

BRB No. 97-1533

DORIS W. SHAW (Widow of)
RICHARD M. SHAW))
)
Claimant-Respondent) DATE ISSUED:
)
v.)
)
WACO SCAFFOLD & SHORING)
COMPANY)
)
and)
)
CONTINENTAL INSURANCE)
COMPANY)
)
Employer/Carrier-)
Petitioners) DECISION and ORDER

Appeal of the Compensation Order Award of Death Benefits of Charles L. Green, District Director, United States Department of Labor.

Bradford C. Jacob (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Death Benefits (Case No. 40-0098357) of District Director Charles L. Green 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 Longshore Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(the 1928 or the D.C. Act).¹

¹The title "district director" has been substituted for the title "deputy commissioner"

On September 18, 1978, the employee, Richard M. Shaw (hereinafter decedent) was awarded permanent total disability benefits under the D.C. Act by Deputy Commissioner Janice V. Bryant, commencing January 10, 1973, for an injury that occurred in 1970. Mr. Shaw died on April 21, 1997, from unrelated causes, and on May 1, 1997, claimant filed a claim for death benefits as decedent's spouse. See 33 U.S.C. §909 (1982).² On May 16, 1997, District Director Charles L. Green issued a Compensation Order awarding death benefits to claimant, as well as funeral expenses. The district director denied employer's Motion for Reconsideration and Motion to Vacate the Compensation Order filed on May 16, 1997, as he stated that his Order was issued in accordance with law. This appeal followed.

On appeal, employer contests the award, asserting that the district director erred in not applying the law in effect at the time of the injury, 1970, under which death benefits were not payable for a non work-related death. Alternatively, employer contends that the district director erred in not applying the Longshore Act as amended in 1984, as the death occurred in 1997, under which death benefits are

used in the statute. 20 C.F.R. §702.105.

²Section 9 of the 1972 Longshore Act states:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit....

33 U.S.C. §909 (1982). This section was amended in 1984 to eliminate the award of death benefits to survivors of disabled employees whose deaths were not related to an employment injury. 33 U.S.C. §909 (1994).

payable only for work-related deaths. Lastly, employer contends that the district director failed to consider whether claimant is the decedent's "widow" under 33 U.S.C. §902(16). Claimant has not responded to this appeal.

Initially, employer raises questions regarding the applicable law. We reject employer's contention that the administrative law judge erred in not applying the law in effect in 1970, which is the time the work-related injury occurred. This argument has been uniformly rejected, and the courts have specifically found widows entitled to death benefits for an unrelated death where an employee who was permanently totally disabled by a pre-1972 injury died after enactment of the 1972 Amendments. *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, 8 BRBS 464 (3d Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981); *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1st Cir. 1979); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 10 BRBS 517 (9th Cir. 1979); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, OWCP*, 539 F.2d 378 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977); *cf. Shea, S & M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170 (CRT)(D.C. Cir. 1991)(for purposes of determining applicability of 1928 D.C. Act or 1979 D.C. Act, time of injury rather than time of unrelated death governs choice of law). Accordingly, we reject employer's contention that the administrative law judge erred in failing to apply the Act as it existed at the time of decedent's 1970 injury.

In the instant case, therefore, the Act in effect at the time of death controls and, as this case arises in the District of Columbia, the law in effect at the time of death is the Longshore Act as amended in 1972. In this regard, we reject employer's contention that the 1984 Amendments to the Longshore Act, Pub. L. No. 98-426, 98 Stat. 1639, apply to cases that arise under the 1928 District of Columbia's Workmen's Compensation Act. The United States Court of Appeals for the District of Columbia Circuit has held that because "the repeal of the 1928 Act [by a new D.C. workers' compensation statute] had the effect of severing the application of the [Longshore Act] to the District of Columbia in 1982, the subsequent 1984 amendments were without effect on the law of the District." *Shea, S & M Ball Co. v. Director, OWCP*, 929 F.2d at 740, n.5, 24 BRBS at 174, n.5 (CRT), *quoting Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). Contrary to employer's contention, the holding in *Keener* has been applied to compensation claims, see *Shea, S & M Ball Co., id.*, and to cases affecting the administration of the 1928 Act. *Washington Metropolitan Area Transit Authority v. Beynum*, ___ F.3d ___, No. 97-1008, 1998 WL 278299 (D.C. Cir. June 5, 1998)(court held that the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. No. 104-134, 110 Stat. 1321, is without effect on the operation of the 1928 Act or the adjudication of claims arising

under it). At the time of its repeal, the 1928 Act provided a death benefit for the spouse of a permanently disabled employee who died from causes unrelated to the employment injury. Therefore, claimant is entitled to death benefits under the 1928 Act if she is decedent's "widow."

Employer lastly asserts that the district director failed to address whether claimant is decedent's widow under 33 U.S.C. §902(16).³ Section 19(d) of the Act, 33 U.S.C. §919(d), provides that fact-finding authority rests with the administrative law judge. See *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986). As with any contested issue, if there is a dispute concerning claimant's status as decedent's widow, the district director may not issue a compensation order, since his authority is limited to cases where the parties agree. See *Roulst v. Marco Construction Co.*, 15 BRBS 443 (1983); 20 C.F.R. §§702.315, 702.316. Where there is no agreement, the district director must refer the case to an administrative law judge upon the request of a party.⁴ *Id.*; see generally *Maine*, 18 BRBS at 129; *Brown v. Bethlehem Steel Corp.*, 16 BRBS 138 (1984). Therefore, we must vacate the Compensation Order issued by the district director and remand this case to the district director for further proceedings as appropriate. See 20 C.F.R. §§702.315, 702.316.

Accordingly, the Compensation Order awarding death benefits is vacated and this case is remanded to the district director for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

³Section 2(16) states:

The term "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or death; or living apart for justifiable cause or by reason of his or her desertion at such time.

⁴We note that employer does not state the basis on which he contests claimant's status as decedent's widow. The file contains a marriage certificate for claimant and decedent dated January 2, 1941, the date of marriage noted by the district director. See Compensation Order at 1.

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge