

EVELYN G. DURHAM)
(widow of JOHN W. DURHAM))
)
Claimant-Respondent)
)
v.)
)
EMBASSY DAIRY)
)
and)
)
BROADSPIRE (AMERICAN MOTORIST) DATE ISSUED: 05/24/2006
INSURANCE))
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)
)
Respondent) DECISION and ORDER

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

Kevin J. O'Connell (O'Connell, O'Connell & Sarsfield), Rockville, Maryland, for employer/carrier.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Compensation Order (No. 40-171024) of Associate District Director Charles L. Green rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (the Act). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986).

Decedent injured his shoulder during the course of his employment as a milkman in June 1981 and was awarded permanent partial disability benefits under Section 8(c)(21), 33 U.S.C. §908(c)(21). *See Durham v. Embassy Dairy*, 19 BRBS 105 (1986). He died on June 14, 2003, due to causes unrelated to his injury, and employer ceased paying benefits. Claimant, decedent's widow, filed a claim for death benefits under Section 8(d)(3), 33 U.S.C. §908(d)(3) (1982).¹ The district director determined that claimant is entitled to benefits under Section 8(d)(3) at a weekly rate of \$127.59, which is 75 percent of decedent's weekly compensation rate of \$170.12, from June 15, 2003, through May 24, 2005, and continuing subject to the limitations of the Act. These benefits, however, are not subject to annual cost-of-living adjustments. Order at 2. Employer appeals, contending claimant's claim was untimely, as it was filed nearly two years after decedent's death. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the award. Claimant has not responded.

This case arises under the D.C. Workmen's Compensation Act. Consequently, claimant is entitled to the rights afforded her under the Longshore Act, as it existed prior to the 1984 Amendments. *Shea, S&M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991); *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). The 1972 Amendments to the Act withdrew adjudicatory power from district directors and granted that power to administrative law judges. 33 U.S.C. §919(d) (1982); *Barthelmy v. J. Ray McDermott & Co.*, 537 F.2d 168 (5th Cir. 1976); *see Percoats v. Marine Terminals Corp.*,

¹Section 8(d)(3) states:

If an employee who was receiving compensation for permanent partial disability pursuant to Section 8(c)(21) dies from causes other than the injury, his survivors shall receive death benefits as provided in [Section 9] except that the percentage figures therein shall be applied to the weekly compensation payable to the employee at the time of his death multiplied by 1.5, rather than to his average weekly wages.

15 BRBS 151 (1982). Thus, absent agreement between the parties, a district director is not empowered to issue a compensation order. *Roulst v. Marco Constr. Co.*, 15 BRBS 443 (1983); 20 C.F.R. §702.315.

In his response brief, the Director has set forth his interpretation of the facts of this case. He stated that decedent died on June 14, 2003, and employer discontinued payments immediately upon learning of his death. Order at 1; Dir. Brief at 1. According to the Director, on June 25, 2004, a claims examiner from the Office of Workers' Compensation Programs (OWCP) inquired as to decedent's pay status; however, employer did not respond. OWCP resubmitted its inquiry on February 1, 2005, and sometime on or before May 3, 2005, employer informed the claims examiner by telephone that decedent had died in 2003. Dir. Brief at 1-2. In response, on May 3, 2005, the claims examiner wrote a letter informing employer that decedent's widow was entitled to death benefits once a claim therefor was filed, and that, unless contested, claimant would be awarded those benefits when she claimed them. The Director states that claimant filed a claim for death benefits on May 9, 2005. The district director issued the compensation order awarding death benefits on May 24, 2005.

We cannot affirm the district director's award of benefits to claimant, nor can we accept the Director's assertion that the widow's claim was timely filed due to employer's failure to file a Section 30(a), 33 U.S.C. §930(a), report. There is no indication that the parties agreed to the issuance of a compensation order, *see* 20 C.F.R. §702.315, and, indeed, employer's appeal indicates otherwise. Thus, the district director was without authority to issue an order awarding death benefits to claimant. *Roulst*, 15 BRBS 443; 20 C.F.R. §702.315. Moreover, there are no documents in the file, other than two letters, from which we can ascertain the facts of this case. Because factual issues exist, such as when employer received notice of decedent's death, whether employer failed to file a Section 30(a) report, whether the time for filing a claim was tolled, when claimant filed her claim and whether it was timely filed, disputed issues must be resolved by an administrative law judge. *See generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000). Thus, we vacate the district director's award of death benefits and remand this case to the district director. If the parties are unable to reach agreement on an award, the district director must refer the case for a hearing before an administrative law judge in accordance with the procedures set forth in the regulations, 20 C.F.R. §§702.315-702.317.

Accordingly, the Compensation Order awarding death benefits is vacated, and the case is remanded to the district director.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge