Thomas, Danny

BOARD

Constitutional questions

The Board, anticipating what the Supreme Court would do if presented with the issue, reached the inevitable conclusion that the statute excluding illegitimate children from receiving benefits (RCW 51.32.005) was violative of the Equal Protection Clause of the U.S. Constitution. **….*In re Danny Thomas*, BIIA Dec., 40,665 (1973)** (*Overruled, In re James Gersema*, BIIA Dec., 01 20636 (2003))

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DANNY B. THOMAS	**)**	**DOCKET NO. 40,665**
	)	
CLAIM NO. F665013	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Danny B. Thomas, by
Gary F. Bass

Employer, Tobin-Camus,
None
(In attendance: Russell A. Murphy, Capitol safety council)

Department of Labor and Industries, by
The Attorney General, per
Richard R. Roth and James S. Kallmer, Assistants

This is an appeal filed by the claimant on March 28, 1972, from a letter of the Department of Labor and Industries dated November 23, 1971, and time loss orders issued by the Department of Labor and Industries on February 25, 1972, and March 27, 1972, which failed and refused to pay the claimant additional time loss compensation for wife and children. **REVERSED AND REMANDED IN PART; DISMISSED IN PART**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on October 17, 1972, in which the orders of the Department were reversed in part and remanded and dismissed in part.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issued presented by this appeal and the evidence presented by the parties are adequately set forth in our hearing examiner's Proposed Decision and Order. We are in accord with the examiner's disposition of the issues in this appeal and wish to direct ourselves only to the problem of the illegitimate child and its relationship to the enumerated provisions of our Workmen's Compensation Act.

We have carefully reviewed the Department's basic objection as set forth in its Petition for Review. It is the Department's position that any relaxation in the time honored treatment of illegitimate children will place an onerous burden on the Department and employers of this state in

protecting themselves against the spurious claims of workmen who, seeking additional time-loss compensation, will hasten to acknowledge numerous illegitimate children as their progeny. Assuming that such a burden might exist, we believe that our Supreme Court, when presented with the issue, will protect the welfare of the illegitimate child.

The issue in this appeal, restated, requires a determination of the right of Carol Ann Thomas, an illegitimate child, to benefits under the Workmen's Compensation Act of this state in view of the definition of the term "child" as contained in RCW 51.32.005. That statute, as it existed at the time of the claimant's injury, read as follows:

> "The term 'child' whenever used in this chapter means every natural born child, posthumous child, stepchild, child legally adopted prior to the injury, and illegitimate child legitimated prior to the injury, all while under the age of eighteen years and over the age of eighteen years if the child is a dependent invalid child."

We believe that statute to be in derogation of the Fourteenth Amendment to the Constitution of the United States in that it denies to illegitimate children equal protection of the law. Further, we believe that even if a constitutional question were not involved, the recent development of the law with regard to illegitimate children in this state as revealed by our Supreme Court would strike down the language of RCW 51.32.005 as it pertains to illegitimate children on the basis of "common sense humanity."

At common law, an illegitimate child was said to be filius nullius -- the child of nobody. 38 ALR 3d 615. His legal rights as a human being were indeed limited. The common law made no provision for the legitimating of the illegitimate child, but the power of legislatures to provide for the legitimating of such children has long been recognized. 10 Am. Jur. 2d 876. In Washington, RCW 26.04.069 provides:

> "Illegitimate children become legitimated by the subsequent marriage of their parents with each other."

Some states view legitimation statutes as being in derogation of the common law, and thus to be strictly construed. Washington views such statutes as remedial. Wasmund v. Wasmund, 90 Wash. 274. The early development of the law with regard to the rights of illegitimate children was heavily concerned with the problems of inheritance. RCW 11.02.005 defines "issue" as including "all of the lawful lineal descendants of the ancestor, all lawfully adopted children, and illegitimates as specified in RCW 11.04.081." That latter statute states:

> "When the parents of an illegitimate child shall marry subsequent to his birth, or the father shall acknowledge said child in writing, such child shall be deemed to have been made the legitimate child of both of the parents for the purposes of intestate succession."

The foregoing language, as contained in RCW 11.04.081, was enacted in 1965 and became effective July 1, 1967. Prior to that, the former statute, RCW 11.04.080, provided:

> "Every illegitimate child shall be considered as an heir of the person who has in any written document, signed in the presence of a competent witness [emphasis added], acknowledged himself to be the father of such child."

The latter statute was interpreted by the Supreme Court in the case of In re Baker's Estate, 49 Wn. 2d 609 (1956). In that case, an illegitimate child was attempting to inherit from her putative father under the provisions of the statute just mentioned. She presented as evidence some 30 letters and postcards in which the deceased putative father had referred to the child as his daughter and of himself as her father. Although in an older case the Supreme Court stated that such statutes are remedial, in this case it indicated that the statute had to be strictly construed and any written document designed to bring an illegitimate child within the gamut of the statute had to be "signed in the presence of a competent witness." This decision of the Supreme Court apparently prompted the legislature to relax the requirement, for it deleted the requirement of a witness in RCW 11.04.081, which became effective July 1, 1967.

With regard to workmen's compensation statutes, illegitimate children have generally not been included within the term "child," when defining death beneficiaries, unless explicit language has been sued. 58 Am. Jur. 695. On its face, the Washington statute leaves no doubt the term "child" includes an illegitimate child, if legitimated prior to the injury involved in the claim. However, courts appear to be spending more time considering the rights of the illegitimate child as a human being. Schmoll v. Creecy, 54 N.J. 194 (1969), 38 ALR 3d 605, concerned the right of illegitimate children to recover damages for the wrongful death of their father. The lower court held that illegitimate children could not recover damages despite their dependency upon their father. The New Jersey Supreme Court reversed, holding that the injury sustained by the illegitimate children was indistinguishable from the injury that they would have sustained had they been born in wedlock, and thus it would be a denial of equal protection to refuse them a remedy available to legitimate children, citing Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guarantee

& Liability Insurance Company, 391 U.S. 73 (1968). Both of the foregoing cases involved the law of Louisiana. In Levy, illegitimate children sought to recover for wrongful death of their mother, and in Glona, a mother sought to recover for the wrongful death of her illegitimate child. The state court had construed the wrongful death statute to protect only a legitimate child and the mother of a legitimate child. The Supreme Court held that, so construed, the statute would deny equal protection of the law.

Of special interest is the decision of our own Supreme Court in Armijo v. Wesselius, 73 Wn. 2d 716 (1968, which was decided three weeks before the decisions in Levy and Glona were handed down. Our court in construing the wrongful death statute of this state so as to include illegitimate as well as legitimate children within the term "child or children," stated that a very persuasive argument could be made that a contrary decision would deny the illegitimate child the equal protection of the law under the Fourteenth Amendment of the Constitution of the United States. The Armijo case is of interest since it is one of first impression as to the scope of the words "child or children" in this state's wrongful death statute, RCW 4.20.020. Our wrongful death statute makes no mention of illegitimate children, so the question becomes whether or not the words "child or children" are qualified sub silentio by the word "legitimate." The court's statement is of interest:

> "In our judgment, the words 'child or children' in RCW 4.20.020 should be construed to include illegitimate as well as legitimate children of deceased parents. No overtones of Victorian or other notions of provincial morality have been noted or implied by legislative enactment and revision of the wrongful death act, and it is but commonsense humanity to conclude that a statute which provides the 'child or children' of a decedent with a remedy for lost support encompasses all natural or adopted children of the decedent who were dependent upon him regardless of their legitimacy." (Emphasis by the court)

Our Supreme Court in the Armijo case calls attention to the case of Peerless Pacific Company v. Burckhard, 90 Wash. 221 (1916) cited as having stated that the words "child or children" when used in statutes will be considered to mean "legitimate child or children." Of that case, the present court states that the Peerless case can no longer be said to support such a broad proposition, if it ever could, and that the Peerless case has never been relied upon or even cited by the court in any other decision interpreting the words "child or children," and refers to the Peerless case as "simply one of those proverbial derelicts floating on the sea of the law, and should be treated accordingly."

The court in the Armijo case recognizes that its decision is contrary to the majority of the cases in other jurisdictions, but points out that it is clearly in accord with a decisive current trend in legislative and decisional law which ignores legitimacy when creating or applying statutes designed to benefit children. The court further states that the reason for the trend is clear. Society is becoming progressively more aware that children deserve proper care, comfort, and protection, even if they are illegitimate. The burden of illegitimacy, states the court, in purely social relationships should be enough, without society adding unnecessarily to the burden with legal implications having to do with the care, health, and welfare of children. The court cites with approval an article entitled "Equal Protection for the Illegitimate," by H. Krause, 65 Mich. L. Rev. 477 (1967). That article deals with the implication of the Fourteenth Amendment as to equal protection of the law with regard to illegitimate children. Although citing with approval the present trend in the law, the court in the Armijo case found it unnecessary to confront the constitutional question.

There remains the problem of the illegitimate child in the interpretation of statutes involving workmen's compensation. The most recent case in the field of workmen's compensation, cited by the examiner, that of Webber v. Aetna Casualty & Surety Company, decided by the Supreme Court of the United States on April 24, 1972, viewed in the light of our court's comments in Armijo, leads inevitably to the conclusion that the definition of "child" as set forth in RCW 51.32.005 violates the equal protection clause of the federal constitution.

In view of the foregoing, the issues in this appeal are disposed of in accord with the findings and conclusions hereinafter set forth.

FINDINGS OF FACT

The Board finds as follows:

1. On April 3, 1968, the claimant injured his right leg while walking down a hill, when his right knee, weakened by a previous injury, gave way suddenly and he fell. The injury occurred in the course of his employment with Tobin-Camus, a logging company, which employment was covered by the Workmen's Compensation Act of this state. On April 12, 1968, the Department of Labor and Industries received a report of accident from the claimant setting forth the injury which occurred on April 3, 1968. The claim was accepted and assigned No. F-665013. On November 23, 1971, the Department wrote a letter to the claimant, explaining that the Department considered claimant to be entitled to compensation solely as a single man. This letter could be treated as a Department order for purposes of appeal. On February 25, 1972, a time

loss order was issued, authorizing payment to claimant of compensation for temporary total disability for a period of one month commencing February 16, 1972, which order compensated claimant solely as a single workman without dependents. A similar order was issued March 27, 1972, covering the period of one month, starting March 16, 1972. On March 28, 1972, the claimant filed his notice of appeal from that order to the Board of Industrial Insurance Appeals, which granted the appeal by order dated April 20, 1972.

2. Appellate proceedings were conducted before the Board of Industrial Insurance Appeals and on October 17, 1972, a hearing examiner for this Board entered a Proposed Decision and Order in connection with this appeal. Thereafter, within the period of time provided by law, a Petition for Review was filed and the case referred to the Board for review as provided by RCW 51.52.106.

3. At the time of claimant's industrial injury of April 3, 1968, he was an unmarried man who had one child, Carol Ann Thomas, born March 19, 1966, whom he was supporting but who was not in his custody.

4. On April 3, 1968, Carol Ann Thomas was in the custody of Georgina Olebar, her natural mother, who was then living separate and apart from the claimant. The claimant had previously orally acknowledged paternity of said child. Claimant later on October 4, 1971, executed a notarized document entitled "Acknowledgement of Paternity and Agreement to Support," by which claimant acknowledged paternity and his obligation to support Carol Ann Thomas.

5. On August 15, 1970, claimant married Celia Florence Stenson, and undertook the support of her two children by a prior marriage.

6. As of February 25, 1972, and March 27, 1972, the claimant was temporarily totally disabled by reason of his industrial injury of April 3, 1968.

CONCLUSIONS OF LAW

The Board concludes as follows:

1. The Board has jurisdiction of the parties and subject matter of this appeal.

2. For the period of time covered by the orders of the Department of Labor and Industries dated February 25, 1972, and March 27, 1972, the claimant was entitled to time loss compensation as a single man. In addition, the Department of Labor and Industries was under requirement of law to pay the sum of $23 per month as and for the support of Carol Ann Thomas, child of the claimant, commencing as of February 16, 1972. Such payments to be made to Georgina Olebar, the natural mother of Carol Ann Thomas.

3. The orders of the Department of Labor and Industries issued on February 25, 1972, and March 27, 1972, are erroneous and should be reversed and this matter remanded to the Department with instructions to issue new orders, superseding said orders of February 25, 1972, and March 27, 1972, paying to the claimant the sum of $185 per month, commencing February 16, 1972, as time loss compensation and paying in addition the sum of $23 per month as and for the support of Carol Ann Thomas, commencing February 16, 1972, said sum of $23 to be paid to Georgina Olebar, the natural mother of Carol Ann Thomas.

4. To the extent that the claimant's notice of appeal applies to orders prior to February 25, 1972, the same is dismissed.

It is so ORDERED.

Dated this 12th day of July, 1973.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
ROBERT C. WETHERHOLT Chairman

/s/
R.H. POWELL Member

/s/
R.M. GILMORE Member