

## TOPIC 9            COMPENSATION FOR DEATH

(See also Topic 8.5, *supra*, Death Benefits for Survivors;)

### 9.1                    APPLICATION OF SECTION 9

Section 9 of the LHWCA reads as follows:

**If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:**

**(a) Reasonable funeral expenses not exceeding \$3,000,**

**(b) If there be a widow or widower and no child of the deceased to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.**

**(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased but no widow or dependent husband then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.**

**(d) 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  $66 \frac{2}{3}$  per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of title 26 of the United States Code, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between  $66 \frac{2}{3}$  per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 6(b), but--

(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 6(b)(1); and

(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 10(i) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.

33 U.S.C. § 909.

**[ED. NOTE:** *The Underlying claims of the worker, who subsequently dies, and the worker's survivors, are separate claims. See Topics 8.5 (Death Benefits for Survivors) and 8.10 (Settlements).*]

A worker's claim for disability benefits and a survivor's claim for death benefits involve two separate and distinct rights. See, e.g., Abercumbia 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 (4<sup>th</sup> 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.).

Like other sections of the LHWCA, Section 9 has been modified by each of the recent amending acts. As cases may still be heard that involve post-1972 amendment law (and pre-1984 amendment law), some recent jurisdiction will be presented concerning that version of the law. Only the 1984 LHWCA will be cited when discussing the provisions now employed for granting death benefits under Section 9.

The 1984 Amendments only apply to deaths occurring after their date of enactment--September 28, 1984. Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989) (decedent developed cancer due to exposure to asbestos while at work and died in 1965; claimant filed a claim for death benefits in 1982; Board applied the 1972 Amendments to claim).

Perhaps the most significant change made to Section 9 by the 1984 Amendments involved the circumstances under which death benefits are available. Specifically, the 1984 Amendments modified Section 9 so that death benefits are now only payable when the employee dies as the result of a work place injury. This restriction changed the 1972 amendment law which provided a new cause of action: death benefits to survivors when the decedent was permanently totally disabled and died of an unrelated cause. The 1984 Amendments repealed this provision and returned the law to its pre-1972 state.

The enactment and subsequent application of Section 9 (as amended in 1984) does not violate a claimant's due process rights since there was not any vested right to death benefits as of the date of enactment of Section 9 as amended in 1984. Close v. International Terminal Operations, 26 BRBS 21 (1992).

Section 9 death benefits must be distinguished from Section 8 disability benefits, which provide for a separate cause of action. Henry v. George Hyman Constr. Co., 749 F.2d 65, 73 (**D.C. Cir.** 1984) ("The case law clearly establishes two separate causes of action, one for disability lying with the disabled employee, and one for death lying with specified survivors of the decedent."). Henry also stated that an award for permanent partial disability may be made following an employee's death, which may be received concurrently with an award under Section 9.

In Puig v. Standard Dredging Corp., 599 F.2d 467, 469 (**1st Cir.** 1979), the court stated that "[c]ases under the Act have consistently held that the right to death benefits is separate and distinct from any right to disability benefits, and that this separate right does not arise until death occurs." See State Ins. Fund v. Pesce, 548 F.2d 1112, 1114 (**2d Cir.** 1977); Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46, 53 (1990) ("in a claim for death benefits, the time of injury cannot be prior to the employee's date of death"); Lynch v. Washington Metro. Area Transit Auth., 22 BRBS 351, 354 (1989).

### **Settlement of Death Benefit Claims**

*[ED. NOTE: The settlement of a worker/claimant is not binding on a claim for death benefits made by a survivor. For a discussion of a claim made for death benefits for survivors, see Topic 8.5 Death Benefits for Survivors. For a discussion of the settlement of death benefit claims see Topic 8.10 Settlements, supra. For a discussion of third-party settlements made by both the worker and spouse who later becomes a widow/widower, see Topics 33.6 Employer Credit for Net Recovery by "Person Entitled to Compensation" and 33.7 Ensuring Employer's Rights—Written Approval of Settlement.]*

### **Extension Acts Applicability**

The death benefits provisions provided for in the LHWCA also apply to the extension acts. The District of Columbia Workmen's Compensation Act (DCW Act) of 1928, however, was repealed in 1979 by the D.C. Council and replaced with the District's own workers' compensation law. Notwithstanding its repeal, the 1928 Act remained in force for the purpose of preserving the provisions of the LHWCA as they existed in 1982 (the effective date for the 1979 Act), for employees who were injured prior to the effective date of the 1979 Act. Under that scheme, "a death benefits claim derive[d] from the worker's employment related injury." Thus, for a worker who was injured prior to the effective date of the 1979 Act, a death benefits claim related to that injury would be covered by the LHWCA. Shea v. Director, OWCP, 929 F.2d 736, 739-40 (**D.C. Cir.** 1991). See also the discussion of the DCW Act under the Extensions to the LHWCA, infra.

#### **9.1.1 Responsible Employer/Carrier**

The 1984 Amendments, as noted above, only apply to causes of action, i.e., deaths. Because the injury that causes the death is considered the triggering event, the employer that employs the decedent, or the carrier that provides coverage for the injury, at the time of the injury leading to the

employee's death, will be held liable for payment of the death benefits to the survivors. The reasoning for this finding is taken from the litigation involving the constitutionality of the 1972 Amendments.

Prior to 1984, significant litigation took place involving the 1972 amendment law (which allowed for death benefits where the employee was permanently totally disabled and dies as the result of a non-related cause). In this instance, the survivors of an employee injured prior to 1972, who was later rendered permanently totally disabled and who died after 1972 but prior to 1984, would qualify for death benefits. An issue arose in two types of cases: where the carrier no longer covered the employer at the time of the unrelated death and where the employer/carrier was held liable for death benefits when the employee was injured prior to 1972.

The constitutionality of the 1972 Amendments survived attack on numerous occasions. The specific issue involving Section 9 concerned the creation of the new cause of action described above, i.e., survivors being permitted to bring a death benefits claim when the permanently totally disabled employee died from causes unrelated to the work injury. In holding that the 1972 Amendments were constitutional, the **Fifth Circuit** rationalized that the decedent must have suffered a work-related injury rendering him permanently totally disabled. "Therefore, the death benefit scheme of [Section 9] is clearly in furtherance of the purpose of the [LHWCA] and is both maritime in nature and a proper subject for Congressional legislation." Travelers Ins. Co. v. Marshall, 634 F.2d 843, 845 (**5th Cir.** 1981) (citation omitted).

The court did not believe that the origin of the right to death benefits was based solely on the event of a death. Rather, the true source of the benefits was in the injury itself, i.e., since the employee must have either died as a direct result of the injury, or must have been rendered permanently totally disabled from the injury. Id. at 846 (citing Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Spence, 591 F.2d 985, 987 (**4th Cir.**), cert. denied, 444 U.S. 963 (1979)).

This rationale became significant, as suggested above, in the situation where an employee was injured pre-1972 and dies post-1972 of unrelated causes, and the insurance carrier who covered the injury no longer provided coverage at the time of death. Liability attached at the time of injury for all subsequent claims, including death benefits which, under pre-1972 law, would not be available. The **Fifth Circuit** held that this application would not deny the insurance carriers due process of the law. Id. at 847. In so ruling, the court viewed Section 9's death benefits provisions "as providing for deferred compensation attributable to the suffering accompanying the necessary precondition of a permanently totally disabling maritime injury." Id. at 848 (analogizing Section 9 of the LHWCA to the comparable provision of the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-945 (1976); citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), in support of its holding that the Due Process Clause was not violated).

See also Spence, 591 F.2d at 987 ("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

origins 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." The court held the carrier liable because it assumed the obligation for potential death benefits when it issued its compensation insurance policy.).

See also Nacirema Operating Co. v. Lynn, 577 F.2d 852, 854 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979) ("We find that the amendment is reasonably related to the permissible goal of indemnifying survivors of injured maritime workers. This conclusion also supports our finding that Congress had the authority to provide the benefits under its maritime power."); Pesce, 548 F.2d at 1112.

