BRB No. 05-0449

LARRY D. HENDERSON (Grandson of JAMES W. HARRISON) Claimant-Petitioner v. KIEWIT SHEA and KEMPER INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 01/31/2006 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Richard W. Galiher, Jr. (Galiher, Clarke & Galiher), Chevy Chase, Maryland, for claimant.

Kevin J. O'Connell (O'Connell, O'Connell & Sarsfield), Rockville, Maryland, for employer/carrier.

Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-DCW-0005) of Administrative Law Judge William S. Colwell rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (1982) (the Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973) (the 1928 D.C. Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, the decedent's grandson, appeals the administrative law judge's finding that he is not entitled to death benefits under the provisions of the 1972 Longshore Act. The decedent sustained a work-related "cardiac incident" on May 1, 1981. In a 1985 Decision and Order, Administrative Law Judge Groner awarded the decedent temporary total disability benefits from the date of injury until October 5, 1981, at which time an award of permanent total disability benefits commenced. Employer was awarded Section 8(f) relief, 33 U.S.C. §908(f), and the Special Fund assumed disability payments as of October 1983.

Claimant was born on September 28, 1985, and was living with his grandfather at the time of the latter's death on July 21, 2001. Claimant filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's work-related cardiac injury caused his death, and that claimant was dependent on decedent at the time of death, pursuant to Section 9(f) of the Act, 33 U.S.C. §909(f). The administrative law judge accepted briefs from claimant, employer and the Director, Office of Workers' Compensation Programs (the Director), on the issue of when a survivor's dependency must be established; an oral hearing was not held.

The administrative law judge rejected the position of claimant and the Director that the time of the 2001 death was the relevant time for determining dependency. He found, *inter alia*, that under the express language of Section 9(f) the determination of dependency must be made at the time of the 1981 work-related injury, and that as claimant had not yet been born he could not establish his dependency on the employee. The administrative law judge therefore denied the claim for death benefits and did not address the issue of whether claimant actually was dependent on the decedent.

On appeal, claimant contends the administrative law judge erred in finding that dependency must be established at the time of the work-related injury that ultimately causes the death rather than at the time of death. The Director agrees, contending that Section 2(2) of the Act, 33 U.S.C. §902(2), supports his interpretation and that his

opinion in this regard is entitled to deference. Employer responds, urging affirmance of the denial of benefits.

This case presents an issue of first impression.[1] The provisions of the 1972 Longshore Act are preserved for claims arising under the 1928 D.C. Act. *Shea, S & M Ball Corp. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991); *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (1984 Amendments do not apply to 1928 D.C. Act claims); 20 C.F.R. §701.101(b). Section 9 of the Act provides death benefits to eligible survivors "if the injury causes death."[2] Section 9(d) of the Act states,

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[1] Two Board cases have touched on this issue, but did not decide it. In *Doe v. Jarka Corp. of New England*, 16 BRBS 318 (1984), the employee sustained a permanently totally disabling back injury in 1969, and he died of unrelated causes in 1979, leaving two minor children. The administrative law judge correctly awarded them benefits, without regard to their dependency, until age 18. 33 U.S.C. §902(14). One child had become disabled in 1978, and the Board remanded the case for the administrative law judge to determine if she was "wholly dependent" upon the employee, as required by Section 2(14) for disabled children over age 18. *Doe*, 16 BRBS at 320.

On remand, the administrative law judge found that the child was not "wholly dependent" upon the employee at the time of the 1969 injury because she received welfare funds at that time. The Board affirmed the lack of dependency finding as supported by substantial evidence. However, claimant also argued that her dependency on the employee should be determined as of the date of the employee's death. The Board declined to address this issue, based on the law of the case doctrine, stating that it had previously rejected this contention in its prior decision. *Doe v. Jarka Corp. of New England*, 21 BRBS 142, 144 (1988). As the Board's prior decision did not, in fact, address this issue, the Board's decisions provide no guidance for the case at hand.

In *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem.*, 14 F.3d 58 (11th Cir. 1994) (table), the widow and son sought death benefits on the theory that the employee was permanently totally disabled due to a 1975 back injury at the time of the 1982 death due to cancer. In addressing the issue of the adult son's dependency, the Board affirmed the administrative law judge's finding that he was "wholly dependent" on the employee at the time of the 1975 back injury on substantial evidence grounds. *See* n. 2, and discussion *infra*.

[2] Section 9 of the 1972 Act also provides death benefits for eligible survivors of those decedents who were permanently totally disabled at the time of death but whose death was not related to the work injury. 33 U.S.C. §909(1982) (amended 1984); *see Shea, S & M Ball Corp. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991); *Lynch v. Washington Metropolitan Area Transit Authority*, 22 BRBS 351 (1989). Our decision herein is premised on the assumption that decedent's death was due

> If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than $66^{2/3}$ per centum of the average wages of the deceased; *then for the support of grandchildren. . . , if dependent upon the deceased at the time of the injury* . . . 20 per centum of such wages for the support of each such person during such dependency.

33 U.S.C. §909(d) (emphasis added). Thus, if Section 9(d) is applicable, a dependent grandchild is entitled to death benefits until he turns 18 or if he is 18 or older "is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) of this section." 33 U.S.C. §902(14). Section 9(f) of the Act states, "All questions of dependency shall be determined as of the time of the injury." 33 U.S.C. §909(f). It is obvious that when an employee's death is concurrent with his work injury the dependency of survivors is determined at the time of the incident, *i.e.*, the death is the injury. This case requires the interpretation of Section 9(f) in a case in which the work-related injury and work-related death are not concurrent.

In finding that the time of decedent's 1981 injury was the pertinent time for determining dependency, the administrative law judge first interpreted the phrase "time of injury" in Section 9(f) with reference to that phrase elsewhere in the statute. Decision and Order at 3. He discussed Section 2(14) of the Act, which states, " 'Child' shall include . . . a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in *loco parentis* for at least one year prior to the time of injury . . ." *Id.* (emphasis in administrative law judge's decision). We hold that the references to "time of injury" in this section are not dispositive of the interpretation of Section 9(f) case as they are equally susceptible to the interpretation claimant seeks in this case, *i.e.*, that the time of death is the relevant "time of injury." Rather, it appears that in relation to the adopted child phrase, the proper emphasis is on the "legally adopted" portion of the sentence. As for the *loco parentis* phrase, the statute contemplates a longer-standing temporal relationship with the employee than for a natural or legally adopted child. *See generally Brooks v. General Dynamics Corp.*, 32 BRBS 114 (1997).

The administrative law judge next turned to Section 12(a) of the Act, 33 U.S.C. §912(a), which requires that the employee give employer notice of his injury. The phrase "time of injury" is not literally contained in Section 12(a),[3] but the administrative law

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to his work-related cardiac injury, and thus is itself work-related. We express no opinion as to the result in a case presenting a non work-related death.

[3] Section 12(a) states:

judge reasoned that because decedent was "aware" of his injury in 1981, this must be the "time of injury" for purposes of determining dependency under Section 9(f). Decision and Order at 4-5. This analysis does not withstand scrutiny because the Act's statutes of limitations provision, 33 U.S.C. §§912, 913, start afresh in a death claim even if the injury causes death – the widow or other survivor need file a claim for death benefits only when she is aware of the relationship between the death and the employment. *See, e.g., Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight],* 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003). The earliest date a survivor can be "aware" of the work-relatedness of a death is the date of death, so it immaterial that the decedent previously was aware of a work-related injury. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *see also Bailey v. Bath Iron Works Corp*., 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991).

