BRB No. 97-975

MIRIAM CASEY and DAVID E. CASEY (widow and son of GEORGE CASEY)	)	
Claimants-Respondents	)	
v.	)	
GEORGETOWN UNIVERSITY MEDICAL CENTER	)	DATE ISSUED:_____
and	)	
AETNA CASUALTY AND SURETY COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

Judith A. Leichtnam (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for employer/carrier.

Joshua T. Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (95-LHC-1663) of Administrative Law Judge Paul A. Mapes 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). The Board heard oral argument in this case on September 15, 1997, in San Francisco, California.

Decedent worked as an anesthesiology resident at employer's facility in 1977. Two weeks into his residency, he was exposed to halothane gas. He began experiencing numerous symptoms such as night sweats, nausea, fever, epigastric discomfort and weight loss. Cl. Exs. 1, 6. Emergency exploratory surgery and a liver biopsy revealed piece-meal necrosis of the liver and other indicators which depicted chronic aggressive hepatitis and early cirrhosis. Cl. Exs. 4, 6. Dr. Danovitch, decedent's treating physician, surmised that decedent contracted his liver disease after repeated exposure to halothane. Emp. Ex. 14 at 151, 264. Decedent filed a claim for disability compensation under the Act, and employer sought a medical opinion from its expert, Dr. Zimmerman. Dr. Zimmerman expressed the opinion that decedent's disease was halothane-associated, partially irreversible, and would decrease his life-expectancy. Cl. Ex. 9. The claim for disability benefits was settled pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), in August 1979 for $140,000, plus future medical benefits. Emp. Ex. 6. Decedent discontinued work as an anesthesiologist, but remained in the practice of medicine, and was not treated for his liver condition again until 1982.

In March 1982, although decedent was experiencing the same symptoms he had in 1977, Dr. Danovitch concluded that the liver disease was inactive; however, he believed decedent had post-necrotic cirrhosis. Emp. Ex. 14. In 1983, decedent obtained work in California, and Dr. Danovitch referred him to Dr. Knauer for continued observation and treatment. Cl. Ex. 6. In July 1983, decedent's symptoms of nausea and fatigue increased, but his liver function appeared normal. Based on this evidence, Dr. Knauer diagnosed "chronic hepatitis, type uncertain." *Id*. Despite increased medication, decedent continued to feel ill. In 1985, additional symptoms returned, and in 1986, decedent's cirrhosis caused other problems such as esophageal varices (enlarged blood vessels from portal hypertension due to cirrhosis) and hip pain. Dr. Papillon examined decedent for a cause of his hip pain and concluded that decedent had auto-immune hepatitis with secondary arthralgia (joint pain). Emp. Ex. 14 at 671; Emp. Ex. 16 at 670, 675.

In 1992, decedent was hospitalized due to a severe increase of symptoms, including vomiting blood, abdominal pain and fatigue. Examination revealed that the esophageal varices recurred and that liquid had filled his lungs. Decedent died on March 4, 1992, due to end-stage liver disease and renal failure due to chronic active hepatitis and cirrhosis. Cl. Exs. 2-3.

Decedent's widow (claimant) filed a claim in California for state workers' compensation benefits, alleging that work-related stress aggravated decedent's liver condition. Based on a review of the medical records by Dr. Bristow, who concluded that neither physical nor emotional work-related stress aggravated decedent's chronic liver disease, the claim was denied. Emp. Ex. 16 at 671, 675-676.

On March 4, 1993, claimant and her son filed a third-party wrongful death claim against defendants engaged in the production, manufacture and distribution of halothane gas. The United States District Court for the Northern District of California granted the defendants' motion for summary judgment, finding that the plaintiffs failed to establish a causal relationship between decedent's liver disease and the halothane exposure or a genuine issue of material fact for presentation to a jury. Relying on Rules 702 and 703 of the Federal Rules of Evidence, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the decision on remand of the United States Court of Appeals for the Ninth Circuit in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995), the district court stated that the plaintiffs' primary evidence of causation, the opinion of Dr. Harrison, was inadmissible because it lacks "scientific reliability" under the *Daubert* standard. The court continued, stating that even if the opinion was admissible, it would not be sufficient to create a "genuine issue of material fact." Emp. Ex. 11 at 44. The plaintiffs filed a timely appeal of this order. Thereafter, the district court assessed costs in excess of $12,000 against the plaintiffs. Following the order assessing costs, claimant agreed in writing to drop the appeal in exchange for the defendants' waiver of their right to recover the court costs.[1] Emp. Ex. 10 at 23-29; Tr. at 50-53.

[1]The written agreement is not part of the record. Tr. at 53.

Claimant and her son filed a claim for death benefits under the Act, alleging that decedent's death was the result of his exposure to halothane gas while employed with employer. The administrative law judge determined that claimants are entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that the death was work-related; however, he found that employer presented sufficient evidence to rebut the presumption. Thereafter, he credited Dr. Harrison, and the reports on which he relied, and found that decedent's death was either caused or accelerated by exposure to halothane gas at employer's facility in 1977. Decision and Order at 21-22. He also held that neither Section 33(g), 33 U.S.C. §933(g), nor the doctrine of collateral estoppel bars this claim for death benefits. Decision and Order at 27-29. Additionally, the administrative law judge found that decedent's average weekly wage for determining claimants' survivor's benefits is properly calculated by using Section 10(c), 33 U.S.C. §910(c), and decedent's wages during the last full calendar year preceding the date of his death. Decision and Order at 33-34. Employer appeals the administrative law judge's decision, and claimants and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.[2]

Section 33(g)

Employer first contends this claim is barred by Section 33(g) of the Act because claimants, in withdrawing their appeal of the district court's summary judgment in the third-party suit, entered into a settlement from which they reaped a benefit. Claimants and the Director argue that the withdrawal of the appeal in return for the defendants' waiver of their right to recover costs does not constitute a settlement within the meaning of Section 33(g). The administrative law judge agreed with claimants and determined that the agreement to withdraw the appeal of the district court's summary judgment does not bar the present claim for death benefits. Decision and Order at 27. Specifically, the administrative law judge relied on the decisions rendered by the Supreme Court of the United States in *Banks v. Chicago Grain Trimmers' Assn.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968), and by the United States Court of Appeals for the Fourth Circuit in *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960), to reject employer's argument. We affirm the administrative law judge's decision, as claimants did not enter into a third-party settlement, but lost their tort suit on the merits.

[2]The administrative law judge also concluded that Section 12, 33 U.S.C. §912, does not apply to bar claimants' claim and that decedent's son is entitled to survivor's benefits. Decision and Order at 30-31. In a Supplemental Decision and Order, the administrative law judge awarded claimants' counsel an attorney's fee and costs of over $24,000. Neither these findings nor the fee award has been challenged on appeal.

Section 33(g) bars a claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than the compensation entitlement without obtaining the employer's prior written consent. 33 U.S.C. §933(g) (1982);[3] *see generally Service Engineering Co. v. Emery*, 100 F.3d 659, 30 BRBS 96 (CRT) (9th Cir. 1996); *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.), *modified on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *cert. denied*, 507 U.S. 984 (1993). In a case involving whether the parties had entered an unapproved third-party settlement, the Board held that Section 33(g) did not bar the claim for benefits where the agreement to settle the third-party suit was conditioned upon the payment of compensation to the claimant but the record contained uncontradicted evidence that the claimant never received money from the third-party defendants. Thus, the record supported the administrative law judge's conclusion that no settlement or compromise under Section 33(g) had been consummated. *Rosario v. M.I. Stevedores*, 17 BRBS 150 (1985). Similarly, in *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995), the claimant and the third party agreed to settle a malpractice claim pending the release of the employer's lien. Because the lien was never released, the settlement was never executed, and the claimant did not receive any settlement funds, the Board affirmed the administrative law judge determination that there was no "settlement" within the meaning of Section 33(g).

Further, the Board has stated that the failure to prosecute a third-party action to final judgment is not a bar to receiving benefits under the Act. *Rosario*, 17 BRBS at 152; *see also Mills v. Marine Repair Service*, 22 BRBS 335 (1989) (decision to not pursue malpractice claim does not invoke Section 33(g) bar). Moreover, where a court has determined the value of a claim, the employer is not prejudiced by the claimant's acceptance of that determination. *Banks*, 390 U.S. at 459 (the protection supplied by Section 33(g) of the Act to an employer is not required when a fact-finder independently evaluates the situation in a third-party claim and awards damages); *Bell*, 284 F.2d at 777 (where there is a judicial determination of the damages, an employer is not prejudiced by the judgment creditor's subsequent consent to a diminution in payment); *cf. Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Smith and Brown, JJ., concurring and dissenting) ("Judgment" documenting special jury verdict was interlocutory judgment subject to revision and negotiations thereafter resulted in settlement); *Broussard v. Houma Land & Offshore*, 30 BRBS 53 (1996) (Rule 68 Offer of Judgment was tantamount to a settlement because mutual assent was required).

In this case, claimants did not succeed in the district court as summary judgment was granted in favor of the defendants. Moreover, in excess of $12,000 in court costs was assessed against them. Claimants thereafter elected to forego their appeal of the unfavorable verdict in return for a waiver of the defendants' right to reimbursement of court costs. Although claimants "retained money," which is "consideration" for purposes of their

[3]The Act, as it existed after the 1972 Amendments, is applicable to this case which arises under the D.C. Workmen's Compensation Act. *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

agreement with the defendants, the parties did not compromise the tort suit and claimants did not receive any settlement proceeds for the purposes of Section 33(g). Employer's rights under the Act were not affected by the agreement to withdraw the appeal in the wrongful death claim. *See* 33 U.S.C. §933(b); *see generally Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997). Moreover, the funds which the defendants waived were not settlement funds to which employer would be entitled to credit. *See* 33 U.S.C. §933(f). As the agreement between claimants and the third parties was not a settlement pursuant to Section 33(g), we reject employer's argument and affirm the administrative law judge's determination that this claim for death benefits is not barred by Section 33(g).

Collateral Estoppel

Employer also argues that the claim for death benefits should be barred by the doctrine of collateral estoppel. Specifically, employer asserts that the district court's finding that claimants failed to establish a causal relationship between decedent's liver disease and halothane exposure should be relied upon to defeat this claim. Employer argues that because the "preponderance of the evidence" standard is used in both forums and the same evidence was evaluated, collateral estoppel is appropriate. Claimants argue that the presumption at Section 20(a) of the Act, unavailable in the wrongful death claim, changes the burdens of proof, and that the administrative law judge has more latitude in admitting evidence than did the district court judge. These differences, they argue, create the potential for a different outcome. The Director agrees that collateral estoppel should not apply in this case because the principles which guide the district court's admission of expert evidence do not apply under the Act. The administrative law judge rejected employer's contention that collateral estoppel bars claimant's claim. He found that claimants are afforded more procedural opportunities in the administrative hearing than in the district court trial and therefore a broader range of evidence may be admitted and considered. He also concluded that the Section 20(a) presumption changes the burdens of persuasion, thereby potentially changing the outcome. Decision and Order at 28-29.

The doctrine of collateral estoppel precludes litigation by the parties in a second action of issues necessarily and actually litigated in the first action. In order for collateral estoppel effect to be given to a finding in a court proceeding by an administrative law judge deciding a claim under the Act, the same legal standards must be applicable in both forums. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting on other grounds), *aff'g on recon. en banc*, 27 BRBS 80 (1993) (Decision on Remand); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988); *Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987).

Contrary to the administrative law judge's reasoning and claimants' argument, the application of the Section 20(a) presumption in this case does not make the burden of persuasion different from that in the wrongful death claim. Although the Section 20(a) presumption aids claimants in demonstrating a causal connection between decedent's exposure to halothane and his death, the administrative law judge found in this case that employer presented sufficient evidence to rebut the presumption. *See, e.g., Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); Decision and Order at 22. Once the presumption is rebutted, it drops from the case and the issue of causation must be resolved on the whole body of proof. *Universal Maritime Corp. v. Moore,* ___ F.3d ___, No. 96-2612 (4th Cir. Sept. 16, 1997). At this juncture claimant, as the proponent, bears the burden of persuasion under the preponderance of the evidence standard. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996). Thus, given the evaluation of the evidence in this case, the legal standard for determining the existence of a causal relationship is the same in both tribunals.

Nevertheless, collateral estoppel is inoperative in the case at bar.

Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board *shall not be bound by common law or statutory rules of evidence* or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

33 U.S.C. §923(a) (1982) (emphasis added); *see also* 20 C.F.R. §§702.338, 702.339. Under the Rules of Practice and Procedure Before the Office of Administrative Law Judges, "relevant evidence" is defined as:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

29 C.F.R. §18.401, and

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority.

29 C.F.R. §18.402. Thus, the administrative law judge has wide discretion to admit evidence relevant to discerning the parties' rights in a hearing under the Act, *Olsen v. Triple A Machine Shops, Inc.* 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Camarillo v. National Steel & Shipbuilding Co.*, 10 BRBS 54 (1979), and hearsay evidence is admissible if it is considered reliable. *Richardson v. Perales*, 402 U.S. 389 (1971); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

Because Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence, he has greater latitude in admitting expert evidence than did the district court, which ruled that claimant's primary evidence in support of causation was not admissible based on Rules 702 and 703 of the Federal Rules of Evidence and the decisions in *Daubert*. As the Federal Rules do not limit the admissibility of evidence in a case under the Act, and as Dr. Harrison's opinion is relevant to a critical issue in this case, the administrative law judge properly admitted it into evidence. *See Brown v. Washington Metropolitan Area Transit Authority*, 16 BRBS 80 (1984), *aff'd mem.*, No. 84-1076 (D.C. Cir. May 17, 1985). The introduction of different evidence, which supports an opposing point of view, clearly affected the outcome of this case, despite the fact that both tribunals applied the preponderance of the evidence standard. For these reasons, employer's argument must fail. We, therefore, affirm the administrative law judge's conclusion that

collateral estoppel does not operate in this case.[4] *See Chavez*, 28 BRBS at 189; *Barlow*, 20 BRBS at 179. Because we conclude that the claim for death benefits is not barred by either Section 33(g) or collateral estoppel, we shall now address employer's remaining contentions on the merits.

Causation

Employer contends the administrative law judge erred in crediting Dr. Harrison's opinion that decedent's death was work-related because it presented evidence rebutting the Section 20(a) presumption, and the preponderance of the evidence establishes that decedent's death was related to his chronic active hepatitis which was not caused by halothane exposure. Claimants and the Director argue that the administrative law judge has the discretion to determine the credibility of the witnesses and that he reasonably credited Dr. Harrison's opinion which establishes a causal connection. The administrative law judge specifically credited Dr. Harrison's opinion over those of Drs. Danovitch and Zimmerman, citing points which he believed were inconsistent in their opinions and thoroughly explaining why he believed Dr. Harrison's view was the more persuasive. Decision and Order at 10-26.

Initially, employer correctly contends, and the administrative law judge so found, that the Section 20(a) presumption has been rebutted and that claimants must establish causation by a preponderance of the evidence. *See* Decision and Order at 22. In reviewing the whole body of proof, the administrative law judge discussed the testimony of the three doctors who formed opinions on causation. Dr. Harrison testified that he believed decedent's death due to chronic active hepatitis was related to his exposure to halothane

[4]Additionally, the issue before district court concerned whether decedent's halothane exposure caused his illness and death for purposes of determining whether the defendants were subject to product liability and wrongful death damages. The issues before the administrative law judge, however, arise in a workers' compensation setting, and, under the Act, the administrative law judge has the latitude to consider not only whether halothane was the cause of death, but also whether it exacerbated a condition or accelerated death. *See generally Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). Thus, the matters "actually litigated" differ, thereby also preventing application of collateral estoppel. *See Chavez*, 28 BRBS at 189.

gas in 1977. He stated that either the exposure to halothane gas caused bouts of acute hepatitis during the summer of 1977 and also activated decedent's pre-existing dormant hepatitis, or the halothane exposure caused decedent to suffer numerous episodes of acute hepatitis which then evolved into chronic active hepatitis and later caused his death. Cl. Ex. 8; Emp. Ex. 15 at 376-378, 465. Although they originally believed decedent was afflicted with a halothane-associated disease, Drs. Danovitch and Zimmerman later opined that decedent's chronic active hepatitis was caused by the spontaneous development of auto-immune hepatitis and, thus, was not work-related. They reasoned that decedent's hepatitis was not halothane-induced because the disease continued and worsened despite the absence of continued exposure to the gas. Emp. Exs. 13-14, 17.

It is within the discretionary powers of the administrative law judge to determine the credibility of witnesses and to evaluate and draw inferences from the medical evidence of record, and the Board must respect those findings if they are rational. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994). The administrative law judge credited Dr. Harrison's opinion and the research on which Dr. Harrison relied and stated:

> [the] evidence suggests that even if [decedent] did have autoimmune hepatitis prior to 1977, his exposure to halothane exacerbated that condition and thereby caused him to die sooner than he otherwise would have. Indeed, this hypothesis is the one that is the most consistent with all of the evidence.

Decision and Order at 25. We reject employer's argument that the administrative law judge erred in relying on Dr. Harrison's opinion under the ruling in *Daubert*. As we previously discussed, the Federal Rules of Evidence are not binding upon the administrative law judge, and he was entitled to weigh Dr. Harrison's opinion with the other relevant evidence of record.[5] As the administrative law judge reached his conclusion based upon the weight of the evidence, employer's argument that claimant did not meet his burden by a preponderance of the evidence is also rejected. Based on the credited evidence, the administrative law judge rationally concluded that decedent's death was caused, exacerbated or accelerated by his exposure to halothane gas in 1977 at employer's facility. In this regard, his conclusion that, even if decedent had autoimmune hepatitis prior to 1977, his exposure to halothane exacerbated that condition, causing him to die sooner, is consistent with the rule that "to hasten death is to cause it." *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 107 (1993). As the record herein contains substantial evidence which supports the administrative law judge's decision, and his decision is consistent with the law, we affirm his conclusion that decedent's death was work-related.

[5]We thus need not address employer's arguments as to whether the specific evidence would be admissible under *Daubert.*

Average Weekly Wage

Lastly, employer contends the administrative law judge erred in awarding claimants benefits based on decedent's average weekly wage during the year preceding his death. It maintains that decedent's average weekly wage at the time of his exposure to halothane in 1977, which it deems to be the time of injury, should be used to compute claimants' benefits. Claimants argue that the administrative law judge made the "best calculation" under the application of the 1972 Amendments by using the later wages. Both parties, in the alternative, argue that the national average weekly wage at the time of decedent's death is appropriate. The Director agrees it was proper to use decedent's 1991 wages to compute average weekly wage.

Section 9 of the Act provides that "[if] the injury causes death" the survivor is entitled to death benefits based on a percentage of the deceased employee's average weekly wage. 33 U.S.C. §909 (1982). Section 10 of the Act defines average weekly wage as those wages the employee was earning at the "time of injury," and subsections (a)-(c) provide a means for determining a particular employee's average weekly wage. 33 U.S.C. §910 (1982). In this case, the administrative law judge determined that use of Section 10(c) is appropriate to calculate decedent's average weekly wage. Decision and Order at 32-33. He found that decedent's wages as a resident in 1977 were not representative of his earning potential as a doctor, and therefore he relied on the best evidence of record concerning decedent's full earning capacity which were decedent's wages in the last calendar year prior to his death. In support of this conclusion, the administrative law judge cited *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), and *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), Ninth Circuit decisions which provide that the "time of injury" for purposes of determining average weekly wage is the time the disease or disability becomes manifest, and which state that the purpose of Section 10 is to compensate a future loss of earning capacity. Therefore, the administrative law judge calculated claimants' benefits based upon decedent's wages during the year prior to his death. Decision and Order at 33-34.

Employer contends that the time of injury occurred in 1977, and relies on the Board's decision in *Buck v. General Dynamics Corp.*, 22 BRBS 111 (1989), for support. In *Buck,* a traumatic injury case where there was a long period of total disability between the injury and the work-related death, the claimant contended that her death benefits should be based on the benefits the decedent was receiving at the time of death or on the wages of comparable co-workers at the time of death. The Board rejected the contention that under this factual scenario the death should be considered a "new injury," and held that claimant's benefits must be calculated with reference to the decedent's wages at the time of the traumatic injury. Since this computation is subject to the minimum and maximum rates pursuant to Section 9(e), the claimant's minimum compensation rate was based on the national average weekly wage at the time of the decedent's death. *Buck*, 22 BRBS at 113-114.

The facts in the instant case are distinguishable from those in *Buck,* in that this case involves a death due to an occupational disease. Long-standing precedent provides that the "time of injury" in the case of disability due to an occupational disease is not the date of the last exposure to harmful stimuli, but is instead the date on which the disability becomes manifest. *Black*, 717 F.2d at 1291, 16 BRBS at 22 (CRT); *see also Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). Thus, the time of injury for purposes of determining average weekly wage under Section 10 is the date on which the occupational disease became manifest through a loss of wage-earning capacity. *Id.; see also Johnson*, 911 F.2d at 250, 24 BRBS at 8 (CRT) (same principle applicable in a latent traumatic injury case). The court in *Black* discussed the reasons for its adoption of the manifestation approach. It noted that as a disability has a long standing impact, the focus should be on how the disability affects future earnings. The court stated that the Board's use of the date of last exposure to calculate average weekly wage failed to account for the future effects of the disability by compensating a worker based on wages he received at a time when he was not yet disabled:

> In the case at hand, for example, the last exposure approach would compensate Black based on his 1944 weekly wage of $92.00 rather than on the earning capacity he was robbed of when the asbestosis struck in 1977 [footnote omitted]. Such a result is incompatible with the goals of the LHWCA.

Black, 717 F.2d at 1289, 16 BRBS at 20-21(CRT).

In this case, decedent was working until his occupational disease hospitalized him and caused his death.[6] The administrative law judge's use of decedent's wages in the year prior to his death is consistent with the case law and it furthers the goal of compensating claimants for the full extent of the wage loss due to decedent's death from his occupational disease. Therefore, we reject employer's contention that the administrative law judge incorrectly determined the applicable average weekly wage, and we affirm both the administrative law judge's average weekly wage determination and his award of death

[6]Section 10(i), 33 U.S.C. §910(i)(1994), although not applicable to this case as it was added by the 1984 Amendments, *see Keener,* 800 F.2d at 1173, codifies this manifestation theory. *See Johnson*, 911 F.2d at 247, 24 BRBS at 3 (CRT). Section 10(i) states that in the case of an occupational disease which does not immediately result in death or disability, the time of injury is the date on which the claimant or employee becomes aware, or should have become aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. §910(i) (1994). In claim for benefits for the death of a voluntary retiree, the pertinent inquiry is the survivor's awareness of the relationship between the occupational disease, the employment and the death, and the Board has held that the earliest the date of awareness can occur is the date of death. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). Average weekly wage is then calculated with reference to Section 10(d)(2), 33 U.S.C. §910(d)(2).

benefits.[7]

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JAMES F. BROWN
Administrative Appeals Judge

_____
NANCY S. DOLDER
Administrative Appeals Judge

[7]Under the 1972 Act, which applies in this D.C. Act case, death benefits are not capped at 200 percent of the national average weekly wage under Section 6(b)(1)(D)(1982). *Director, OWCP v. Rasmussen*, 440 U.S. 29, 9 BRBS 954 (1979).