The **First Circuit** ruled in a similar fashion as the **Fifth Circuit** above, although it did not rely on analogies to other statutes. Puig, 599 F.2d at 467 (this case fell under the Defense Base Act, a LHWCA extension act.) The **First Circuit** also asserted that, by holding the employer/carrier liable for a post-1972 death which was unrelated to the pre-1972 work injury, the statute was not being retroactively applied. "Rather, because the right to death benefits under the Act arises only upon death, and is separate from the right to disability benefits which arises when the employment injury occurs, application of the 1972 [Section 9] amendment in a case where ... death occurred after the amendment's effective date is a prospective application." Id. at 470.

The **Ninth Circuit** also ruled in favor of the constitutionality of the 1972 Amendments. Todd Shipyards Corp. v. Witthuhn, 596 F.2d 899 (9th Cir. 1979). The court noted that nothing in the 1972 Amendments, nor legislative history, stated that death benefits in the case of a totally disabling injury shall not be effective when the injury occurred prior to the Amendments and the death after the Amendments. Id. at 901. The **Ninth Circuit** concluded that the 1972 Amendments did not retroactively affect the employer/carrier's vested rights. Upon the decedent's death, a new right of action became vested in the decedent's survivors. "It could not be known, until the death occurred, whether there would be any eligible survivor(s) or, if so, who those survivor(s) would be. Thus, amended [Section 9] operates prospectively when applied" to these types of cases. Id. at 902. Finally, the **Ninth Circuit** could not "say that the Congressional scheme lacks a rational basis in that it is 'wholly unreasonable in providing benefits for those who were most likely to have shared the miner's suffering.'" Id. at 903 (quoting Usery, 428 U.S. at 25-26).

The **Fourth Circuit** has reasoned in a similar fashion regarding the lack of any due process violation and the rational basis of Congress' actions. Norfolk, Baltimore & Carolina Lines v. Director, OWCP, 539 F.2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977). One additional argument was addressed and dismissed in this case, that being any violation of the Contracts Clause of the U.S. Constitution. Specifically, the court ruled that "[t]he amendment cannot be voided on the ground that it constituted an impairment of contracts [i.e., a contract entered into between the employer and the carrier prior to 1972 to cover injuries], for the constitutional bar to such impairment is directed only to the States." Id. at 382.

## Employer/Carrier or Trust Fund Responsibility

The circuit courts have disagreed on whether the employer/carrier or the Special Fund should have been responsible for the increased death benefits when the employee was injured pre-1972, but died post-1972. As the **D.C. Circuit** noted in Henry, 749 F.2d at 65, "[i]n all of these cases, employers or insurance companies argued that the injury triggered the application of the [LHWCA] and, therefore, that the pre-1972 benefits formula should apply." The court went on to state that "[i]n every case, however, courts and the Board reasoned that, since death and disability were two separate causes of action, death occurring after the effective date of the 1972 amendments would trigger the more generous benefits available under those amendments, notwithstanding the fact that the injury which caused the death occurred prior to 1972." Id. at 73-74 (emphasis in original).

See Director, OWCP v. Bath Iron Works Corp., 885 F.2d 983, 988 (**1st Cir.** 1989), cert. denied, 494 U.S. 1091 (1990) ("In the case of a worker injured before 1972 who dies after 1972 ... [the enacting Act] does not pay for a 'gap' adjustment from the 'government/special fund' sources, because no 'gap' exists in such a case. Death benefits in cases of pre-1972 injury, post-1972 death are calculated for the first time at the time of death. And, that calculation provides the survivors with benefits at the generous, post-1972 rates."); Puig, 599 F.2d at 469; St. Louis Shipbuilding & Steel Co. v. Casteel, 583 F.2d 876, 877-78 (**8th Cir.** 1978); Pesce, 548 F.2d at 1114; Rouse v. Norfolk, Baltimore & Carolina Lines, 2 BRBS 11, 13-14 (1975), aff'd on other grounds sub nom. Norfolk, Baltimore & Carolina Lines v. Director, OWCP, 539 F.2d 378 (**4th Cir.**), cert. denied, 429 U.S. 1078 (1976).

The **Sixth Circuit**, however, came to the opposite conclusion. In Director, OWCP v. Detroit Harbor Terminals, 850 F.2d 283 (**6th Cir.** 1988), the court interpreted Section 10(h)(1) to mean, "when a party was injured pre-amendment and died from that injury post-amendment, one could say that the death had commenced prior to the amendment date. Since the decedent's disability benefits were adjusted after the amendments, and those disability benefits were converted into death benefits, '[t]here is little difference in the adjustment process, other than one of nomenclature." As such, the court held that the Special Fund was responsible for the increased payments. Id. at 288.

### 9.1.2 Section 20(a) Presumption

**[ED. NOTE: See Topic 20 for a complete discussion of Section 20, *infra*.]**

Section 20(a) of the LHWCA presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the LHWCA, i.e., that the death was work-related. Sprague v. Director, OWCP, 688 F.2d 862 (**1st Cir.** 1982). See also Woodside v. Bethlehem Steel Corp., 14 BRBS 601 (1982) ("It is well-established that, if an injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the resultant condition is compensable.... This rule is consistent with the maxim that 'to hasten death is to cause it.'"); Fineman v. Newport News Shipbuilding & Dry Dock Co., 27 BRBS 104 (1993) (length of hastening is not significant).

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

## 9.2 FUNERAL EXPENSES

The 1984 Amendments to Section 9(a) of the LHWCA provide for funeral expenses not to exceed \$3,000.00. This subsection contemplates that payment is to be made 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 \$3,000.00**. Payment of funeral expenses is not considered payment of compensation for purposes of Section 33(g). Kahny v. Arrow Contractors, 15 BRBS 212, 223 (1982), aff'd mem. sub nom. Kahny v. OWCP, 729 F.2d 777 (5th Cir. 1984). Only an employer/carrier may be held liable for payment of funeral expenses, and not the Special Fund. Bingham v. General Dynamics Corp., 20 BRBS 198, 205 (1988).

## 9.3 SURVIVORS

Section 9(f) provides that all questions of dependency are determined as of the time of injury. This should be kept in mind as the subsections under this section are considered.

### 9.3.1 Spouse and Child

The **Fifth Circuit** has held that state law is dispositive of the question regarding whether a claimant meets the LHWCA's requirement of being a "wife." Ryan-Walsh Stevedoring Co. v. Trainer, 601 F.2d 1306, 1313 (**5th Cir.** 1979). State law is relied upon because the LHWCA does not define "widow" or "widower" and no federal common law of marriage or domestic relations exists. *Id.* at 1314. The court warned that the conjugal nexus test, set forth by the **Supreme Court** in Thompson v. Lawson, 347 U.S. 334, 336-37 (1954), should not be interpreted "as authorizing the creation of a federal common law of marriage to determine whether the claimant, in the first instance, was married to the deceased employee." Rather, this test was fashioned for the situation where the widow was not living with the decedent at the time of death by reason of his desertion. *Id.* at 1315.

The Board has held that Section 2(16)'s definition of "widow or widower" should be read in the disjunctive: "a widow or widower is a wife or husband who, at the time of the employee's death, is living with the employee, or is dependent for support upon the employee, or is living apart from the employee for justifiable cause, or is living apart by reason of desertion." Griffin v. Bath Iron Works Corp., 25 BRBS 26, 28 (1991) (emphasis in original). Thus, Section 2(16) has been interpreted as affording alternative bases for recovery. *Id.* at 29. Therefore, if the spouse was married to the decedent at the time of his death, dependency need not be established, including for the time of his initial injury, to qualify for death benefits. *Id.*

In Angelle v. Steen Production Service, Inc., 34 BRBS 157 (2000), the Board found that the ALJ properly rejected a claimant's allegation that she was the decedent worker's widow. The Board noted the the ALJ properly chose to apply Louisiana domestic relations law to determine her status and that his application of the state law was correct.

It should be noted that a literal reading of Section 9(b) would apparently require a widower, unlike a widow or surviving child, to show dependency. The Board instructed, however, that the inquiry must focus on the relationship between the claimant and decedent, *see* Leete v. Director, OWCP, 790 F.2d 418 (**5th Cir.** 1986), "and, in particular, whether there was a 'conscious choice [by the claimant] to terminate her prior conjugal relationship.'" Kennedy v. Container Stevedoring Co., 23 BRBS 33, 36 (1989) (quoting Thompson v. Lawson, 347 U.S. 334 (1954)) (emphasis in original).

The Board noted that the decedent's behavior is not dispositive of the issue, but rather, claimant's conduct must be scrutinized, i.e., whether claimant "intended to sever the marital bond or ... [make] a conscious choice to end her marital relationship with decedent." *Id.* at 37. In holding that each case should be decided on its merits, the Board stated that "[j]ustifiable cause for living

apart is not limited to only temporary separations or situations in which a spouse is fearful of an infectious disease or bodily injury...." *Id.* See also *Lynch*, 22 BRBS at 355.

The **Fifth Circuit** has held that the "conjugal nexus test" must be applied in assessing whether a claimant is the "deserted" spouse of the decedent. *Leete*, 790 F.2d at 421 (quoting *Thompson*, 347 U.S. at 336-37). The **Fifth Circuit** stated "that the determination of whether a conjugal nexus exists is not to be reached by 'assessing the marital conduct of the parties.'" *Id.* (quoting *Thompson*, 347 U.S. at 336). The court suggested that, in some cases, post-death conduct near the time of death "might be relevant to assessing the strength of the conjugal nexus between a [claimant] and a decedent...." *Id.* The relevant issue is whether the claimant is a deserted spouse at the time of decedent's death. See also *Hicks v. Southern Ill. Univ.*, 19 BRBS 222, 227 (1987).

A death claim is analogous to a survival action. If a claimant dies prior to the date his claim for death benefits is adjudicated, the claimant's right to such benefits survives the claimant's death. *Hickman v. Universal Maritime Serv. Corp.*, 22 BRBS 212, 216-17 (1989) ("There is no plausible reason to extinguish claimant's entitlement to benefits based upon the delay inherent in the administrative adjudicative process which precluded resolution of her claim until after her death."). Part of the Board's rationale was that debts accrue while waiting for an award to be issued and, often, the compensation awarded is used to satisfy the debts incurred while waiting for resolution through the adjudicative process.

In interpreting the definition of "child" under the LHWCA, the **Fifth Circuit** asserted that term "must be liberally construed in favor of coverage and in a way which avoids harsh and incongruous results." *Trainer*, 601 F.2d at 1317-18 (quotation omitted) (even though "child's" grandmother failed to qualify as deceased's dependent because of state domestic relations law, "child" was eligible for death benefits because she lived with her grandmother and decedent, and was reliant on decedent for support). See also *Shea*, 410 F.2d at 56.

According to Section 2(14) of the LHWCA, a "child" may include an "acknowledged illegitimate child dependent upon the deceased." The **Fifth Circuit** has held that "[a]pplication of rigorous state law schemes for proof of paternity, designed to serve various state interests such as the orderly devolution of property, especially immovable [i.e., real] property, is inconsistent with the history and tradition of liberal administration of benefits under the [LHWCA]." *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (**5th Cir.**), cert. denied, 484 U.S. 976 (1987) (citing *Voris v. Eikel*, 346 U.S. 328 (1953)). Therefore, even though state law would prevent a designation of paternity, if a paternal link can be proven in the proceedings under the LHWCA, death benefits under the LHWCA will not be precluded. *Id.* (the facts of that case supported a finding of acknowledgment).

The Board has stated that "[w]hile it is unconstitutional to discriminate on the basis of a child's legitimacy, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the LHWCA does not discriminate in an impermissible fashion because it permits illegitimate children to recover if

acknowledged and dependent." Hicks, 19 BRBS at 225-26 (this case fell under the Defense Base Act).

The **Fifth Circuit** has held that "a child '**en ventre sa mese**' (in its mother's womb) will be considered a dependent of a covered employee if, at the time of the accident, the mother of the child was dependent on the employee." Wilfred, 818 F.2d at 399 (citing Shea, 410 F.2d at 56). In deciding a mother's dependency, "total" dependency need not be proven. Rather, the **Fifth Circuit** concluded that "partial" dependency would be sufficient. Id. (citing Texas Employers Ins. Ass'n v. Sheppard, 62 F.2d 122 (**5th Cir.** 1932)).

A parent may not settle in advance a dependent's death benefits claim where that dependent's interests were not protected under state law. Wilfred, 818 F.2d at 400.

### **9.3.2 Amount of Compensation Payable**

Under Section 9(b) of the LHWCA, when a widow or widower survives the decedent with no children, that spouse shall receive 50 percent of the decedent's average weekly wage until death or remarriage. If children survive in addition to the widow or widower, an additional 16 2/3 percent of the average weekly wage shall be added per child. **However**, although this may have been an oversight by Congress when it amended Section 9 over the years, be aware that the total compensation shall not exceed 66 2/3 percent of the decedent's average weekly wage. Thus, regardless of whether one or more than one, child survives together with a widow or widower, only 16 2/3 percent of the average weekly wage will be added to the spouse's 50 percent.

There is a **family unit exception to this rule** wherein the employer's overall liability under both state and federal statutes may exceed the 66 2/3 percent maximum imposed by Section 9(b). In Ferguson v. Southern States Cooperative, 27 BRBS 17 (1993) where one of the decedent's three children was from a prior marriage and entitled to large death benefits under state law, the employer was not entitled to offset its state liability to that child against its liability to the other claimants under the LHWCA. In Ferguson, the Board noted that the **Supreme Court** explicitly recognized in Sun Ship, Inc. v. Commonwealth of Pennsylvania, 447 U.S. 715 at 724 (1980), 12 BRBS 890 at 894, that concurrent jurisdiction could result in more favorable awards under a state act than under the LHWCA.

Section 3(e) provides a credit for "amounts paid to an employee." As the **Ninth Circuit** discussed in Lustig v. U.S. Dept. of Labor, 881 F.2d 593, 595, 22 BRBS 159, 161 (CRT) (**9th Cir.** 1989), this language is distinct from the words "any amounts paid by an employer," rejected by Congress in enacting Section 3(e). Thus, the Board reasoned, it is appropriate for the judge to look to the amount paid to each claimant and credit the amount due each under state law. 27 BRBS at 23.

### **9.3.3 Death or Remarriage of Surviving Spouse**

If the widow or widower remarries, she or he shall receive two years' compensation in a lump sum. If one child survives in addition to that widow or widower, the child shall receive 50 percent of the decedent's average weekly wage. If more than one child survives in addition to that widow or widower, 16 2/3 percent shall be added to the 50 percent discussed above. Again, a cap of 66 2/3 percent of the average weekly wages has been placed on the total compensation payable for death benefits. Note that the increase in compensation for the children also occurs when the widow or widower dies.

The **Eleventh Circuit** has held that, where a surviving spouse remarries, the surviving children are entitled to an immediate increase in compensation benefits under Section 9(b) of the LHWCA. American Mut. Liab. Ins. Co. v. Smith, 766 F.2d 1513, 1519 (**11th Cir.** 1985) ("We conclude that the plain language of [Section 9] and its legislative history demonstrate that the increase of the children's benefits is not to be delayed for a two year period following the remarriage of a surviving spouse."). Thus, upon remarriage, the surviving spouse receives a lump sum payment equivalent to two years' compensation and the surviving children receive an immediate increase in their benefits.

### **9.3.4 Section 9(b) in Conjunction With Section 9(e)**

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

### **9.3.5 Surviving Children/No Surviving Spouse**

Pursuant to Section 9(c), if one child survives and no surviving spouse exists, the child shall receive 50 percent of the decedent's average weekly wage. If more than one child survives with no surviving spouse, an additional 16 2/3 percent will be added to the above 50 percent, to be divided equally among the surviving children.

When an employer is entitled to credit for overpayment to one child (i.e. child had reached 23<sup>rd</sup> birthday), employer may apply credit against future compensation owed to another sibling (who is still a minor). Brad Valdez and Joshua Valdez (Children of Manuel Valdez, Jr.) V. Crosby & Overton, 34 BRBS 69 (2001). In Valdez, the Board reasoned that because Section 9(b) allows for payment of one death benefit to a spouse including additional compensation for surviving children, the compensation owed to one sibling was subsequent compensation due under the same award as that paid to the other sibling.

### 9.3.6 Payments to Other Dependents

Under Section 9(d) of the LHWCA, if no widow, widower, or children survive, or where the aggregate of the payments to those survivors is less than 66 2/3 percent of the decedent's average weekly wage, support may be provided for the decedent's **grandchildren and siblings**. This support, however, may only be granted where the grandchildren and siblings were **dependent** on the deceased **at the time of injury**, and such compensation is limited to the period of dependency. Additionally, compensation may be granted to others meeting the definition of "dependent" (see 26 U.S.C. § 152), but not otherwise included under Section 9 of the LHWCA. In the cases of dependents discussed in this paragraph, compensation shall be in the amount of 20 percent of the decedent's average weekly wage.

If no widow, widower, or children survive the decedent, or where the aggregate of the compensation payable to those survivors does not exceed 66 2/3 of the deceased's average weekly wage, support may be granted to the **parents and grandparents** of the decedent. As above, this support may be provided only if the parents or grandparents were **dependent** on the decedent at the time of injury. The amount of compensation for these survivors shall be in the amount of **25 percent** of the deceased's average weekly wage.

In no case shall the aggregate amount payable pursuant to this subsection exceed the difference between 66 2/3 percent of the decedent's average weekly wages and the amounts payable under Sections 9(b) and (c). See Topics 9.3.2, 9.3.3 and 9.3.5, supra.

As noted, the LHWCA provides that if there be no surviving spouse or child, death benefits may be granted to a "dependent" of the decedent at the time of death, who is not otherwise eligible under Section 9, as that term is defined by Section 152 of title 26 of the Tax Code. Angelle v. Steen Production Services, Inc., 34 BRBS 157 (2000). In Angelle, the Board made several inter-related **holdings as regards Section 152 of the Tax Code**. First, it held that a decedent's taxable year for purposes of a dependency determination under Section 9(d) is the period from January 1<sup>st</sup> until the date of his death that year. Second, the Board held that a claimant's testimony regarding the decedent's level of financial support constitutes record evidence of the decedent's support and there is no requirement under the LHWCA nor Section 152 of the Tax Code that the claimant further substantiate her testimony with documentation (so long as the testimony does not lack credibility). Third, the Board interpreted Section 152(a)(9) to not require that the decedent's "household" include everyone living under one roof. (In Angelle, the claimant and the decedent rented a separated room and bath from the claimant's mother, in the home of claimant's mother and they had their own phone and cable television service. The Board likened this as tantamount to a couple living in a third person's house as boarders.) Fourth, the Board found that it did not matter that a decedent never actually claimed a claimant as a dependent in his tax returns since Section 152 speaks in terms of whether the decedent was *entitled* to claim a claimant, not whether he actually does so.

### 9.3.7 No Survivors or Dependents

According to Section 44(c)(1) of the LHWCA, if no survivors exist, and death benefits would otherwise be appropriate, i.e., the employee died as the result of a work place injury, the employer/carrier shall pay \$5,000.00 to the **Special Fund**.

### 9.3.8 Compensation to Aliens

Section 9(g) provides that compensation may be payable to aliens who are not residents of the United States or Canada. In that case, compensation shall be in the same amount as residents, except that **dependents** in any foreign country shall be **limited** to the surviving spouse and children, or if no surviving spouse or children, then to surviving parents whom the employee supported, at least in part, for one year prior to the date of injury. Note that the LHWCA actually states "wife" instead of "spouse," although this was probably an oversight by Congress when it amended the LHWCA, i.e., limiting dependency to a wife and not a husband would probably violate the Equal Protection Clause of the Constitution.

In Logara v. Jackson Engineering Co., \_\_\_ BRBS \_\_\_ (2001), the Board held that a **treaty of friendship** between Greece and the United States **does not act to prevent commutation of benefits** to a citizen of Greece under provisions of Section 9(g). Additionally, in Logara, the Board specifically found that **Section 9(g) was constitutional**.

## 9.4 MAXIMUM/MINIMUM BENEFIT

### 9.4.1 Decedent's Average Weekly Wage

The 1984 Amendments completely modified Section 9(e) of the LHWCA. Under this section, the decedent's average weekly wage shall not be less than the national average weekly wage (see Section 6(b)). The total weekly benefits shall not, however, exceed the lesser of the decedent's average weekly wage or the benefit which the decedent would have been eligible for under Section 6(b) (1).

The **Supreme Court** held that, under the 1972 Amendments to the LHWCA, death benefits were not subject to the maximum limits expressly placed on disability payments by Section 6(b)(1). The **Court** noted that the total weekly death benefits payable to survivors were not modified by the 1972 Amendments, i.e., they remained at a maximum of 66 2/3 percent of the deceased's average weekly wage. "The 1972 Amendments deleted the specific dollar minimum and maximum limitations on average weekly wages and substituted in their place a provision dealing only with a minimum limitation, which was tied to the applicable national average weekly wage." Director, OWCP v. Rasmussen, 440 U.S. 29, 33-34 (1979).

In discussing Section 9(e), the Court stated that "Congress replaced specific minimum and maximum limitations on average weekly wages, and hence on death benefits, with a minimum limitation governed by the applicable national average weekly wage. That the omission of a maximum limitation on death benefits was inadvertent is disproved by the legislative history of the 1972 Amendments." Id. at 37. The Court concluded that Section 6(d) "does not render the maximum limitations contained in [Section 6(b)(1)] applicable to death benefits." Id.

### 9.4.2 Death Due to Occupational Disease

According to Section 9(e)(2), as modified by the 1984 Amendments, in case of death due to an occupational disease for which the time of injury occurs after retirement (see Section 10(i)), the total weekly benefits shall not exceed 1/52 of the employee's average annual earnings for the 52-week period preceding retirement. Ponder, 24 BRBS at 53. Where Section 9(e)(2) applies and the weekly death benefits calculated under Section 9(b) exceed 1/52 of the employee's annual earnings, the benefits will be modified so that they will not exceed the latter amount. Id.

Pursuant to Section 9(e), as amended in 1984, "which establishes a minimum and maximum benefit level in computing death benefits, the average weekly wage of the deceased shall not be less than the national average weekly wage, and the total benefits awarded may not exceed the lesser of the actual average weekly wage of decedent or the maximum benefit which an employee is eligible to receive under 33 U.S.C. § 906(b)(1).... Section 6(b)(1) also imposes a cap on both disability and death benefits equivalent to 200 percent of the national average weekly wage." Buck v. General Dynamics Corp. Elec. Boat Div., 22 BRBS 111, 114 (1989).

The Board refused to accept the argument "that the date of death should be considered as a separate date of injury for the purpose of computing an award of survivor's benefits. Section 10 ... specifically ties the calculation of death benefits to the lesser of the average weekly wage of the deceased as defined by Section 10 or the national average wage without mention of intervening cost-of-living adjustments." Id. The average weekly wage should be based on the date of injury. Id.

In Donovan v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 2 (1997), the Board examined the meaning of "shall not exceed" in Section 9(e)(1). The Board held that the phrase 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 surviving spouse.