The administrative law judge also cited the Board's decision in *Lynch v. Washington Metropolitan Area Transit Authority*, 22 BRBS 351 (1989), for the proposition that the time of decedent's 1981 injury controls the dependency determination. The issue in *Lynch* was whether the Department of Labor had jurisdiction to adjudicate a death benefits claim where the employee's death occurred after the repeal of the 1928 D.C. Act by the District of Columbia Workers' Compensation Act of 1979, 36 D.C. Code §301 *et seq.* In *Lynch*, the decedent was found to be permanently totally disabled as of February 13, 1975 under Section 8(a) of the Act. The decedent died on February 25, 1984, due to causes unrelated to his disability. The 1928 D.C. Act was repealed as of July 26, 1982. The Board held that although the new D.C. Act became effective in 1982, the provisions of the Longshore Act as they existed in 1982 were preserved by virtue of the General Savings Statute, 1 U.S.C. §109, for the benefit of those persons whose claims originate from employment events occurring prior to the effective date of the 1982 D.C. Act. *Lynch*, 22 BRBS at 354-355. The Board noted that although a claim for death benefits is a separate cause of action which does not arise until the employee's death, the liability of employer for death benefits is fixed at the time of injury since 20 C.F.R. §701.101(b) of the regulations provides that claims for deaths based on

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> Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment, except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. . . .

employment events occurring prior to the effective date of the 1982 Act are covered under the 1928 D.C. Act and thus the Longshore Act. *Lynch*, 22 BRBS at 354. Therefore, in *Lynch*, the decedent's widow was entitled to death benefits under Section 9 of the 1972 Longshore Act, even though the death occurred in February 1984 after the effective date of the new 1982 D.C. Act, because the basis for the award of death benefits arose in 1975, when the decedent became permanently totally disabled by his work-related condition. *Id.*

The United States Court of Appeals for the District of Columbia Circuit approved this holding in *Shea, S & M Ball Corp. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991), on almost identical facts. The court stated that,

> for purposes of determining coverage under the two Acts, the relevant question is not when the cause of action arose, but when the injury giving rise to that cause of action occurred. In our view, the statutory language of both Acts and the precedent establish that a death benefits claim derives from the worker's employment-related injury.

Id., 929 F.2d at 739-740, 24 BRBS at 173(CRT). The court in *Shea*, and the administrative law judge in the instant case, also cited extensively from *Pennsylvania National Mutual Casualty Ins. Co. v. Spence*, 591 F.2d 985, 9 BRBS 714 (4th Cir.), *cert. denied*, 444 U.S. 963 (1979). In that case, the employee was injured in 1967, resulting in permanent total disability. He died in 1973 from unrelated causes. The issue concerned whether the insurer at the time of the 1967 injury or the self-insured employer at the time of the death was liable for the death benefits. The court affirmed the Board's holding that the carrier at the time of the 1967 injury was liable, stating,

> The Act does provide . . . for two separate rights and types of recovery, the beneficiaries of which are different[,] . . . both types of recovery derive their basis from the same event, i.e., the employee's injury. It is that event which gives both a right to compensation payments under § 908 and a right to death benefits under § 909. Neither right of action, whether for compensation payments or for death benefits, exists apart from the critical fact of injury; each is dependent for its basis on the injury. It is inaccurate, therefore, to state that the right to the death benefits has its origin solely in the event of death; the real source of the liability for such benefits under the Act traces directly back to the injury itself.

591 F.2d at 987, 9 BRBS at 717-718 .

These cases do not support the interpretation of Section 9(f) given to it by the administrative law judge. First, the cases do not purport to interpret specific statutory

sections, such as the ones at issue here. Rather, two of them address jurisdictional issues and one addresses a responsible carrier issue; there are no statutory provisions addressing these issues. Moreover, the cases involved non work-related deaths which make them factually distinguishable from this case.

The administrative law judge ultimately concluded that the term "injury" in Section 9(f) should be given its plain meaning. While use of the "plain meaning" of a word is a general tenet of statutory construction, a statutory definition of a term takes precedence over a word's everyday meaning. *See generally Smith v. U. S.*, 508 U.S. 223 (1993); *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996). We turn, then, to the Director's contention that the word "injury" in Section 9(f) must be given its meaning by reference to Section 2(2) of the Act.

Section 2(2) states: "The term 'injury' means accidental injury or death arising out of and in the course of employment, . . ." 33 U.S.C. §902(2) (emphasis added). Thus, the Director posits that an "injury" under the Act has its common meaning, but also means a "work-related death." We find the Director's interpretation compelling, as "[t]he most traditional tool of statutory construction is to read the text itself." *Southern California Edison Co. v. F.E.R.C.*, 195 F.3d 17 (D.C. Cir. 1999).

This definition of "injury" as encompassing a work-related death comports with the purpose of Section 9 of the Act, entitled "Compensation for Death," which is to provide benefits to eligible survivors. *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (To determine whether statutory language is "plain," Court considers "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Before death occurs, the dependence of any person on the employee is simply irrelevant to the statutory scheme, as disability benefits are not supplemented for spouses or dependents. *See* 33 U.S.C. §908(a)-(e). Indeed, there is a well-established line of cases stating that the right to seek benefits for the death of an employee is a separate and distinct right of survivors that does not arise until the death occurs. *See, e.g., Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984); *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1st Cir. 1979). Moreover, the administrative law judge's reading of the statute treats similarly situated persons differently based on whether the employee's injury and death were concurrent or not. Such incongruous results are to be avoided, *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663 (2d Cir. 1938), in view of the fact that in a non-concurrent death case individuals could be just as dependent upon the reduced wages and/or disability compensation received by the disabled employee as upon the full wages of an employee killed on the job.

Dicta in *Lowe* support the Director's interpretation of Section 9(f). In *Lowe*, the employee sustained an injury in 1927 resulting in permanent total disability. He died

from his injury seven years later, and his widow filed a claim for death benefits. The employer argued that the maximum benefit payable for both disability and death was $7,500 pursuant to Section 14(m), which provided that the "total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7,500."[4] The court held that Section 14(m) applied separately to the disability and death claims. The court stated, moreover, that "[w]hen death occurs, a new cause of action arises which requires an adjudication on all questions such as accident, notice of death, claim, causal relationship, and *dependency*," 93 F.3d at 665 (emphasis added), and "[w]here the injured employee . . . dies as a result of the injury, the death benefit provisions arise and different compensation is provided." *Id.*

In sum, we hold that the definition of "injury" contained in Section 2(2) applies to the word "injury" in Section 9(f), such that an individual must establish his or her dependency at the time of the "work-related death." Therefore, we reverse the administrative law judge's finding to the contrary. The statute itself provides a clear definition for the term "injury" and there is no reason to inquire further given the purpose of the Act's death benefits provisions. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 26 BRBS 49, 51(CRT) (1992); *see generally Adams v.* Bowen, 872 F.2d 926 (9th Cir. 1989), *cert. denied*, 493 U.S. 851 (1989). That the statute uses the term "death" alone in some sections of the Act, *see* 33 U.S.C. §902(16), or the phrase "injury or death" in various sections, *see, e.g.*, 33 U.S.C. §§912, 913, does not require us to hold that Section 2(2) is inapplicable to Section 9(f). Section 2 of the Act is prefaced with the phrase, "When used in this chapter –," and thus there is no basis for concluding that the Section 2(2) definition of "injury" is inapplicable to Section 9(f).[5] The administrative law judge's denial of death benefits is vacated and we remand the case for findings regarding any other contested issues.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for the resolution of any remaining issues.

SO ORDERED.

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[4] Section 14(m) subsequently was amended several times to increase the compensation payable. It was repealed in 1972.

[5] Employer suggests that this interpretation is mistaken given that "injury" and "work-related death" are not interchangeable terms in every portion of the statute, citing Section 7, 33 U.S.C. §907. The definition of the term "injury" is written in the disjunctive and the appropriate definition must be selected given the factual situation of the case and the other statutory provisions at issue.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge