BRB Nos. 09-0831,
09-0831A and 09-0831B

QUINCY and SUSAN URSO (Parents of WESLEY J. URSO, deceased) Claimants-Petitioners Cross-Respondents v. MVM, INCORPORATED and CONTINENTAL INSURANCE COMPANY/CNA INTERNATIONAL Employer/Carrier-Respondents Cross-Petitioners B Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Cross-Petitioner A	)	DATE ISSUED: 07/29/2010 DECISION and ORDER

Appeals of the Decision and Order and the Order Denying Claimant's Motion for Reconsideration and Granting Employer's Motion for Reconsideration of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Ronald S. Webster (Webster Law Group), Orlando, Florida, for claimants.

Greg Gruzman (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimants and the Director, Office of Workers' Compensation Programs (the Director) appeal, and employer cross-appeals, the Decision and Order and the Order Denying Claimant's Motion for Reconsideration and Granting Employer's Motion for Reconsideration (2008-LHC-00852) of Administrative Law Judge Stuart A. Levin 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Decedent was employed as a contractor for a classified government agency. At the time of his death, the decedent was stationed in Beirut, Lebanon and lived on the grounds of the United States Embassy. Decedent decided to get a tattoo from a tattoo parlor near the embassy. He recruited a friend to accompany him to the tattoo parlor because he planned to take pain medication for the procedure, which he acquired from a pharmacy. The tattoo process took about six hours, and the decedent was groggy on his way home. The friend left him on his bunk and attended a function away from their rooms. When the friend returned several hours later, he found the decedent dead in his bunk. An autopsy was performed and the doctor concluded that decedent had died due to an overdose of the pain medication, Tramadol, which may have triggered a fatal cardiac arrhythmia. The physician noted that decedent had a pre-existing hypertrophied left ventricle. Although the decedent did not have a wife or children, his parents (claimants) filed a claim for death benefits based on their claim of dependency on the decedent's support. *See* 33 U.S.C. §909(d).

In his Decision and Order, the administrative law judge found that the decedent died from an accidental overdose of Tramadol. The administrative law judge found that the intoxication was not the sole cause of death as the decedent also had a hypertrophied left ventricle and septum of the heart which contributed to his death and that there is no evidence that decedent intended to harm himself. Therefore, the administrative law judge found that the claim is not barred pursuant to Section 3(c) of the Act, 33 U.S.C. §903(c). In considering whether the death occurred in the course and scope of the decedent's employment, the administrative law judge applied the zone of special danger analysis.

He concluded that the recreational activity of getting a tattoo and the self-administered, accidental lethal dose of an over-the-counter medication were reasonably foreseeable and arose out of the conditions of decedent's employment in Lebanon. With regard to the death benefits claim by the decedent's parents, the administrative law judge analyzed the issue of dependency pursuant to Section 152(d) of the Internal Revenue Code, 26 U.S.C. §152(d)(2). *See* 33 U.S.C. §909(d). He found that claimants do not qualify as "dependents" because their gross income exceeded the exemption amounts of $3,300 in 2006 and $3,400 in 2007. However, the administrative law judge awarded funeral expenses pursuant to Section 9(a) of the Act, 33 U.S.C. §909(a). The administrative law judge denied claimants' motion for reconsideration and affirmed his finding that the evidence does not establish that their status as dependents under Section 152 of the tax code. The administrative law judge analyzed employer's motion for reconsideration of his finding that the decedent's death was not due solely to his intoxication, but affirmed his finding that the decedent did not die from the overdose alone. In addition, the administrative law judge affirmed his findings regarding the zone of special danger and that the death occurred in the course of decedent's employment.

On appeal, claimants and the Director contend that the administrative law judge erred in finding that the claimants were not dependent upon decedent at the time of his death. The Director contends that the administrative law judge erred in relying on Section 152 of the tax code, as the Act specifically provides death benefits for parents if they were dependent at the time of death and that partial dependence is sufficient to establish dependency. The Director contends that claimants were clearly dependent on decedent and that their dependency would have continued because they are both disabled. The Director argues in the alternative that if the Board affirms the administrative law judge's finding that claimants were not dependent upon decedent, the Board should order employer to pay $5,000 to Special Fund pursuant to Section 44(c)(1) of the Act, 33 U.S.C. §944(c)(1).[1] Employer responds, urging affirmance of the administrative law judge's finding that the claimants failed to establish dependency on the decedent pursuant to the Act, and thus affirm the denial of death benefits. On cross-appeal, employer contends that the administrative law judge misapplied the zone of special danger doctrine and thus erred in finding that the death occurred in the course of the decedent's employment. In addition, employer contends that the administrative law judge erred in finding that the decedent's death was not caused solely by his intoxication and thus in finding that the claim is not barred pursuant to Section 3(c) of the Act, 33 U.S.C. §903(c).

[1] We accept the Director's brief in reply to employer's response brief, which is accompanied by a motion to accept it out of time. 20 C.F.R. §802.217. Employer's objection to this filing is rejected.

Timeliness of Employer's Cross-Appeal

The Director has filed a motion to dismiss employer's cross-appeal, averring that the cross-appeal was untimely filed pursuant to 20 C.F.R. §802.205(b). Employer replies, stating that its counsel was not properly served with the administrative law judge's decision by the district director, with the notices of appeal by claimant's counsel and the Director, or with acknowledgements of the appeals by the Board. Employer contends that its cross-appeal was timely filed as to the date it received copies of the notice of appeal and acknowledgements. The service sheets confirm that the administrative law judge's decisions, the claimant's and the Director's notices of appeal, and the Board's acknowledgements were not served on the correct counsel for employer; they were served on an attorney who represented employer at the formal hearing but subsequently left the law firm that was authorized as employer's representative. However, the carrier was properly served with the decisions and the notices of appeal.

Section 802.205(b) states:

> If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time prescribed by paragraph (a) of this section, whichever period last expires. In the event that such other party was not properly served with the first notice of appeal, such party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date that service is effected.

20 C.F.R. §802.205(b). Employer's notice of cross-appeal was not timely filed with respect to the date the administrative law judge's decision was filed by the district director, 33 U.S.C. §921(a); 20 C.F.R. §802.205(a), or the dates claimant's and the Director's appeals were filed, 20 C.F.R. §802.205(b). Case precedent supports the Director's contention that proper service on counsel is not required for the time period for filing an appeal to commence. *See Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989); *Ins. Co. of North America v. Gee*, 702 F.2d 411, 15 BRBS 107(CRT) (2d Cir. 1983); *Beach v. Noble Corp*., 29 BRBS 22 (1995) (order on recon. *en banc*) (McGranery, J., concurring)(Brown, J., dissenting). *See also Carillo v. Louisiana Ins. Guar. Ass'n*, 599 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009) (in context of addressing when an order is effective so that compensation is due under 33 U.S.C. §914(f), court holds mailing is not part of "filing" under 33 U.S.C. §921(a)). *Cf. Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31(CRT) (9th Cir. 1993) (proper service on parties required). In addition, while Section 802.205(b) states that if a *party* is not properly served with the notice of appeal, the time to file a cross-appeal does not begin to run until service is effected, the definition of the word "party" in Section

801.2(a)(10), 20 C.F.R. §801.2(a)(10), supports the construction that improper service on *counsel* is not a tolling event.[2]

We reject employer's assertion that the failure of the claimant and the Director to serve employer with their notices of appeal tolls the time for filing a cross-appeal pursuant to Section 802.205(b). Claimant and the Director served their notices of appeal on carrier at its correct address. Notice to carrier is sufficient notice to employer under the statute and the laws of agency. 33 U.S.C. §935. Moreover, although the Board's acknowledgements of the notices of appeal were not served on either employer or carrier, *see* 20 C.F.R. §802.210, this is without legal significance as a notice of cross-appeal must be timely as to the filing of another party's initial appeal, not the acknowledgment thereof. 20 C.F.R. §802.205(b). Accordingly, for the reasons expressed herein, we grant the Director's motion to dismiss employer's cross-appeal.[3]

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[2] Section 801.2(a)(10) states:

> *Party* or *Party in Interest* means the Secretary or [her] designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken.

[3] We note, however, that the administrative law judge's finding that decedent's death is compensable is rational, supported by substantial evidence, and in accordance with law. The "zone of special danger" doctrine applies where the obligations or conditions of employment create a set of circumstances that foreseeably increase the risk of injury. *See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *N.R. [Rogers] v. Halliburton Services*, 42 BRBS 56 (2008) (McGranery, J., dissenting); *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978). We reject employer's contention that the Board's recent decision in *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009), demonstrates that decedent's decision to get a tattoo was a personal choice that was thoroughly disconnected from his employment such that the zone of special danger doctrine does not apply. *See O'Leary*, 340 U.S. at 507; *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989). The administrative law judge rationally found that it was foreseeable that someone in the paramilitary workforce would get a tattoo, and thus that such was not a "thoroughly disconnected" recreational activity. Likewise, regardless of the tattoo procurement, the administrative law judge rationally found that the self-administration of legally obtained pain medications is a reasonably foreseeable activity. He further rationally stated that accidental misuse of such substances, which may be controlled in the United States but available over-the-counter overseas, also is foreseeable. Moreover, that decedent may have been more at risk due to his pre-existing heart condition only strengthens the administrative law judge's finding, as an employer takes it employees as it finds them.

Dependency

Claimants and the Director contend that the administrative law judge erred in finding that claimants were not dependent on decedent at the time of his death. Section 9 provides death benefits to certain survivors where a work-related injury causes an employee's death. 33 U.S.C. §909. Section 9(d) provides that if there is no surviving spouse or child, as in this case, then benefits may be paid to other familial dependents. [4]

Southern Stevedoring Co. v. Henderson, 175 F.2d 863 (5th Cir. 1949). Thus, the administrative law judge rationally related decedent's death to the peculiar dangers of overseas employment. *See Kalama Services Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004), *aff'g* 36 BRBS 78 (2002).

In addition, we affirm the finding that the claim is not barred pursuant to Section 3(c), 33 U.S.C. §903(c). Section 20(c) provides a presumption that, in the absence of substantial evidence to the contrary, the injury was not occasioned solely by his intoxication. 33 U.S.C. §920(c). Although the administrative law judge found that decedent was under the influence of a drug, Tramadol, at the time of death, he properly found that employer did not produce substantial evidence that decedent's death was due solely to the intoxication in view of Dr. Kawas's opinion that decedent had an underlying cardiac condition that likely contributed to death. As employer did not rebut the Section 20(c) presumption, Section 3(c) is inapplicable. *See G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009); *Birdwell v. Western Tug & Barge*, 16 BRBS 321 (1984).

[4] Section 9(d) of the Act provides:

> If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of title 26 of the United States Code, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency.

33 U.S.C. §909(d).

Parents, grandparents, grandchildren, brothers and sisters of the decedent are entitled to death benefits if they establish that, at the time of decedent's death, they were dependent at least in part upon the decedent for the maintenance of their accustomed standard of living. *Henderson v. Kiewit Shea*, 39 BRBS 119 (2006); *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22 (1983); *Fino v. Bethlehem Steel Corp.*, 5 BRBS 223 (1976).

The administrative law judge stated that for purposes of determining dependency under Section 9(d), the Act incorporates the requirements for dependency under Section 152 of the Internal Revenue Code. Decision and Order at 11-12. We agree with claimants and the Director that this is an incorrect statement of law. As the Director correctly contends, the plain language of Section 9(d) establishes three groups of potential claimants: 1) grandchildren or brothers and sisters, if dependent upon the deceased at the time of injury, who receive 20 percent of the decedent's wages; 2) any other persons who satisfy the definition of the term "dependent" in section 152 of title 26, but are not otherwise eligible under this section, who receive 20 percent of the deceased's wages; and 3) each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, who receive 25 percent of the deceased's wages. *See Henderson,* 39 BRBS 119.

Moreover, the Board has specifically rejected the application of the tax code test for parental dependency. *Fino*, 5 BRBS at 227. The Board rejected the employer's contention that the absence of the word "parent" from the designation of survivors in the first portion of Section 9(d), the sentence structure and punctuation of Section 9(d), and the reference to Section 152 of the Internal Revenue Code for "any other person" all indicate that a claimant's qualifications as a dependent must rest solely on the criteria established under Section 152 of the Internal Revenue Code. Referencing the 1972 legislative history, *see* S. Rep. No. 92-1125, 92nd Cong. 2d Sess. (1972); H. Rep. No. 92-1441, 92nd Cong. 2d Sess. (1972), the Board held that the pre-1972 amendment test for dependency remains the applicable law for parents. Therefore, the test for dependency turns upon whether the claimants were dependent on the decedent at least in part at the time of the injury for maintenance of their accustomed standard of living. *Fino*, 5 BRBS at 226-227; *see also Myers v. Bethlehem Steel Co.*, 250 F.2d 615 (4th Cir. 1957); *Vinnell Corp. of California v. Pillsbury*, 199 F.2d 885 (9th Cir. 1952). Thus, the administrative law judge erred in considering whether the claimants met the more stringent requirements for dependency pursuant to Section 152 of the tax code.

The Director urges the Board to hold that the evidence of record establishes that claimants were financially dependent upon decedent at the time of his death. Section 9(d) premises a parent's entitlement to death benefits upon a showing of "dependence." 33 U.S.C. §909(d). The United States Court of Appeals for the Fifth Circuit has defined "dependency" under the Act by looking to its common meaning, *e.g.*, "not self-

sustaining," "relying on for support," "helping to maintain the dependent in his customary standard of living." *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397, 399 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Texas Employers' Ins. Ass'n v. Shea*, 410 F.2d 56 (5th Cir. 1969); *Standard Dredging Corp. v. Henderson*, 150 F.2d 78, 80 (5th Cir. 1945).[5] The Board has adopted this approach. *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985). Partial dependency is sufficient, and the test is whether the contributions were needed and relied upon to maintain the alleged dependent in the position in life to which she or he was accustomed. *Texas Employers' Ins. Ass'n v. Sheppeard*, 62 F.2d 122 (5th Cir. 1932); *L.H. [Henderson] v. Kiewet Shea*, 42 BRBS 25 (2008). The administrative law judge must make the determination of dependency based on all the circumstances of a particular case. *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120 (2002).

