claims from survivors of *involuntary retirees*, death benefits are based on the average weekly wage of the *employee* at the time of injury, as Section 10(d)(2)(B) would not apply in such cases. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

The Board rejected claimant's contention that death benefits should be based on the compensation her husband was receiving for permanent total disability at the time of death or on the wages of a comparable employee. Because decedent died in 1986, calculation of claimant's survivor's benefits was governed by Section 9(e) as amended in 1984. As decedent's average weekly wage at the time of injury was less than the applicable national average weekly at the time of his death, the deputy commissioner correctly employed the national average weekly wage figure in computing claimant's weekly benefits. Moreover, since claimant was decedent's sole survivor, pursuant to Section 9(b), she was entitled to weekly benefits of 50% of the applicable national average weekly wage or \$148.41. The Board held that the deputy commissioner correctly determined that claimant was entitled to receive \$148.41 in weekly benefits since this amount was less than both decedent's average weekly wage at the time of injury and the maximum benefit level under Section 6(b)(1). *Buck v. General Dynamics Corp. Electric Boat Div.*, 22 BRBS 111 (1989).

The Board held that the administrative law judge properly determined that claimant, decedent's sole survivor, was entitled to weekly benefits based on 50 percent of the national average weekly wage at the time of death but because this amount, \$151.33, exceeded the statutory maximum, the Board modified the death benefit award to reflect 1/52 of decedent's average weekly wage in the 52 week period prior to retirement as mandated by Section 9(e)(2). *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

In affirming the district director's award of death benefits, the Board held that Section 9(e)(1) does not bar the application of Section 10(f) adjustments where such adjustments to death benefits would increase compensation above the employee's average weekly wage, as the maximum ceiling on death benefits is contained in Section 6(b)(1), which provides that compensation for disability or death benefits "shall not exceed an amount

equal to 200 per centum of the applicable national average weekly wage . . . .” The Board held that the “shall not exceed” phrase in Section 9(e)(1) is applicable only to the initial calculation of the base rate at which death benefits are payable, and does not act as a ceiling on the rate at which death benefits can be paid to a survivor. *Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2 (1997).

In this D.C. Act case, in which the 1984 Amendments do not apply, the Board held that Section 9(e) did not limit the maximum compensation payments to the amount of the decedent’s average weekly wage. Rather, this maximum applies to the initial computation of death benefits. Thereafter, due to application of Section 10(f) adjustments, the payments of death benefits may exceed the decedent’s average weekly wage as to hold otherwise would nullify Section 10(f) which applies to awards of death benefits. The Board thus followed *Donovan*, 31 BRBS 2, in a pre-1984 context. *Weeks v. U.S. Elevator Corp.*, 39 BRBS 25 (2005).

The Board noted that claimant’s award of Section 9(c) death benefits is subject to annual increases pursuant to Section 10(f) of the Act. Death benefits are based on the decedent’s average weekly wage at the time of death, not to exceed 200 percent of the National Average Weekly Wage, pursuant to Section 8(e). *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

## Section 9(g)

Section 9(g) contains provisions for benefits to aliens not residents of the United States or Canada. It provides that the amount is the same as that provided for residents except that dependents in a foreign country are limited to the surviving spouse or children, or if there is no surviving spouse or child, to the surviving mother or father whom the employee supports in whole or in part for one year prior to the injury. It further states that the Secretary may at his option, or upon application of the insurance carrier shall, commute all future installments of compensation.

The Board affirmed an employer's right to commutation under Section 9(g) in *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001). Initially, the Board held that Section 9(g) does not violate the Treaty of Friendship, Commerce and Navigation (FCN Treaty) between the United States and Greece. Although a similar provision of New York law was held to violate the FCN Treaty with Japan, the Board held that the treaty with Greece contains different language than the treaty with Japan; the United States is obligated to accord "national treatment" to Greek nationals only when they reside within the United States. As claimant resides in Greece, the treaty is not violated. Moreover, as treaties and statutes are accorded equal stature, the Longshore Act, which was amended after the treaty went into effect in 1954 without changes to Section 9(g), is paramount to the FCN Treaty.

In *Logara*, the Board also rejected claimant's contention that Section 9(g) is unconstitutional under the Due Process clause of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment, based on the fact that the decedent was a naturalized United States Citizen. A claim for death benefits is distinct from the right to disability benefits; claimant's right to death benefits did not arise until the decedent's death, and thus she is not entitled to rely on decedent's status for constitutional protection. Aliens outside the United States are not entitled to the protection of the United States Constitution. The Board further held that the doctrine of laches did not apply to employer's request for commutation, as this doctrine generally applies to the filing of an action, which this is not, and moreover, neither Section 9(g) nor its implementing regulation, 20 C.F.R. §702.142, contains a provision fixing the time in which commutation may be requested.

The Board, however, held that the administrative law judge erred in his application of the district director's method of computing the amount of benefits to which claimant was entitled in light of Section 10(f), the application of which is mandatory to an award of death benefits. The discount rate applied by the district director accounts for the present value of the lump sum payable, but it can be applied only after Section 10(f) adjustments are taken into account in determining the lump sum. The rejection of Section 10(f) based on the difficulty in ascertaining the value of future increases in the national average weekly wage is not a valid reason for not applying Section 10(f). It is not reasonable to

assume that no increases will occur, although Section 9(g) provides the district director with discretion as to the value of the future Section 10(f) adjustments. Thus, the case was remanded so that Section 10(f) adjustments could be included in the calculation of claimant's commuted death benefits.

The Board rejected employer's argument that claimant's status as an illegal alien precluded him from receiving benefits under the Act, holding that the Act does not differentiate between the disability compensation paid to illegal aliens and that paid to legal residents and/or citizens of the United States. 33 U.S.C. §§902(3), 909(g). Specifically, the Board observed that absent a statutory exclusion, which Congress provided for specified types of employees, claimant must be treated as other injured workers for purposes of the Act. Thus, the Board also rejected employer's assertion that claimant's status as an illegal alien precluded him from having any legal wage-earning capacity, since it was undisputed that claimant was working for employer and earning wages when he was injured in that employment. The Board noted that if claimant were able to work, employer's vocational evidence would be considered without regard to claimant's illegal status. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5<sup>th</sup> Cir. 2010).

The Fifth Circuit affirmed the award of temporary total disability benefits to an illegal alien, rejecting employer's contention that the claimant suffered no loss in *legal* wage-earning capacity as he was an illegal undocumented worker and did not have a legal wage-earning capacity prior to his injury. The Act applies to "*any person* engaged in maritime employment" and specifically states that "aliens not residents" are entitled to the same compensation as residents. 33 U.S.C. §§902(3), 909(g). The court's decision in *Hernandez*, 848 F.2d 498 (Section 5(b) tort case) supports this result. The Fifth Circuit held that awarding workers' compensation benefits under the Act is a non-discretionary, statutory remedy and that the remedy provided by the Act is a substitute for the negligence claim that an employee could otherwise bring against his employer in tort. This result does not conflict with the Immigration Reform and Control Act of 1986. *Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5<sup>th</sup> Cir. 2010), *aff'g J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008).

The Board held that authority for approving an application for commutation of benefits under Section 9(g) lies with the district director and not the administrative law judge. Specifically, Section 9(g) states that the Secretary may commute future payments to non-resident aliens. Since the enactment of the 1972 Amendments and Section 19(d), references to the Secretary refer to the deputy commissioners (district directors) to whom the Secretary's discretionary authority has been delegated. Therefore, the administrative law judge did not have the authority to address the issue. The Board held that the administrative law judge erred in relying on 29 C.F.R. §18.29 as authority for addressing commutation, as this refers to general powers for conducting a hearing and Section 9(g)

is a rule of special application. Thus, in this case arising under the DBA involving an alien non-resident widow, the administrative law judge erred in addressing the issue of commutation because he did not have the authority to address it; moreover, there also was no application for commutation pending. With the exception of the administrative law judge's proper statement that benefits to decedent's children cannot be commuted because they are citizens of the United States, the Board vacated the administrative law judge's commutation findings and held that employer may file an application with the district director should it wish to apply to commute the widow's benefits. *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).