

BRIAN WALKER)	
(Deceased father of claimants))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STEVEDORES, INCORPORATED)	DATE ISSUED: 01/12/2005
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

David W. Bernberg, New Orleans, Louisiana, for claimants.

Alan G. Brackett (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for self-insured employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Decedent's children (claimants) appeal the Decision and Order (2003-LHC-0959) of Administrative Law Judge C. Richard Avery 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).

Decedent had worked for employer for six days when he fell from a barge into the Mississippi River on January 15, 2000, and presumably drowned. His body was never recovered; at the time of the hearing he had not been declared legally dead. Decedent was survived by seven illegitimate children. These children sought death benefits under

the Act.¹ 33 U.S.C. §909(c). At the time of his death, decedent had been out of prison for eleven weeks, following three years of incarceration.

In his decision, the administrative law judge found that, although they were acknowledged offspring, the children were not “dependent” upon their father within the meaning of the Act because none of the children relied on their father for regular financial support for their living expenses. Therefore, the administrative law judge denied death benefits.

On appeal, claimants contend that in determining they were not dependent upon the decedent, the administrative law judge erred in looking at the period during which decedent was incarcerated, rather than the period immediately preceding the work accident. In addition, claimants contend that the administrative law judge erred in finding that decedent’s contributions to them were not sufficient to establish dependency and that the administrative law judge mischaracterized evidence regarding decedent’s contributions to them. Employer responds, urging affirmance of the administrative law judge’s decision as it is rational and supported by substantial evidence.

The Act provides for the payment of death benefits to a surviving “child” of the deceased. 33 U.S.C. §909(c). The statutory definition of “child” provides that illegitimate children must establish that they were “acknowledged” by the employee and dependent upon him for support at the time of injury.² 33 U.S.C. §902(14); *Duck v. Fluid Crane & Constr. Corp.*, 36 BRBS 120 (2002). Section 9(f) of the Act states that “All questions of dependency shall be determined as of the time of the injury,” 33 U.S.C. §909(f). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has defined “dependency” within the meaning of 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.” *See St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir. 1986), *aff’d in part part Jones v. St. John Stevedoring Co., Inc.*, 18 BRBS 68 (1986), *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 (5th Cir. 1945). In view of this case law, the Board has

¹ Claimant’s counsel states on appeal that all seven of decedent’s children are pursuing this claim. However, the oldest of the children did not present any evidence at the hearing regarding dependency on his father. Thus, the administrative law judge found that there was nothing upon which to base a decision in his favor and that the claim was abandoned. This conclusion is not challenged on appeal.

² The administrative law judge found that all seven children were “acknowledged” by decedent. Decision and Order at 6.

held that a determination of dependency does not require an examination of state law. *Duck*, 36 BRBS at 126; *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985). Rather, the administrative law judge must make this finding based on the factual circumstances of the particular case. *Jones*, 18 BRBS at 70. Partial dependency is sufficient to establish dependency under the Act. *Texas Employers' Ins. Ass'n v. Sheppard*, 62 F.2d 122 (5th Cir. 1932). The Fifth Circuit has affirmed a finding of dependency when the monetary payments for the individual's support were regular even if the amount of each payment was small. *See Shea*, 410 F.2d at 62, (decendent gave his parents payments totaling \$80 to \$90 in the year prior to his death, but the payments were regular and thus considered part of support); *Sheppard*, 62 F.2d 124.

In this case, the mothers of decedent's children testified at the formal hearing. Ms. Jones testified: that her two children lived with her and her mother, both at the time of decedent's release from prison and at the time of his disappearance; that her mother paid for rent and utilities; and that she receives food stamps and welfare. The only specific examples of decedent's contribution to the children's support after his release from prison were his provisions of the necessary items for Ms. Jones's daughter's school parade outfit and tennis shoes. Ms. Dorsey, the mother of three of decedent's children, testified that decedent would provide any items she asked for and that he provided food and clothing for the children while he worked at Walmart following his release from prison. Ms. Smith, the mother of decedent's youngest child, testified that Mr. Walker bought shoes and clothing for their daughter, but that she supplied the support for their daughter, and Mr. Walker did not give money directly for the child's support.

The administrative law judge found that the date of injury is decedent's date of disappearance, January 15, 2000, and that dependency should be determined as of that time. 33 U.S.C. §909(f). Although the administrative law judge stated that the relevant inquiry is the eleven-week period prior to decedent's death, he found it relevant that decedent was unable to support his children during the three years of his incarceration, *i.e.*, between March 1996 and October 1999. Decision and Order at 7. The administrative law judge explained that it is relevant to the degree to which the children's mothers relied on decedent for financial assistance, stating that in view of decedent's previous incarceration, "it is hard to conceive in what ways decedent's children could have financially depended on him for any kind of regular monetary support during the 11 weeks prior to his death." *Id.* (emphasis in original). The administrative law judge concluded that no evidence was offered as to how decedent was a reliable source of support for his children.

Based on the record before us, we affirm the administrative law judge's finding that the evidence fails to establish that the children were dependent upon decedent at the time of his disappearance. Contrary to claimants' contention, the fact that the administrative law judge referred to decedent's period of incarceration does not establish

error in view of the administrative law judge's consideration of the relevant evidence and his rational finding that the mothers' testimony was vague as to the degree of decedent's support in the time following his release from prison. The mothers referred primarily to instances when the decedent provided clothing and shoes. Ms. Dorsey testified that decedent gave her money after he was released from prison, but she did not indicate how often or how much; Ms. Jones and Ms. Smith deny receiving monetary support. While it is not necessary to establish that an employee's contribution is more than "miniscule and minute support in terms of dollars and cents," *Shea*, 410 F.2d at 62, the case law indicates that if the payments or purchases are small, such contributions should be made regularly in order for the minor to establish he or she relied on those purchases or payments for a portion of support. In this regard, the contributions must be such that the recipients rely on them to help maintain their standard of living. *United States Fidelity & Guaranty Co. v. Britton*, 188 F.2d 674 (D.C. Cir. 1951). In this case, the administrative law judge rationally found that the testimony is vague and thus is insufficient to establish that decedent contributed to the maintenance of his children, and thus that they were dependent upon him at the time of injury. *Standard Dredging Corp.*, 150 F.2d at 81 ("there must be a real need for help in living as well as actual contribution"). As claimants have demonstrated no reversible error in the administrative law judge's finding, we affirm the denial of benefits as it is rational, supported by substantial evidence, and in accordance with law.³

³ Claimants contend that the administrative law judge mischaracterized the testimony of decedent's brother and also the decedent's employment in the eleven weeks after his release from prison. Decedent's brother stated decedent gave money, and possibly items, for the children's support, Tr. at 25, in contrast to the administrative law judge's statement that Mr. Walker testified his brother was unable to provide for them, Decision and Order at 3. The administrative law judge also stated that decedent was temporarily unemployed after his release from prison, when in fact, he began work at Walmart on the second day thereafter. Any error in this regard is harmless, however, as neither decedent's brother's testimony nor decedent's employment at Walmart is sufficient to establish that the children were dependent on decedent.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge