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

6 In re: LILIA LACY) Docket No.: 18 19397
7)
8 vs.) CLAIMANT'S REPLY TO
9 DEPARTMENT OF LABOR &) DEPARTMENT'S RESPONSE TO
INDUSTRIES) CLAIMANT'S MOTION FOR
10) SUMMARY JUDGMENT AND
Claim No.: AS-31430) RESPONSE TO DEPARTMENT'S
11) CROSS MOTION FOR SUMMARY
JUDGMENT

12 COMES NOW, Lilia Lacy, and replies to the Department's Response to Claimant's
13 Motion for Summary Judgment and Responds to the Department's Cross Motion for Summary
14 Judgment filed February 6, 1019.

15 **REPLY AND RESPONSE:**

16 The Department's attempt to draw a categorical distinction between the terms "physical
17 custody" and "legal custody" is unhelpful to the Department's position in this case because it is
18 clear from Lilia Lacy's affidavit testimony that she actually maintains both physical and legal
19 custody of Drake Lacy, even using the most technical definitions of those terms possible.

20 Meanwhile, Ms. Lacy hereby respectfully responds that the liberal construction of the
21 Industrial Insurance Act is not bound by high technicalities imported from family law concepts
22 not at issue here. It is enough to say that Ms. Lacy exercises "legal custody" over her grandson
23 simply because her custody-in-fact is total and extends to every aspect of Drake's upbringing, as
24 well as that it has not been challenged by any legal authority in this state.

25 CLAIMANT'S REPLY TO DEPARTMENT'S RESPONSE TO
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1 Ms. Lacy's actual custody over Drake is not "illegal," so it should be found to meet the
2 Industrial Insurance Act's definition of "legal custody" as set forth in RCW 51.08.030. The
3 Department doesn't dispute that Ms. Lacy has custody of Drake. Meanwhile, she hasn't
4 kidnapped him or done anything illegal to acquire that custody. She is not offending public
5 policy by caring for Drake in her home as her own child. She is recognized by doctors, schools
6 and Drake's biological parents as a the "legal" custodian for Drake, so the Department's demand
7 for a custody decree is entirely overbearing and inconsistent with the IIA's liberal construction.

8 Here, the Board should find that any "legally permitted" exercise of actual custody over
9 a dependent child under the worker's control should be sufficient to fall within the Industrial
10 Insurance Act's liberally-construed definition of what constitutes "legal" custody. This is
11 especially true since the statute involved also requires the injured worker to show that they are
12 exercising this not-illegal "custody" over a "child" who is [economically] "dependent" upon the
13 injured worker and under the injured worker's "control." Enough additional requirements are set
14 forth by the statute that the Department cannot identify a genuine concern that suddenly every
15 new injured worker will be able to prove wage order entitlement for hordes of randomly-selected
16 children. No such risk exists.

17 The Department's plea that it should not be made "responsible" for the cost of Drake's
18 upkeep is also of dubious merit since a child contributes, at most (assuming there are not more
19 than five children), just 2% to any injured worker's wage order. This statistically petty
20 contribution on behalf of each dependent child is not equivalent to a transfer full financial
21 responsibility to the Department's shoulders. It is statutorily sufficient to recognize the economic
22 "dependency" of each covered child, yet it is also clearly not enough in any knowledgeable
23 parent's mind to reflect the true investments made by responsible parents in their dependent
24 children. The Department's dubious argument on this point is also one of equity, not law, so the

1 Board should make no finding in that respect if it can resolve our conflict based on statutory-
2 construction grounds.

3 In the alternative, Black's Law Dictionary (8th ed. 2004), Page 1161 defines "custodian"
4 as "[i]n reference to a child, a custodian has either legal or physical custody." On Page 1162 it
5 references the term "custodian" with respect to "[f]amily law" and explains that "[c]ustody
6 involves legal custody (decision-making authority) and physical custody (caregiving authority),
7 and an award of custody usually grants both rights." (emphasis added). The explanation
8 continues on Page 1162 that "[i]n a case involving parental dereliction, such as abuse or neglect,
9 the court may award custody to the state for placing the child in foster care if no responsible
10 relative or family friend is willing and able to care for the child. – Also termed child custody;
11 legal custody; managing conservatorship; parental functions." In other words, "legal custody"
12 really just means "not-illegal custody" because "legal custody" and "custody" are synonymous
13 terms that are really just long and short form definitions of the same managing
14 conservator/parenting concept.

15 At Page 1163, Black's defines "legal custody" as "[t]he authority to make significant
16 decisions on a child's behalf, including decisions about education, religious training, and
17 healthcare." Ms. Lacy's affidavit shows that she exercises all of these authorities, so her exercise
18 proves she is within the definition of the IIA's term now under scrutiny.

19 At Page 1164, Black's defines a "custody proceeding" as being "[a]n action to determine
20 who is entitled to legal or physical custody of a child. * Legal custody gives one the right to
21 make significant decisions regarding the child, and physical custody gives one the right to
22 physical care and control of the child. See 1163. In other words, even if we split the verbiage of
23 RCW 51.08.030 into subparts where "legal custody" means "authority to make significant
24 decisions on the child's behalf" and "control" corresponds to the family law concept of "physical
25 custody," Ms. Lacy's affidavit shows her actual custody is total and comprehensive over Drake

1 so he is still properly to be included in her wage order. The Department of Labor and Industries
2 cannot label her a mere “physical custodian” of her grandchild merely because she has no court
3 decree in-hand declaring the reality of her much broader parenting responsibilities to Drake.

4 Ms. Lacy concedes that she knows of no reason why a court decree adjudicating her total
5 legal custody would be unavailable to her. Nonparental actions for child custody are provided
6 for in Chapter 26.10, RCW. A person “other than a parent” may file a petition seeking custody
7 of a child if the child is “not in the physical custody of one of its parents or if the petitioner alleges
8 that neither parent is a suitable custodian.” RCW 26.10.030(1). Drake is in Ms. Lacy’s physical
9 custody, not that of a biological parent. If Ms. Lacy should file such an action, “[t]he court shall
10 then determine custody in accordance with the best interests of the child.” RCW 26.10.100.
11 Once a custody decree has issued, “the custodian may determine the child’s upbringing, including
12 education, health care, and religious training, unless the court after hearing, finds, upon motion
13 by the noncustodial parent, that [said determination(s) would endanger the] child’s physical,
14 mental or emotional health...” RCW 26.10.170. Thus, if Lilia Lacy had ever wanted to petition
15 for a legal decree formalizing her relationship with Drake Lacy as non-parental legal custodian,
16 she had the right to do so and she believes she would have likely obtained that decree for the
17 mere asking (i.e., by filing a petition in Family Court).

18 But, the question presented here is actually whether Ms. Lacy’s failure to formally file
19 for a legal custody decree prior to suffering an industrial injury or occupational disease is fatal
20 to her claim for Industrial Insurance Act benefits as the de facto parent of Drake Lacy? The
21 Board should rule without hesitation that it is not necessary for an injured worker to hold such a
22 decree in hand at the time of their injury, especially since the Washington Supreme Court has
23 stated that the “de facto parentage doctrine” allows “meaningful adjudication” of whether a
24 person claiming de facto parentage has “undertaken a permanent role as [an identified child’s]
25 parent.” *In Re: the Custody of B.M.H.*, 179 Wn.2d 224 (2013).

1 In B.M.H., the Supreme Court characterized the de facto parentage doctrine as a “flexible,
2 equitable remedy that complements legislative enactments where parent-child relationships arise
3 in ways that are not contemplated in the statutory scheme.” The Industrial Insurance Act is a
4 legislative enactment. To the extent that the Department now argues that Drake cannot be
5 considered as a dependent child under Lilia Lacy’s legal custody and control merely because he
6 is her biological grandchild and she holds no custody decree in hand, the de facto parentage
7 doctrine should still allow the Board to find that Drake is her qualified, child dependent.

8 Thus, regardless of whether the Industrial Insurance Act might theoretically be construed
9 using the Department’s overly strict and self-interested definition of “legal custodian,” a
10 definition bound neither by the realities of Ms. Lacy’s relationship with her grandson, Drake, nor
11 with the mandate of liberal construction to which the Industrial Insurance Act entitles her in this
12 dispute, Washington’s Supreme Court has already instructed that the de facto parentage doctrine
13 allows complimentary consideration of her parenting realities based upon common law.

14 If the Board decides in this matter to follow the analysis of the Supreme Court in B.M.H.,
15 then it should rule that an injured worker who is not a biological parent may nevertheless establish
16 de facto parent status, therefore, full legal custodian status of a dependent child for purposes of
17 RCW 51.08.030 where the following four elements specified in B.M.H. are found: (1) the natural
18 or legal parent consented to and fostered the parent-like relationship; (2) the petitioner and child
19 lived together in the same household; (3) the petitioner assumed obligations of parenthood
20 without expectation of financial compensation; and (4) the petitioner has been in a parental roll
21 parental in nature.

22 Here, Ms. Lacy has demonstrated sufficient proof of all four elements via her affidavit,
23 while the state of Washington has demonstrated no proof to the contrary. In the alternative,
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1 drawing all inferences against the state as the moving party in its cross-motion for summary
2 judgment, the state's motion should be denied and trial should proceed.

3 Specifically, Ms. Lacy's affidavit shows quite clearly that Drake's biological parents have
4 left him in her physical custody to raise as her own child for a period of well over a decade. They
5 visit on rare occasions but do not remove Drake from Ms. Lacy's household or challenge her
6 custody and control of Drake in any respect. In conducting themselves in that fashion, Drake's
7 biological parents have consented to and fostered the parent-like relationship Ms. Lacy has
8 developed with her dependent grandchild that lives in her house. It is also apparent from Ms.
9 Lacy's affidavit that Drake has lived in her household for well over a decade. Ms. Lacy has
10 assumed all of the obligations of parenthood without being paid or expecting to be paid to do so,
11 since Drake's parents contribute only de minimis sums to his upbringing on an occasional basis.
12 Finally, Ms. Lacy has assumed her true parental roll for a length of time the Board should
13 unquestionably deem sufficient to establish her bonded, dependent, relationship, parental in
14 nature. For all of these reasons, it is irrelevant whether Ms. Lacy had a court decree of "legal
15 custody" in hand at the time of her injury or occupational disease for which she is now going to
16 receive a pension. In determining her wage order, whether originally (now res judicata) or at the
17 time of pension review (i.e., even if *Biruetta* is directly on-point), she is under either
18 circumstances legally entitled to be recognized as the de facto parent of Drake Lacy under
19 Washington's de facto parentage doctrine.

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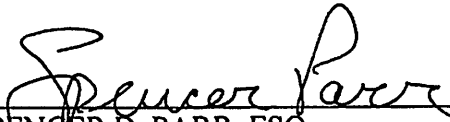
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1 **CONCLUSION:**

2 Ms. Lacy's motion for summary judgment should be granted because she is a de facto
3 legal custodian of her dependent grandchild, Drake Lacy, and she is therefore entitled to a 2%
4 benefit in her wage order on that basis. The Department's motion for summary judgement should
5 be denied.

6 In the alternative, trial should proceed with a current motion ruling that Ms. Lacy is
7 entitled at trial to prove that she is a de facto legal custodian of Drake Lacy under this state's
8 court-established "de facto parentage doctrine."

9 RESPECTFULLY SUBMITTED THIS 13TH DAY OF FEBRUARY, 2019.

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