

Tyrrell, Cletus, Dec'd

BENEFICIARIES

Child (RCW 51.08.030)

The statute defining "child" is not intended to include children to whom the worker stands in loco parentis. ...***In re Cletus Tyrrell, Dec'd, BIA Dec., 12,121 (1960)***
[*Editor's Note:* Consider effects of expansion of definition in amended version of RCW 51.08.030.]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: CLETUS TYRRELL, DEC'D)	DOCKET NO. 12,121
)	
CLAIM NO. C-439432)	DECISION AND ORDER

APPEARANCES:

Petitioner, Ethel Tyrrell, by
John E. Calbom

Employer, Yager Construction Co.,
None

Department of Labor and Industries, by
The Attorney General, per
L. E. Prediletto, Assistant

Appeal filed by the petitioner, Ethel Tyrrell, on July 1, 1959, from an order of the supervisor of industrial insurance dated June 22, 1959, rejecting her claim for compensation for William Albert Davis, Jr., a minor step grandson of the deceased workman. **SUSTAINED.**

DECISION

As the surviving widow of the deceased workman, Cletus Tyrrell, Ethel Tyrrell was placed on the pension rolls, effective June 25, 1957, by a department order dated May 18, 1959. On June 2, 1959, Ethel Tyrrell, as representative of William Albert Davis, Jr., her minor grandson and step grandson of the deceased workman, made application to the department for compensation for said minor. On June 22, 1959, a department order was issued as follows:

"WHEREAS application for compensation has been now made by the representative of William Albert Davis, Jr., a minor and grandson of the deceased, Cletus G. Tyrrell, said application being made on the basis of an order of the Superior Court for King County dated August 7, 1953, releasing said William Albert Davis, Jr., into the temporary custody of the maternal grandmother, Ethel Tyrrell, widow of the above named deceased, and

WHEREAS the said William Albert Davis, Jr., is not the child of the deceased as the word "child" is defined in Section 51.08.030 R.C.W. and, further, that compensation is payable to a grandson of a workman whose death results from an injury only when the deceased workman leaves surviving no widow, widower or child (Section 51.08.050 R.C.W.) and

IT IS THEREFORE ORDERED that the application for compensation for William Albert Davis, Jr., is hereby denied for the above reasons."

1 On July 1, 1959, Ethel Tyrrell, the surviving widow of Cletus Tyrrell, Deceased, appealed to this
2 board, and her appeal was granted on July 23, 1959, and set for conference.
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4 At said conference, held in Moses Lake, Washington, on August 12, 1959, the petitioner,
5 Ethel Tyrrell, was not present in person, but was represented by John E. Calbom, her attorney.
6 The employer, Yager Construction Co., was not represented, and the department of labor and
7 industries was represented by L. E. Prediletto, assistant attorney general.
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10 At this conference, counsel for the petitioner and the department agreed, for the record, that
11 William Albert Davis, Jr., born October 3, 1952, is the grandson of Ethel Tyrrell, and was the step
12 grandson of the deceased workman; that said minor was not adopted by the deceased and Ethel
13 Tyrrell, his widow, but had been in the Tyrrell household since August of 1953, pursuant to a King
14 County Juvenile Court order, dated August 7, 1953, wherein Catholic Charities was given
15 temporary custody of the minor child with the right to place said child in the temporary custody of
16 Ethel Tyrrell, after an investigation by said charities. No subsequent order as to custody had been
17 entered. It was further agreed that this case might be submitted for a decision and order by this
18 board, based on the above agreed facts, and on the complete department file.
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24 The only issue presented by this appeal is whether or not Ethel Tyrrell, surviving widow of
25 the deceased workman, is entitled to compensation for William Albert Davis, Jr., minor step
26 grandson of the deceased workman.
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28 It is contended by the petitioner in her notice of appeal that the supervisor's order of June 22,
29 1959, was in error because the deceased stood "in loco parentis" to the minor step grandson on the
30 date of the decedent's death.
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32 A search has failed to disclose any case in this state in which the Supreme Court has
33 considered the precise question raised by the petitioner. In State ex rel. Gilroy v. Superior Court,
34 37 Wn. (2d) 926, the Supreme Court reversed the lower court's decision that the operator of a
35 maternity hospital was liable for funds expended by the King County Welfare Department in placing
36 a minor child in foster home care after the child had been left by the child's mother in the care of the
37 operator, based upon a finding that the operator was "in loco parentis" to the child. In reversing the
38 lower court, the court quotes 67 CJS 803, Sec. 71, as follows:
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43 "The term 'in loco parentis' has been defined as in the place of parent
44 charged factitiously with a parent's rights, duties, and responsibilities;
45 more specifically, the relationship which a person assumes toward a
46 child not his own, holding the child out to the world as a member of his
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1 family toward whom he owes the discharge of parental duties. It has
2 been said that the accepted definition of a person 'in loco parentis' is
3 one who means to put himself in the situation of a lawful parent to the
4 child with respect to the office and duty of making provision for it; one
5 assuming the parental character and discharging parental duties; a
6 person standing 'in loco parentis' to a child is one who has put himself in
7 the situation of a lawful parent by assuming the obligations incident to
8 the parental relation, without going through the formalities necessary to
9 a legal adoption."

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11 The Court also quotes from Sec. 72, pg. 804, of the same text:

12 "Where one is 'in loco parentis', the rights, duties, and liabilities of such
13 persons are the same as those of the lawful parent. The assumption of
14 the relation is a question of intention, and not of chance, which may be
15 shown by the acts and declarations of the persons alleged to stand in
16 that relation."
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19 The supreme court goes on to say:

20 "Under the authorities, it seems clear that the relationship of in loco
21 parentis becomes established only when a person intends to assume
22 toward a child the status of a parent." (Emphasis supplied).
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24 Admittedly, the principal basis of the court's decision in the Gilroy case, supra, was on statutory
25 construction, but the court was unable to find anything in the record that would indicate any
26 intention by the operator to stand in loco parentis to the child. The record before us here is bare as
27 to those "acts and declarations" of the deceased which would show his intention to assume the
28 relationship. The mere fact that the child lived in his household would not, by itself, be finally
29 determinative of that intention. In Kransky v. Glen Alden Coal Company, 47 Atlantic (2d) 645, 354
30 PA 425, the Supreme Court of Pennsylvania decided a case under their workmen's compensation
31 act adversely to the petitioner. The deceased was living in a meretricious relationship with the
32 grandmother of the child "in question". The applicable Pennsylvania statute, 77 PS, Sec. 562,
33 specifically provides "if members of the decedent's household at the time of his death, the terms
34 'child' and 'children' shall include stepchildren, adopted children, and children to whom he stood in
35 loco parentis." The court states that in order to be entitled to benefits under the act, it must be
36 shown "(1) That the child was a member of the employee's household at the time of his death, and
37 (2) that the later stood in loco parentis to the child." The court goes on to say, "The first requisite
38 calls for a finding of fact; the second raises a conclusion of law." Discussing the relationship, the
39 court's language is as follows: "A person who means to put himself in the situation of the lawful
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1 father of the child, with reference to the father's office and duty of making provision for the
2 child...but always the intention to assume a parent's responsibility for a child is an important
3 element in determining the existence of the relationship." The Pennsylvania court disclaimed being
4 swayed by the meritricious relationship of the parties, and said that such a relationship did not
5 preclude the establishment of in loco parentis. The court believed the evidence as a whole but did
6 not sustain the petitioner's claim and pointed out that, from all that appeared in the record, the
7 deceased may merely have supported the child in his home as an accomodation to the child's
8 grandmother, without having formed any intention to assume the parent's responsibility for the
9 child.

10 From all that appears in the record on this appeal, the same may be said here. There is
11 nothing more in the record here than that the child had lived in the deceased's home. The child
12 was still a ward of the court at the time of the deceased's death, and was placed in his home in the
13 temporary custody of his wife alone, subject to a possible later adoption by qualified persons. All
14 facts other than the child's residence in the deceased's home would seem to negate the forming of
15 any intention by the deceased to stand in loco parentis to the child. We must conclude, therefore,
16 that the petitioner has failed to sustain the burden of proof that such a relationship was formed.

17 However, even if we were to assume, *arguendo*, that the relationship of in loco parentis
18 existed, the question still remains whether the surviving spouse is entitled to receive compensation
19 on behalf of her minor grandchild under the provisions of the workmen's compensation act. The
20 applicable statute under which she was granted a pension is R.C.W. 51.32.050 (2), which provides
21 that:

22 "If the workman leaves a widow or widower, a monthly payment of
23 \$125.00 shall be made throughout the life of the surviving spouse, to
24 cease at the end of the month in which remarriage occurs, and the
25 surviving spouse shall also receive per month for each child of the
26 deceased at the time any monthly payment is due, the following
27 payments...."

28 "Child" is defined by R.C.W. 51.08.030 as follows:

29 "'Child' means every natural born child, posthumous child, stepchild,
30 child legally adopted prior to the injury, and illegitimate child legitimated
31 prior to the injury, all while under the age of 18 years."

32 It is the general rule that the workmen's compensation act is to be liberally construed as to those
33 who come within its provisions. However, applicants are held to strict proof of their right to receive
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1 benefits. D'Amico v. Conquista, 24 Wn. (2d) 674. Further, where the language of the act is not
2 ambiguous, there is no room for construction. Lowry v. Dept. of L. & I., 21 Wn. (2d) 538. R.C.W.
3 51.32.050 very specifically states that the surviving spouse shall also receive payment for each
4 child of the deceased and R.C.W. 51.08.030 defines child. There is no ambiguity in the definition
5 and, while a stepchild is included, there is no mention of a grandchild or a step grandchild.
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9 The Pennsylvania statute, as we pointed out in citing Kransky v. Glen Alden Coal Company,
10 supra, specifically provides that the term "child" shall include persons "to whom the deceased stood
11 in loco parentis." Inasmuch as posthumous children, stepchildren, legally adopted children and
12 illegitimate children legitimated prior to the injury were specifically included under the definition of
13 "child" under our statute, it seems obvious that it was not intended to include children to whom the
14 deceased stood in loco parentis. This is in accordance with the well established rule of statutory
15 construction that the express mention of one thing in a statute excludes all others (expressio unius
16 est ex-clusio alterius). This rule was stated by our court in State ex rel. Port of Seattle v.
17 Department of public Service, 1 Wn. (2d) 102 as follows:
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22 "Where a statute enumerates the persons or things to be affected by its
23 provisions, there is an implied exclusion of others, and the natural
24 inference follows that it is not intended to be general."
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26 We must conclude, therefore, that the petitioner's grandson, William Albert Davis, Jr., is not a
27 "child" of the deceased workman within the meaning of the act and that the supervisor's order of
28 June 22, 1959, should be sustained.
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30 **FINDINGS OF FACT**

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32 In view of the foregoing, and after reviewing the entire record herein, including the
33 department file, the board finds as follows:
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- 35 1. As the surviving widow of Cletus G. Tyrrell, the deceased workman,
36 Ethel Tyrrell, was placed on the pension rolls, effective June 25, 1957,
37 by department order dated May 18, 1959. On June 2, 1959, Ethel
38 Tyrrell, as representative of William Albert Davis, Jr., her minor
39 grandson, step grandson of the deceased workman, made application
40 for compensation under the workmen's compensation act, for said
41 minor. On June 22, 1959, a department order was issued denying the
42 application of Ethel Tyrrell. On July 1, 1959, she appealed to this board,
43 and her appeal was granted on July 23, 1959, and set for a board
44 conference.
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2. There is no evidence in the record that the deceased workman, Cletus G. Tyrrell, intended to assume the duties and responsibilities of a parent with respect to William Albert Davis, Jr.

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CONCLUSIONS OF LAW

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Based on the foregoing findings of fact, the board concludes:

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1. This board has jurisdiction of the parties and subject matter of this appeal.
 2. The deceased workman, Cletus G. Tyrrell, did not stand in loco parentis to William Albert Davis, Jr., on the date of the deceased's death.
 3. William Albert Davis, Jr., is not a "child" of Cletus G. Tyrrell, deceased, as contemplated by the workmen's compensation act entitling the surviving widow to compensation for said minor.
 4. The order of the supervisor of industrial insurance, dated June 22, 1959, is correct and should be sustained.

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ORDER

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Now, therefore, it is hereby ORDERED that the order of the supervisor of industrial insurance dated June 22, 1959, be, and the same is hereby, sustained.

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Dated this 28th day of June, 1960.

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BOARD OF INDUSTRIAL INSURANCE APPEALS

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/s/ _____
J. HARRIS LYNCH Chairman

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/s/ _____
JOE DAVIS Member

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/s/ _____
HAROLD J. PETRIE Member