10-1978

Director, Office of Workers' Compensation Programs, United States Department of Labor v. Rasmussen

Lewis F. Powell Jr.

Discuss

The cert memo is not helpful on analysis. See Brad's bench memo of 11/13/78.

Flat conflict bet. CA9 & CADC as to interpretation of LAHWCA as to benefits

Case is "dull as dishwater" but SG says GO and pending & others possible.

Resp's husband was killed in Vietnam while working on a base. He was covered by the Defense Base Act.

PRELIMINARY MEMORANDUM

Conference of June 8, 1978
List 1, Sheet 3

Cert to CA 9 (Merrill, Trask, Takasugi)

No. 77-1465

The Q is whether under that ambiguous Act, the widow is entitled to the maximum payments provided for disability or for death.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR

v.

~~The Labor Dept.~~ GEO Central, Inc (public contractor who employed husband)

GENEVIVE RASMUSSEN (widow) Federal/Civil Timely

wanted to determine maximum under "disability" provision, but the Benefits Review Bd (Labor Dept agreed with Resp. that "death" provision apply. CA9 agreed.

No. 77-1491

GEO CONTROL, INC. & N.H. INSURANCE CO. (employer and his insurer)

v.

Statutory language is susceptible of either interpretation.

RASMUSSEN (beneficiary) Same Same

1. Summary. This petition presents the question of whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, imposes the same maximum on payments in the case of death - payments to survivors that it imposes in the case of compensation - payments to victims.

This would be a good candidate for a National Court of Appeals. DISCUSS & determine whether the issue is seen as important enough & merit plenary review. BSO

2. Facts. GEO Control was a public contractor operating under the Defense Base Act, 42 U.S.C. § 1651, which incorporates the Longshoremen's and Harbor Worker's Compensation Act, a comprehensive scheme for benefiting an employee injured on the job or his survivors if he is killed on the job, by payments proportionate to his earnings. William Rasmussen was an employee of GEO Control working in Viet-Nam. He was killed by a land mine, and his widow and son are entitled to some benefits.

The case revolves around the following provisions of the Act:

33 U.S.C. (Supp. V) 906 (b)(1):

> Compensation for "disability" shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):
> (A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.
> (B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1975.
> (C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.
> (D) 200 per centum beggining October 1, 1975.

(b)(3):

> As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30.

(d):

> Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability

> or death benefits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. (Supp. V) 909(b):

> If the injury causes death . . . the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: . . .
>
> (b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each child; in the case of the death or remarriage of such widow or widower, [etc.] . . . Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.

(e):

> 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 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

33 U.S.C. (Supp. V) 910(f):

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection 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.

GEO Control paid Mrs. Rasmussen and her son according to the maximum levels set in 33 U.S.C. § 906 (b)(1) for disability

but the Rasmussens contended that they should be paid according to 33 U.S.C. § 909(b) for death benefits. The administrative law judge at the Benefits Review Board, Department of Labor, agreed with the Rasmussens, and the Board affirmed his decision. Appeal was taken to CA 9 by the Director of the Office of Workmen's Compensation Programs, U.S. Department of Labor, and by GEO Control.

3. Opinion below (no dissents). CA 9 affirmed the Benefits Review Board. The dispute centers around confusing cross-references in the above quoted sections. 906(b)(1) describes maximum levels of compensation for disability. But 906(d) refers to"determinations under this subsection . . . for permanent total disability or death benefits . . . ." (emphasis added). Hence, the maximum in 906(b)(1) seems to apply to death benefits as well. However, 909(b) explicitly provides the scale for death benefits, and it is higher than the scale for disability if, as in this case, the decedent's earnings were significantly above the national average. 906(b)(1) sets maxima in terms of the national average; 909(b) sets maxima in terms of the actual wages that had been received, and 909(e) puts a floor on that ~~of~~ the national average.

The problem is which lead to follow. CA 9 observed that before the 1972 amendments, the maximum payments had been the same whether the cause were death or disability. The court then traced the legislative history, noting particularly the frequent recognition

of the fact that maximum levels of death compensation were to be removed. A good example is set out in footnote 7, p. 10A, where the section-by-section description of the amendment comments that the dollar minimum and maximum levels under the old law were being removed, and a new minimum imposed.

The difficulty with this view is that 906(d) then has very little meaning when it refers to death benefits. CA 9 held that it would still make sense to interpret the word "determinations" to refer to the minimum levels, which, according to 906(b)(3), would be set in terms of the national average wage.

4. Contentions. The Solicitor General, representing the Director of the Office of Workers' Compensation Programs, Department of Labor, begins his brief by assuring the Court that the Director's standing to challenge the Board's opinion could be fully defended, if the Court grants cert. or requests a supplemental memorandum.

On the merits, the SG points out a direct conflict between CA 9 and CADC and CA3. This is a genuine conflict. In Director v. O'Keefe, 545 F.2d 337 (1976) (CA 3) and Director v. Boughman, 545 F.2d 210 (19760 (CADC), the respective courts overruled the Board's position, explicitly referring to this case. And the CA 9 opinion in this case explicitly refers to the CADC case, though it does not explicitly observe a conflict.

The SG's argument relies on 906(d), which does refer to the calculation of death benefits as made in that subsection. If 906(d) were interpreted merely to be a reference to the national average wage, to be used in calculating the minimum amount of benefits, then there would have been no need for 910(f), which speaks in very direct terms about adjusting and calculating the national average. The SG further contends that it would have been irrational for the Congress to favor the relatives of deceased workers rather than the worker himself while he is disabled. Although the two groups are not in direct conflict, it is true that CA9's interpretation will lead to an increase in benefits upon the death of a disabled worker.

The SG urges that cert. be granted to resolve the conflict between CA 9 and CA 3, CADC. There are only 40 cases still pending where compensation is in doubt, this is because the provisior of 906(b)(1) stipulate increased levels of compensation in the later years, so that the disparity has mooted out. The petitioner GAO mirrors the SG's arguments, but provides the useful statistic that there are 770,000 employees potentially covered by this Act.

Wow!

The respondent does not discuss the conflict among the circuits. But it urges that the issue is of no general importance, drawing on the statistics provided by petitioner that only 40 out of 770,000 cases are involved, and there is no likelihood of any future cases arising in view of the increasing steps in 906(b)(1).

5. Discussion. There is an undeniable conflict over this question of statutory interpretation. Under CA9's view, 906(d) must be given a meaning that is strained, and that is superfluous in light of 910 (f). Under CA3 and CADC's view, 909(b) is subordinated to the maximum levels set in 906(b)(1), which, in its terms, applies only to disability benefits.

Since these benefits run for as long as the survivors are alive and eligible (for children, under a certain age; for spouses, diminished levels after re-marriage), it is certain that some beneficiaries will receive more than their equally situated fellow beneficiaries when the only difference is the federal judicial circuit in which they are located. The act could generate more cases in the admittedly unlikely event of a national wage deflation, so that the higher percentages in 906(b)(1), when multiplied by the national average, still produce a lower amount than 909(b), which is geared to the wage actually paid to the worker during his lifetime. If the present economy's wages are ever to be viewed as excessively high (as the 1920 wage levels might have been viewed in the 1930's), then the anomaly could arise again.

On the merits, I confess to an almost equally balanced mind. CA 9 strikes me as slightly more persuasive since the section directly dealing with death benefits ought to control over a sectinn in its terms dealing with compansation for disability

and only made applicable to the case of death benefits by the operation of another provision, several subsections away. Both views necessitate concluding that some part of the Act is superfluous.

My recommendation is to grant in No.77-1491, where petitioner's standing is beyond question, and to request the Solicitor to submit the memo he suggested concerning the standing of the Director of the Office of Workers' Compensation Programs to petition the Court in this case.

5/30/78 Campbell Opinion in petition

There is a response.

Dismiss

PRELIMINARY MEMORANDUM

Conference of June 8, 1978
List 1, Sheet 3

No. 77-1491

GEO CONTROL, INC. & N.H. INSURANCE CO. (employer and his insurer)	Cert to CA 9 (Merrill, Trask, Takasugi)	
v.		
RASMUSSEN (beneficiary)	Fed/Civil	Timely

Please see the memorandum in No. 77-1465, Director, Office of Worker's Compensation Programs, U.S. Department of Labor v. Genevive Rasmussen.

June 8, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-1491

GEO CONTROL, INC.

vs.

RASMUSSEN

Grant & consolidate with 77-1465

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

June 8, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-1465

DIRECTOR, OFFICE OF WORKERS'

vs.

RASMUSSEN

Ilst conflict
bet. CA9 + CADC

Grant
&
consolidate
with
77-1491

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.		✓											
Stewart, J.				ark 5G									
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.			✓										
Stevens, J.			✓										
.....													

G

GRANT

Marsel

October 13, 1978 Conference
List 1, Sheet 5

No. 77-1491

Motion to Dispense with Printing Appendix

GEO CONTROL

v.

RASMUSSEN

The Solicitor General, with the consent of all parties, requests that the Court dispense with the printed appendix (Rule 36(8)) because the case presents only legal issues, and the facts are set forth in the appendix to the cert petn.

9/28/78 Marsel

PJC

grant. Eq.

October 13, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-1491

GEO CONTROL, INC.

vs.

RASMUSSEN

Motion to dispense with printing appendix.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

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GRANT

NSMarsel

October 13, 1978 Conference
List 1, Sheet #5

No. 77-1465 — Motion to Dispense with Printing Appendix

DIR., OFFICE OF WORKERS' COMP. PROGRAMS

v.

RASMUSSEN

No. 77-1491 — Same

GEO CONTROL

v.

RASMUSSEN

The Solicitor General, with the consent of all parties, requests that the Court dispense with the printed appendix (Rule 36(8)) because the case presents only legal issues, and the facts are set forth in the appendix to the cert petn.

The request certainly appears appropriate.

9/28/78 — Marsel

PJC

grant. Esq.

October 13, 1978

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on ....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 77-1465

DIR., OFFICE OF WORKER' COMP. PROGRAMS

vs.

RAMUSSEN

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Resp. is widow of a civilian killed in Vietnam while working for GEO Control, Inc. BB 11/13/78 on Govt Ctt. He was covered by Defense Base "Act" which incorporates Longshoremens Compensation Act.

Q is whether the Act which imposes no express maximum limit on death benefits means the law intends for death benefits to be subject to same limit as disability benefits

§ 9(e) ~~[illegible]~~, as amended 1972, imposes a minimum but no maximum limit for death benefits. Prior to 1972, it did impose a max. limit.

§ 6(b) imposes both min. & max. limits for "disability" benefits.

Peter rely on language in other sections of Act & certain subsequent. Re also argue it is unlikely Congress intended to allow unlimited benefits for death while imposing a limit on disability benefits.

CA9, in their case, held for Resp - i.e. no max.

CADC & CA3 have held otherwise, so there is square conflict.

BENCH MEMORANDUM

To: Mr. Justice Powell

Re: No. 77-1465, Director, Office of Workers' Compensation Programs, United States Dep't of Labor v. Rasmussen, Bruce Thinks language & leg. history of 1972 amend of § 9(e) supports decision of CA9.

and

No. 77-1491, Geo Control, Inc. v. Rasmussen

The issue in this case is whether the Longshoremen's and Harbor Worker's Compensation Act, as amended (the Act), imposes the same maximum limitation on death benefits as it imposes on disability benefits. In the present case, the CA 9 held that the Act does not impose the same limitation. In Director v. O'Keefe, 545 F.2d 337 (3d Cir. 1976), and Director

I need to study briefs more carefully.

v. Boughman, 545 F.2d 210 (D.C.Cir. 1976), the courts reached the opposite conclusion. (direct conflict)

Several of the Briefs reproduce the relevant statutory provisions. The most helpful is that of petr Geo Control, at pp. 3-7, which juxtaposes the provisions of the Act before and after the 1972 amendments. Statutes in GEO's Brief

1. The Language of the Statute

Section 9(e) of the Act establishes limits on "death benefits" under the Act. Before 1972, §9(e) established both a maximum and minimum limit. The maximum limit on weekly benefits was $70 (2/3 x $105; see § 9(d)), the minimum limit $18 (2/3 x $27) or actual weekly wage, whichever was lower. The amended §9(e) clearly provides for a minimum limit equal to two-thirds of the "applicable national average weekly wage," or to actual average weekly wage of the decedent, whichever is less. The amended version of § 9(e) does not contain any maximum limit on death benefits. In contrast, §§6(b)(1) & (2) contain provisions setting both maximum and minimum limits on "disability compensation" in terms of the national average weekly wage. The petrs entire effort in this case is directed to repairing the silence of amended §9(e) on this point. No maximum limit on death benefits } This case arises because of silence in § 9(e) as to max. benefits for ...

The efforts of petrs based on language in other sections of the Act are ingenious but unconvincing. They argue that §6(d) links death benefits and disability benefits, and shows that the limitations of §6(b) on maximum disability

benefits should be read into §9(e) to limit death benefits. To reach this result, the petrs argue that the "determinations" referred to in §6(d) are the calculations of maximum limits under §6(b)(1).

Section 6(b)(1), however, by its terms applies only to "compensation for disability" and does not mention death benefits. Further, the term "determinations" in §6(d) is read most reasonably as referring to the requirement of §6(b)(3) that "the Secretary shall determine" periodically the national average weekly wage. On this reading, and by mentioning both disability and death benefits, section 6(d) applies the latest determination of national average weekly wage to the calculation of §6(b) and §9(e) limitations applicable to those whose eligibility commenced in some preceding period. The effect is to keep the limits for all current beneficiaries moving with the national average weekly wage, rather than leaving beneficiaries stuck forever with the limits in effect in the year in which they first became eligible. On this reading, nothing in §6(d) alters the fact that §9(e) makes the national average weekly wage relevant only to calculate the minimum weekly death benefit.

Petrs argue that if one adopts the view of §6(d) just stated, then the reference to "survivors" in that section is superfluous in view of §10(f). 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 sustained after October 27, 1972, 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 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1."

The petrs argue that since §10(f) already provides for the annual upward adjustment of benefits in line with the latest calculation of the national average weekly wage, §6(d) must have some other purpose than simply adjusting the §9(e) limit on minimum benefits. They urge that §6(d), in view of §10(f), makes sense only if there are also maximum limits on death benefits. The reasoning supporting this point can be illustrated by the following examples.

Section 6(d) applies the latest determination of national average weekly wage to the calculation of the relevant limitations under §9(e) and §6(b). But consider a beneficiary (either a permanently disabled worker or the survivor of a deceased worker) who, when first eligible, qualifies for benefits somewhat above the minimum allowed by either §9(e) or §6(b). Under §6(d), considered alone, his benefits would remain constant as the national average weekly wage increased, until the minimum limitation finally caught up with his original level of benefits and began to push it upwards. Section 10(f) avoids this result by increasing all death

benefits or compensation for permanent total disability each year by a percentage equal to the increase that year in the national average weekly wage. The recipient remains each year in the same position relative to the §6(b) and §9(e) limits.

Now consider the same recipient of benefits under §10(f) alone. His benefits would increase each year as the national average weekly wage increased, until the amount of benefits bumped up against the maximum limit applicable at the time that he was awarded benefits. Section 6(d) avoids that result by applying each year's determination of the average wage to the limits applicable to all recipients, not just to those who are awarded compensation beginning in that period. But if §9(e) imposes no maximum limit on death benefits, then §10(f) alone would take care indefinitely of annual upward adjustments in survivors' benefits. There would be no uppoer limit for death benefits to "bump up against," and therefore no reason to refer to "survivors" in §6(d).

The petrs have identified an anomaly in the statute, but only one involving a superfluity and not an inconsistency. The anomaly may be eliminated by construing §6(d) to impose the maximum benefit limits of §6(b)(1) on §9(e). As I see it, the question is whether to respond to the anomaly by tolerating it, or by ignoring the plain language of §§ 6(b)(1) and 9(e), which applies a mizimum limit only to disability compensation. I would stay with the plain language, especially in view of the

legislative history.

2. The Legislative History

I will review only the principle arguments of the parties, and indicate why I think resps have the better of the case on this ground as well as on the statutory language.

In 1972, two bills were introduced to amend the Act. Under one bill, co-sponsored by Senator Eagleton, the Chairman of the committee handling the matter, maximum limits on death and disability compensation were eliminated. Under the other bill, the fixed dollar limits were increased substantially. The SG notes that both bills treated death and disability benefits the same way, and reasons that the resulting compromise (limits, but linked to a national wage average that takes inflation into account) must have retained that feature. Accordingly, he concludes, if maximum disability benefits are set by §6(b), then the same maximum limits must be applicable to death benefits under §9(e). This is a non sequitur; it depends upon the unsupported and unsupportable assumption that any compromise necessarily retains the symmetry that the SG perceives in the original bills.

The SG points out that in the Report of the National Commission on State Workmen's Compensation Laws (Commission Report), the Commission accepted the need for maximum limits on death benefits. He also notes that the Commission Report appears to have been influential in shaping several provisions

of the amendments to the Act, and that the Senate Report on the bill as reported said that "the provisions of tis bill are fully consistent with the recommendations of the [Commission]." This comment in the Senate Report, however, is contained in the final paragraph of the summary of the report. If one turns to the portions of the report dealing with §9(e), one gets a more just estimation of the committee's actual view of that section.

In the general discussion of the major provisions of the Act, with reference to "Survivor Benefits" payable under §§ 8 and 9 of the Act, the Senate Report noted that such benefits are "subject to a maximum of 66 2/3 percent of the average weekly wages" of the decedent. In the same passage, the Report commented that "[a] minimum death benefit tied to the applicable national average weekly wage but not to exceed the employee's average weekly wage is also provided." There is no mention of a maximum limit on death benefits in § 9(e), other than the provision for a maximum minimum--that is, the benefits cannot exceed actual wages, even if that figure is less than two-thirds of the national average.

Later in the Report, in the section-by-section analysis, the Report contains the following comment on §9(e): "Section 10(d) amends section 9(e) to provide that in computing death benefits the employee's average weekly wage shall be considered as not less than the national average weekly wage. However, maximum weekly death benefits could not be more than

the employee's average weekly wages." Again, there is no indication that the limitations on disability benefits established in §6(b) are to be read into §9(e).

In a subsequent portion of the Report, the change in §9(e) was indicated by bracketing language to be deleted and italicizing language to be added:

> "(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor] less than [$27] *the applicable national average weekly wage as prescribed in section 6 (b)* but the total weekly [compensation] *benefits* shall not exceed the *average* weekly wages of the deceased."

The clear indication is that the maximum limitation was eliminated from §9(e) by the amendments of 1972.

The House Report on the bill amending the Act was even more explicit about the change made in §9(e). "[The bill] amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the Act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased."

The House Report marked the changes in §9(e) as follows:

> "(e) In computing death benefits the average weekly wages of the deceased

> shall be considered to have been not [more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased] less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased."

Against all of these indications that the maximum limit on death benefits was eliminated from §9(e) by the 1972 amendments, the petrs find support in a single sentence of the summary discussion of "Maximum and minimum benefit amounts." The sentence seems to indicate that increases in death benefits, like disability compensation, are subject to the phase-in schedule of §6(b). "To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased as the ceiling moves to 200 percent." I note that in the subsequent analysis of §6(b), the Report limits its effect to "compensation for disability."

The remainder of the petrs' legislative history arguments fall into several categories: (1) Congress would not have removed maximum limits on death benefits without more extensive discussion in the committee Reports; (2) Congress would not have removed the maximum limit on death benefits without doing the same for disability compensation; (3) Congress would not have removed the maximum limit on death

benefits because it is a bad idea to do so; and (4) Congress would not have eliminated the maximum limit on death benefits because the proposal to set a maximum limit related to national average wage, when made by a witness at the committee's hearings on the bill, was suggested for both death and disability benefits; since Congress adopted the suggestion for disability benefits, it must have done so for death benefits. None of these arguments is convincing in the face of the language of the statute and the committee Reports on the amendments.

3. Decisions of the CA 3 and CA DC

In Director v. Boughman, 545 F.2d 210 (D.C.Cir. 1976), the CA agreed with the position taken by petrs in the present case. To the arguments already reviewed, the CA added only one:

> "Foremost among our reasons for reaching this conclusion is the commonsense conviction that Congress did not intend to provide, without ever so stating and in sharp contradistinction to every previous version of the Act, that a totally disabled employee, in need of continuing care, should be compensated less generously than the family of an employee who dies. It is hardly within the policy of this Act to place a premium on death."

Id. at 213. The Act greatly liberalized the compensation paid to disabled workers under §6(b). That §9(e) appears to have gone even further in liberalizing the benefits paid to

survivors of deceased workers does not seem to me to be a good reason for concluding that §9(e) "really" was meant to go only as far as §6(b).

In Director v. O'Keefe, 545 F.2d 337 (3d Cir. 1976), the CA also agreed with the position taken by the petrs here. The CA 3 relied principally upon the anomaly introduced by the reference to "survivors" in §6(d).

Summary

The petrs have two arguable bases for their position: (1) the anomalous reference to "survivors" in §6(d); and (2) the sentence from the Senate Report, quoted at p. 9 supra. The anomaly is real, at least as I have read the statutory system. The sentence from the legislative report does appear to contemplate the application of §6(b)(1) limitations to survivors' benefits under § 9(e).

The language of the statute, however, seems to me to be clear enough. Section 6(b)(1) is limited explicitly to disability compensation. Section 9(e), applicable to death benefits, contains only a minimum limit. The Senate and House Reports indicate that the maximum limit on death benefits was eliminated by the 1972 amendments. I recommend affirming the CA 9 in this case.

BB
11/28/78

77-1465 Rasmussen. Notes on oral argument.

Petr United States

Section 6(d) makes 6(b)(1) limit on disability benefits applicable to death benefits.

Petr argues that Congress intended, when it amended Act in 1972, to do away with fixed $ maximums but not all maximums.

HB - entire case rests on §6(d)? Yes

Petr cited study commission report recommending ceilings linked to an inflation-proof index. Claims 1972 Amendments are in accord w/ this report.

Argues that Congressional reports show that 6(d) was meant to solve problems attributable to the phase-in period. Argues that 6(d) also applies ceiling to "survivors", i.e., to death benefits.

Acknowledges that court below restricted 6(d) to application only to annual average wage determinations.

Petr argues that construed as the court below, §6(d) is redundant in view of §10.

HB - §6(d) difficult to square w/ petr's argument. Petr - language is ambiguous, but intent is clear.

Petr also stresses consistent course of state and federal statutes in imposing ceilings on benefits. Costs are the important factor; in view of higher incidence of death insurance than disability insurance, and higher expenses of disability than death, anomalous to remove ceiling on ~~disability but not~~ death benefits but not on disability benefits.

JPS- If Congress had wanted a limit on death benefits, wouldn't it have put the ceiling in §9.

Petr- no, just cross-reference to §6.

[But there is not even a cross-reference]

Petr. Geo-Thermal

The Act of 1972 was focused primarily on revising minimum benefits. Since not concerned with maximum benefits, do not assume a reversal of prior policy of imposing ceilings, since there is no explicit repudiation of prior approach to ceilings.

Resp.

Two questions:

① Did 1972 Amendments eliminate death benefit ceilings?

② Did it mean to do so?

Resp answers each "yes"

The language of the statute contains no maximum on death benefits.

In legis. history, note that as originally proposed, the 1972 Act eliminated all maximums. This was a clear understanding throughout committee deliberations.

Act was then revised. Ceiling was imposed on disability benefits, §6. §9 was also rewritten, but no ceiling was imposed; it was rewritten to tie minimum payments to national average weekly wage. Resp. concludes that Congress intended the §9 result – no ceiling – that it got.

Study Comm'n Report. Filed during committee deliberations on 1972 Act. Q – did Study Comm'n distinguish ceilings on death and on disability? Resp – yes. [But evidence of this is rather slim] Comm'n recommended the same benefit system for death and for disability. But discussion in Report shows grounds for distinguishing death and disability benefits.

Further, in defining §9 "death benefits," Congress parted company with the Nat'l Study Comm'n Report.

Section 6(d) contains no maximum. Its purpose is meant to extend benefits ~~only~~ of increasing nat'l weekly wage only to death benefit and permanent disability benefit recipients. E.g., one temporarily disabled gets the same benefits as awarded at time of injury, even if disability persists.

JPS - what purpose for 10(f)?

Resp.: 10(f) excludes temporary disability recipients other than those at the limits.

CJ - doesn't SG's construction produce a sensible ~~a~~ result in view of purpose of the Act.

Resp - no; recalls that as originally proposed, Act abolished all maximums.

In response to JPS, resp. indicates that there was subst'l testimony before the congr'l committees supporting abolition of the ceilings.

Rebuttal:

JPS - why is it irrational for Congress to strike a compromise by removing one ceiling but not the other?

Petr: it would be illogical and unreasonable, in light of the purposes of workmen's compensation, to distinguish between death and disability.

January 18, 1979

No. 14-1465 Director v. Rasmussen

Dear Bill:

Please show at the end of the next draft of your opinion that I took no part in the decision of this case.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

I did not participate in decision because I attended a funeral in New York on Nov. 28 when this case was argued.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 18, 1979

Re: No. 77-1465 & 77-1491 - Director, Workers' Compensation Programs v. Rasmussen

Dear Bill:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 18, 1979

Re: 77-1465; 1491 - Director v. Rasmussen

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Rehnquist
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 19, 1979

RE: Nos. 77-1465 & 77-1491 Director, Office of Workers' Compensation Programs and GEO Control v. Rasmussen, et al.

Dear Bill:

I agree.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 19, 1979

Re: Nos. 77-1465 & 77-1491: Director, Office of Workers' Compensation Programs, US Department of Labor v. Rasmussen; and Geo Control, Inc., and New Hampshire Insurance Co. v. Rasmussen

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Dear Bill,

I agree.

Sincerely yours,

Byron

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 22, 1979

Re: No. 77-1465 - Director v. Rasmussen
No. 77-1491 - Geo. Control, Inc. v. Rasmussen

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 1, 1979

Re: 77-1465 - Director v. Rasmussen and
77-1491 - Geo Control v. Rasmussen

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

You are Out

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1979

Re: (77-1465 - Director v. Rasmussen
(
(77-1491 - Geo Control v. Rasmussen

Dear Bill:

I join.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
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in WHR 1/79	agree 1/19/79	join WHR 1/19/79	~~Join WHR~~ 1/~~19~~79	join WHR 21/79	join WHR 1/22/79	~~out~~ 1/18/79	Int Dept 1/18/79	join WHR 1/18/79
			agree 1/19/79					
				77-1465 Director v. Rasmussen				