

PATRICIA ANN CLEMON )  
and BRUCE MACK )  
(Co-Executrix and Administrator )  
of the estate of DAVID MACK) )

Claimant-Respondent )

v. )

ADDSCO INDUSTRIES, )  
INCORPORATED )

Self-Insured )  
Employer-Respondent )

DATE ISSUED: \_\_\_\_\_

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT OF )  
LABOR )

Petitioner )

DECISION and ORDER

Appeal of the Decision and Order Approving Settlement of Quentin P. McColgin,  
Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

Winn Faulk (Drinkard, Ulmer, Hicks & Leon), Mobile, Alabama, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., 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: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the

Decision and Order Approving Settlement (90-LHC-1525) of Administrative Law Judge Quentin P. McColgin 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 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board held oral argument in this case in Mobile, Alabama, on January 11, 1994.<sup>1</sup>

Decedent, a retired employee who was exposed to injurious noise during the course of his employment with employer, underwent an audiological evaluation on October 29, 1986, the results of which revealed a 32.8 percent binaural impairment. Emp. Ex. 1. Based on these results, decedent filed a claim for compensation under the Act on April 3, 1987; however, he died of respiratory failure on February 4, 1989. Subsequently, on November 12, 1990, decedent's widow died. Both deaths occurred prior to the adjudication of this claim. Emp. Ex. 4; Tr. at 4. At the formal hearing, claimants<sup>2</sup> and employer informed the administrative law judge of their agreement to settle the claim. The administrative law judge thereafter approved the settlement, which requires employer to pay \$8,500 into the Probate Court of Mobile County in full settlement of decedent's hearing loss claim. The amount is to be paid within 20 days after a final order has been issued or the time for appeal has expired, whichever is later. If the award becomes final, either without appeal or after all appeals are exhausted, then the probate court shall distribute the money, less court costs, to decedent's estate. If the government obtains a non-appealable reversal of the award, then the money, less court costs, shall be refunded to employer, and employer will be entitled to a hearing on the merits. The settlement further provides that claimants' counsel is entitled to a \$2,045 fee, which employer shall not be obligated to pay if the award is reversed. Decision and Order at 1-4; Tr. at 6.

On appeal, the Director, presenting two primary arguments, challenges the settlement approved by the administrative law judge. First, he contends the settlement is not a proper Section 8(i), 33 U.S.C. §908(i) (1988), settlement as it does not fully resolve the claim and discharge employer of its liability, and it attempts to bind the Special Fund without the Director's participation.<sup>3</sup> Secondly, the Director argues that the settlement inappropriately provides for the payment of benefits to decedent's estate instead of the Special Fund pursuant to Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3) (1988). In response, urging affirmance, claimants assert that the settlement correctly provides for payment to decedent's estate, as all unpaid benefits to which

---

<sup>1</sup>By Order dated December 3, 1993, the Board consolidated this case for oral argument with *Wood v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 92-2532 (March 18, 1994). We hereby sever these cases, 20 C.F.R. §802.104(b), and note that our decisions therein will be issued separately.

<sup>2</sup>Claimants herein are decedent's non-minor daughter and son, co-administratrix and executor of decedent's estate.

<sup>3</sup>The Director was notified in advance by certified mail of the proposed settlement and did not object. However, he contends this does not "validate" the settlement.

decedent is entitled under the Act had accrued prior to his death. Further, they contend that the agreement is in accordance with Section 8(i), as it does not affect the Special Fund and, even if it did, the Director was given adequate notice of the settlement and ample opportunity to respond. Employer also responds, urging the Board to uphold the settlement; however, it takes no position on which party, decedent's estate or the Special Fund, is the proper recipient of decedent's unpaid benefits. In the alternative, employer requests a hearing on the merits of the case.

Section 8(i) of the Act permits the parties of a disputed claim to compromise and settle their dispute, provided the employer and/or the carrier therein are fully discharged of liability, and the administrative law judge approves the agreement. See *Poole v. Ingalls Shipbuilding, Inc.*, BRBS , BRB Nos. 92-1259, 92-1259A (November 24, 1993); 33 U.S.C. §908(i)(1), (3) (1988); 20 C.F.R. §§702.241-702.243. Section 702.242(a) of the regulations requires the settlement agreement to be a stipulation signed by all the parties. 20 C.F.R. §702.242(a). An agreement between an employer and a claimant which affects the liability or the rights of the Special Fund is not binding on the Fund absent the Director's participation, be it explicit or constructive. *Byrd v. Alabama Dry Dock & Shipbuilding Corp.*, BRBS , BRB No. 92-930 (December 16, 1993); *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, BRBS , BRB No. 91-789 (May 24, 1993); *Brady v. J. Young & Co.*, 17 BRBS 46 (1985). Thus, to determine whether the Director's contentions have merit, we must first ascertain whether the parties' settlement affects the rights or liability of the Special Fund.

The Director contends the settlement approved by the administrative law judge deprives the Special Fund of monies to which it is rightly entitled. In this regard, he argues that because decedent died without statutory survivors prior to the adjudication of this claim, Section 8(d)(3) of the Act applies, and the plain language of that section mandates payment of decedent's unpaid benefits to the Special Fund. Specifically, the Director avers that the term "unpaid" in Section 8(d), 33 U.S.C. §908(d) (1988), should be interpreted literally, including accrued and unaccrued amounts, making the maturity or immaturity of the payments irrelevant.<sup>4</sup> Further, he distinguishes the instant case from *Alabama Dry Dock & Shipbuilding Corp. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986), and *Wilson v. Vecco Concrete Construction Co.*, 16 BRBS 22 (1983), as

---

<sup>4</sup>We note that claimants and employer agreed to settle this claim for an amount between that which decedent would have received pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988), and that which he would have received pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988), and that they do not challenge the adequacy of the settlement on appeal. Regardless of the terms of the settlement herein, hearing loss injuries are compensated under the schedule at Section 8(c)(13) in accordance with the Supreme Court's holding in *Bath Iron Works Corp. v. Director, OWCP (Brown)*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993). Although the Director originally argued the applicability of Section 8(d)(3) to cases involving benefits awarded under Section 8(c)(23), in his reply brief, he addresses the applicability of that section to Section 8(c)(13) benefits, and, at oral argument, he noted that this case involves an injury for which benefits are properly calculated under Section 8(c)(13). O.A. Tr. at 7. Moreover, as decedent retired in 1968, it is readily apparent, and the Director so acknowledged, that all benefits accrued prior to decedent's death. See *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993); O.A. Tr. at 10-11.

they involve total disability benefits, and he contends that reliance on *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C. Cir. 1948), is misplaced, as Section 8(d)(3) invalidates the *Turner* analysis regarding unaccrued payments and overrules the analysis regarding accrued but unpaid payments.

When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989); *see also Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 183 (1993). 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, 104 S.Ct. 2778 (1984). Thus, our review of the Section 8(d) issue in this case properly begins with the language of that section.<sup>5</sup> Section 8(d) 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. . . .
- (2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subsection (c)(1)-(20) of this section unpaid at the 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 this subsection shall be paid to the special fund established under section 44(a) of this Act.

33 U.S.C. §908(d) (1988).<sup>6</sup>

---

<sup>5</sup>We note that the purpose of Section 8(d) is to ensure the payout of the entire scheduled award, irrespective of an employee's death. *See Hamilton v. Ingalls Shipbuilding, Inc.*, 26 BRBS 114, 119 (1992), *rev'd mem. on other grounds sub nom. Director, OWCP v. Ingalls Shipbuilding, Inc.*, No. 93-4054 (March 10, 1993); 33 U.S.C. §908(d) (1988).

<sup>6</sup>Section 8(d)(1) of the Act enumerates the hierarchy of recipients of benefits in the event an injured employee receiving scheduled permanent partial disability benefits dies due to causes unrelated to his injury. Incorporating Section 9(d), the statutory survivors include the widow or widower, and also children, grandchildren, siblings, parents and grandparents, all of whom must have been dependent on the decedent. 33 U.S.C. §§908(d)(1), 909(d).

Because the principle of statutory construction requires courts to begin with the plain language of the statute, the threshold question before us concerns the interpretation of the term "unpaid" in Section 8(d)(1), since the total amount "unpaid" is paid to the benefit of specified survivors, and if there are no statutory survivors, to the Special Fund. The Director's argument that the plain language of Section 8(d) supports payment of decedent's benefits to the Special Fund rests on the general definition of the term "unpaid" as including any money that has yet to be physically received by the person entitled to it. Statutory interpretation, however, requires that language be construed and defined to meet with legislative intent and to prevent absurdities or inconsistencies created by using the general definition of a term; in extraordinary circumstances, the courts have held that words may be disregarded, substituted, transposed or inserted. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 102 S.Ct. 3245 (1982); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 60 S.Ct. 1059 (1940); Sutherland Stat. Const. §§47.35-47.38 (5th ed. 1992). The Longshore Act, moreover, must be liberally construed in order to effectuate its remedial purposes and avoid harsh and incongruous results. *See, e.g., Voris v. Eikel*, 346 U.S. 328 (1953). In this case, we must reject the Director's position as inconsistent with the statute, case precedent and the purpose of the Act, as use of a literal definition of the word "unpaid" would pay to the Special Fund instead of the deceased employee's estate benefits to which he had a vested right. We do not believe the plain meaning of the Act supports this construction.

It is a well-established concept that disability compensation which accrues prior to an employee's death is the property of the employee's estate.<sup>7</sup> In *Turner*, 169 F.2d at 681, the United States Court of Appeals for the District of Columbia Circuit rejected a claim by the administrator of a deceased employee's estate for the portion of a scheduled award which accrued after the employee's death, *i.e.*, although employer regularly paid benefit installments, upon the date of death, there remained a balance of \$2,905. In rejecting the estate's claim for the balance, the court stated:

Doubtless, as the cases hold, the employee does acquire a vested right in unpaid benefit installments which have become due and payable before his death. They pass to his estate if he dies without dependents. But in this case all matured installments were paid to the date of the employee's death. He having died without dependents the unmatured portion of the award abated.

*Id.* at 682. The Director contends that this case, which appears to be on point, was overruled by the 1972 Amendments to the Act. Prior to 1972, Section 8(d) provided for the payment to specified

---

<sup>7</sup>Courts have long recognized the potential inheritance problems which arise with scheduled permanent partial disability awards because of the general rule that there are no property rights in compensation awards, and to solve the problems, they distinguish between "accrued" and "unaccrued" scheduled benefits. Larson, *The Law of Workmen's Compensation*, §§2.60, 58.40. Citing cases in which the courts have unanimously awarded accrued payments to the estates of deceased employees, Larson states: "Accrued but unpaid installments are, of course, an asset of the estate, like any other debt." Larson, §58.41; *see also* 82 Am. Jur. 2d Workers' Comp. §728; 99 C.J.S. Workmen's Compensation §149.

survivors of "any compensation to which any claimant would be entitled under subdivision (c) of this section [except subdivision (c)(21)] notwithstanding death arising from causes other than the injury." The 1972 Amendment changed this language to that currently in Section 8(d)(1), requiring that where an "employee who is receiving compensation for permanent partial disability [under the schedule] dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable" to specified survivors, and added current Section 8(d)(3) providing for the payment of benefits to the Special Fund where the employee died without statutory survivors.

The Director argues that this change overruled *Turner* in two respects. First, the Director states that by enacting Section 8(d)(3), Congress provided that the unmatured portion of an award must be paid even where the employee dies without survivors instead of lapsing as in *Turner* and that payment in such cases is made to the Special Fund. We agree with the Director on this point. Clearly, Section 8(d)(3) is consistent with the directive in Section 8(d)(1) that the total schedule award shall be paid, and it provides a beneficiary for the unmatured portion where a deceased employee leaves no statutory survivors.

We do not, however, agree that the legislative change made in 1972 overruled *Turner* in the second respect asserted by the Director, *i.e.*, that *Turner* was overruled insofar as it holds that the matured portion of unpaid permanent partial disability benefits are payable to the estate of the deceased employee. There is no evidence that Congress intended this result in amending Section 8(d).<sup>8</sup> Such a holding would represent a fundamental change inconsistent with general principles of workers' compensation laws. *See* n.7, *supra*. Far from indicating an intent to make such a sweeping revision, the legislative history states that the amendment "continues the existing provisions" for payment of enumerated benefits to survivors, making changes in the designated survivors and providing that if there are no survivors, the compensation which would be payable to the survivors is payable to the Special Fund. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 15-16 (1972); *see also* S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972). We hold, therefore, that Section 8(d)(3) filled a gap in the legislative scheme noted by *Turner*, in that the unmatured portion of scheduled awards were permitted to abate rather than being fully payable where a deceased employee left no statutory survivors.

The Board has consistently held that the estate is entitled to accrued benefits in cases involving other types of disability benefits than those covered by the Section 8(c) schedule. For example, in *Wilson*, 16 BRBS at 22, the Board affirmed the administrative law judge's determination that an employee's estate was entitled to the additional temporary total disability benefits, based on an adjusted average weekly wage, to which the employee would have been entitled had he lived.

---

<sup>8</sup>The primary focus of the 1972 Amendments to Section 8(d) was in creating a remedy for survivors with non-scheduled permanent disabilities. The Act was amended to add provisions entitling survivors of employees entitled to benefits for permanent partial disability under Section 8(c)(21) and permanent total disability under Section 8(a) at the time of death to recover a death benefit where the employee died from causes unrelated to the work injury. These provisions were repealed in 1984. *See* 33 U.S.C. §§908(d)(3), 909(a) (1982) (repealed 1984).

The Board stated:

While the unmaturing portion of an award abates at death, an employee acquires a vested right to unpaid benefit installments. Upon his death without dependents, the right to these unpaid benefit installments passes to his estate.

*Wilson*, 16 BRBS at 25 (citing *Turner*, 169 F.2d at 681). The United States Court of Appeals for the Eleventh Circuit has also relied on the court's reasoning in *Turner*, stating:

Once an employee establishes the right to payment, the Act does not attempt to direct what he may or may not do with the money. Because the right to payments accrued to [decedent] before his death, these payments must go to his estate.

*Alabama Dry Dock*, 804 F.2d at 1561, 19 BRBS at 64 (CRT); see *Turner*, 169 F.2d at 682. We decline to distinguish *Alabama Dry Dock* and *Wilson* on the basis that they do not concern permanent partial disability benefits as the discussions therein regarding accrued benefits are consistent with general workers' compensation laws. See n.7, *supra*. The material distinction is that pursuant to Section 8(d), the unaccrued portion of a schedule award is paid out, while continuing awards abate at the time of death.

This construction is consistent with the statute as a whole. The preface to Section 8 mandates that "[c]ompensation for disability shall be paid to the employee. . . ." 33 U.S.C. §908 (emphasis added); see also *Henry v. George Hyman Construction Co.*, 749 F.2d 65, 73, 17 BRBS 39, 45 (CRT) (D.C. Cir. 1984), and Sections 8(d)(3) and 19(f), 33 U.S.C. §919(f), allow for an award of disability benefits after the death of the recipient. See *Alabama Dry Dock*, 804 F.2d at 1561, 19 BRBS at 63-64 (CRT). Where an award is entered after the death of an injured employee, his entitlement to disability benefits is determined by the terms of the Act and not by whether his claim happens to have been adjudicated at the date of death. See, e.g., *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988). In a case involving repealed Section 8(d)(3),<sup>9</sup> which contained language similar to that in current Section 8(d)(1) applicable to claims under Section 8(c)(21), the Board addressed entitlement to death benefits where the deceased employee had settled his claim; thus, he 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"

---

<sup>9</sup>In 1984, Section 8(d)(3) was repealed. It stated:

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(b)-(g), 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.

33 U.S.C. §908(d)(3) (1982). Current Section 8(d)(3), at issue here, was formerly Section 8(d)(4).

actually means "is entitled to compensation," and thus his survivor could claim benefits. *Abercrombia v. Chaparral Stevedores*, 22 BRBS 18.4, 19 (1989), *aff'g on recon.* 22 BRBS 18 (1988). *Accord Acuri v. Cateneo Lines Service Co.*, 8 BRBS 102 (1978). 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. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992). There is no case precedent holding that entitlement is determined by physical receipt of payment, as Director would have us hold here, or by the date of an adjudication, which has no relation to the merits of a claim and is subject to delay. The terms of the Act and case precedent lead inexorably to the conclusion that installments due and payable prior to the employee's death are the property of the employee; his estate is thus entitled to these vested benefits upon his death.



Were we to interpret the term "unpaid" in the literal sense propounded by the Director, *i.e.*, that the term "unpaid" includes all accrued and unaccrued amounts due decedent, we would create a law which directly contradicts this well-established precedent and divests the employee's estate of a vested interest in the accrued compensation.<sup>10</sup> This we decline to do. Accordingly, we hold that an employee has a vested interest in benefits which accrue during his lifetime, and, after he dies, his estate is entitled to those benefits, regardless of when an award is made. Furthermore, as benefits which do not accrue prior to an employee's death abate unless otherwise provided by statute, *see Turner*, 169 F.2d at 682; *Larson*, §§58.42, 58.44; 82 Am. Jur. 2d Workers' Comp. §729, we hold that the term "unpaid" in Section 8(d) means "unaccrued," and we construe that section as curing the abatement of unaccrued scheduled permanent partial disability benefits under the Act. Thus, upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors or to the Special Fund upon his death without survivors. 33 U.S.C. §908(d)(1), (3) (1988).

In the instant case, all permanent partial disability benefits due decedent as a result of his work-related hearing loss accrued prior to his death in 1989. Therefore, as decedent's estate is entitled to those accrued benefits, we hold that the settlement between the parties herein accords with our interpretation of Section 8(d), affects neither the rights nor the liability of the Special Fund, and completely discharges employer's liability. *See Wood v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 92-2532 (March 18, 1994); *Byrd*, slip op. at 6-7. Because the settlement comports with Section 8(i) of the Act, we reject the Director's Section 8(i) arguments, and we affirm the administrative law judge's approval of the parties' settlement. *See generally Poole*, slip op. at 6; *Kelly v. Ingalls Shipbuilding, Inc.*, 27 BRBS 117 (1993).

We note that even were we to adopt the Director's position and interpret the term "unpaid" as including both accrued and unaccrued amounts, the Special Fund would not be entitled to decedent's accrued benefits in this case, as we reject the Director's contention that decedent died without a statutory survivor. The Board has recently held that the operative time for determining survivorship under Section 8(d) is the date of an employee's death. *Wood*, slip op. at 9-11. Consequently, in that his wife survived him, decedent's death triggered the application of Section 8(d)(1) and not Section 8(d)(3). In her status as survivor, absent a settlement, had there been any unaccrued benefits in this case, decedent's wife would have been entitled to them, and upon her death, her right to the payments would have passed to her estate. *See id.*

---

<sup>10</sup>Although it is common for the courts to give deference to the Director as the administrator of the Act, deference is not appropriate where the Director's position is unreasonable. *See Insurance Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); *Tyndzik v. University of Guam*, 27 BRBS 57 (1993) (Smith, J., concurring and dissenting). Because the Director's position deprives an employee's estate of a vested right, it is unreasonable. It is also unreasonable because, instead of encouraging an employer to promptly pay benefits, the Director's position fosters delay and gives the employer an incentive to pay the Special Fund, rather than its employees, thereby possibly reducing its annual assessment under Section 44 of the Act, 33 U.S.C. §944.

Accordingly, the administrative law judge's Decision and Order Approving Settlement is affirmed.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

JAMES F. BROWN  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge