BRB No. 96-0717

KAY DONOVAN (Widow of GRAY DONOVAN)	)	
Claimant-Respondent	)	
v.	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
Self-Insured Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Compensation Award - Supplemental Award of Compensation From the Special Fund for Death Benefits of B. E. Voultsides, District Director, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Mark Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Compensation Award - Supplemental Award of Compensation From the Special Fund for Death Benefits (Case No. 5-29201) of District Director B. E. Voultsides 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 the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Eneberg v. Todd Pacific Shipyards*, 30 BRBS 59 (1996)(McGranery, J., concurring and dissenting).

The facts of this case are not in dispute. Gray Donovan began working for employer in 1956. Two years later, he was transferred into employer's lead department where he was exposed to injurious levels of lead. Mr. Donovan worked continuously in this department until 1978 when numerous gastro-intestinal ailments forced him to leave this employment. Thereafter, Mr. Donovan filed a claim for benefits under the Act. In a Decision and Order dated January 18, 1983, Administrative Law Judge Anastasia T. Dunau awarded Mr. Donovan permanent total disability compensation commencing on September 18, 1978, based on an average weekly wage of $228.33. The administrative law judge additionally awarded employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

On September 4, 1995, Mr. Donovan (hereinafter decedent) died as a result of his work-related poisoning.[1] In a Compensation Award dated February 8, 1996, the district director ordered that decedent's widow (hereinafter claimant) be paid death benefits by the Special Fund in accordance with Section 9(e) of the Act, 33 U.S.C. §909(e), at a rate of $190.23 per week, representing 50 percent of the national average weekly wage of $380.46, commencing on September 5, 1995. In his award, the district director ordered that claimant's death benefits be subject to applicable adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f).

On appeal, employer contends that the district director erred by failing to reference the limitation on death benefits contained in Section 9(e). Specifically, employer argues that under Section 9(e), claimant's death benefits in the future may not exceed decedent's average weekly wage of $228.33. Claimant responds, urging affirmance of the district director's award of benefits. The Director, Office of Workers' Compensation Programs (the Director) has filed a response brief supporting claimant's position.

[1]It is undisputed that decedent's death was caused, at least in part, by his exposure to lead during the course of his employment with employer.

The threshold question presented by this appeal, whether Section 9(e) mandates that Section 10(f) adjustments to death benefits end once benefits reach the level of the deceased employee's average weekly wage, is one of first impression for the Board. Section 9(e) provides in pertinent part:

> (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 906(b) of this title, but-
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> (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 906(b)(1) of this title . . .

33 U.S.C. §909(e)(1988).[2] Section 10(f) provides:

> (f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of-
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> (1) a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or
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> (2) 5 per centum.

33 U.S.C. §910(f)(1988).

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[2]Section 6(b)(1) of the Act provides that:

> (1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

33 U.S.C. §906(b)(1).

When interpreting a statute, the starting point is the plain meaning of the words of the statute. *See Moskal v. United States*, 498 U.S. 103 (1990); *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989); *see also Story v. Navy Exchange Service Center*, BRBS , BRB Nos. 96-0533/A (Jan. 9, 1997). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States v. Rodgers*, 466 U.S. 475 (1984)(plain language controls unless it leads to results that are "`absurd or glaringly unjust"'). If, however, the statute is silent or ambiguous with respect to the specific issue, the agency's interpretation should be given special deference if it is based on a permissible construction of the statute; the court may not substitute its own construction of a statutory provision for a reasonable one made by the agency. *See Chevron U.S.A.*, 467 U.S. at 843; *see also Newport News Shipbuilding & Dry Dock v. Howard*, 904 F.2d 206, 23 BRBS 131 (4th Cir. 1990). Thus, where the Director's position is reasonable and does not contravene plain statutory language, it is entitled to some degree of deference. *See Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991).

Employer contends that the district director erred in subjecting claimant's death benefits to unlimited future adjustments under Section 10(f). In support of this contention, employer asserts that the "shall not exceed" language contained in Section 9(e)(1) establishes an absolute ceiling on the rate at which benefits can be paid to a surviving spouse; thus, employer interprets Section 9(e)(1) of the Act as not setting forth a directive for determining the base rate for death benefits at the time such an award is initially calculated but, rather, as establishing an absolute ceiling on the rate at which death benefits can be paid to a surviving spouse. Accordingly, employer contends that under Section 9(e)(1), claimant's future death benefits cannot be greater than decedent's average weekly wage of $228.33, thereby prohibiting further annual Section 10(f) adjustments once the amount of her death benefits reaches this point.[3] We disagree. Our review of the Act indicates that Section 9(e)(1) does not bar the application of Section 10(f) adjustments where such adjustments to death benefits would increase compensation above the employee's average weekly wage, as the maximum ceiling on death benefits is contained in Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1), and not Section 9(e)(1) as alleged by employer.

Our analysis of Section 9(e)(1) begins with the opening language of that section which states: "In computing death benefits . . ." 33 U.S.C. §909(e)(1988). We agree with the Director's

[3]In support of its position, employer cites *Ponder v. Kiewit Sons' Co.*, 24 BRBS 46 (1990). However, *Ponder* concerned a claim for benefits based on death due to an occupational disease which became manifest after the employee's retirement, and therefore, the applicable section was Section 9(e)(2), 33 U.S.C. §909(e)(2). In *Ponder*, the Board held that 50 percent of the applicable national average weekly wage exceeded 1/52 of the deceased employee's stipulated average annual earnings, which amounted to $140.70, and modified the administrative law judge's award accordingly. *Ponder* did not address the relationship between Section 10(f) and Section 9(e) of the Act.

position that the plain reading of that phrase requires that the "shall not exceed" phrase contained in Section 9(e)(1) 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. This interpretation is consistent with Congressional intent. Prior to the 1972 Amendments to the Act, the maximum benefit levels for disabled employees and survivors had been identical. The 1972 Amendments, however, removed the cap on survivors' benefits. *See Director, OWCP v. Rasmussen*, 440 U.S. 29, 9 BRBS 954 (1979). Thereafter, in amending the Act in 1984, Congress sought to reestablish the equality of treatment of maximum entitlements with regard to disabled employees and survivors. Specifically, by amending Sections 9(e) and 6(b) of the Act in 1984, Congress reinstated a cap on death benefits so that the maximum weekly payments allowable under the Act would be 200 percent of the national average weekly wage for *both* disability and death benefits.[4] *See* S. Rep. No. 98-81, 98th Cong., 1st Sess. 33 (1983). Thus, the absolute ceiling on the rate at which death benefits can be paid to a survivor is contained in Section 6(b)(1) of the Act, which provides that compensation for disability or death benefits "shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage . . ." 33 U.S.C. §906(b)(1) (1988).

Additionally, as claimant observes, employer's interpretation of Section 9(e), taken to its logical extreme, would nullify Section 10(f) adjustments to permanent total disability compensation awarded under Section 8(a) of the Act. Under Section 8(a), in cases of permanent total disability, "66 2/3 per centum of the average weekly wages *shall be paid* to the employee during the continuance of such total disability." 33 U.S.C. §908(a)(emphasis added). Applying employer's reasoning, this section arguably appears to set a maximum rate of compensation at two-thirds of the employee's average weekly wage, and would bar the application of Section 10(f) beyond this apparent maximum benefit. Such a result, however, would be contrary to the remedial purpose of Section 10(f), which is to minimize the effects of inflation on awarded benefits. Moreover, the express language of Section 10(f) mandates that cost-of-living adjustments be made, even though they augment an employee's compensation rate in excess of the level set forth in Section 8(a), subject to the limitation set forth in Section 6(b)(1). The clear implication, therefore, is that Section 9(e)(1) operates in the same fashion as Section 8(a); it provides for a maximum *initial* calculation of the benefit rate which is thereafter adjusted annually in accordance with Section 10(f), with a maximum ceiling as defined by Section 6(b)(1).

As both claimant and the Director argue, to limit claimant's death benefits to decedent's average weekly wage renders Section 10(f) meaningless, thereby abrogating the remedial purpose of

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[4]In *Director, OWCP v. Rasmussen*, 440 U.S. 29, 9 BRBS 954 (1979), the United States Supreme Court held that a maximum benefit level did not apply to death benefits, pursuant to the 1972 Amendments to the Act. In response to the decision of the Supreme Court in *Rasmussen*, the Senate Committee stated: "Accordingly, the committee is reinstating both in Sections 6(b)(1) and 9(e) of the LHWCA the equality in the treatment of maximum entitlements as regards disabled and survivors which had existed for almost 50 years prior to the 1972 congressional action. The committee is limiting the maximum weekly death payments to an amount not to exceed 200 percent of the national average weekly wage and specifically rejects the conclusion and decision of the Supreme Court in the *Rasmussen* case." S. Rep. No. 98-81 98th Cong., 1st Sess. 33 (1983).

Section 10(f), as well as the intent of Congress to provide for the equality in treatment of maximum entitlements with regard to permanent total disability compensation and death benefits. We therefore hold that Section 9(e)(1) does not bar the application of Section 10(f) where adjustments to death benefits would increase compensation above the employee's average weekly wage, as the maximum ceiling on death benefits is the amount equal to 200 percent of the applicable national average weekly wage, pursuant to Section 6(b)(1) of the Act.

Accordingly, the Compensation Order - Supplemental Award of Compensation From the Special Fund For Death Benefits of the district director is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge