

LINDA KAY and KYLER WELCH)	
(BYRON J. BOSWELL, deceased))	
)	
Claimants-Petitioners)	
)	
v.)	
)	
FUGRO GEOSCIENCES,)	DATE ISSUED: 11/24/2010
INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Russell L. Dornier, Baton Rouge, Louisiana, for claimants.

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimants, Linda Kay Welch and Kyler Welch, appeal the Decision and Order (1993-LHC-3078 and 2009-LHC-00765) of Administrative Law Judge Clement J. Kennington rendered on claims 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 15, 1993, the decedent, Byron Boswell, died as a result of an accident which occurred in the course of his work for employer. At the time of his death, decedent was living in Baton Rouge, Louisiana, with his fiancée, Linda Kay Welch, their child, Daylon Boswell (born September 18, 1992), and with Ms. Welch's child from a prior relationship, Kyler Welch (born January 8, 1989). Decedent also had an ex-wife with whom he had one child, Brandon Boswell (born April 28, 1985). Employer voluntarily initiated payment of death benefits on March 3, 1993, to Daylon Boswell and Kyler Welch, and on July 16, 1993, to Brandon Boswell, retroactive to January 16, 1993, under Section 9 of the Act, 33 U.S.C. §909. In December 1993, a lawsuit was filed in state court on behalf of the three children pursuant to the Jones Act and general maritime law. EX 10. On March 23, 1994, Administrative Law Judge Richard Avery issued a decision withholding any further payment of death benefits pursuant to the Act, pending a determination in Louisiana state court as to decedent's status as either a longshoreman under the Act or seaman under the Jones Act. EX 11. Employer settled the tort suits with Brandon Boswell in March 1996,¹ and with Daylon Boswell in September 2009.² EXs 12, 28. Carrier sought, pursuant to Section 33(f) of the Act, 33 U.S.C. §933(f), a credit in the amount of the third-party recoveries against its liability for any additional compensation payments under the Act. In October 2009, carrier's Section 33(f) claim was settled with Daylon Boswell, who returned to carrier \$250,118.06 in payments previously made to him under the Longshore Act.

Meanwhile, on November 17, 2007, District Judge William Dupont had determined, as a matter of law, that decedent was a longshoreman at the time of his death. Thereafter, Kyler Welch received from employer on May 28, 2009, an additional \$218,233.32 in death benefits (\$214,903.54), interest, and assessments (\$3,329.78) under the Act. EX 29. Linda and Kyler Welch thereafter continued pursuit of their claims for death benefits. Specifically, Ms. Welch argued that she is entitled to death benefits because she should be considered a "widow" for purposes of Section 9(b) of the Act, or alternatively, as an "other dependent" as classified by Section 152 of the Internal Revenue Code, 26 U.S.C. §152. *See* 33 U.S.C. §909(d). Kyler Welch argued that he is

¹ Brandon Boswell settled with employer in March 1996, for \$300,000. In April 1996, the parties filed a Section 8(i) settlement application, which outlined the terms of the state court tort settlement, in order "to foreclose any and all future claims for compensation under the [Act]," and acknowledged that the net sum received by Brandon Boswell, \$189,000, was "in excess of the greatest amount [he] could receive under the Act." EX 12.

² Daylon Boswell settled with employer in September 2009, for \$1,050,000. The parties stipulated that the net recovery received by Daylon Boswell, \$688,461.57, was in excess of the greatest amount which he could receive under the Act. EX 28.

entitled to additional death benefits, dependent upon an assessment of his mother's entitlement to death benefits, *i.e.*, if there is no widow, the children's portions are greater. *Id.*

In his decision, Administrative Law Judge Clement J. Kennington (the administrative law judge) concluded that Ms. Welch is not entitled to death benefits because she is neither a "widow" nor "other dependent" under Sections 9(b) and 9(d) of the Act, and that Kyler Welch is not entitled to any additional death benefits under Section 9(c), because he is no longer under the age of 18, he is no longer a fulltime student, and because, in any event, employer is entitled to a credit in excess of any additional death benefits to which he might be entitled. On appeal, claimants challenge the administrative law judge's denial of death benefits. Employer responds in support of the administrative law judge's denial of benefits.³

Widow/Other Dependent

Claimant, Linda Kay Welch, argues that she is a surviving widow entitled to death benefits in accordance with Section 9(b) of the Act. In particular, Ms. Welch contends that the term "widow" as defined by Section 2(16) of the Act, requires only that she was living with decedent or dependent upon him for support at the time of his death, requirements she alleges are established by the facts in this case.

Section 2(16) of the Act provides:

The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

33 U.S.C. §902(16). In this case, it is undisputed that Ms. Welch and decedent lived together at the time of his death but did not formally participate in a marriage ceremony. Contrary to claimant's position, all clauses of Section 2(16) require one to be either a "wife" or "husband" of the decedent. 33 U.S.C. §902(16); *Thompson v. Lawson*, 347 U.S. 334 (1954). Thus, the issue is whether Ms. Welch was decedent's wife at the time of his death. *See Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991). The Act does

³ Employer also requests that claimants' appeal be dismissed since claimants did not file a Petition for Review in addition to their brief. Claimants did, in fact, file with the Board a separate document entitled "Petition for Review." 20 C.F.R. §802.211. Employer's motion to dismiss is therefore denied. 20 C.F.R. §802.211(d).

not define “marriage,” and thus state law controls in determining whether a marriage has been created.⁴ See *A.S. [Schweiger] v. Advanced American Diving*, 43 BRBS 49 (2009) (McGranery, J., dissenting); *Angelle v. Steen Production Service, Inc.*, 34 BRBS 157 (2000); *Jordan v. Virginia Int’l Terminals*, 32 BRBS 32 (1998). The parties are in agreement that Louisiana law applies in determining whether Ms. Welch was married to decedent.

The Louisiana Civil Code provides that “[m]arriage is a legal relationship between a man and a woman that is created by civil contract.” LSA C.C. Art. 86. The Code further provides that three requirements must take place for a valid contract of marriage: (1) The absence of a legal impediment; (2) A marriage ceremony; and (3) The free consent of the parties to take each other as husband and wife, expressed at the ceremony. LSA C.C. Art. 87. As it is undisputed that Ms. Welch and decedent did not participate in a marriage ceremony, a requisite for a valid marriage contract in Louisiana, see EX 9, Dep. of Linda Kay Welch at 10, 15, 27, 29-30, 31, 44, 59, the administrative law judge’s finding that Ms. Welch was not decedent’s wife at the time of his death for purposes of Section 9(b) of the Act and consequent denial of death benefits under that provision are affirmed.⁵ See *Angelle*, 34 BRBS 157.

Ms. Welch alternatively argues that she is entitled to death benefits pursuant to Section 9(d) of the Act because she is, pursuant to Section 152(a) of the Internal Revenue Code, an individual who had “the same principle place of abode” and “was a member” of decedent’s household at the time of his death.⁶ She contends that the administrative law

⁴Although there is federal law relating to marriage, it does not define marriage for these purposes. See 1 U.S.C. §7; 28 U.S.C. §1738C.

⁵ Moreover, the parties conceded that common law marriages are not recognized by the state of Louisiana. Decision and Order at 8.

⁶ Section 9(d) provides in pertinent part:

If there be no surviving wife or husband or child, . . . then for the support of grandchildren or brothers or 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, but are not otherwise eligible under this section, 20 percentum 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 injury, 25 percentum of such wages during such dependency.

33 U.S.C. §909(d).

judge erred in not following a line of Louisiana state cases beginning with *Henderson v. Travelers*, 354 S.2d 1031 (La. 1978), which, she alleges, stands for the proposition that “common-law” spouses may receive benefits under the Louisiana workers’ compensation scheme.⁷ Section 9(d) of the Act provides that if there is no surviving spouse or child, death benefits may be granted to a “dependent” of decedent at the time of death, who is not otherwise eligible under Section 9, as that term is defined by Section 152 of Title 26. See 33 U.S.C. §909(d); 26 U.S.C. §152. Section 152(a) defines “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.*

⁷ It is not entirely clear whether claimant raises the *Henderson* decision in terms of her contentions relating to Section 9(b) or 9(d). Regardless, we reject claimant’s position that that state court decision and its progeny are controlling, as this case is factually distinguishable. In *Henderson*, the court held that the “dependent concubine” (also referred to by the court as common law spouse) of a workman fatally injured at work could recover worker’s compensation benefits on the basis that she was a *dependent member of his family* when her doing so did not infringe upon any share of compensation benefits to which statutorily entitled claimants, *i.e.*, wife, child, parent, were preferentially entitled. First, *Henderson* is distinguishable from this case with regard to Section 9(b), because it concerned whether the claimant, who lived with the decedent as his common law spouse, could receive benefits not as a “widow” but rather as an “other dependent” under the Louisiana workers’ compensation law. See *Angelle*, 34 BRBS at 159. Thus, *Henderson* does not stand for the proposition that a common law spouse is entitled to state worker’s compensation benefits as the decedent’s “wife.” As noted, moreover, a common law marriage cannot be created in Louisiana. Second, in contrast to the language of Section 9(d) of the Act, the state provision in question in *Henderson* did not include a specific reference to “persons who satisfy the definition of the term ‘dependent’ in section 152 of Title 26.”

26 U.S.C. §152(a) (emphasis added). Thus, such an individual must have received over one-half of her support from the taxpayer and have resided with the taxpayer.

The dependency issue in this case centers on the question presented by Section 152(a) as to whether over half of Ms. Welch's support came from decedent in the year preceding his January 15, 1993, death. 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 a claimant further substantiate her testimony with documentation. *Angelle*, 34 BRBS 157; *see also Reed v. Holcim, (US) Inc.*, 40 BRBS 34 (2006), *vacated and remanded on other grounds mem.*, 291 F.App'x 647 (5th Cir. 2008) (remanded by court for administrative law judge to determine whether the award of benefits to a decedent's mistress comports with the prospective element of Section 9(d), which entitles a dependent to continued compensation only "during such dependency"). Ms. Welch's testimony regarding her dependence on decedent consists only of her "yes" response to the question as to whether she "relied on [decedent] for support at the time of death." EX 9, Dep. at 56. The administrative law judge rationally found this statement alone is insufficient to establish that Ms. Welch received over half of her support from decedent at the time of his death. Absent from the record are any statements by Ms. Welch, or documentation, which show that decedent paid over half of their household expenses, rent, utilities, and/or other expenses. *See e.g., Reed*, 40 BRBS 34; *Angelle*, 34 BRBS 157. Rather, as the administrative law judge found, Ms. Welch acknowledged that she is a college graduate, that she was working at the time of decedent's death, and that she maintained her own checking account and credit cards. CX 8, Dep. at 34. She further stated that she filed her own tax returns, and thus, was not claimed as a dependent by decedent for the three years prior to decedent's death. CX 8, Dep. at 26-27. These statements support the administrative law judge's finding that Ms. Welch was not "dependent" upon decedent for over half of her support in the year preceding his death. Consequently, as it is supported by substantial evidence, we affirm the administrative law judge's finding that Ms. Welch did not establish that over half of her support came from decedent. Therefore, we affirm the denial of death benefits under Section 9(d). *See L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008).

Child

Claimant, Kyler Welch, contends he is entitled to death benefits from the date of decedent's death through the date he reaches 23 years of age at the rate of 50 percent of the "maximum" weekly wage subject to appropriate cost of living increases, since he is

the sole remaining “claimant” child in this case.⁸ Section 9(c) of the Act provides for the payment of compensation for death of an employee to a child or children of the deceased employee where there is no surviving spouse, and establishes that children of decedent shall share in equal parts of 66 2/3 percent of decedent’s average wage, unless there is only one child, in which case he/she receives 50 percent of such wage. 33 U.S.C. §909(c). The contention on appeal is that since Kyler is the only child still entitled to benefits, as the others settled their claims, he therefore should receive 50 percent of decedent’s average weekly wage rather than the 16 2/3 percent paid to him by employer.

Kyler Welch’s assertion, that he is entitled to death benefits at the rate of 50 percent of decedent’s wages from the date of decedent’s death through the date he reaches 23 years of age, is not consistent with the Act. First, his argument incorrectly assumes that he was the only surviving child of decedent at the time of his death, which is, as the administrative law judge found, contrary to the evidence in this case. In this regard, the administrative law judge properly found that decedent left three dependent children at the time of his death, *i.e.*, Brandon Boswell, Kyler Welch, and Daylon Boswell, and that each child was entitled to one-third of 66 2/3 of decedent’s average weekly wage at the time of his death as prescribed by Section 9(c) of the Act. Additionally, as the administrative law judge found, the fact that Brandon and Daylon Boswell ultimately settled their claims does not alter the formula for payment prescribed by Section 9(c) of the Act. As Section 9 states, there is to be one death benefit,⁹ and employer, as vessel owner, entered into third-party settlements with Brandon and Daylon Boswell for the specific purpose of having those claimants agree to “forever forgo any claim under the Act.” EX 12. Employer, therefore, has settled the portion of the single death benefit attributable to those individuals, and the settlement replaces the benefits due

⁸ Employer concedes Kyler Welch’s entitlement to death benefits as “a child in relation to whom the deceased employee stood in loco parentis.” *See* 33 U.S.C. §902(14).

⁹ The prefatory language of Section 9 states:

If the injury causes death, the compensation therefore shall be known as a death benefit

33 U.S.C. §909 (emphasis added); *see generally Blackwell Constr. Co. v. Garrell*, 352 F.Supp. 192 (D.D.C. 1972); *Hawkins v. Harbert Int’l, Inc.*, 33 BRBS 198 (1999); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

by way of a Section 33(f) credit.¹⁰ Thus, employer is not required to also increase the payment of the death benefit to another eligible claimant not involved in the settlement and who remains entitled to a share of the death benefit.¹¹

Next, although Kyler Welch argues that his benefits should be calculated based on the “maximum” compensation rate, the Act provides that death benefits are to be based on decedent’s average weekly wage at the time of death, not to exceed 200 percent of the National Average Weekly Wage. 33 U.S.C. §909(e). The parties stipulated that decedent’s average weekly wage was \$678.19 and this has not been shown to be erroneous. Additionally, Kyler Welch’s contention that he is entitled to death benefits until he reaches the age of 23 is contrary to the facts in this case, since it was stipulated at the November 5, 2009, hearing, that Kyler Welch, then age 21, “is not presently a full-time student within the meaning of the Longshore Act.” HT at 7; *see* 33 U.S.C. §902(18). Kyler Welch produced no evidence to suggest that his status as a student changed from the time of the hearing, and in contrast, employer produced evidence supporting a finding that Kyler Welch ceased being a full-time student as of the spring of 2008. Moreover, Kyler Welch has not presented any challenge to the administrative law judge’s finding that he has already received total death benefits, \$214,903.54,¹² in excess of that to which he is entitled regardless of whether his entitlement to such benefits ended as of his 18th birthday, \$116,417.68, the date he ceased being a full-time student, \$132,467.94,¹³ or even assuming he remained a full-time student up until his 23rd

¹⁰ To the extent that employer settled the Jones Act suit, employer is entitled to a credit pursuant to Section 3(e), 33 U.S.C. §903(e). *See generally Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3^d Cir. 1995).

¹¹ The non-settling claimant remains protected by virtue of the fact that the employer is entitled to offset only that third-party recovery apportioned to each party entitled to compensation, *i.e.*, a non-settling claimant’s entitlement to benefits cannot be offset by the proceeds received by other settling claimants. 33 U.S.C. §933(f); *see* n.15, *infra*.

¹² We note that the administrative law judge incorrectly found that Kyler Welch had received \$218,233.32 in death benefits from employer, for the record indicates that Kyler Welch, in fact, received \$214,903.54 in death benefits. EX 29. The difference between the two figures is payment for interest and additional assessments.

¹³ The administrative law judge determined that Kyler Welch should be entitled to \$132,467.94 pursuant to Section 9(c). He reached this sum by adding the benefits to which he found Kyler Welch entitled to during three separate periods of time, *i.e.*, \$72,788.10, representing \$150.20 per week for the period spanning from January 16, 1993, through April 28, 2003; \$43,629.58, representing \$226.20 per week for the period

birthday, \$155,978.18.¹⁴ Thus, employer has a credit, pursuant to Section 14(j), 33 U.S.C. §914(j), in excess of any additional amount of death benefits to which claimant might be entitled.¹⁵ Consequently, we affirm the administrative law judge's denial of additional benefits for Kyler Welch.

between April 29, 2003, and January 8, 2007; and \$16,050.26, representing \$226.20 per week for the period from January 8, 2007, through May 31, 2008. *See* Decision and Order at 16.

¹⁴ Furthermore, we note that Kyler Welch's award of Section 9(c) death benefits is subject to annual increases pursuant to Section 10(f), 33 U.S.C. §910(f). Recalculating Kyler Welch's benefits in accordance with Section 10(f) reveals that he has already received total benefits from employer in excess to which he would be entitled if Section 10(f) adjustments were applied.

¹⁵ Contrary to the administrative law judge's finding, employer is not entitled to a Section 33(f) credit for the settlements it reached with Brandon and Daylon Boswell against any additional compensation owed to Kyler Welch, because no part of those settlements were apportioned to him. 33 U.S.C. §933(f), *I.T.O Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (employer is entitled to offset only that third-party recovery apportioned to each party entitled to compensation); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991) (since the offset applies to the third-party recovery of the "person entitled to compensation" the employer is entitled to offset its liability to a particular claimant under the Act against only the third-party recovery received by that person for the covered injury or death). For the same reason, the administrative law judge's reference to employer's entitlement to a Section 33(f) credit for the overpayment made to Kyler Welch is incorrect. *Id.* Nonetheless, the administrative law judge's error in this case is harmless, since, regardless of the amounts received by Brandon and Daylon Boswell with regard to the lawsuit, employer is, under 33 U.S.C. §914(j), entitled to a credit for the advance payments of compensation it made to Kyler Welch against the amount of death benefits owed to him under the Act. *Valdez v. Crosby & Overton*, 34 BRBS 185, *aff'g on recon.* 34 BRBS 69 (2000); *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

Accordingly, the administrative law judge's Decision and Order denying death benefits to Linda Welch under Sections 9(b) and (d), and additional death benefits to Kyler Welch, pursuant to Section 9(c), is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge