BRB No. 96-666

DELORES BROOKS (on behalf of LOVIE BROOKS, putative child of CHARLES GRAY)	)	
Claimant-Respondent	)	DATE ISSUED: June 17, 1998
v.	)	
GENERAL DYNAMICS CORPORATION	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Matthew Shafner (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision on Motion for Reconsideration (94-LHC-1946) of Administrative Law Judge David W. Di Nardi 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).[1] We

[1]Having never received the record in this case, on January 31, 1997, the Board dismissed this appeal and remanded the case to the district director for reconstruction of the record subject to reinstatement on the Board's docket once the record was complete. The Board reinstated the appeal on April 1, 1998, after it received the reconstructed record from the district director.

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, Charles Gray, worked for employer and retired in 1975. Claimant and employer agree that decedent died on December 25, 1993, as a result of his work-related lung cancer, which was diagnosed on August 27, 1993. Decision and Order at 4. Claimant filed claims for death benefits on behalf of herself as his widow and on behalf of her child, Lovie. Employer contested the claims.

The administrative law judge found that claimant does not qualify as decedent's widow, and he denied her claim for death benefits.[2] Decision and Order at 34. The administrative law judge also found that the record does not support a finding that decedent was Lovie's biological father. *Id.* at 35. However, he found that Lovie is a child to whom decedent stood *in loco parentis* and that she is entitled to death benefits as his child. In the alternative, the administrative law judge found that Lovie is decedent's acknowledged illegitimate dependent child. *Id.* at 39-40. In his decision on employer's motion for reconsideration, the administrative law judge clarified his findings, stating that he found in favor of Lovie on two grounds: decedent

[2]The administrative law judge used the guidelines set forth by the Board in *Trainer v. Ryan-Walsh Stevedoring Co.*, 8 BRBS 59 (1978), *aff'd in part and rev'd in pert. part*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979), to determine that claimant does not qualify as decedent's widow. The Board recently acknowledged the invalidity of the *Trainer* decision in *Jordan v. Virginia International Terminals*, 32 BRBS 32 (1998), wherein it held that state law must be applied to determine whether a survivor was the spouse of a deceased employee. Claimant does not appeal the administrative law judge's finding that she is not decedent's widow.

stood *in loco parentis* or alternatively Lovie is the "stepchild or acknowledged illegitimate dependent child" of decedent.[3] He rejected employer's argument that the *in loco parentis* argument was not timely raised and was a surprise to it. Therefore, he reaffirmed his conclusion that Lovie is entitled to death benefits. Employer appeals this decision, and claimant, on behalf of her daughter, responds, urging affirmance.

[3]The administrative law judge did not actually analyze whether Lovie was decedent's stepchild, but as he found that decedent and claimant did not enter into a common law marriage, Lovie could not be decedent's stepchild.

Employer argues that the administrative law judge erred in finding that decedent stood *in loco parentis* to Lovie and in alternatively finding that she is the acknowledged illegitimate daughter of decedent. Claimant argues that the administrative law judge's findings are supported by substantial evidence of record. To address employer's argument, it is first necessary to review the definition of "child" under the Act. Section 2(14) provides:

> "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. * * * "Child," "grandchild," "brother," and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) (sic) of this section.

33 U.S.C. §902(14). The Board has held that the term "*in loco parentis*," which is not defined by the Act, must be defined by using the appropriate state law. *Franklin v. Port Allen Marine Service*, 16 BRBS 304 (1984); *see also Jordan v. Virginia International Terminals*, 32 BRBS 32 (1998) (appropriate to use state law to define the term "wife" as that term is not defined by the Act). The Board has also held that the terms "dependent" and "acknowledged" do not require an examination of state law but, rather, may be defined by their common meanings. *Jones v. St. John Stevedoring Co., Inc.*, 18 BRBS 68 (1986), *aff'd in pert. part sub nom. St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985).

Lovie Brooks was born in March 1979, two months prematurely. She was born with a cleft pallet (resulting in numerous surgeries), and she has a hearing impairment, speech impediment and mental impairment. At the time of the hearing, Lovie was just shy of 16 years old. According to one of her teachers, Ms. Lovelace, Lovie could function like a 6- or 7-year-old at a first grade reading level and a second grade math level. Ms. Lovelace believed Lovie would not be capable of living independently and would only be able to hold a job if it were highly sheltered with a facilitator to tell her what to do. Tr. at 56-57. Therefore, Lovie went to special classes at the elementary and junior high schools. She also participated in the Special Olympics, and it was these activities which the two teachers, Ms. Lovelace and Ms. Cothern, testified brought them into contact with decedent -- the only man

they ever knew as Lovie's "father." Cl. Exs. 47, 80-82; Tr. at 46-50, 59-61, 78-81. They each stated that decedent provided Lovie with money when she needed it for field trips, that Lovie would tell them that he bought her clothes and that sometimes he was the only "parent" at home when they dropped off or picked up Lovie for some event. He was also the person who would give permission for Lovie to attend field trips. Cl. Ex. 47; Tr. at 46-50, 54-55, 59-60, 78-81.

Claimant testified that decedent provided for Lovie, supplying money for food and clothes, and even going so far as to spoil her by buying anything she asked for. Tr. at 117-118. Claimant also stated that, when necessary, decedent would discipline Lovie. Tr. at 118-119. She stated that Lovie called decedent "daddy" and decedent called Lovie by her name or "baby" and that decedent was the only father Lovie ever knew. Cl. Ex. 50 at 30; Tr. at 116-117. Claimant also testified that decedent wanted to adopt Lovie and that they consulted an attorney and discovered it is a costly process. According to claimant, the attorney advised them to file a record with the Social Security Administration so that Lovie could be provided for as decedent's child through his social security benefits. Cl. Ex. 50 at 25, 56, 68. Consequently, decedent signed a statement with the Social Security Administration, declaring that Lovie was his acknowledged biological child, and the Administration accepted this statement and began making payments to Lovie in June 1989. Cl. Exs. 36-37. Claimant also obtained from friends and acquaintances statements that they believed Lovie to be decedent's daughter. Cl. Exs. 53, 57, 70, 78-79; Tr. at 153, 158.

Decedent's relatives testified that decedent could not be Lovie's biological father because he was not in Mississippi at the time Lovie would have been conceived. They stated that they met Lovie in 1983 or 1984 when they first met claimant, and they testified that decedent was quite fond of Lovie. Cl. Ex. 48 at 8-9, 14; Cl. Ex. 49 at 7-8; Tr. at 184-185, 198-201, 226. Decedent's brother, Sam, and his sister, Annie, both stated that decedent had not mentioned his intention of adopting or providing for Lovie, but that after he filed the statement with Social Security, he told everyone he had adopted Lovie. Cl. Ex. 48 at 17-18; Cl. Ex. 49 at 14; Tr. at 241-242. Sam and Annie also testified that when decedent was living with claimant, he provided for all of Lovie's needs and was very generous with the little income he had. Cl. Ex. 48 at 45; Cl. Ex. 49 at 25-26.

Employer contends the administrative law judge erred in awarding Lovie death benefits. Employer argues that Lovie is not decedent's illegitimate child and that decedent did not stand *in loco parentis* to Lovie because she was neither wholly nor substantially dependent on him, as she received the majority of her support from

Social Security and welfare.[4] Initially, we agree with employer that the administrative law judge erred in finding, in the alternative, that Lovie is decedent's illegitimate daughter. Such a finding is irrational in light of his finding that Lovie is not decedent's biological child, a finding that is supported by substantial evidence of record. Ergo, Lovie cannot be decedent's illegitimate child, as that status requires a biological relationship. Therefore, we reverse his finding on this matter, leaving for our consideration only whether his conclusion that decedent stood *in loco parentis* to Lovie is supported by substantial evidence.

The Board has held that the definition of the term "*in loco parentis*" is to be found in the laws of the pertinent state. *Franklin*, 16 BRBS at 306. A person standing *in loco parentis* to a child in Mississippi is "one who has assumed the status and obligations of a parent without a formal adoption." *Worley v. Jackson*, 595 So.2d 853, 855 (Miss. 1992). The court declared:

> any person who takes a child of another into his home and treats it as a member of his family, providing parental supervision, support and education as if it were his own child, is said to stand *in loco parentis*. A person stands *in loco parentis* to a child only when the person intends to assume toward the child the status of a parent. 59 Am. Jur. 2d, Parent and Child, §88.

Worley, 595 So.2d at 855 (citing *W.R. Fairchild Constr. Co. v. Owens*, 224 So.2d 571, 575 (Miss. 1969)); *see also Ingalls Shipbuilding Corp. v. Neuman*, 322 F.Supp. 1229, 1247 (S.D. Miss. 1970), *aff'd*, 448 F.2d 773 (5th Cir. 1971).[5]

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[4]Claimant testified that she was not employed and that she received income from Social Security on her own behalf and on behalf of Lovie. She also stated that once decedent claimed Lovie as his daughter, Lovie's Social Security benefits increased. Further, she identified her sources of income as Aid to Dependent Children, food stamps, occasional part-time work in private homes as a maid, family support and "Charlie" (decedent). Cl. Ex. 50 at 21-23, 27, 32-33. Claimant stated that decedent paid the taxes on her house, made repairs after a fire, paying for those items not covered by the Red Cross or other agencies, and paid for groceries, beyond what food stamps covered. Cl. Ex. 50 at 35-36, 50.

[5]In Connecticut, wherein decedent was exposed to asbestos, *in loco parentis* has been defined as:

> a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption, and embodies the

> two ideas of assuming the parental status and discharging the parental duties. * * * Whether a [person] stands *in loco parentis* is primarily a question of intent to be determined in light of the circumstances peculiar to each case.

Bricault v. Deveau, 157 A.2d 604 (Conn. Super. Ct. 1960).

The administrative law judge did not specifically analyze decedent's status in terms of state law. Rather, he found based on the evidence that Lovie was dependent, under that term's common definition, on decedent. Employer argues that Lovie was not wholly or substantially dependent on decedent and, therefore, does not qualify as his "child." Contrary to employer's argument, to be entitled to benefits under the Act, Section 2(14) requires only that Lovie qualify as decedent's "child." The relevant portions of the definition of child include "a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury" or "a stepchild or acknowledged illegitimate child dependent upon the deceased. . . ." 33 U.S.C. §902(14). Further, a "child" includes those persons "under eighteen years of age" or those over eighteen and wholly dependent and incapable of self-support or those who are students within the definition at 33 U.S.C. §902(18). *Id.* Thus, Lovie, who was only 15 at the time of the hearing can qualify as a "child" under the Act by virtue of her age alone if decedent stood *in loco parentis* for at least one year prior to his injury. As there is no dependency requirement for a child under age 18, unless he or she is a stepchild or an acknowledged illegitimate child, and as we have reversed the administrative law judge's determination that Lovie is decedent's illegitimate child, Lovie's dependence on decedent is not dispositive of the issue of her status as decedent's "child" under the Act.[6] *Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979); *Maryland Drydock Co. v. Parker*, 37 F.Supp. 717 (D.Md. 1941); *Doe v. Jarka Corp. of New England*, 16 BRBS 318 (1984).

In finding that decedent stood *in loco parentis* to Lovie, the administrative law

[6]Because dependence is not at issue in this case, employer's reliance on *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988), is misplaced. The claimant in *Doe* was 18 years old and was not a student. By definition, she was required to be "wholly dependent" upon the deceased employee at the time of his injury in order to obtain benefits. The Board held that because part of her support was derived from welfare funds, she was not "wholly dependent" and was not entitled to benefits. *Doe*, 21 BRBS at 144; *see also Doe v. Jarka Corp. of New England*, 16 BRBS 318, 320 (1984). The facts of *Doe* are not analogous to the present case.

judge credited testimony that decedent played a large role in Lovie's life, going so far as to provide food, clothes, guidance, discipline, and gifts. When Lovie had opportunities to attend field trips or to stay away from home overnight with her teachers, decedent is the person who gave permission for her to do so. He also provided money for lunches or school projects, transportation to and from school or field trips, and he was often the only adult at home when Lovie returned from school. Decedent even sought to adopt Lovie, but due to the procedural costs, opted to provide for her through Social Security. Further, the administrative law judge noted that this familial relationship between Lovie and decedent continued from the time he moved to Mississippi in the early 1980s until 1993, when, while on his deathbed, decedent continued to provide for Lovie by making sure that claimant got Lovie a bicycle for Christmas.

The state definitions of the phrase "*in loco parentis*" contain an element of intent, *Worley*, 595 So.2d at 855; *Bricault*, 157 A.2d at 604; 59 Am. Jur. 2d, Parent and Child, §§75, 88, and the administrative law judge noted this aspect of the definition in his decision. Decision and Order at 38. Thus, it is the intent of the adult, as revealed by his actions, which defines whether that adult stands *in loco parentis* to a child. Considering decedent's overall behavior, the administrative law judge found that Lovie was dependent on decedent,[7] and that decedent's actions were indicative of his intent to provide for Lovie as a parent would. Although the administrative law judge did not cite the pertinent state law in defining the phrase "*in loco parentis*" to assess decedent's status with regard to Lovie, his analysis is consistent with state law and encompasses its primary elements. Moreover, his conclusion is rational and supported by substantial evidence of record. *See Franklin,* 16 BRBS at 306-307. Therefore, we affirm the administrative law judge's determination that Lovie is entitled to death benefits as decedent's child because decedent stood *in loco parentis* to Lovie for at least one year prior to his injury. 33 U.S.C. §902(14).

Accordingly, the administrative law judge's finding that Lovie was decedent's acknowledged illegitimate child is reversed. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

[7]The Mississippi law identifies support of the child as one of the factors to consider in determining whether an adult stands *in loco parentis* to a child. *Worley*, 595 So.2d at 855.

Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge