

ETHEL CAIN)	
(Widow of ROBERT E. CAIN))	
)	
Claimant)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED: _____)
)	
and)	
)	
COMMERCIAL UNION INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Ann Thorne Bagala (Norman, Hanson & DeTroy), Portland, Maine, for employer/carrier.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (83-LHC-1853) of Administrative Law Judge David W. DiNardi 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.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by

substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The case is before the Board for a second time. The decedent was employed as a pipe coverer at Bath Iron Works when on March 28, 1970 he was found to have asbestos-related lung disease. This disease was found to be related to decedent's employment at Bath Iron Works. Employer voluntarily paid temporary total disability benefits for certain periods, and permanent total disability benefits from March 4, 1971, until decedent's death from asbestosis on February 15, 1975. Following decedent's death, claimant began to receive death benefits from employer pursuant to Section 9, 33 U.S.C. §909, and also received adjustment to these benefits pursuant to Section 10(h) of the Act, 33 U.S.C. §910(h), as required by the Act as amended in 1972. The Section 10(h) adjustments were paid by employer who was routinely reimbursed for the adjustments by the Special Fund. On August 3, 1981, claimant and employer were informed by the Office of Workers' Compensation Programs that the payment of Section 10(h) adjustments would now come directly from the Special Fund instead of from the employer. The Special Fund thereafter refused to make any payments to claimant in excess of the pre-1972 liability of employer, arguing that since decedent's death was subsequent to the effective date of the 1972 Amendments, employer was responsible for paying any adjustments to claimant's benefits. Employer disagreed with this position, and brought the issue before the administrative law judge seeking reimbursement of the Section 10(h) adjustments that it had already paid, and an order requiring future payments of these adjustments to be made by the Special Fund.

The administrative law judge considered the evidence of record and found that the Special Fund and appropriations were responsible for paying adjustments to claimant's death benefits pursuant to Section 10(h)(2) of the Act. 33 U.S.C. §910(h)(2). The administrative law judge further found that employer was responsible for paying claimant's pre-1972 basic weekly benefits rate, but that employer was entitled to reimbursement from the Special Fund for adjustments made to claimant's benefits that it had paid pursuant to the 1972 Amendments. The administrative law judge also found that the Special Fund is liable for all future adjustments made pursuant to Section 10(h)(1) and (3). Accordingly, the administrative law judge ordered the Special Fund to reimburse employer for adjustments it paid, and awarded benefits to claimant which were payable by both employer and the Special Fund. The Director appealed, contending that employer's liability for benefits should be determined by Section 9(e) of the Act, 33 U.S.C. §909(e), and thus no reimbursement was due under Section 10(h)(2).

In its original Decision and Order, the Board held that as Section 9(e) is the correct provision for determining the compensation rate for claimant's death benefits, the administrative law judge erred in applying the provisions of Section 10(h)(1) and (3) to this case. Accordingly, the Board vacated the award of adjustments and remanded the case for recalculation of the death benefit award under Section 9(e). See *Cain v. Bath Iron Works Corporation*, BRB No. 84-761A (Aug. 31, 1987)(unpub.). The Board, however, rejected Director's argument that use of Section 9(e) precluded the shifting of liability between the pre-1972 Amendment benefit and post-1972 Amendment benefit level to the Special Fund and appropriations pursuant to Section 10(h)(2). Thus, the Board affirmed the administrative law judge's finding that liability for the difference in claimant's benefits shifts to

the Special Fund and appropriations, and that employer is entitled to reimbursement.¹

On remand, the administrative law judge determined that his original award was already in compliance with the Board's opinion and accordingly, reaffirmed it. In the current appeal, the Director contends that the employer and carrier are liable in full for death benefits determined according to the 1972 version of Section 9 of the Act for any death that occurred after 1972, regardless of when the decedent's injury occurred or disability commenced. The Director notes that as the present case arises within the appellate jurisdiction of the United States Court of Appeals for the First Circuit, *Director, OWCP v. Bath Iron Works (Lebel)*, 885 F.2d 983, 22 BRBS 131 (CRT)(1st Cir. 1989), *cert. denied*, 110 S.Ct. 1838 (1990), is controlling. Thus, the Director maintains that the administrative law judge's decision should be modified to hold employer liable for \$92.31 per week from the date of death forward, and the Special Fund and appropriations liable only for annual adjustments pursuant to Section 10(h)(3).

Section 10(h), originally enacted in the 1972 Amendments, provides for adjustments to compensation for permanent total disability or death which commenced or occurred before October 27, 1972, the enactment date of the 1972 Amendments. 33 U.S.C. §910(h). Subsections 10(h)(1) and (3) upgrade the benefits payable for pre-Amendment injuries beyond the pre-Amendment maximum, and subsection 10(h)(2) shifts liability for the increase from the employer to the Special Fund and appropriations. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the First Circuit reviewed the question currently before us in the context of a case in which the claimants, whose decedent had been injured before 1972, sought death benefits under the Act for a death which occurred in 1983. The court held that because death benefits for a post-1972 death are calculated at the more generous post-1972 rates, *see* 33 U.S.C. §909(e)(1982)(amended 1984), it is unnecessary to apply the "gap-closing" provision of Section 10(h)(1) to these cases. *See Lebel*, 885 F.2d at 996, 22 BRBS at 144.

¹The Director sought review of the Board's decision by the United States Court of Appeals for the First Circuit. The Court held that the ministerial nature of the remaining determination was not sufficiently clear to warrant treatment of the Board's remand order as "final." Thus, the case was sent back to the administrative law judge in accordance with the Board's remand order. *Director, OWCP v. Bath Iron Works Corp.*, 853 F.2d 11, 21 BRBS 130 (CRT)(1st Cir. 1988).

Inasmuch as this case arises within the jurisdiction of the First Circuit, we agree with the Director that *Lebel* is controlling. Accordingly, consistent with *Lebel*, we modify the administrative law judge's award to reflect that employer is liable for \$92.31 per week from the date of death forward,² and that the Special Fund and appropriations are liable only for annual adjustments pursuant to Section 10(h)(3). *See* 33 U.S.C. §910(f), (h)(3).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is modified to reflect employer's liability for death benefits pursuant to Section 9 as amended in 1972. The administrative law judge's finding that the Special Fund and appropriations are liable for annual adjustments pursuant to Section 10(h)(3) is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²These benefits represent half of decedent's actual average weekly wage at the time of injury because it was greater than the \$149.10 National Average Weekly Wage applicable at the time of decedent's death. *See* 33 U.S.C. §909(e).