BRB No. 04-0814

CHRISTINE WEEKS (Widow of RONALD WEEKS)	)	
Claimant-Respondent	)	
v.	)	
U.S. ELEVATOR CORPORATION	)	DATE ISSUED: 06/29/2005
and	)	
INDUSTRIAL INDEMNITY INSURANCE COMPANY/GUARNTY FUND MANAGEMENT SERVICE	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph H. Koonz (Koonz, McKenney, Johnson, DePaolis & Lightfoot, LLP), Washington, D.C., for claimant.

Jeffrey W. Ochsman (Friedlander, Misler, Sloan, Kletkin & Ochsman, PLLC), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Request for Modification (2004-DCW-2) of Administrative Law Judge Linda S. Chapman 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), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are

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

Ronald Weeks died in the course of his employment with U.S. Elevator Corporation on June 15, 1976. His widow, claimant herein, and her two minor children were awarded death benefits in a 1977 compensation order based on $66^{2/3}$ percent of decedent's average weekly wage ($475.55 x $66^{2/3}$ = $317.03). The district director awarded Section 10(f) adjustments, 33 U.S.C. §910(f) (1982). Thus, the award of death benefits has been adjusted annually to include cost-of-living increases, and, since the children reached their majority, has been paid only to claimant at 50 percent of decedent's average weekly wage, with adjustments.

In 2002 or 2003, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that, since 1981, the payments to the survivors have exceeded decedent's average weekly wage in contravention of Section 9(e) of the Act, 33 U.S.C. §909(e). Employer thus sought a credit for the alleged overpayment. The administrative law judge denied the motion, pursuant to the Board's holding in *Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2 (1997), that Section 9(e) applies only to the initial calculation of benefits and does not preclude application of Section 10(f) when benefits exceed the decedent's actual average weekly wage.

On appeal, employer contends that the administrative law judge erred in relying on the Board's decision in *Donovan*, as that case arose under the 1984 Amendments, which are inapplicable in this D.C. Act case. Employer contends that the Board's decision in *Lombardo v. Moore-McCormack Lines, Inc.*, 6 BRBS 361 (1977), applies and supports its contention that the decedent's actual average weekly wage provides the absolute maximum compensation payable for death benefits under the 1972 Act. Claimant responds, urging affirmance of the administrative law judge's denial of employer's motion for modification.[1]

The 1972 version of the Act is applicable in this D.C. Act case. *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). Section 9(e) of the 1972 Act states:

[1] Claimant contends that laches bars employer's motion for modification because employer did not raise the issue until more than 20 years after it alleges claimant's benefits surpassed the maximum compensation payable. Doctrines of finality do not apply to prevent application of Section 22. *See generally Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 906(b) of this title ***but the total weekly benefits shall not exceed the average weekly wages of the deceased.***

33 U.S.C. §909(e) (1982) (emphasis added). The Supreme Court held in *Director, OWCP v. Rasmussen*, 440 U.S. 29, 9 BRBS 954 (1979), that Section 6(b) of the 1972 Act, 33 U.S.C. §906(b) (1982), does not contain a cap on the amount of death benefits payable, *i.e.*, that the 1972 version of Section 6(b) which capped disability benefits at a percentage of the national average weekly wage, is not applicable to death benefits due to the omission of the term "death" benefits from Section 6(b).[2] Section 10(f) of the 1972 Act states,

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after October 27, 1972, chapter shall be increased by a percentage equal to the percentage (if any) by which the applicable national 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.

33 U.S.C. §910(f) (1982) (amended 1984).[3] The *Rasmussen* Court did not directly address the issue of whether uncapped death benefits could exceed the decedent's average weekly wage pursuant to Section 9(e). *But see Rasmussen*, 440 U.S. at 41, 44 n.16, 9 BRBS at 962, 964 n.16.

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[2] Section 6(b) of the 1972 Act lifted the former flat rate maximum benefit payable for disability, and capped disability benefits on a sliding scale from 125 percent (for the period ending September 30, 1973) to 200 percent of the national average weekly wage (commencing October 1, 1975). 33 U.S.C. §906(b) (1982). The Act was amended in 1984 to add a 200 percent cap on death benefits as well. 33 U.S.C. §906(b) (2000).

[3] Under the 1972 Act, death benefits were awardable either if the death was due to the employment injury or if the employee was permanently totally disabled at the time of death due to an unrelated cause. 33 U.S.C. §909 (1982) (amended 1984). Section 10(f) was applicable only on an award of death benefits where, as here, the death was due to the work injury. *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988).

In *Donovan*, 31 BRBS 2, however, the Board addressed that part of the 1984 version of Section 9(e) that is identical to the language in the 1972 version at issue here. Specifically, Section 9(e) of the 1984 Act states:

> (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—
>
> (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; and. . . .

(emphasis added). In *Donovan*, as in this case, the employer contended that the decedent's average weekly wage was a cap on benefits payable to the survivors due to the "shall not exceed" language, such that Section 10(f) adjustments were not applicable to the extent they caused the compensation rate to surpass the decedent's average weekly wage. The Board adopted the position of the Director, Office of Workers' Compensation Programs, that the Section 9(e) "cap" on death benefits is applicable only to the initial calculation of death benefits, due to the phrase "In computing death benefits" at the beginning of Section 9(e). *Donovan*, 31 BRBS at 4-5. The Board held that Section 9(e) is analogous to Section 8(a), which states, "In case of total disability adjudged to be permanent $66^{2/3}$ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability," yet there is no question that Section 10(f) adjustments apply to increase permanent total disability compensation beyond two-thirds of the employee's average weekly wage. *Id.; see, e.g., Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT) (2d Cir. 1990). In this regard, the Board held that the employer's interpretation would nullify Section 10(f), contrary to the express language of that section making it applicable to an award of death benefits. The administrative law judge found that *Donovan* squarely addresses the issue presented by employer in this case and mandates that its motion for modification be rejected.

We reject employer's contention that the administrative law judge erred in relying on *Donovan*. Employer's contention that *Donovan* is not controlling precedent because it arises under the 1984 Act is unavailing. It is evident from the plain language of the 1972 and 1984 versions of Section 9(e) that the two provisions must be interpreted in the same manner as they are virtually identical in stating that the *computation* of death benefits shall not exceed the decedent's average weekly wage. Therefore, the administrative law judge properly found that under the 1972 Act, benefits due the survivors are not capped by the decedent's average weekly wage when Section 10(f) adjustments cause the award to exceed the average weekly wage.

Furthermore, we reject employer's contention that the Board's decision in *Lombardo v. Moore-McCormack Lines, Inc.*, 6 BRBS 361 (1977), supports it position that claimant's death benefits are capped by decedent's average weekly wage. In *Lombardo*, the administrative law judge awarded death benefits based on 50 percent of the decedent's average weekly wage. On appeal, the Board held that the administrative law judge erred, as this average weekly wage was lower than the national average weekly wage, in contravention of Section 9(e). The Board further stated,

> Subsection 9(e) also says that the death benefits are not to exceed the decedent's average weekly wage. Thus in this case the weekly benefits for the year immediately following the death would be the full 50 per cent of the national average weekly wage or $74.57. As the national average weekly wage increases in succeeding years, the weekly benefit would also increase to a maximum of $77.88 (the decedent's actual average weekly wage).

Lombardo, 6 BRBS at 363-364. Employer contends that this statement supports its contention that decedent's actual average weekly wage provides the maximum payable to claimant. The administrative law judge fully considered this contention, and rationally rejected it on the basis that *Lombardo* did not address the applicability of Section 10(f), which the subsequent decision in *Donovan* did. Decision and Order at 4. Moreover, the passage from *Lombardo* is arguably *dicta*, as the issue in that case concerned the minimum compensation due, not the maximum compensation payable. *See Dunn v. Equitable Equip. Co.*, 8 BRBS 18 (1978). Therefore, as the administrative law judge properly applied *Donovan* and her decision is in accordance with law, we affirm the denial of employer's motion for modification and the consequent conclusion that there is no ceiling on the death benefits due claimant in this case. *Rasmussen*, 440 U.S. 29, 9 BRBS 954.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge