BRB No. 02-0499

TANYA HOLMES (minor child of RONALD HOLMES, deceased)	)	
Claimant-Petitioner	)	
v.	)	
SHELL OFFSHORE, INCORPORATED	)	DATE ISSUED: MAR 31, 2003
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion to Dismiss and the Decision and Order Denying Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Robert L. Hackett, New Orleans, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Motion to Dismiss and the Decision and Order Denying Claimant's Motion for Reconsideration (2002-LHC-271) 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 was a Ballast Control Operator on one of employer's offshore oil platforms. According to an affidavit, on January 16, 1999, he told his supervisor of

his separation from his wife, and he asked for leave to return home to resolve some personal problems. He was not sleeping well due to these problems and felt he was a safety risk. When decedent arrived home on January 17, 1999, he committed suicide.

Decedent's widow filed a claim for death benefits under the Act. In her deposition, she testified that decedent had been acting strangely at the time of their December 1998 argument, the incident precipitating the separation, but that she felt the separation was only temporary. She also testified that a suicide note was found in decedent's jacket pocket, demonstrating to her that the death was not accidental. Employer filed a motion for summary decision on the widow's claim, arguing that the claim was barred by Section 3(c) of the Act. 33 U.S.C. §903(c).

The administrative law judge considered the evidence attached to employer's motion and found that decedent did not suffer any work-related injury or illness prior to taking his own life. Consequently, he found that decedent's widow failed to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), and, as decedent willfully intended to take his own life, Section 3(c) barred the claim for compensation. Finding no genuine issue of disputed facts, the administrative law judge granted the motion for summary decision and dismissed the claim. Decision and Order I. Due to the widow's failure to respond to employer's motion for summary decision and to the administrative law judge's motion to show cause, despite the verification of service, the administrative law judge deemed such failure as a waiver of rights, and denied her motion for reconsideration. Decedent's widow did not appeal these decisions.

One year later, on September 21, 2001, decedent's daughter by his first marriage (claimant), stepdaughter of decedent's widow, filed a claim for death benefits. Employer filed a motion to dismiss based on the principle of collateral estoppel. The same administrative law judge decided the case. He found: "The same forum, the same Employer and same attorneys are involved here that were involved in the widow's claim. The only addition to this claim is the child, who apparently has now reached majority, and who stands in privity with her stepmother, Janice Holmes, as far as entitlement under the Act is concerned." Decision and Order II at 2. Accordingly, he dismissed the claim because the final judgment of the prior claim determined that the death was not compensable. The administrative law

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[1]Section 3(c) of the Act specifically excludes coverage where "the injury was occasioned solely . . . by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(c). Section 20(d) of the Act, 33 U.S.C. §920(d), applies to presume that the injury was not due to decedent's willful intent, and employer bears the burden of producing evidence of "willful intention." *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

[2]The Director, Office of Workers' Compensation Programs, filed a one-paragraph letter acknowledging his concurrence with employer's position that collateral estoppel bars the claim.

judge summarily denied claimant's motion for reconsideration.

Claimant appeals the dismissal of her claim. She argues that collateral estoppel is not applicable and that the dismissal of her claim is in error as it confines her to the facts presented to the administrative law judge in the prior case and presumes she is in privity with her stepmother. She contends she is not in privity with her stepmother, she is entitled to present facts to the administrative law judge which would support her own claim, and there is no law supporting employer's argument that privity depends on the "source of benefits." Claimant, therefore, requests reversal of the finding that her claim is precluded because of a final judgment on the prior claim and remand for a hearing on the merits. Employer argues that the administrative law judge correctly applied collateral estoppel and dismissed claimant's claim. It asserts that the payment of death benefits under the Act is a function of the death and this creates the privity between claimant and decedent's widow. As the event giving rise to the claim was found to be non-compensable and that conclusion became final, employer asserts that payment of death benefits is precluded.

This case arises in Louisiana within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. Under federal law, *res judicata* can only apply if: 1) the parties in the current action are the same or are in privity with the parties in the prior action; 2) the court that rendered the prior judgment was a court of competent jurisdiction; 3) the prior action must have terminated with a final judgment on the merits; and 4) the same claim or cause of action must be involved in both actions. *Gulf Island-IV, Inc. v. Blue Streak-Gulf Is. Ops.*, 24 F.3d 743 (5th Cir. 1994); *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990); *Sider v. Valley Lines*, 857 F.2d 1043 (5th Cir. 1988); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). The concept of *res judicata* includes both claim preclusion and issue preclusion, also called collateral estoppel. *Thomas v. Janzen*, 800 So.2d 81 (La.App.2 2001); 50 C.J.S. Judgments §779. For collateral estoppel to bar a party from re-litigating an issue, the issue at stake must be identical to the one alleged in a prior litigation, the issue must actually have been litigated, the determination of that issue must have been a critical and necessary part of the judgment of the earlier action, and the parties or their privies must have had a full and fair opportunity to litigate the issues. *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313 (1971); *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996); *Ortiz*, 25 BRBS 228; *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988). In the case currently

[3]There is only one "death benefit" under Section 9 of the Act, 33 U.S.C. §909, regardless of the number of survivors. *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).

[4]Common law *res judicata* and collateral estoppel are not applicable in Louisiana; however, Louisiana has codified these principles. La. R.S. 13:4231.

before the Board, it is clear that the claims for benefits in both the current and prior cases are based on the same death and rely on the identical issue of whether the death was compensable. Both cases proceeded through the same and proper administrative course and, thus, are held to the same burden of proof, *see Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997), and the prior adjudication reached a final judgment. The only disputed question is novel to the Board: does claimant stand in privity with her stepmother, decedent's widow? Because we hold she does not, collateral estoppel and *res judicata* do not apply to defeat her claim.

The Act does not define privity; therefore, we must look elsewhere to resolve the question before us. *Black's Law Dictionary* (5th ed. 1979) states:

> In its broadest sense, "privity" is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.

"Privity defines the legal conclusion that the relationship between a party and a nonparty is sufficiently close to mandate the application of the doctrine of res judicata." 50 C.J.S. Judgments §830. According to Fifth Circuit and Louisiana law, "privity" exists only in three narrowly-defined circumstances: 1) where the current party is the successor in interest to a prior party's interest in property; 2) where the current party controlled the prior litigation; or 3) where the current party's interests were adequately represented by a party in the prior suit so as to consider the prior party the "virtual representative" of the current party because their interests are so closely aligned. *Meza*, 908 F.2d at 1266; *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172 (5th Cir. 1987); *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *appeal dismissed*, 423 U.S. 908 (1975); *Thomas*, 800 So.2d at 89; *Hudson v. City of Bossier*, 766 So.2d 738 (La.App.2 2000), *writ denied*, 775 So.2d 450 (La. 2000). Of the three concepts of privity, only the third, virtual representation, would be applicable in the instant case. However, to be "closely aligned," so as to be one's virtual representative, it is not enough to merely show that "the party and the nonparty have common or parallel interests in the factual and legal issues presented in the respective actions[,]" *Thomas*, 800 So.2d at 89, or that they both used the same attorney, *Benson & Ford*, 833 F.2d at 1175; *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 864 (5th Cir. 1985). Rather, in the Fifth Circuit, virtual representation requires "an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." *Meza*, 908 F.2d at 1272 (quoting *Benson & Ford*, 833 F.2d at

[5]The *Meza* court stated that "under the rubric of adequate representation," courts have consistently held that a non-party is bound by a prior decision if he authorized a party in that suit to represent him or if he was represented as a member of a class. Less settled is the meaning of "closely aligned." *Meza*, 908 F.2d at 1266-1267.

1175).

Virtual representation is very narrowly construed in the state courts, but it has been applied in certain situations. *McDonald v. Cason*, 801 So.2d 1255 (La. App. 3d Cir. 2001) (majority shareholder of a company stood in privity with the company where his interests were adequately represented in the first litigation, and he took an active role in proving the case); *Central Mutual Ins. Co. v. Dunker*, 799 S.W.2d 334 (Tex. App.-Houston 1990) (insurance company cannot re-litigate whether its insured was negligent in an accident, as insurer was virtually represented by the insured in the personal injury suit); *Mason v. Mason*, 366 S.W.2d 552 (Tex. 1963) (beneficiaries of a trust are considered adequately represented by the trustee, if their interests are not in conflict, so they are estopped from challenging the validity of the trust once the trustee has proven it valid in a prior case). Nevertheless, the courts generally have found that the relationships between the parties and non-parties are insufficient to bind the non-parties to the outcomes of the first cases. For example, in a case challenging the abandonment and re-zoning of a certain piece of property, the court held that the presence of the same individual in both suits did not make *res judicata* applicable because she was present in the first suit in her official capacity as a member of the planning commission and in the second suit in her own individual capacity as a citizen. *Thomas*, 800 So.2d at 90. The court held that there was no privity because the commission was dismissed from the first suit, so its interest in challenging the ordinance was not furthered, and "[w]hen citizens have distinct private rights, an adjudication in a proceeding where the citizens are not parties, individually or as members of a class, is not a bar to the private citizens' action. . . ." *Thomas*, 800 So.2d at 90; *see also Hudson*, 766 So.2d at 744 (class of citizens seeking to tax casino boats was not virtually represented by the School Board where it stipulated to the validity of contracts proposing to waive the right to tax casino boats).

Similarly, the Fifth Circuit has narrowly interpreted virtual representation. For

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[6]The Fifth Circuit is in line with other circuit courts of appeals in holding that "virtual representation" is a concept of privity. The circuits, however, have expressed differing definitions of "virtual representation." *Niere v. St. Louis County, Missouri*, 305 F.3d 834 (8th Cir. 2002) (virtual representation applies if litigation is public in nature and plaintiffs barred by *res judicata* had common interest with actual litigants); *Perez v. Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001) (virtual representation requires more than confluence of interests and it cannot be applied unless non-party had actual or constructive notice of prior claim and had chance to join); *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950 (7th Cir. 2000) (circuit takes a dim view of virtual representation); *Favish v. Office of Independent Counsel*, 217 F.3d 1168 (9th Cir. 2000) (virtual representation based on express or implied legal relationship); *Becherer v. Merrill Lynch, Pierce, Fenner, et al.*, 193 F.3d 415 (6th Cir. 1999) (virtual representation requires express or implied legal relationship and parties of first suit must be accountable to parties of second suit); *Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172 (3d Cir. 1994) (virtual representative is legally designated representative of non-party); *Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987) (virtual representative is accountable to non-parties and has tacit approval of court).

example, it held that, for purposes of *res judicata*, the term "parties" is not limited to those parties identified on paper but includes those parties whose interests are "properly *placed before the court*." *Gulf Island-IV*, 24 F.3d at 746 (emphasis in original). In *Gulf Island-IV*, the court stated that, even assuming, *arguendo*, that a party to the current case was in privity with a named but unserved party in the prior case, *res judicata* does not apply, as the unserved entity was never properly before the court. *Id.* at 747. The Fifth Circuit has also held that a union does not virtually represent a former, retired, union member in a contract dispute with the former employer. There was no express or implied representation because the evidence established that the retired worker did not consent to representation or know of the suit, there was no contractual or statutory duty for the union to represent him, and even if it volunteered to represent him, it would be doubtful as to whether it owed him a duty of fair representation. *Meza*, 908 F.2d at 1272-1273; *see also Benson & Ford*, 833 F.2d at 1173-1175 (witness in antitrust case not barred from bringing another antitrust case against same defendants on same facts).

Finally, and most relevant here, even close familial relationships, without something more, are insufficient to invoke virtual representation. In a Texas case, the court held that *res judicata* did not apply to bar a child from pursuing her own paternity suit because her mother was not her virtual representative in the mother's unsuccessful paternity suit. *R.M.H. by Gabert v. Messick*, 828 S.W.2d 226 (Tex. App.-Ft. Worth 1992). In the Fifth Circuit, the court held that a father was not the virtual representative of his own family members. *Freeman*, 771 F.2d 860. In *Freeman*, a father was injured and his daughter was killed in a car crash. The father brought suit in state court for his own injuries, but he lost when the jury found the defendant was not negligent. He then brought suit in federal court on behalf of himself and as representative of his wife and three other children for the wrongful death of his daughter. The Fifth Circuit affirmed the application of collateral estoppel for the father's claim because the controlling issue, whether the defendant was negligent, had already been adjudicated as to the father. However, the court found that collateral estoppel did not apply to bar the claims of the wife and other children. Despite using the same attorney, and seeking to pursue a finding of negligence based on the same accident, the court found that the father was not the virtual representative of the others in the first case; thus, they were all entitled to their own day in court. *Id.* at 865; *see Benson & Ford*, 833 F.2d at 1175. In the scope of personal injury law, "close family relationships are not sufficient by themselves to establish privity. . . ." *Freeman*, 771 F.2d at 863; *see also* 50 C.J.S. Judgments §830.

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[7] *But see E.I.B. v. J.R.B.*, 259 N.J.Super. 99, 611 A.2d 662, *cert. denied*, 130 N.J. 602, 617 A.2d 1223 (1992) (court applied virtual representation because, under New Jersey statute, the mother represents the child); *see also Jessica G. v. Hector M.*, 653 A.2d 922 (Md. 1995) (discussion of privity in paternity cases; court held no privity here because mother's case was decided on procedural grounds and not on the merits); *O'Bannon for O'Bannon v. Azar*, 506 So.2d 522 (La. App. 1st Cir.), *writ denied*, 511 So.2d 1158 (La. 1987) (mother clearly represented child in suit, so child's subsequent case barred).

In light of the above precedent, it is clear that privity requires something more than a common interest in the outcome of a legal issue. It also is clear that, contrary to employer's assertion, the source of the award is not relevant to determining whether one party is in privity with another. Rather, the concept of privity attempts to define how one party stands, legally, with respect to another. As the concept of virtual representation in the Fifth Circuit requires either express or implied consent to legal representation, and as there is no evidence of either in the instant case, virtual representation cannot apply, and, thus, claimant cannot be held to be in privity with her stepmother. *See Meza*, 908 F.2d at 1272-1273. Moreover, as the circuit court has held that even close family relationships alone are insufficient to satisfy the above requirement, it follows that privity does not arise here merely on the basis of a relationship by marriage. *Freeman*, 771 F.2d at 865. We hold that the administrative law judge erred in finding that claimant was in privity with her stepmother and that she is bound by the prior finding that her father's death is not compensable. Although the two claims arose out of the same death, raising the same question of compensability, and the same attorney was used in both claims, under the law of the circuit, claimant herein was not adequately or virtually represented in the prior claim and is free to bring her own claim. While the administrative law judge's desire for judicial economy and avoidance of piecemeal litigation is admirable, his decision deprives claimant of her day in court. Therefore, we reverse the administrative law judge's application of collateral estoppel and his dismissal of claimant's claim for death benefits, and we remand the case for a hearing on the merits.

Accordingly, the administrative law judge's Decision and Order dismissing the claim is reversed, and the case is remanded for consideration of the merits.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge