

IN THE MATTER OF)	
BERNARD J. REED (DECEASED))	
)	
MARTHA REED)	
)	
Claimant-Respondent)	
)	
SHERRIE McLAURIN)	DATE ISSUED: 07/19/2006
)	
Claimant-Respondent)	
)	
v.)	
)	
HOLCIM, (US) INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-interest)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits and the Decision and Order Denying Employer's Petition for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

George H. Jones, Metairie, Louisiana, for claimant Martha Reed.

Clara E. Toombs, Monroe, Louisiana, for claimant Sherrie McLaurin.

Thomas J. Wagner (Wagner & Bagot, LLP), New Orleans, Louisiana, for self-insured employer.

Richard A. Seid and Matthew Boyle (Howard Radzley, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for

Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits and the Decision and Order Denying Employer's Petition for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fees (2004-LHC-1796) of Administrative Law Judge Richard D. Mills 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board held oral argument in this case on June 13, 2006, in New Orleans, Louisiana.

Bernard Reed (decedent) drowned in a work-related accident on September 12, 2003. At the time of his death, decedent was separated from his wife, Martha Reed, and had been sharing his domicile with Sherrie McLaurin (claimant) for approximately two years. Both Mrs. Reed and claimant filed claims under the Act for death benefits as decedent's widow. 33 U.S.C. §909(a), (b). Alternatively, claimant sought benefits as decedent's dependent pursuant to Section 9(d) of the Act, 33 U.S.C. §909(d).

In his decision, the administrative law judge found that Mrs. Reed is the decedent's widow pursuant to Section 9(b), and he awarded her death benefits at the rate of 50 percent of decedent's average weekly wage.¹ The administrative law judge also found that claimant qualifies as decedent's "dependent" under Section 152(a)(9) of the Tax Code, 26 U.S.C. §152, and thus is entitled to death benefits under Section 9(d) of the Act. The administrative law judge awarded claimant benefits at the rate of 16 ^{2/3} percent of decedent's average weekly wage. 33 U.S.C. §909(d). The administrative law judge denied employer's motion for reconsideration and awarded claimant's attorney a fee, payable by employer, for work performed before the administrative law judge in the successful prosecution of her claim. The administrative law judge also ordered employer to pay an attorney's fee to counsel for decedent's widow.

¹ This finding is not challenged on appeal.

On appeal, employer contends that the administrative law judge erred in finding that claimant was decedent's dependent under the Act, and thus in finding that she is entitled to death benefits.² In addition, employer contends that the fee award to claimant's counsel should be reversed if the Board holds that claimant was not decedent's dependent, and that the administrative law judge erred in finding that it is liable for a fee to counsel for Mrs. Reed. The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the administrative law judge's award of benefits to claimant. Claimant responds, also urging affirmance of the administrative law judge's decision.

As an initial matter, we hold that the administrative law judge's award of benefits to both Mrs. Reed and claimant is not *per se* in contravention of the Act, as employer contends.³ The Act specifically provides for benefits of 50 percent of the decedent's average weekly wage for a surviving spouse, 33 U.S.C. §909(b), and if the amount payable to a surviving spouse and children is less than 66^{2/3} percent of the deceased's average weekly wage, another "dependent" who meets the definition thereof under Section 152 of the Tax Code may be awarded benefits of up to 20 percent of the decedent's average weekly wage. 33 U.S.C. §909(d). However, the aggregate of survivor benefits cannot exceed 66^{2/3} percent of the decedent's average weekly wage. The administrative law judge properly accounted for these provisions by awarding Mrs. Reed benefits at the rate of 50 percent of decedent's average weekly wage and claimant benefits at the rate of 16^{2/3} percent of decedent's average weekly wage.⁴

Employer contends that the administrative law judge erred in finding claimant was decedent's dependent because their relationship was contrary to Louisiana law. Employer further contends that claimant was not a member of decedent's household

² By Order dated July 22, 2005, the Board denied employer's motion for a stay of payments, for failure to establish irreparable harm. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.105. Employer's appeal of the Board's Order to the United States Court of Appeals for the Fifth Circuit remains pending at the court.

³ We also reject employer's contention that claimant forfeited her right to claim benefits as an "other dependent," as she first sought benefits as decedent's widow. The Act does not forbid a claimant from pleading alternate grounds for entitlement to benefits, and the administrative law judge was authorized to adjudicate an issue raised for the first time at the hearing. 20 C.F.R. §702.336(a).

⁴ Decedent did not have any qualifying children at the time of his death. *See* 33 U.S.C. §902(14).

because she was unrelated to him. Finally, employer contends that claimant did not establish her dependence on decedent.

As stated, Section 9(d) of the Act provides that benefits may be granted to a “dependent” of decedent who is not otherwise eligible under Section 9 and who meets the definition of the term “dependent” in Section 152 of Title 26 (the Tax Code). 33 U.S.C. §909(d); 26 U.S.C. §152. At the time of decedent’s death, Section 152(a) defined “dependent” as:

(a) General definition. -- For purposes of this subtitle, the term “dependent” means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):

* * *

(9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer’s household.

(b) Rules relating to general definition. -- For purposes of this section –

* * *

(5) An individual is not a member of the taxpayer’s household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.

26 U.S.C.A. §152(a)(9), (b)(5) (West 2003).⁵ In interpreting the Tax Code, the courts

have deferred to state law to determine if the parties’ relationship is in violation of local law. *Ensminger v. C.I.R.*, 610 F.2d 189 (4th Cir. 1979), *cert. denied*, 446 U.S. 941 (1980). In the cases and legislative history cited by employer, the disputes involved whether the taxpayer could claim a non-relative as a dependent when the parties live in a

⁵ The administrative law judge properly applied the definition of “dependent” in effect at the time of decedent’s death in 2003. 33 U.S.C. §909(f)(all questions of dependency shall be determined as of the time of the injury); *Angelle v. Steen Production Service, Inc.*, 34 BRBS 157 (2000).

state which proscribes co-habitation in its criminal statutes. *See id.*, citing S. Rep. No. 1983, 85th Cong., 2d Sess., reprinted in 1958 U.S.C.C.A.N. 4791, 4804;⁶ *Turnipseed v. C.I.R.*, 27 T.C. 758 (1957) (crime in Alabama to live “in adultery or fornication”); *Martin v. C.I.R.*, T.C. Memo. 1973-136, 1972 WL 2332 (U.S. Tax Ct. 1973) (relationship “illegal and violative of criminal statutes” in the three states where parties lived – Florida, Alabama and Illinois). In considering the same issue in a state in which co-habitation did not violate local law *per se*, the bankruptcy court, in applying the definition of dependent under the Tax Code, held that a taxpayer could claim a person who lived the entire tax year as a member of the taxpayer’s household as a dependent. *Shackelford v. United States*, 3 B.R. 42 (Bankr. W.D. Mo. 1980). The court found that while the state did not recognize “common-law” marriage, there was nothing illegal about two unmarried person living together in a sexual relationship, so long as their conduct was not “lewd or lascivious” in violation of the Missouri criminal statute. *Id.*

In the present case, employer argues that state law provides that “Married persons owe each other fidelity, support, and assistance.” La. CIV. CODE ANN. Art. 98 (West 2003). Thus, as claimant and the decedent, who was married to someone

⁶ The court in *Ensminger* stated that:

It was the intention of the Congress to preclude any dependency deduction for the partner of a taxpayer when the two were living in a quasi-marital relationship, which is illicit under the laws of the state in which they reside. *Ensminger*, 610 F.2d at 191. As it was a misdemeanor in North Carolina for unmarried persons “to and lasciviously associate, bed and cohabit together,” the court found that the taxpayer could not claim a dependency deduction.

else, lived together in an adulterous relationship, employer contends that their relationship was in violation of local law within the meaning of Section 152(b)(5). We reject this contention, as the administrative law judge properly found that while Louisiana law imposes on spouses a “positive duty” of fidelity, infidelity does not violate state law. Indeed, the Louisiana Court of Appeal has observed that “there is no civil nor criminal prohibition against [adultery] between” adults in the state of Louisiana. *Roppolo v. Moore*, 644 So.2d 206 (La.Ct. App. 1994), *writ denied*, 650 F.2d 253, *recon. denied*, 651 So.2d 261 (La. 1995). Moreover, while adultery is grounds for a divorce petition in Louisiana, it does not automatically terminate the marriage contract. La. CIV. CODE ANN. Art. 103(2) (West 2003); *Clark v. Tenneco, Inc.*, 353 So.2d 418 (La.Ct. App. 1978), *writ denied*, 355 So.2d 266 (La. 1978). The absence of a criminal sanction for adultery or cohabitation precludes a finding on the facts of this case that the relationship between claimant and decedent was “in violation of local law.” *Ensminger*, 610 F.2d at 191; *Shackelford*, 3 B.R. at 44. Therefore, we affirm the administrative law judge’s finding that claimant is not precluded by Section 152(b)(5) of the Tax Code from claiming dependent status pursuant to Section 9(d) of the Act.

The administrative law judge next reviewed the facts under the three criteria required to establish dependency pursuant to Section 152(a)(9). He found that claimant was decedent’s dependent because she received over one-half of her support from the decedent, was a member of his household, and had her principal place of abode in decedent’s home. Decision and Order at 7; Decision on Recon. at 2. Employer contends that the administrative law judge erred in finding that claimant was a “dependent” of decedent under Section 152(a) of the Tax Code as there was no documentary proof of factual dependence or need, and no evidence that decedent contributed over one-half of claimant’s support for the year in which decedent died. We reject this contention. The Board has held that claimant’s testimony regarding decedent’s level of financial support may constitute sufficient evidence of dependency, and there is no requirement under the Act or Section 152 of the Tax Code that claimant further substantiate her testimony with documentation. *Angelle v. Steen Production Service, Inc.*, 34 BRBS 157 (2000). Claimant testified that decedent paid all of their household expenses, rent, utilities, and the automobile loan and expenses. Tr. at 25, 27. She also testified that her earnings in 2002 totaled \$1,772 and that the decedent’s income was approximately \$32,000.⁷ *Id.* at 25. Moreover, the record contains wage statements to substantiate this testimony, McLaurin Exs. D-F, as well as documents concerning a car loan in both of their names. *Id.* at A.

⁷ Claimant did not submit any evidence of her earnings in 2003 but testified that she only worked sporadically while living with the decedent. Tr. at 25, 28.

We reject employer's contention that the claimant failed to establish dependency as she did not show that she was unable to earn her own income during the time the decedent provided her support. Neither the Act nor the Tax Code requires a person to establish an inability to independently support herself. Moreover, the administrative law judge rationally found, based on claimant's testimony and on the incomes of decedent and claimant, that decedent provided over one-half of claimant's support. Decision on Recon. at 2. As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the administrative law judge's finding that the decedent provided over one-half of claimant's support for the year preceding his death. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Angelle*, 34 BRBS at 161; *Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988).

Employer does not contest the finding that claimant's principal place of abode was the decedent's home, but it contends that the "member of the household" requirement under Section 152(a)(9) requires evidence of a familial or legal relationship and that such was absent here. We reject this contention as well. Unlike subsections (1)-(8) of Section 152(a) requiring a familial relationship, the regulations implementing subsection (9) specifically state that, "It is not necessary that the dependent be related to the taxpayer." 26 C.F.R. §1.152-1(b). It is necessary, however, for the taxpayer to both maintain and occupy the household, for the putative dependent to live with the taxpayer, and for their relationship to be non-violative of local law. *Id.*; *see generally Aruai v. C.I.R.*, T.C. Memo. 2006-98, 2006 WL 1280887 (U.S. Tax Ct. 2006). In this regard, the administrative law judge's finding that claimant was a member of the decedent's household is supported by substantial evidence. The record contains documentation that the two lived in the same house. *See, e.g.*, McLaurin Exs. B, C. Claimant testified they lived together for two years prior to decedent's death, and that there were no contractual agreements between them. Tr. at 24, 31; *see Hamilton v. C.I.R.*, 34 T.C. 927 (1960) (individual not "dependent" under subsection (a)(9) where taxpayer provided home in exchange for housekeeping services). Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the

administrative law judge's award of death benefits to claimant as decedent's dependent, pursuant to Section 9(d).⁸ *Angelle*, 34 BRBS 157.

We next address employer's contention that the administrative law judge erred in holding it liable for the attorney's fee awarded to Mrs. Reed's counsel. We agree with employer that the administrative law judge's rationale for holding employer liable cannot be affirmed. The administrative law judge stated that Mrs. Reed was required to defend her entitlement as decedent's widow due to the actions of claimant. As she successfully established she was decedent's widow, the administrative law judge held employer liable for her attorney's fee. Decision on Recon. at 3.

Employer cannot be held liable for Mrs. Reed's attorney's fee for work before the administrative law judge on the facts of this case. Employer began paying death benefits to Mrs. Reed as the decedent's widow while the case was before the district director. EX 1, 2. Before the administrative law judge, employer continued to pay full benefits, employer did not contest Mrs. Reed's entitlement, there was no controversy between employer and Mrs. Reed, and she did not succeed in obtaining any additional compensation contested by employer. Under these circumstances, employer cannot be held liable for Mrs. Reed's attorney's fee for work before the administrative law judge, and we reverse the administrative law judge's finding in this regard.⁹ 33 U.S.C. §928(a), (b); *see generally Terrell v. Washington Metropolitan Area Transit Authority*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.*, 36 BRBS 133 (2002) (McGranery, J., concurring); *see also Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981); *Ryan v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 208 (1987).

Where employer is not liable for a claimant's attorney's fee, the attorney's fee may be assessed against claimant as a lien on her compensation award pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). The regulation at 20 C.F.R. §702.132 provides, *inter alia*, that the financial circumstances of claimant shall be taken into account when the fee is to be assessed against claimant. 20 C.F.R. §703.132. Thus, as

⁸ As we affirm the administrative law judge's finding that claimant is entitled to death benefits pursuant to Section 9(d), we affirm the administrative law judge's finding that claimant's counsel is entitled to an attorney's fee to be paid by employer. 33 U.S.C. §928(a).

⁹ The finding that claimant's actions required Mrs. Reed's attorney to perform work to defend her entitlement as decedent's widow could be a basis for concluding that the attorney performed necessary work, but it is not a valid basis for holding employer liable for this fee.

we have reversed the administrative law judge's finding that employer is liable for a fee for Mrs. Reed's counsel, we remand the case to the administrative law judge to consider an attorney's fee payable by Mrs. Reed as a lien on her compensation award. *See Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

Accordingly, the Decision and Order-Awarding Benefits and the Decision and Order Denying Employer's Petition for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fees of the administrative law judge awarding death benefits to Mrs. Reed and to claimant are affirmed. The administrative law judge's attorney's fee award to claimant's counsel, payable by employer, is affirmed. The administrative law judge's finding that employer is liable for Mrs. Reed's attorney's fee for work before him is reversed, and the case is remanded for the administrative law judge to address an attorney's fee award payable by Mrs. Reed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge