

Workmen's Compensation - Death Benefits - Right of Posthumous Illegitimate to Benefit Payments

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Repository Citation

Walter I. Lanier Jr., *Workmen's Compensation - Death Benefits - Right of Posthumous Illegitimate to Benefit Payments*, 20 La. L. Rev. (1960)
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ployer into a quandary as to discharge or forced retirement of his employees. It is interesting to speculate as to what effect a change in the factual situation might have had on the decision. As previously mentioned, had the deceased been actively at work when the letter was received, his argument as to "in the course" would have been strengthened considerably. Had the letter contained material which had more connection with his particular employment, such as the escape of a convict who had threatened him, then the case as to "arising out of" would have been strengthened. It cannot be said that one or both of these factual changes would have resulted in an award of compensation, but certainly in such a case, a stronger argument in favor of such an award would have existed.

Peyton Moore

WORKMEN'S COMPENSATION — DEATH BENEFITS — RIGHT OF POSTHUMOUS ILLEGITIMATE TO BENEFIT PAYMENTS

Plaintiff sued for compensation on behalf of her minor child. The father and mother of the child lived together in open concubinage while the father was still legally married to another woman. The child was born eight months after its father was accidentally killed during the course of his employment. The trial court denied recovery but was reversed by the court of appeal.¹ On appeal to the Louisiana Supreme Court, *held*, reversed, two Justices dissenting. Since a posthumous illegitimate is not a member of the family and not actually dependent, he is not entitled to recover compensation benefits under the Louisiana Workmen's Compensation Statute. *Williams v. American Employers Insurance Co.*, 237 La. 101, 110 So.2d 541 (1959).

Under the Louisiana Workmen's Compensation Statute, if an industrial accident causes death within two years, a worker's dependents may receive benefit payments.² Dependents are classified as (1) those conclusively presumed to be dependent,³ and (2) those who must prove actual dependency.⁴ Legitimate children, legitimate adopted children, legitimate posthumous children, legitimate stepchildren, and illegitimate children acknowledged under Articles 203, 204, and 205 of the Louisiana

1. *Williams v. American Employers Ins. Co.*, 103 So.2d 568 (La. App. 1958).

2. LA. R.S. 23:1231 (1950), as amended by La. Acts 1956, No. 412.

3. *Id.* 23:1251.

4. *Id.* 23:1252.

Civil Code are conclusively presumed to be dependent.⁵ These children need only show that they are under the age of eighteen, or if they are over the age of eighteen that they are physically or mentally incapacitated from earning a living, and that they were living with the deceased parent at the time of the injury or death.⁶ The Louisiana judiciary has consistently held that unacknowledged illegitimates cannot be conclusively presumed dependent.⁷ However, where the party claiming compensation is not conclusively presumed to have been actually dependent upon the deceased employee for support, he may nevertheless receive benefits under the act if he can prove (1) actual dependency upon the earnings of the employee for support *at the time of his death*,⁸ and (2) that either he was a member of the family of the deceased employee or was related to the employee as husband or wife, or lineal descendant or ascendant, or brother or sister.⁹ Following this statutory formula the Louisiana courts have held that illegitimates may receive death benefits where they are shown to have been members of the family or household of the deceased at the time of his death and were actually dependent upon him for support.¹⁰ Prior to the instant case the question of whether or not a posthumous illegitimate was entitled to benefit payments had not been litigated in Louisiana, but it has generally been held in jurisdictions having statutes similar to Louisiana's that a posthumous illegitimate is not considered a member of the deceased's family and is not actually dependent upon him for support at the time of death.¹¹

In the instant case the court denied compensation by reasoning that the posthumous illegitimate was neither a member of the deceased's family nor actually dependent upon the deceased

5. *Id.* 23:1021(3), 23:1251. *Dangerfield v. Indemnity Ins. Co.*, 209 La. 195, 24 So.2d 375 (1945); *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1945).

6. La. R.S.23:1251(3) (1950).

7. *Beard v. Rickert Rice Mills, Inc.*, 185 La. 55, 168 So. 492 (1936); *Perkins v. Brownell-Drews Lbr. Co.*, 147 La. 337, 84 So. 894 (1920); *Dangerfield v. Indemnity Ins. Co.*, 19 So.2d 598 (La. App. 1944); *Ellis v. Union Compress & Whse. Co.*, 178 So. 726 (La. App. 1931); *Stewart v. Parish of Jefferson Davis*, 136 So. 659 (La. App. 1931); *Wells v. White-Grandin Lbr. Co.*, 129 So. 171 (La. App. 1930); *Gullung v. Dalgarn Const. Co.*, 1 La. App. 147 (Orl. App. 1924).

8. La. R.S. 23:1252, 23:1254 (1950).

9. *Ibid.*

10. *Caddo Contracting Co. v. Johnson*, 222 La. 796, 64 So.2d 177 (1953); *Thompson v. Vestal Lbr. & Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1945); *Jenkins v. Pemberton*, 87 So.2d 775 (La. App. 1956); *Patin v. T. L. James & Co.*, 42 So.2d 304 (La. App. 1949); *Williams v. Jahncke Service, Inc.*, 38 So.2d 400 (La. App. 1949); *Lunkin v. Triangle Farms, Inc.*, 24 So.2d 213 (La. App. 1945).

11. See, generally, 99 C.J.S., *Workmen's Compensation* § 141(2) (1958) and 58 AM. JUR., *Workmen's Compensation* § 175 (1948).

at the time of death. The court held that the term "member of the family" referred only to living persons and that a child would only become a member of the family at birth.¹² Although the unborn child was certainly actually dependent upon its mother, the court reasoned that the child could only be considered constructively dependent upon its father and hence not entitled to compensation.¹³

It would seem that in the instant case the court has departed from the firmly established principle that the provisions of the compensation statute should be liberally construed. The court used a seemingly technical argument for disposing of the plaintiff's case.¹⁴ It is submitted that this decision is not in keeping with the intent and spirit of the compensation principle.¹⁵ In passing the compensation statute, the legislature placed upon industry the burden of supporting those who were dependent upon a worker killed in the industry's operation. It was deemed a better social policy that industry and its consumers should carry this load rather than society as a whole. From its inception the Louisiana Workmen's Compensation Statute was designed to place the burden of supporting legitimates on industry and its consumers.¹⁶ Posthumous legitimates were specifically

12. "The illegitimate, posthumous son of this plaintiff, in our opinion, was not a member of the family of the employee at the time of the latter's death. As was correctly stated by the district judge . . . it is unreasonable, and therefore not within the contemplation of the statute, to say that an unborn child is a member of the family, for that term connotes a living person. The unborn child becomes a member of the family upon birth. The right to compensation is determined upon the basis of facts existing at the time of the death of the employee, and not deferred to await the contingency of live birth." *Williams v. American Employers Ins. Co.*, 237 La. 101, 106, 110 So.2d 541, 543 (1959). It would seem by this opinion that the court feels that at least as far as compensation is concerned that the rights of a child, except where specifically mentioned by statute, do not come into existence until birth.

13. "Furthermore, we are unable to conclude that plaintiff's posthumous son was *actually* dependent (a prerequisite for recovery of compensation under the 'member of the family' doctrine) on his father. Undoubtedly he was actually dependent on the mother at the time of the employee's death. But his dependency on the father (if any existed), obviously, was only constructive, not actual." *Williams v. American Employers Ins. Co.*, 237 La. 101, 107, 110 So.2d 541, 543 (1959). This argument is ably answered in *MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* § 304 (Supp. 1960).

14. The court's argument can be rebutted by the very able argument of the court of appeal judge who said: "We perceive no anomaly in extending the benefits of the statutes to a posthumous child of a deceased employee on the ground that it was a dependent member of the family of the household of its deceased father at the time of his death, even though it was then in embryo. Life was present, life continued, and that life, before, at and after birth, was dependent upon the father for its support and maintenance." *Williams v. American Employers Ins. Co.*, 103 So.2d 568, 572 (La. App. 1958). The court of appeal opinion was adopted by Justice Hawthorne in his dissent in the instant case.

15. See *MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* § 32 (1951).

16. The provisions of LA. R.S. 23:1251 (1950) clearly evidence this.

included in this coverage.¹⁷ As a result of subsequent jurisprudence illegitimates also were held to come under the coverage of the act.¹⁸ Since the court has shifted the burden of supporting illegitimates onto industry and the consumer, it seems somewhat inconsistent that they now carve out a small niche of illegitimate dependents and force them to look to society for their support. It seems anomalous to allow compensation to posthumous legitimates and to illegitimates and yet deny recovery to posthumous illegitimates. Certainly a contrary holding would not create any great administrative problem.¹⁹

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17. *Id.* 23:1021(3).

18. See note 10 *supra*.

19. This case is also noted in 34 TUL. L. REV. 421 (1960).