

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0337

ANNIE CHRISTIE)
(Widow of EVERETT CHRISTIE))
)
Claimant-Petitioner)

v.)

BATH IRON WORKS CORPORATION)
)
Self-Insured)
Employer-Respondent)

DATE ISSUED: 03/31/2021

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jerry R. DeMaio,
Administrative Law Judge, United States Department of Labor.

James J. MacAdam (MacAdam Jury, P.A.), Freeport, Maine, for Claimant.

Stephen Hessert (Norman Hanson & DeTroy, LLC), Portland, Maine, for
Self-Insured Employer.

Jennifer Ledig (Elena S. Goldstein, Deputy Solicitor; Barry H. Joyner,
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: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Jerry R. DeMaio's Decision and Order Awarding Benefits (2018-LHC-00167; 2018-LHC-00559) on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case arises out of an injury that occurred on April 7, 2014, when the employee, Everett Christie, scraped his right hand in the course of his employment. Mr. Christie went to the emergency room on April 13, 2014, where a wound culture from his finger showed streptococcus bacteria. JX 8 at 776. He remained in the hospital, developing acute respiratory failure and pulmonary edema. On June 25, 2015, he underwent a high-risk bypass surgery and thereafter experienced recurrent cardiac arrests. He passed away on July 3, 2015.

Claimant, the widow of Decedent, testified that they married on November 29, 2014, but had lived together for nearly eight years at the time of his death. Tr. at 12. Claimant has one child, a daughter, who was born on May 9, 2001. *Id.* at 14. Claimant's daughter is autistic and Claimant testified she will never be able to live independently. *Id.* at 14-15. Claimant's daughter is the biological child of Claimant's former boyfriend who has not been in contact with her since 2006. *Id.* at 18. The state of Maine ordered him to pay child support in the amount of \$86.83 a week but he frequently does not pay. *Id.* at 20. Claimant's daughter lived with Decedent since she was seven years old and called him "dad." *Id.* at 14, 23. Decedent engaged in activities customary in a parent-child relationship: he often got her ready for school in the morning, took her shopping and to visit friends, and spent time with her at the park and beach. *Id.* at 22-23. He also paid a majority of the household bills and half of the mortgage payment. *Id.* at 25-26, 41-42.

The administrative law judge found Decedent was temporarily totally disabled by his work injury from April 7, 2014 to July 3, 2014 and Claimant established his work-related right finger injury contributed to his death. Decision and Order at 9. Thus, he found Claimant entitled to death benefits as Decedent's surviving spouse under Section 9 of the Act, 33 U.S.C. §909.¹ *Id.* He concluded, however, that Claimant's daughter is not entitled to death benefits because she is not Decedent's "child" as defined in the Act. Decision and Order at 9. He found that to qualify for benefits under the Act, Claimant's daughter must have lived with Decedent as a stepchild for at least one year at the time of his death. *Id.*

¹ The administrative law judge also found Employer entitled to Section 8(f) relief on the award of death benefits, 33 U.S.C. §908(f). *See* Decision and Order at 12.

Because Claimant had not been married to Decedent for one year at the time of his death, the administrative law judge determined Claimant's daughter was not a stepchild for the purportedly requisite time period.² *Id.*

The administrative law judge further found Claimant did not establish that Decedent stood in loco parentis to her daughter for at least one year prior to his death. He applied the state of Maine's definition of in loco parentis or a "de facto parent" as someone who "has undertaken a permanent, unequivocal, committed and responsible parental role in the child's life."³ *See* Decision and Order at 10. He found the evidence does not establish Decedent unequivocally undertook a parental role because Claimant had not informed the state of Maine that she was living with Decedent or that he was helping support her child. *Id.* He therefore concluded Claimant's daughter is not entitled to death benefits. *Id.*

Claimant appeals the administrative law judge's decision, challenging his finding that her daughter is not entitled to death benefits. Employer filed a response brief, arguing first that the appeal should be dismissed as untimely and in the alternative, that the administrative law judge's decision should be affirmed on the merits. The Director, Office of Workers' Compensation Programs (the Director), also filed a response brief, contending the administrative law judge's decision should be vacated because he applied the wrong standard of law as to the status of the relationship between Claimant's daughter and Decedent.

Timeliness

We reject Employer's contention that the appeal should be dismissed as untimely filed. Section 21(a) of the Act, 33 U.S.C. §921(a), states that a compensation order becomes final thirty days after the order is filed in the district director's office unless it is appealed to the Board. *See also* 20 C.F.R. §802.205(a). In this case, the administrative law judge's decision was filed in the district director's office on May 8, 2020 and Claimant's notice of appeal was filed on June 8, 2020, making it timely, because the 30th day, June 7, was a Sunday. 20 C.F.R. §802.221. The Board's acknowledgment of the

² In making this finding, the administrative law judge mistakenly stated Claimant married Decedent on December 3, 2014.

³ The term "in loco parentis," which is not defined by the Act, is defined by using the appropriate state law, in this case, Maine. *Brooks v. General Dynamics Co.*, 32 BRBS 114 (1998); *Franklin v. Port Allen Marine Serv.*, 16 BRBS 304 (1984).

appeal dated August 14, 2020, does not affect the timeliness of the appeal. Because the appeal is timely, we address the merits of Claimant's appeal.

Entitlement to Death Benefits

Where a work injury causes an employee's death, Section 9 of the Act provides death benefits to certain survivors, including a surviving spouse and child. 33 U.S.C. §909. Section 2(14) of the Act defines a "child" as anyone under 18 years of age, or in certain circumstances over 18, who is:

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....

33 U.S.C. §902(14).

The administrative law judge's finding that Claimant's daughter is not entitled to death benefits because she had not been Decedent's stepchild for at least one year is erroneous as a matter of law. There is no requirement that a child be the employee's stepchild for at least one year. By the statute's unambiguous terms, there are two discrete methods for qualifying as a "child" under Section 2(14) which might apply in this case: (1) a child in relation to whom the decedent stood in loco parentis for at least a year; or (2) a stepchild dependent upon the deceased. 33 U.S.C. §902(14). The one year requirement applies only to the employee's status in loco parentis to the child.

Claimant's daughter was Decedent's step-child as of November 29, 2014, when Claimant and Decedent married. Thus, she is entitled to death benefits by law until she turned 18 if she was "dependent upon the deceased" as of the time of Decedent's injury. 33 U.S.C. §§902(14), 909(f). The Board has held that in cases where a work-related injury and work-related death are not concurrent, dependency is to be established as of the time of death. *See Henderson v. Kiewit Shea*, 39 BRBS 119 (2006). Dependency is defined by its common law meaning. *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987). Partial dependency is sufficient; the test is whether the stepchild relied on the employee "for support ... [or] for contributions to meet the reasonably necessary expenses of living." *Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988); *see also Urso v. MVM, Inc.*, 44 BRBS 53 (2010); *L.H. [Henderson] v. Kiewit 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).

The uncontradicted evidence, which the administrative law judge accurately summarized, clearly establishes Claimant's daughter was at least partially dependent on Decedent at the time of his death.⁴ Decision and Order at 3. Claimant testified the child support from her daughter's biological father is not enough to support her and is not regularly paid. Tr. at 22. Decedent's earnings were more than double Claimant's and he paid the majority of the household bills and half of the mortgage payment. *Id.* at 25-26. There is no evidence undermining the child's significant financial reliance on Decedent or that she had any other sources of financial support aside from Claimant's and Decedent's incomes (plus her father's small, inconsistent child support payments). As Claimant's daughter was Decedent's stepchild and was dependent upon him for several years prior to, and at the time of, his death, we reverse the administrative law judge's finding that she is not a "child" under the Act. *See St. John Stevedoring Co.*, 818 F.2d 397 (dependency was established for a posthumous child where the father paid the mother regular payments for support and bought the child clothing and gifts). Accordingly, she is entitled to death benefits from July 3, 2015 through May 9, 2019, when she turned 18 years old.⁵

Our inquiry is not complete, however, as Claimant's daughter may also be entitled to benefits after she turned 18. The statute provides for death benefits to a child "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

⁴ We note the administrative law judge stated "the evidence presented does not establish that [the child] was [Decedent's] dependent under the Act." Decision and Order at 10. This statement, however, was made in the context of finding Decedent did not stand in loco parentis to Claimant's daughter. To the extent the administrative law judge appeared to base his finding that Decedent had not stood in loco parentis to Claimant's daughter for at least one year on his finding that Claimant's daughter was not Decedent's dependent, he erred because there is no dependency requirement in the Act for a child under the age of 18 to whom the employee stood in loco parentis. *Brooks*, 32 BRBS at 115. Moreover, as explained *supra*, the uncontradicted evidence establishes that Claimant's daughter was dependent on Decedent.

⁵ Because Claimant's daughter is entitled to death benefits as Decedent's stepchild, we need not address whether she is also entitled to benefits as a child to whom Decedent stood in loco parentis for at least one year prior to his death. In addition to the error noted *supra* at n. 4, the administrative law judge provided no support for his conclusion that de facto parental status is defeated in Maine because Claimant did not inform the state that she was living with Decedent and he was helping to support her daughter. *See generally Pitts v. Moore*, 90 A.3d 1169, 1176-77 (Me. 2014) (setting forth judicial test for de facto parenthood as Maine lacks statutory reference to the term).

defined [by Section 2(18)]....” 33 U.S.C. §902(14).⁶ As the administrative law judge did not address Claimant’s daughter’s entitlement to death benefits after the age of 18, we remand the claim for him to consider the issue. *See Smith v. Mt. Mitchell, LLC*, 48 BRBS 1 (2014); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff’d on recon.*, 26 BRBS 32 (1992), *aff’d mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994); *Lucero v. Kaiser Aluminum & Chem. Corp.*, 23 BRBS 261 (1990), *aff’d mem. sub nom. Kaiser Aluminum & Chem. Corp. v. Director, OWCP*, 951 F.2d 360 (9th Cir. 1991); *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

Accordingly, we reverse the denial of death benefits for Claimant’s daughter and hold she is entitled to benefits as Decedent’s dependent stepchild from July 3, 2015 to May 9, 2019 in accordance with Section 909(b), 33 U.S.C. §909(b). We remand the case for the administrative law judge to address her entitlement to death benefits after May 9, 2019 in accordance with Section 2(14), (18). We affirm the Decision and Order Awarding Benefits in all other respects.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

⁶ Section 2(18) defines “student.” 33 U.S.C. §902(18). The hearing in this case was held four days after the child’s 18th birthday.