

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC File No.: 1312352

RECEIVED

JUN 02 2016

SC Court of Appeals

Tyrone York, as personal representative
for Timothy York (Deceased), Shirley York,
and Yvonne Burns,

Plaintiffs,

Of Whom Yvonne Burns is the Appellant,

And

Shirley York is a Respondent,

v.

Longlands Plantation a.k.a. Knollwood, Inc.,
and Companion Property and Casualty Group,

Respondents.

Appellate Case No. 2016-000258

INITIAL BRIEF OF APPELLANT

W. E. Jenkinson, III, Esquire
J. Thomas Thompson, Esquire
Jenkinson, Jarrett, & Kellahan, P.A.
Post Office Drawer 669
Kingstree, SC 29556
(843) 355-2000
Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	4
Statement of the Case.....	4
Facts	5
Arguments	
I. STANDARD OF REVIEW	10
II. THE COMMISSION ERRED AS A MATER OF LAW IN FINDING THAT DECEDENT AND YVONNE WERE ENGAGING IN FORNICATION.....	10
III. SOUTH CAROLINA'S FORNICATION STATUTES ARE UNCONSTITUTIONAL.....	11
IV. THE COMMISSION ERRED IN FINDING THAT <i>DAY V. DAY</i> , 216 S.C. 334, 58 S.E. 2D 83 (1950) BARS YVONNE'S BENEFITS CLAIM.....	13
V. THE COMMISSIONER AND THE FULL COMMISSION ERRED IN RELYING ON <i>FIELDS V. HOLLOWELL & HOLLOWELL, ET AL.</i> , 238 N.C. 614, 78 S.E.2d 740 (1953).....	16
VI. S.C. CODE § 42-9-120 DEPENDENCY IN "ALL OTHER CASES" IS NOT LIMITED TO RELATIVES.....	17
VII. THE COMMISSION ERRED IN DENYING YVONNE BENEFITS AS DECEDENT'S PRIMARY DEPENDENT.....	20
Conclusion	21

TABLE OF AUTHORITIES

Cases:

<i>Adams v. Texfi Indus.</i> , 320 S.C. 213, 464 S.E.2d 109 (1995).....	17
<i>Bush v. Gingrey Bros.</i> , 100 S.E.2d 821, 823, 232 S.C. 20, 23 (1957).....	16
<i>Byers v. Mt. Vernon Mills, Inc.</i> , 268 S.C. 68, 231 S.E.2d 699 (1977).....	13, 14
<i>Camp v. Spartan Mills</i> , 302 S.C. 348, 350, 396 S.E.2d 121, 122 (Ct. App. 1990).....	20
<i>Day v. Day</i> , 216 S.C. 334, 58 S.E.2d 83 (1950).....	4, 12, 13, 14, 15, 16, 19
<i>DeBruhl v. Kershaw County Sheriff's Dep't</i> , 303 S.C. 20, 397 S.E.2d 782 (Ct.App.1990).....	21
<i>Duncan v. Duncan</i> , 232 N.C. App. 369, 754 S.E.2d 451, 455 <i>review den.'d</i> , 367 N.C. 531, 762 S.E.2d 208 (2014) and <i>review dis.'d</i> , 367 N.C. 531, 762 S.E.2d 208 (2014).....	16
<i>Dye v. Gainey</i> , 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995).....	11
<i>Fields v. Hollowell et al</i> , 238 N.C. 614, 78 S.E.2d 740 (1953).....	4, 11, 12, 16
<i>Ford v. Allied Chem. Corp.</i> , 252 S.C. 561, 167 S.E.2d 564 (1969).....	20
<i>Garrett v. Burris</i> , 224 N.C. App. 32, 735 S.E.2d 414 (2012) <i>aff'd</i> , 366 N.C. 551, 742 S.E.2d 803 (2013).....	16
<i>In re J.M.</i> , 276 Ga. 88, 575 S.E.2d 441 (2003).....	13
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	12, 13
<i>Lowe v. AM-CAN Transport Serv.s, Inc.</i> , 283 S.C. 534, 324 S.E.2d 87 (Ct.App.1984)....	20
<i>Martin v. Zihlerl</i> , 269 Va. 35, 607 S.E.2d 367 (2005).....	12
<i>O'Banner v. Westinghouse Elec. Corp.</i> , 319 S.C. 24, 459 S.E.2d 324 (Ct. App. 1995)....	21
<i>Palm v. General Painting Co.</i> , 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988).....	13, 15
<i>Pierre v. Seaside Farms, Inc.</i> , 386 S.C. 534, 689 S.E.2d 615 (2010).....	10

<i>Sims v. S.C. State Comm'n of Forestry</i> , 235 S.C. 1, 109 S.E.2d 701 (1959).....	17
<i>South Carolina Coastal Council v. South Carolina State Ethics Comm'n</i> , 306 S.C. 41, 410 S.E.2d 245 (1991).....	18
<i>South Carolina Second Injury Fund v. Young</i> , 301 S.C. 524, 392 S.E.2d 807 (Ct. App. 1990).....	16, 18, 19
<i>State v. Blackmon</i> , 304 S.C. 270, 403 S.E.2d 660 (1991).....	18
<i>State v. Lynch</i> , 301 N.C. 479, 272 S.E.2d 349 (1980).....	16
<i>State v. Pilcher</i> , 242 N.W. 2d 348 (Iowa 1976).....	13
<i>State v. Ramsey</i> , 311 S.C. 555, 430 S.E.2d 511 (1993).....	18
<i>State v. Samuel</i> , 19 N.C. 177 (1836).....	16
<i>State v. Saunders</i> , 75 N.J. 200, 381 A.2d 333 (1977).....	13
<i>State v. Wilson</i> , 121 N.C. 650, 28 S.E. 416 (1897).....	16
<i>Thong v. Andre Chreky Salon</i> , 634 F. Supp. 2d 40, 47 (D.D.C. 2009).....	11
Statutes:	
S.C. Code Ann. § 1-23-380(A)(6) (Supp.1994).....	21
S.C. Code Ann. §16-15-60.....	4, 10, 11, 13
S.C. Code Ann. §16-15-80.....	4, 10, 13
S.C. Code Ann. § 42-1-70 (2013).....	17
S.C. Code § 42-9-120.....	<i>Passim</i>
S.C. Code Ann. § 42-9-130.....	4, 5, 19, 21
S.C. Code § 42-9-140(B).....	4, 17
S.C. Code Ann. § 42-9-290 (2013).....	17, 18

STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION ERR IN BARRING YVONNE BURNS' CLAIM FOR BENEFITS AS A MATTER OF LAW, BY CONCLUDING THAT S.C. CODE ANN. §16-15-60 AND §16-15-80 APPLY (DEFINING AND PUNISHING FORNICATION) TO DECEDENT'S COHABITATION WITH YVONNE BURNS AT THE TIME OF DECEDENT'S DEATH?
- II. DID THE COMMISSION ERR IN FINDING THAT *DAY V. DAY*, 216 S.C. 334, 58 S.E.2D 83 (1950), CONTROLS AND IS DISPOSITIVE OF THIS CASE?
- III. DID THE COMMISSIONER AND THE COMMISSION ERR IN RELYING ON *FIELDS V. HOLLOWELL & HOLLOWELL, ET AL.*, 238 N.C. 614, 78 S.E.2D 740 (1953)?
- IV. DID THE COMMISSION ERR IN CONCLUDING THAT YVONNE BURNS' BENEFICIARY CLAIM IS NOT WITHIN THE LEGISLATIVE SCHEME OF DEPENDENCY EVEN THOUGH SHE IS A NON-RELATIVE?
- V. DID THE COMMISSION ERR IN DENYING YVONNE BURNS' CLAIM TO COMPENSATION AS DECEDENT'S PRIMARY DEPENDENT?

STATEMENT OF THE CASE

Decedent, Timothy "Blue" York ("**Decedent**" or "**Timothy**"), died in a work-related accident on August 26, 2013 when his boat capsized on a pond at Longlands Plantation while he and a co-worker were spraying algae within the course and scope of Decedent's employment with Knollwood, Inc. Yvonne Burns ("**Yvonne**" or "**Common Law Wife**"), who cohabited with Decedent for several years, but was not legally married to him, claimed Workers' Compensation death benefits for herself as his dependent, under S.C. Code § 42-9-120 or § 42-9-130.

Decedent's brother, Tyrone York ("**Tyrone**" or "**P.R.**"), the Personal Representative of Decedent's estate, sought Workers' Compensation benefits on behalf of Decedent's mother, Shirley York ("**Mother**"), under S.C. Code § 42-9-140(B).

Respondents, Tyrone (as P.R. on Mother's behalf); Longlands Plantation a.k.a. Knollwood, Inc. ("**Employer**"); and Companion Property and Casualty Group ("**Carrier**") admitted the work-related accident and subsequent death; and Carrier conducted a dependency investigation to determine the beneficiary.

After a hearing held on June 5, 18 and 19, 2014, Hearing Commissioner, Hon. Melody L. James ("**Commissioner**") entered an Amended Decision and Order dated June 5, 2015 concluding that Yvonne was a dependent pursuant to S. C. Code § 42-9-120; but that Decedent's Mother is entitled to the full sum of death benefits allowable under the Act. Yvonne appealed to the Full Commission ("**Commission**"), which adopted the Order in totality, by its Decision and Order ("**Order**"), entered January 20, 2016. This appeal followed.

FACTS

Decedent died in a work-related accident on August 26, 2013 when his boat capsized on a pond at Longlands Plantation while he and a co-worker were spraying algae within the course and scope of Decedent's employment with Employer. Order p. 2. Respondents admitted the work-related accident and death and conducted a dependency investigation. Order p. 50. All potential claimants other than Decedent's Mother and his Common Law Wife waived all claims to benefits. Vol 1 Hrg. Tr. pp. 5-8. Yvonne claimed benefits as Decedent's Common Law Wife and/or dependent under S.C. Code § 42-9-120 or § 42-9-130. (Vol 1 Hrg. Tr. pp. 11/2-8; 12/12-18).

The Commissioner found and the Commission adopted the finding¹ (Finding No. 52,

¹ The Full Commission having adopted the Commissioner's June 5, 2015 Amended Decision and

Order p. 67) that Yvonne was partially dependent on Decedent who contributed to household expenses; and that her level of dependency was greater than that of his Mother (Finding No. 39, Order pp. 63; 67). As to Yvonne's theories of dependency, it found (Finding No. 11) that Decedent and Yvonne lived together off and on in a tumultuous relationship, representing themselves as a couple; and that they may have intended to get married; but that (Finding No. 12) they were not married as of Decedent's death. (Order p. 55). It found that the couple was "at most, engaged" (Finding No. 51, Order p. 66); and that the couple was "engaging in fornication" (Finding No. 57, Order p. 68).

The Commission noted (Finding No. 38) Yvonne's testimony that Decedent contributed to payment of her utility bills and that she used his debit card to pay various bills for her vehicle; its insurance and upkeep; groceries; and clothing. (See Vol 3 Hrg. Tr. pp. 76/1-80/16; Order pp 62-63). It found (Finding No. 17) that the predominance of lay witness testimony did not support a common law marriage (Order p. 56), noting that Decedent's family did not know about the couple's engagement (Finding No. 13) and that Yvonne testified that she did not get along with them (Finding No. 12, Order p. 55; See Vol 3 Hrg. Tr. p. 65/2-5)

But, the Estate's claimant, Decedent's Mother, testified that the couple lived together in the house on Broomstraw Road (Vol 2 Hrg. Tr. p. 68/13-15); the couple's neighbor, Pamela Johnson testified that Decedent lived with Yvonne in the house on Broomstraw Road for at least seven years (Vol 2 Hrg. Tr. p. 87/11-22); and, Decedent's friend of forty-three years, Frederick Childers, testified that Decedent lived with Yvonne for four years before his death. (Vol 1 Hrg. Tr. pp. 274/7-12; 288/20-289/8). Mother testified, both at deposition and at the hearing that she

Order in full, all references hereafter to "Order" or to "Commission" also mean the

knew about the arrangement with Yvonne using Decedent's debit card funds, along with Yvonne's own earnings, to pay the couple's bills over the whole course of their relationship, on a weekly basis; and that Yvonne was dependent on Decedent. (Vol 2 Hrg. Tr. pp. 58/10-59/18; 67/22-68/7).

Further, while the P.R. testified that Decedent's mail went to his aunt's address on McMillan Road² (Vol. 1 Hrg. Tr. pp. 188/8-189/9), Decedent's auto insurance agent, Robert Mims, testified that Decedent changed his address with the insurance agency to the Broomstraw Road address on April 27, 2011 (more than two years before his August 26, 2013 death) (Vol. 1 Hrg. Tr. pp. 47/19-48/4); furniture store employee, Gerald Wilder, testified that Decedent listed his address as the Broomstraw Road address on a purchase agreement on May 11, 2012 (more than one year prior to his death) (Id. p. 61/12-19); and, documentary evidence showed that Decedent signed a home improvement contract for the Broomstraw Road home on May 17, 2013. (APA p. 8) Deceased's long-time friend and twenty-year co-worker, Althonia Rodgers, testified that he saw Decedent seven days per week and that Decedent lived in the Broomstraw Road house, continuously, for at least six or seven years, as if married to Yvonne. (Vol. 1 Hrg. Tr. pp. 83/14-21; 84/1-12; 85/1-86/8). He testified that Deceased helped to fix up the Broomstraw Road house and Yvonne handled the couple's finances using Deceased's debit card. (Vol. 1 Hrg. Tr. pp. 88/10-90/22).

The Commission noted (Finding No. 18) that Gerald Wilder testified that the couple purchased furniture together and that one of the couple represented at the time of purchase, November 13, 2012, that they were getting married. Order p. 56. (See Vol 1 Hrg. Tr. p. 63/20-23;

Commissioner's Amended Decision and Order and the Commissioner.

²The Order erroneously finds (Finding No. 16) that the mail went to Broomstraw Road; but all related testimony was to the effect that Decedent's bank statements and some other mail went to

p. 64/15-17) It noted further that (Finding No. 20) convenience store owner, Chris Battle, testified that Decedent asked him for pricing for hosting their wedding reception (See Vol 3 Hrg. Tr. p. 33/19- p. 34/19); and that (Finding No. 21) Deceased's cousin, Towanda Williams testified that Deceased told her he was going to marry Yvonne, but, that she knew that the couple had not married. (Order p. 57).

The Commission found that it is undisputed that no civil ceremony took place (Finding No. 22) and that the documentary evidence does not support common law marriage (Finding No. 23, Order p 57). It emphasized the couple's representations of themselves as single or head of household for income tax purposes (Findings No. 24-26; 33; 34, Order pp. 58-59; 62). And it found "compelling" (Finding No. 29) that Yvonne had not informed her son of the couple's engagement, though he could see the engagement ring on her finger (See Vol 3 Hrg. Tr. p. 152/17- p. 153/12); and, that the couple had not set a date or formalized the plans for the wedding. (Order pp. 60-61; See Vol 3 Hrg. Tr. p. 156/10- p. 157/16).

At the hearing, Yvonne still possessed Decedent's debit card that she had used for years prior to and up to his death. (Vol. 3 Hrg. Tr. p. 73/10-25). Decedent kept about \$50 cash for weekly spending, of which his Mother claimed she received a small amount. (Vol 2 Hrg. Tr. pp. 61/23-62/7). The rest of the money from Decedent's paychecks was used to pay their joint living expenses; and, Decedent could have gotten his card back from Yvonne but he didn't. He let her keep it. (Vol. 2 Hrg. Tr. pp. 58/10-59/18). Yvonne customarily took the combined cash from both their paychecks and paid their bills, including the Duke Energy electric bill (\$180-\$450/month); the gas and water bills for the Broomstraw house (about \$40/month); the payment for the

his aunt's address on McMillan Road.

furniture they purchased at Wilder Brothers (\$130/month); her SUV payment (\$350/month); house and vehicle insurance (\$158.14 to \$165.05/month); real estate taxes; groceries; clothes; her work uniforms; and gas, oil and maintenance for the vehicles she alone drove. (Vol. 1. Hrg. Tr. pp. 32/21-33/6; 33/13-19; Vol. 2 p. 217/5-22; Vol. 3 pp. 73/6-74/13; 75/2-80/16; 141/7-20; 167/15-168/21; 185/10-186/9; and APA 181; 200; 226-227; 236-238).

Mary McLaughlin testified that she is Yvonne's second or third cousin and had known Decedent for fourteen years; and that Decedent gave Yvonne the PIN code for his card and the witness and Yvonne were often together when Yvonne used it to get cash for bills and groceries; that Decedent would sometimes call Yvonne to remind her to get certain items for him on these occasions; and that the couple had lived together for five or six years this way. (Vol. 2 Hrg. Tr. pp. 184/16-185/1; 217/22; 187/2-4). Decedent's friend, Althonia Rodgers, testified that Decedent permitted Yvonne to use his debit card to withdraw his payroll money to use in paying bills that supported the couple's household. (Vol. 1 Hrg. Tr. p. 136/15-137/3).

Decedent also paid for improvements to the Broomstraw Road house. (Vol. 1 Hrg. Tr. pp. 92/6-16; 218/16-220/20; Vol. 2 pp. 192/19-198/10; Vol. 3 pp. 89/15-91/13; APA 182-190). He bought furniture for the house (Vol. 3. p. 84/11-89/14; APA 231-236); he transferred title to his 1999 Oldsmobile to her on October 29, 2011 when he could no longer drive, and the Oldsmobile was still at the Broomstraw Road house at the time of the hearing. (Vol. 3. Hrg. Tr. pp. 54/13-56/20; APA 161-162). (This evidence contradicts the Order at Finding No. 19, which indicates that the Commission considered a certificate of title for a 1996 Lincoln Town Car titled solely in Decedent's name. (Order p. 51). Finding No. 23 also makes reference to a car title, but does not describe or identify the vehicle. (See Order p. 58.)

ARGUMENTS

I. STANDARD OF REVIEW.

“An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record.” *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010). “Substantial evidence” is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

II. THE COMMISSION ERRED AS A MATTER OF LAW IN FINDING THAT DECEDENT AND YVONNE WERE ENGAGING IN FORNICATION.

The Commission found (Findings No. 56 and 57) the fornication statutes to be applicable and to bar Yvonne's claim to benefits as a dependent. Order p. 68.

Any man or woman who shall be guilty of the crime of adultery or fornication shall be liable to indictment and, on conviction, shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor more than one year or by both fine and imprisonment, at the discretion of the court.

S.C. Code Ann. § 16-15-60.

“Fornication” is the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman, both being unmarried.” S.C. Code Ann. § 16-15-80. It is undisputed that Decedent and Yvonne were not legally married. Yvonne contends that the preponderance of evidence established that they lived

together in the Broomstraw Road house for many years. (See Finding No. 11, Order p. 55) However, no evidence was presented of *acts* of fornication (carnal intercourse), nor any evidence of a *conviction* for fornication, under S.C. Code §§ 16-15-60 and 15-16-80; and the Order makes no reference to any such act or conviction that could possibly support its findings. (See Findings No. 51-59, Order pp. 66-69) The three-volume Hearing Transcript is devoid of any such evidence, reference or argument. Thus, these findings are not supported by substantial evidence.

Additionally, statutes criminalizing private, consensual, sexual intercourse are irrelevant for the purposes of civil litigation. See *Thong v. Andre Chreky Salon*, 634 F. Supp. 2d 40, 47 (D.D.C. 2009). Although South Carolina case law has not explicitly held such statutes to be irrelevant for purposes of civil litigation, *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) effectively recognized the irrelevancy of S.C. Code § 16-15-60 for purposes of civil litigation.

For these reasons, the Commission erred, as a matter of law, in applying the fornication statutes and finding that the Decedent and Yvonne were engaging in fornication and in concluding that this "fornication" barred Yvonne's claim. (See Findings No. 56 and 57, Order p. 68)

III. SOUTH CAROLINA'S FORNICATION STATUTES ARE UNCONSTITUTIONAL.

On the basis of its "fornication" finding, the Commission found the couple to have been engaged in an "illicit relationship" (Findings No. 53-59, Order pp. 67-69). The Commission found that, even though Yvonne was Decedent's dependent (Finding No. 52, Order p. 67), the legal analysis of two bigamy decisions - a North Carolina Supreme Court decision (*Fields v. Hollowell & Hollowell, et al.*, 238 N.C. 614, 78 S.E.2d 740 (1953)) and a South Carolina

Supreme Court decision (*Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950)) - bar Yvonne's recovery. (Findings No. 53-59, Order pp. 67-69). But, it is undisputed that there was no bigamy or other legal impediment to marriage between Yvonne and Decedent that could support the conclusion that their relationship was "illicit", because unrefuted evidence showed that Yvonne's two prior marriages legally ended through valid divorces in 1987 and 1993 - many years prior to Decedent's relationship with Yvonne. (APA pp. 6; 20).

Moreover, more than fifty years after the *Day* and *Fields* decisions, the United States Supreme Court held that state statutes prohibiting fornication and other consensual intimate acts and relationships are unconstitutional. *Lawrence v. Texas*, 539 U.S. 558 (2003). See also, *Martin v. Zihlerl*, 269 Va. 35, 607 S.E.2d 367 (2005). The U.S. Constitution protects the liberty interests of persons to maintain a personal relationship "in the confines of their homes and their own private lives" including "overt expression in intimate conduct" as a part of such relationships. *Lawrence*, 539 U.S. at 567; *Martin*, 607 S.E.2d at 369. The fundamental right infringed by such statutes is the right to enter and maintain a personal relationship without governmental interference. *Id.* **This "protection extends to intimate choices by unmarried as well as married persons."** *Lawrence*, 539 U.S. at 577-578; *Martin*, 607 S.E.2d at 370 (emphasis added).

The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. *Id.*

State interests in the protection of marriage and family are insufficient to warrant intrusion upon a person's liberty interest exercised in the form of private, consensual sexual

conduct between adults. *Id.* Thus, S.C. Code §§ 16-15-60 and 16-15-80, making "fornication" a punishable criminal act, are unconstitutional. See also *In re J.M.*, 276 Ga. 88, 575 S.E.2d 441 (2003) (Georgia fornication statute unconstitutional); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (N.J. fornication statute unconstitutional); *State v. Pilcher*, 242 N.W. 2d 348 (Iowa 1976) (Constitution voids state statutes prohibiting consensual sexual acts between unmarried adults).

The (unproved) extent of Decedent's and Yvonne's private, intimate, adult relationship is protected by *Lawrence* and its progeny. It was not illegal or "illicit" because they had a fundamental right to enter and maintain a personal relationship without governmental interference and they had no legal marital obligation to anyone else. The Commission's conclusions to the contrary and resulting benefits denial are illegal government interference which must be reversed as errors of law. (See Findings 53-59, Order pp. 67-69)

IV. THE COMMISSION ERRED IN FINDING THAT *DAY V. DAY*, 216 S.C. 334, 58 S.E. 2D 83 (1950) BARS YVONNE'S CLAIM FOR BENEFITS.

There are only three decisions where South Carolina courts have denied workers compensation benefits to a woman living with and dependent upon a deceased worker at the time of death. They are: *Day v. Day*, 216 S.C. 334, 58 S.E. 2d 83 (1950) (relied upon as dispositive by the Commission) (Order pp. 67-69); *Byers v. Mt. Vernon Mills, Inc.*, 268 S.C. 68, 231 S.E.2d 699 (1977); and, *Palm v. General Painting Co.*, 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988). All were decided at least 15 years before the U.S. Supreme Court decision in *Lawrence* recognized constitutional protection of private, intimate, adult relationships. In each case, the relationship was "illicit" or illegal, because one of the parties was still married to someone else when they

entered into the relationship on which the claim was based. Thus, there was a legal impediment to the relationship in each of the three cases - a crucial distinction absent in this case.

In *Day v. Day*, 216 S.C. 334, 58 S.E. 2d 83 (1950), Maggie Day claimed compensation as decedent's widow, or, alternatively, as his dependent. Maggie went through a marriage ceremony with the decedent while her first husband was still alive and living nearby, and without making any effort to obtain a divorce. Her alleged marriage to the decedent was void from its inception. The Commission awarded her benefits. The Circuit Court reversed, holding:

[T]he word 'dependent' as used in our Workmen's Compensation Law, refers to those lawfully dependent, and ... it is against the public policy of our State to make an award to one in a bigamous relationship with a deceased workman.

Id. Our Supreme Court affirmed explaining:

An examination of the record shows that for fourteen years she and the deceased lived together as husband and wife in the city of Greenwood, conscientiously and above reproach in accordance with the putative marital relationship. The fact remains, however, that it was an illicit relationship under the law.

Id.

The court went to great lengths in explaining the breadth and lack of limitation in the actual dependency provisions of our Act. *Id.* When deciding that Maggie was nevertheless not entitled to compensation, the court repeatedly emphasized the bigamous and **illegal** nature of her relationship with the Decedent. *Id.*

Byers v. Mt. Vernon Mills, Inc., 268 S.C. 68, 231 S.E.2d 699 (1977) also involved a bigamous relationship. There, decedent married his first wife, Helen, in 1945. Five years later, without obtaining a divorce and while his first wife was still alive, he married a second woman, Martha, with whom he lived, as man and wife until 1967. Six years after the second wedding, the

first wife, Helen, divorced decedent. In 1967, decedent left the second wife, Martha, and legally married the third wife, Dorothy, with whom he lived until his death in 1973. Dorothy and Martha claimed death benefits as the surviving spouse. Martha's argument was that when Helen divorced the decedent, it removed the impediment to her marriage and her marriage ripened into a legitimate common law marriage that did not dissolve when the decedent left her to marry Dorothy. The Supreme Court held Dorothy was the legal spouse and Martha was the alleged spouse in a bigamous relationship because there was no evidence that the decedent and Martha entered into a new agreement to a common law marriage after the decedent's first wife divorced him. Without such a new agreement, Martha's relationship with the decedent did not ripen into a legitimate marriage. Therefore, there was no impediment to the decedent's marriage to Dorothy in 1967.

In 1988, the Court of Appeals decided *Palm v. General Painting Co.*, 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988). The facts in *Palm* are similar to those in *Day*. Julia, the mother of the decedent's illegitimate children was married to a man who was in prison. While still married to her incarcerated husband, Harvey, Julia lived with the decedent for two years and had two children with him. The Commission found that the evidence showed she was actually wholly dependent upon the decedent for her support at the time of the decedent's death even though she was still married to Harvey. Relying on *Day*, the Commissioner denied Julia's claim for benefits. The Court of Appeals upheld that ruling, relying on *Day*.

But, because there was no legal impediment to the relationship (common law marriage) of the couple, and because the Commission found that Yvonne was dependent upon Decedent (Finding 52, Order p. 67), these cases are inapposite to Yvonne's benefits claim as Decedent's

dependent. The Commission thus erred, as a matter of law, in concluding otherwise.

V. THE COMMISSIONER AND THE FULL COMMISSION ERRED IN RELYING ON
FIELDS V. HOLLOWELL & HOLLOWELL, ET AL., 238 N.C. 614, 78 S.E.2d 740 (1953).

Likewise, the Commission erred in relying on *Fields v. Hollowell & Hollowell, et al.*, 238 N.C. 614, 78 S.E.2d 740 (1953) as persuasive authority in this case. When there is no South Carolina case law interpreting a provision of our Workers' Compensation Act, decisions from other jurisdictions with **identical or similar provisions** should be given careful consideration. *Bush v. Gingrey Bros.*, 100 S.E.2d 821, 823, 232 S.C. 20, 23 (1957) (emphasis added). North Carolina cases, like cases from other states, are not controlling. *Id.* In fact, South Carolina courts have not looked to North Carolina case law in past cases involving dependency under our "in all other cases" statute, § 42-9-120. Instead, on questions of dependency under that section, South Carolina courts have looked to cases from Colorado (*Bush*, 232 S.C. at 25), Virginia (*Day*, 216 S.C. at 342-343), and New York (*Young*, 301 S.C. at 528).

Additionally, North Carolina does not have "identical or similar" provisions relevant here, because it does not recognize common law marriage. Its Supreme Court has held that "[a] common law marriage or marriage by consent is not recognized by this State." *Duncan v. Duncan*, 232 N.C. App. 369, 373, 754 S.E.2d 451, 455 *review denied*, 367 N.C. 531, 762 S.E.2d 208 (2014) and *review dismissed*, 367 N.C. 531, 762 S.E.2d 208 (2014) (citing *State v. Lynch*, 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980)). Common law marriages cannot be created in North Carolina. *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012) *aff'd*, 366 N.C. 551, 742 S.E.2d 803 (2013) (citing *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897); *State v. Samuel*, 19 N.C. 177 (1836)).

For these reasons, *Fields* has no bearing whatsoever on the law of South Carolina as applied in this case.

VI. S.C. CODE § 42-9-120 DEPENDENCY IN "ALL OTHER CASES" IS NOT LIMITED TO RELATIVES.

The Workmen's Compensation Act was adopted for the benefit of the employees and their dependents, and it should be liberally construed in order to accomplish this humane purpose. *Sims v. S.C. State Comm'n of Forestry*, 235 S.C. 1, 9, 109 S.E.2d 701 (1959) The Act directs that benefits be paid to the "dependents" of the deceased worker. S.C. Code Ann. § 42-9-290 (2013). It does not define dependents. *Adams v. Texfi Indus.*, 320 S.C. 213, 216, 464 S.E.2d 109 (1995). It prescribes how dependence is to be established.³ Those who meet the specific statutory definitions of surviving spouse and children⁴ are conclusively presumed to be wholly dependent. S.C. Code Ann. § 42-9-110 (2013) All other claimants are required to factually prove some level of actual dependence and may lose their right to compensation if other claimants establish total dependence and they fail to prove actual total dependence. S.C. Code Ann. § 42-9-120 (2013). *Adams v. Texfi Indus.*, 320 S.C. 213, 216, 464 S.E.2d 109 (1995).

Only in one very specific circumstance, not applicable here, the Act limits the definition of dependents who can recover death benefits to very close relatives: Where the claimants are not citizens or residents of the United States or Canada, the Workers Compensation Act limits

³It also directs how the award is to be divided among total dependents, partial dependents and nondependent children and parents. The total death benefit is to be divided among those who are wholly dependent unless there are none, in which case partial dependents are to be paid a portion of the award in accordance with the amount of support provided by the decedent. S.C. Code Ann. § 42-9-290 (2013). If no claimants establish total or partial dependency or if partial dependents can claim only part of the death benefit, the Law directs payment of the remaining death benefits to nondependent children, or if there are none, to the decedent's parents irrespective of age or dependency. S.C. Code Ann. § 42-9-140 (2013).

⁴Partially dependent claimants other than minor legitimate children of the decedent may be bumped up to the level of wholly dependent claimants if they meet the statutory definition of children in S.C. Code Ann. § 42-1-70 (2013).

recovery of death benefits to those meeting the statutory definition of surviving spouse or children, who are conclusively presumed wholly dependent, or in the absence of statutory surviving spouse or children to those meeting the statutory definition of surviving parents. S.C. Code Ann. § 42-9-290 (2013) There is no similar limitation for claimants who are citizens or residents of the United States or Canada (as Yvonne undisputedly is).

The absence of such limiting language in S.C. Code Ann. § 42-9-120 demonstrates legislative intent not to limit “dependents” to relatives, where such claimants are able to prove total or partial dependence. Clearly, had the legislature intended to limit this section to relatives, it was fully capable of doing so, having done so in S.C. Code Ann. § 42-9-290. In interpreting a statute, this Court's primary function is to ascertain the intent of the legislature. *E.g.*, *State v. Ramsey*, 311 S.C. 555, 430 S.E.2d 511 (1993). Of course, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *E.g.*, *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, however, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *E.g.*, *South Carolina Coastal Council v. South Carolina State Ethics Comm'n*, 306 S.C. 41, 410 S.E.2d 245 (1991). *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779, 70 A.L.R.5th 723 (1997).

South Carolina Second Injury Fund v. Young, 301 S.C. 524, 392 S.E.2d 807 (Ct. App. 1990) demonstrates that “dependent” is broader than the specific relatives (spouse, parents, children) named in various parts of the Act. In *Young*, a wholly dependent niece claimed a right to death benefits. The Second Injury Fund argued that she could not be a dependent under the Act because she was not one of the relatives specifically mentioned by the Act. The Court of Appeals

rejected that argument:

This contention has no merit whatever. Indeed, the Supreme Court put it to rest in *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950). There it said:

It is generally held that unless a Workmen's Compensation Act specifically sets forth who shall be considered wholly or partially dependent on the earnings of an employee, dependency and the extent thereof are to be determined as questions of fact in accordance with the facts as they exist at the time of the injury to the employee.

Our Act does not define dependency, and does not specifically indicate who are dependents, except the designated persons who are conclusively presumed to be wholly dependent upon the deceased employee. Stated generally, a dependent is one who looks to another for support and maintenance; one who is in fact dependent - one who relies on another for the reasonable necessities of life. *Id.*

In the forty years since *Day* was decided, our Act still does not define dependency, still does not list who may be dependents, and still only designates those persons who are conclusively presumed to be wholly dependent upon a deceased employee. See S.C. Code Ann. § 42-9-110 (1976) ("A surviving spouse or a child shall be conclusively presumed to be wholly dependent for support on a deceased employee."); *id.* § 42-9-120 ("In all other cases questions of dependency . . . shall be determined in accordance with the facts as the facts may be at the time of the accident ..."). Until our Act is changed, then, a niece of a deceased employee may ordinarily qualify for compensation as a dependent. ...

Because no hard and fast rule can be laid down as to what constitutes actual dependency and because the question of dependency, as the *Day* case says, is one of fact, each case must rest and be determined on its own particular facts and circumstances.

Young, 301 S.C. at 526-529.

S.C. Code § 42-9-120 thus does not limit "dependents" to relatives and the Commissioner and Full Commission erred in concluding (Finding No. 52) that it and S.C. Code § 42-9-130 are immaterial. (Order p 67).

VII. THE COMMISSION ERRED IN DENYING YVONNE BENEFITS AS DECEDENT'S PRIMARY DEPENDENT.

The Commission found (Findings No. 12 and 39) that Yvonne was dependent on Decedent and had a greater level of dependency than Decedent's Mother. Order pp. 55 and 63. These findings are amply supported by the evidence that Decedent's entire weekly paycheck, but for approximately \$50.00 spending money (which he shared with his Mother), went to paying Yvonne's household bills and expenses. (See Statement of Facts above). There was no substantial evidence from which to conclude otherwise. Decedent had an average weekly wage of \$567.27 (Stipulation 2). (Order p. 2). Of this amount, the unrefuted evidence showed that after subtracting \$50.00 for spending money shared with Mother, \$517.27 per week went to Yvonne's expenses.

The Commission noted that Mother testified that she received a total of \$50.00-\$60.00 monthly from Decedent (Vol. 2 Hrg. Tr. p. 40/4-9), which translates mathematically to approximately \$15.00 per week; and it noted that she also received financial help from her other son, the P.R., and also receives social security benefits (Id. p. 40/10-25). (Order p. 19). Mother testified to other facts showing her substantial dependence on the P.R.: She lives in a home owned by the P.R. and he helps her with her water bills. (Vol. 2 Hrg. Tr. pp. 45/17-46/2).

Judicial review of the commission's order is limited to determining whether the findings are supported by substantial evidence. *Lowe v. AM-CAN Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct.App.1984). Substantial evidence is that evidence which would allow reasonable minds to reach the conclusion the full commission reached. *Camp v. Spartan Mills*, 302 S.C. 348, 350, 396 S.E.2d 121, 122 (Ct. App. 1990) (citation omitted). The determination of witness credibility and the weight to be accorded evidence is reserved to the commission. *Ford v.*

Allied Chem. Corp., 252 S.C. 561, 167 S.E.2d 564 (1969); *DeBruhl v. Kershaw County Sheriff's Dep't*, 303 S.C. 20, 397 S.E.2d 782 (Ct.App.1990). This court cannot substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. S.C.Code Ann. § 1-23-380(A)(6) (Supp.1994). *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 30, 459 S.E.2d 324, 327 (Ct. App. 1995).

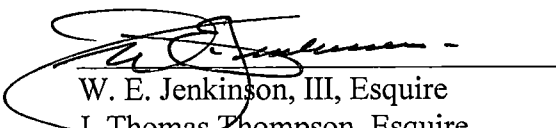
Thus, in light of the Commission's errors of law addressed in argument above, the matter must be remanded for apportionment of Decedent's benefits, primarily to Yvonne, in accordance with the statute and the findings as to Yvonne's dependency. "If there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency." S.C. Code Ann. § 42-9-130.

CONCLUSION

On the basis of all of the above and foregoing it is respectfully requested that the Orders of the Commissioner and Full Commission be reversed on the issue of the beneficiary of death benefits and that the matter be remanded for further Orders allocating those benefits primarily to Yvonne Burns in accordance with statutory and case law of South Carolina.

Respectfully submitted,

May 31, 2016


W. E. Jenkinson, III, Esquire
J. Thomas Thompson, Esquire
Jenkinson, Jarrett & Kellahan, PA
Telephone: (843) 355-2000
Facsimile: (843) 355-2010
Email: Billy@Jenkinsonlaw.com
Attorneys for Appellant