

8.5 DEATH BENEFITS FOR SURVIVORS

Section 19(f) of the LHWCA provides:

An award of compensation for disability may be made after the death of an injured employee.

33 U.S.C. § 919(f).

Section 8(d) of the LHWCA provides:

(1) If an employee who is receiving compensation for permanent partial disability pursuant to section 8(c) (1)-(20) dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower,

(B) if the employee is survived only by a child or children, such unpaid amount of the award shall be paid to such child or children in equal shares,

(C) if the employee is survived by a widow or widower and a child or children, such unpaid amount of the award shall be payable to such survivors in equal shares,

(D) if there be no widow or widower and no surviving child or children, such unpaid amount of the award shall be paid to the survivors specified in section 9(d) (other than a wife, husband, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each under this subparagraph.

(2) Notwithstanding any other limitation in section 9, the total amount of any award for permanent partial disability, pursuant to section 8(c)(1)-(20) unpaid at time of death shall be payable in full in the appropriate distribution.

(3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under section 8(c)(21), if there be no survivors as prescribed in this section, then the compensation payable under the

subsection shall be paid to the special fund established under section 44(a) of this Act.

33 U.S.C. § 908(d).

[ED. NOTE: For purposes of third party settlements and credits in death claims, see Topic 33 infra, particularly, 33.6 and 33.7.]

A worker's claim for disability benefits and a survivor's claim for death benefits involve two separate and distinct rights. See, e.g., Abercrombia v. Chaparral Stevedores, 22 BRBS 18 (1988) aff'd on recon. 22 BRBS 18 (1989); Alneida v. General Dynamics Corp., 12 BRBS 901 (1980); Henry v. George Hyman Const. Co., 749 F.2d 63 (D. C. Cir. 1984) 17 BRBS 39 (CRT) (1984); Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F.2d 76, 79 (4th Cir. 1950) ("When death occurs, a new cause of action arises."); International Mercantile Marine Co. v. Lowe, 93 F. 2d 663, 664 (2d. Cir. 1938), cert. denied, 304 U.S. 565 (1938). See also Travelers Ins. Co. v. Toner, 190 F.2d 30 (D.C. Cir. 1951), cert. denied, 342 U.S. 826 (1951). Benefits paid for disability or death under a state settlement may only be used to offset like benefits owed under the LHWCA. See Pigott v. General Dynamics Corp., 23 BRBS 30(1989); Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990) (Held: Decedent's disability benefits due under the LHWCA and a claimant's death benefits under a California settlement may only be offset against her survivor's benefits under the LHWCA.).

In Liuzza v. Cooper/T. Smith Stevedoring Co., Inc., 35 BRBS 112 (2001), the Board held that the employer's overpayment of disability benefits to the deceased could not be credited or offset against its liability for death benefits to the decedent's widow because disability and death claims were separate and distinct claims, and disability payments were not advance payments of death benefits within the meaning of Section 14(j) of the LHWCA.

Section 8(d) provides for the payment of unpaid portions of scheduled permanent partial disability awards to survivors. 33 U.S.C. § 908(d). See Sections 2(14)-(18) for definitions of the various classes of survivors enumerated in Section 8(d)(1)(A)-(D). Section 8(d)(3) (formerly Section 8(d)(4)) also provides that an award for disability may be made after the death of the injured employee; this section is not limited to permanent partial disability awards.

Former Section 8(d)(3), which provided for continuation of permanent partial disability payments under Section 8(c)(21) where an employee receiving such an award dies from causes unrelated to his employment, was deleted by the 1984 Amendments. This amendment is analogous to the repeal of unrelated death benefits in Section 9 and applies to deaths occurring after enactment.

Whether an award is scheduled or unscheduled will determine who receives an award for disability made after the death of the injured employee. Section 8(d)(3).

Section 8(d)(3) provides that, where an employee who is entitled to scheduled permanent partial disability benefits dies without statutory survivors, the unpaid portion of the scheduled award is paid to the Special Fund. Alabama Dry Dock & Shipbuilding Corp. v. Director, OWCP, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986); Cleman & Mack (Co Executrix & Administrator of the Estate of David Mack), 28 BRBS 104 (1994); Andrews, 17 BRBS at 212 n.4; Wilson, 16 BRBS at 27; see Hamilton v. Ingalls Shipbuilding, Inc., 26 BRBS 114 (1992). See also, Henry v. George Hyman Const. Co., 749 F.2d 65, 73 (D.C. Cir. 1984); Eckley v. Fibrex & Shipping Co., 21 BRBS 120 (1988) (Where an award is entered after the death of an injured employee, his entitlement to disability benefits is determined by the terms of the LHWCA and not by whether his claim happens to have been adjudicated at the date of death.).

In Abercumbia v. Chaparral Stevedores, 22 BRBS 18 (1989), aff'g on recon. 22 BRBS 18 (1988), the Board addressed the issue of entitlement to death benefits where the deceased employee had settled his claim. In Abercumbia, the decedent, thus, was not physically receiving compensation on the date of death although his entitlement to disability benefits was established. The Board held that the phrase “was receiving compensation” actually means “is entitled to compensation,” and thus his survivor could claim benefits. Because the employee “is entitled to compensation,” he has a vested interest in it, regardless of whether the claim has been adjudicated. See Estate of Cowart v. Nichlos Drilling Co., 505 U.S. 469, 26 BRBS 49 (CRT) (1992).

Section 8(d), which directs payment to the Special Fund when there are no statutory survivors, applies only to scheduled awards, and not to unscheduled awards made under Sections 8(c)(21) or (23). Hamilton v. Ingalls Shipbuilding, Inc., 26 BRBS 114 (1992) (where accrued but unpaid benefits awarded pursuant to Section 8(c)(23) are paid to a deceased claimant with no statutory survivors, the decedent's estate, and not the Special Fund, is entitled to the permanent partial benefits).

The fact that a decedent with a scheduled permanent partial disability suffers a temporary exacerbation prior to death resulting in total disability does not preclude the survivors from obtaining death benefits pursuant to Section 8(d)(3), providing there is no evidence that a decedent's condition would have improved to the point where he no longer possessed the permanent partial disability. Leech, 15 BRBS at 22. This principle evolved from the Board's holding in Acuri v. Cataneo Lines Service Co., 8 BRBS 102 (1978), that an employee need not be receiving permanent partial disability benefits at the time of death, for purposes of Section 8(d)(3), providing he was ultimately found to have been entitled to such compensation.

The Board has held that the underlying permanent partial disability survives solely to form the basis of a survivor's claim under Section 8(d) and cannot support a concurrent award for the period prior to death when temporary total disability benefits are being paid. Leech, 15 BRBS at 21-22.

In Wilson v. Vecco Concrete Construction Co., 16 BRBS 22 (1983), the Board held that a claim filed by decedent's estate for average weekly wage adjustments and Section 8(d) benefits was

not time-barred, because the estate was merely substituted for the decedent in his timely-filed claim. The Board nevertheless denied continuing benefits under Section 8(d) because the decedent's survivors, his sisters, were not dependent upon him as required by the LHWCA. The Board held that Section 8(d) does not provide for payment to decedent's estate, but only to specified survivors. Decedent's estate was entitled only to unpaid benefits accruing prior to death and thus was not entitled to permanent partial disability compensation, as decedent had received payments for total disability before his death. The estate did recover compensation due to an increase in average weekly wage for the period prior to death, as such awards do not abate at death. See also Andrews v. Alabama Dry Dock & Shipbuilding Co., 17 BRBS 209 (1985) (award for permanent total benefits accrued prior to death payable to estate).

In Henry v. George Hyman Construction Co., 15 BRBS 475 (1983), rev'd, 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984), the Board held that decedent's permanent partial disability (amputated leg) survived a finding of temporary total disability which existed at the time of death. The Board, nevertheless, found that decedent's permanent partial disability could not form the basis of a Section 8(d) award because Section 8(d) applies only when the decedent died from causes other than the injury, and the evidence established that decedent died from causes related to the injury; benefits were awarded under Section 9. The D.C. Circuit reversed the Board's decision, holding that the widow is entitled to both Section 9 death benefits **and** the unpaid portion of decedent's Section 8(c) scheduled permanent partial disability award. Henry, 749 F.2d 65, 17 BRBS 39 (CRT).

On remand in Henry, the judge ordered the employer to pay to the claimant permanent partial disability benefits, pursuant to Section 8(c)(4) and (d), for a period of 104 weeks, after which time the Special Fund would commence payments of compensation to the claimant for the remaining weeks of scheduled compensation. On appeal, however, the Board held that all liability for Section 8(c)(4) and (d) rests with the Special Fund since the employer has previously paid 104 weeks of benefits as a result of the decedent's death. Henry, 21 BRBS 329 (1988).

[ED. NOTE: Care must be taken to distinguish pre-1984 amendment case law from that now in effect. For example, where the decedent was permanently partially disabled at the time of his death in 1982, his settlement of his disability claim had no effect upon the survivor's benefits since the survivor did not seek the settlement. Section 8(d)(3) benefits were awardable, if at the time of the employee's death he retained any permanent partial disability and he was permanently partially disabled when he died from causes other than the work related injury. Abercumbia v. Chaparral Stevedores, 22 BRBS 18 (1988), on remand, 22 BRBS 18.4 (1989). Since the 1984 Amendments, a claimant cannot receive compensation for the death of an employee which is not causally related to his work-related injury. 33 U.S.C. §§ 908(d), 909 (1984).]

In the situation where both the claimant and his spouse have died, the accrued benefits owed to the claimant are payable to his estate pursuant to 33 U.S.C. §908(d) as the employee has a vested interest in benefits which accrue during his lifetime, regardless of when they were awarded. Wood v. Ingalls Shipbuilding, Inc., 28 BRBS 27, 35 (1994), modified in part on recon., 28 BRBS 156, 158 (1994); Clemon v. ADDSCO Industries, 28 BRBS 104, 112 (1994).