Although the administrative law judge applied the incorrect dependency test, he made findings of fact that establish that claimants were partially dependent upon decedent to maintain their standard of living. *See* Decision and Order at 12. The administrative law judge found that decedent sent his parents cash and checks ranging from $200 to $1000 per month, helped pay for their food, and helped them repair and maintain their home. In addition, the rent paid by tenants for decedent's property in Pennsylvania was sent directly to his parents, although he maintained the property and paid the mortgage and taxes. Decedent also purchased items such as dentures for both of his parents, a computer, multiple appliances for their home, a new roof, and their cell phones. Each of decedent's parents receives Social Security disability benefits in the amount of $573.30 per month. They also receive rental income from a property they own in Florida, but for which they also hold a mortgage and provide the maintenance and utilities. Claimants have not filed income tax returns for several years, and were listed as dependents on decedent's tax returns in 2003, 2004 and 2005. They have no retirement income from an employer. *Id.*

Employer contends that claimants were not dependent as they receive at least $3,791 per month in income, including their Social Security benefits, food stamps, rental income from their Florida rental property, rental income from decedent's Pennsylvania property, and $120 per month from decedent's aunt. Employer further contends that claimants have monthly expenses in the amount of $1,803, including mortgages on their home and rental property, real estate taxes on their home, utilities of $400 per month and food expenses above the amount of food stamps. Employer contends that other

[5] Decisions of the United States Court of Appeals for the Fifth Circuit issued prior to September 30, 1981, are binding precedent in the Eleventh Circuit, wherein this case arises, unless specifically overruled by that court. *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981)(*en banc*).

contributions, including the dentures, appliances and cell phones, should be considered gifts and as such are not applicable to the dependency consideration. We reject this latter contention as it is appropriate to consider gifts in determining dependency. *St. John Stevedoring*, 818 F.2d at 399-400; *Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988). Moreover, the proceeds from decedent's Pennsylvania rental property cannot be considered the parents' "income;" decedent directed those payments to claimants, and they are clear evidence of decedent's support for them. In addition, although employer correctly notes that claimants have income from their rental property, the administrative law judge stated that they have expenses such as a mortgage, utilities and taxes on this property. Decision and Order at 12-13.

The uncontroverted evidence of record shows that the decedent made consistent, substantial contributions to his parents in his lifetime, including them as dependents on his tax returns for the three years prior to his death. The focus of the analysis is whether the claimants were dependent on the decedent at least in part at the time of the death for maintenance of their "accustomed standard of living," *Fino*, 5 BRBS at 226-227, not whether the amount of their income exceeded their expenses without the decedent's assistance. We hold that this requirement has been met. The evidence establishes that decedent's parents were his dependents, at least in part, at the time of his death as a matter of law. *Pillsbury*, 199 F.2d at 887 (finding deceased employee's mother had been partially dependent upon him because deceased sent his mother portions of his income, which she used for such expenses as house and tax payments, clothing for herself, and home supplies); *see also Myers*, 250 F.2d 615 (finding a clear case of partial dependency because the deceased paid some money toward his grandchild's support, purchased clothes and shoes for the child, and paid medical bills at the time of the child's birth). Therefore, we reverse the administrative law judge's denial of dependency benefits pursuant to Section 9(d) and hold that claimants are entitled to benefits in accordance with that section.

Attorney's Fee

Claimants contends that the administrative law judge erred in failing to award an attorney's fee to claimants' counsel to be paid by employer. Claimants' attorney is entitled to a fee upon successful prosecution of a claim. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). However, an attorney's fee award cannot be entered until the attorney files a fee application pursuant to 20 C.F.R. §702.132. There is no indication that claimant's counsel submitted a fee application to the administrative law judge. As we affirm the administrative law judge's finding that decedent's death was covered under the Act and hold the claimants qualify as dependents under Section 9(d), the administrative law judge must consider the claimants' counsel's request for an attorney fee when a fee petition is filed.

Accordingly, we affirm the administrative law judge's finding that decedent's death is compensable. We reverse the administrative law judge's finding that the claimants were not dependent on decedent at the time of his death. Claimants are entitled to benefits pursuant to Section 9(d).[6]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[6] The administrative law judge found that decedent's average weekly wage was $2,873.08. Decision and Order at 2. The district director should calculate the amount due each parent pursuant to Section 9(d). *See also* 33 U.S.C. §906(b)(1).