

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY  
Workers Compensation Commission

CASE NO. 2016-000509

SUSIE HENLEY, EMPLOYEE,

v.

OTIS SPUNKMEYER, EMPLOYER, and TRUMBULL  
INSURANCE COMPANY c/o THE HARTFORD, CARRIER, RESPONDENTS.

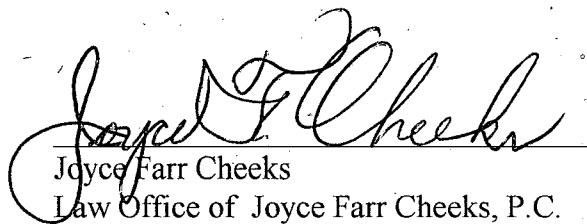
EX PARTE:

DAVID HENLEY.....APPELLANT,

AND

JEANNETTE PADGETT, JOEL PADGETT,  
AND MAURICEPADGETT.....RESPONDENTS.

BRIEF OF APPELLANT



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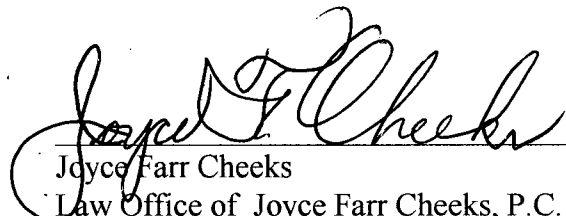
  
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TABLE OF CONTENTS

Table of Authorities..... ii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Facts ..... 8

Arguments

1. THE SUBSTANTIAL EVIDENCE IN THE RECORD DOES NOT SUPPORT THE APPELLATE PANEL'S FINDING AND CONCLUSION THAT APPELLANT DAVID HENLEY DOES NOT QUALIFY AS DECEDENT'S SURVIVING SPOUSE.....13

2. THE APPELLATE PANEL'S ORDER VIOLATES THE REQUIREMENTS OF S.C. CODE §42-17-40 WITH REGARD TO THE COMMISSION'S DUTY TO MAKE ADEQUATE FINDINGS AND CONCLUSIONS.....19

3. APPELLANT WAS DEPENDENT UPON DECEDENT FOR SUPPORT AS ANTICIPATED IN THE S.C. WORKERS' COMPENSATION ACT AND ENTITLED TO BENEFITS ACCORDINGLY.....20

Conclusion.....22

## TABLE OF AUTHORITIES

### CASES

Adams v. Texfi Industries, 320 S.C. 213, 216, 464 S.E.2d 109, 111 (1995).....	20
Adams v. Texfi Industries, 341 S.C. 401, 535 S.E.2d 124 (S. C. 2000).....	15
Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804.....	20
Bowlin v. Bowlin, 285 S.E. 2d 273, 274, 276 (N.C. Ct. of Appeals, 1981).....	14, 16
Day v. Day, 216 S.C. 334, 342, 58 S.E.2d 83, 86-87 (1950).....	21
Holley v. Owens Corning Fiberglas Corp., 301 S.C. 519, 392 S.E.2d 804 (Ct. App. 1990), cert. granted, opinion adopted, 302 S.C. 518, 397 S.E.2d 377 (1990).....	14
Jones v. Leagan, 384 S.C. 1, 12, 681 S.E.2d 6, 384 (Ct. App., 2009).....	17
Lark v. Bi-Lo, Inc., 276 S.C.130, 135, 276 S.E.2d 304, 306 (1981).....	12
Nettles v. Spartanburg Sch. Dist. 7, 341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000).....	20
Rogers v. University Motor Inn, 103 N.C. App. 456, 461, 405 S.E.2d 770 (1991).....	17, 18
Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005).....	12
South Carolina Second Injury Fund v. Young, 301 S.C. 524, 392 S.E. 2d 807 (S.C. App, 1990).....	21
Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).....	12
Theisen v. Theisen, 394 S.C. 434, 442, 716 S.E.2d 271, 275 (2011).....	18
Thomas v. 5 Star Transportation; Opinion No. 5298 (S.C. App., 2015).....	12, 14-17

## STATUTES

S.C. Code Ann. § 1–23–380 (Supp. 2014).....	12
S.C. Code Ann. § 42–1–175.....	13, 17, 19
S. C. Code Ann. § 42-9–110.....	13,15
S. C. Code Ann. § 42-9–290.....	1, 13, 16
S. C. Code §42-9-120.....	19, 20
S. C. Code §42-9-140.....	21
S.C. Code Ann. § 42-17-40 (Supp. 2010).....	19

## OTHER AUTHORITIES

99 C.J.S. <i>Workers' Compensation</i> § 263.....	18
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## **STATEMENT OF ISSUES ON APPEAL**

1. DID THE APPELLATE PANEL ERR IN FINDING AND CONCLUDING THAT APPELLANT DAVID HENLEY DOES NOT QUALIFY AS CLAIMANT'S SURVIVING SPOUSE PURSUANT TO S.C. CODE ANN. §42-1-175?
2. DID THE APPELLATE PANEL ERR IN FAILING TO FULLY CONSIDER AND/OR RULE ON THE ISSUE OF WHETHER APPELLANT DAVID HENLEY WAS DEPENDENT, EITHER WHOLLY OR PARTIALLY, ON THE CLAIMANT IMMEDIATELY PRIOR TO HER WORK RELATED DEATH.
3. DID THE APPELLATE PANEL ERR IN FAILING TO FIND AND CONCLUDE THAT APPELLANT DAVID HENLEY WAS DEPENDENT, EITHER WHOLLY OR PARTIALLY, ON THE DECEDENT IMMEDIATELY PRIOR TO HER WORK RELATED DEATH.

## **STATEMENT OF THE CASE**

Claimant Susie Henley (decedent) worked for Otis Spunkmeyer, Inc. (Employer). On September 19, 2012, a broken dock door at the employer's premises fell on decedent and crushed her to death. The coroner reported asphyxiation secondary to a crush injury to the chest as the cause of death. Employer accepted the claim as a compensable death resulting proximately from an on-the-job injury by accident pursuant to the S. C. Worker's Compensation Act (the Act).

Thereafter, Employer retained Tuten Insurance Services Corporation to conduct a dependency investigation. On August 16, 2013, Employer filed a Form 21, Employer's Request for Hearing, to determine the amount of compensation for the decedent's death claim pursuant to S.C. Code Ann. §42-9-290.

After several continuances the single commissioner heard the case on April 14, 2015. Employer requested a determination of a good faith discovery of beneficiaries pursuant to Regulations 67-902 and 67-904, a determination as to whom death benefits should be disbursed, and asserted that Employer had paid decedent's funeral expenses.

The potential dependents/beneficiaries appeared at the hearing seeking an award of death benefits pursuant to S.C. Code Ann. §42-9-290. Specifically, potential dependent David Henley (Appellant) maintained that he is the surviving spouse and beneficiary of the decedent and entitled to a conclusive presumption of dependency; and if not determined to be the surviving spouse, Appellant maintained alternatively that he was wholly dependent, but at the very least, partially dependent upon the decedent pursuant to the Act.

Potential dependent/beneficiary George Williams (Williams) maintained that he is the surviving spouse and entitled to a presumption of dependency because there is no record of any divorce from his marriage to decedent, and, as a result, the decedent's marriage to Appellant is void. Williams further asserted that decedent's desertion was justifiable cause for their separation.

Potential dependents/beneficiaries Maurice Padgett, Joel Padgett, and Jeanette Padgett, decedent's adult children, maintained that neither Appellant nor Williams meets the definition of a surviving spouse, and, as a result, each of decedent's three (3) children is entitled to benefits under §42-9-140(a). Potential dependents Maurice, Joel, and Jeanette Padgett further asserted that they meet the definition of dependents under the statute even though they do not meet the presumption.

Potential dependents Sequoia and Damia Padgett, Jeanette Padgett's minor children and decedent's only grandchildren, maintained that they were wholly dependent upon the decedent, and if not deemed to be wholly dependent, they were at least partially dependent upon the decedent.

The parties stipulated at the hearing to the following:

1. This is an admitted death resulting proximately from the accident.
2. The South Carolina Workers' Compensation Commission has jurisdiction over this matter.

3. The purpose of the hearing is to determine all issues as set forth on the Forms 52 and 53, specifically to determine to whom benefits are payable and in what amount.

4. All parties and potential dependents received timely and proper notice of the scheduled hearing.

5. Claimant's average weekly wage is \$695.82, with a corresponding compensation rate of \$463.90.

6. Venue is proper in Richland County, South Carolina.

In addition to the parties' APA submissions, the Commission's WCC File No. 1212974, with the exception of self-serving declarations and unstipulated medical reports, was made a part of the record of the case.

The single commissioner issued his order on August 7, 2015. Only Appellant David Henley appealed the single commissioner's decision.

The appellate panel issued its Order on February 8, 2016 based on the record in the case. The appellate panel affirmed the Single Commissioner's order in its entirety, finding and concluding as follows:

#### Findings of Fact

1. That all parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Claimant (deceased) as employee, and Otis Spunkmeyer Holdings, Inc. and Trumbull Insurance Company c/o The Hartford as Employer/Carrier.

2. That jurisdiction and venue are proper.

3. That pursuant to Regulation 67-902, the Employer/Carrier conducted an exhaustive good-faith dependency investigation to determine the proper people dependent upon the

Deceased Employee for support and, therefore, to whom the death benefits should be payable.

4. This is an admitted death claim that occurred on September 19, 2012, while Claimant was working on the premises of the Employer.

5. Claimant had an average weekly wage of \$695.82 with a corresponding compensation rate of \$463.90.

6. That the good faith dependency investigation performed by Tuten Insurance Services Corporation revealed seven potential dependents: (a) David Henley; (b) George Williams; (c) Jeanette Padgett; (d) Joel Padgett; (e) Maurice Padgett; (f) Sequoia Padgett; (g) Damia Padgett.

7. That the Employer has already paid the funeral expenses of Claimant, totaling \$13,431.42.

8. That Mr. George Williams is entitled to no benefits in this matter for the following reasons:

(a) We find the testimony of Mr. Williams void of any credibility;

(b) Claimant and Mr. Williams were lawfully married on July 15, 1988;

(c) By Order of the Family Court on January 9, 1990, a separation document was approved. I specifically note that Mr. Williams was the moving party in that action;

(d) We find that Mr. Williams was not dependent upon the Claimant for support;

(e) We find that no record exists proving that the marriage ended in divorce;

(f) We find that Mr. Williams and Claimant were not living together at the time of her death and were not living apart for justifiable cause;

(g) We find Mr. Williams' assertion that Claimant deserted him lacks any merit;

(h) Mr. Williams re-married in spite of his assertion that he is the lawful spouse of Claimant and has been married for twelve years.

9. That Mr. David Henley is entitled to no benefits in this matter for the following reasons:

(a) We find this case different from *Thomas v. Five Star Transportation* for a number of reasons:

(1) In the instant matter, we cannot find that Claimant and Mr. Henley entered into this marriage in good faith. It is clear that the Claimant was aware of an impediment to marriage;

(2) In the instant matter, the impediment to marriage was never removed;

(3) Even if the good faith exception applies, we find that Mr. Henley and Claimant were living apart for no justifiable reason. It is clear they were living apart intentionally and we find insufficient evidence to conclude they were planning to re-unite, other than Mr. Henley's self-serving testimony.

10. That Sequoia Padgett and Damia Padgett were not dependent upon the Claimant at the time of her death. While both were the beneficiaries of Claimant's generosity, it never rose to the level of dependency.

11. That Maurice Padgett, Joel Padgett, and Jeanette Padgett were not dependent upon the Claimant at the time of her death. We find that "dependent" connotes someone who relies upon another for support and is not able to exist or sustain oneself without the power or aid of someone else (see *Black's Dictionary*). It is abundantly clear that each of these individuals relied upon the support of their mother; however, it is equally clear that each of them are able to exist or sustain themselves without the assistance of their mother. The fact

that each felt no compunction about their reliance upon their mother in no way translates that reliance into dependency.

12. That Claimant left no dependents in this matter. As a result, benefits are to be divided equally according to §42-9-140(a) to her children, Maurice Padgett, Joel Padgett, and Jeanette Padgett.

13. That Maurice Padgett, Joel Padgett, and Jeanette Padgett are entitled the commuted balance of the 500 weeks of death benefits, less burial expenses, less \$1400 in Guardian ad litem fees subject to a Form 61 Attorney Fee Petition approved by the Commission, pursuant to the application of §42-9-140(a) and §42-9-290.

#### Conclusions of Law

1. Under the South Carolina Workers' Compensation Act and other applicable law, it is the determination of the undersigned Commissioner that under §42-9-290 and Regulation 67-902 and 67-904, Defendants have performed an exhaustive and good faith dependency investigation.

2. David Henley does not qualify as a surviving spouse under §42-1-175.

3. George Williams does not qualify as a surviving spouse under §42-1-175.

4. Sequoia Padgett and Damia Padgett were not dependent upon the Claimant at the time of her death. While both were the beneficiaries of Claimant's generosity, it never rose to the level of dependency. Sequoia Padgett and Damia Padgett do not qualify as dependents under §42-9-290.

5. Pursuant to Regulation 67-216(F), the Guardian *ad Litem* shall be paid from the proceeds of the claim for services rendered, subject to change through a Form 61 Attorney Fee Petition approved by the Commission.

6. Since Claimant did not leave a surviving spouse, benefits are to be divided equally according to §42-9-140(a) to her surviving non-dependent children, Maurice Padgett, Joel Padgett, and Jeanette Padgett.

7. In accordance with §42-9-290, the commuted value of 500 weeks of death benefits is 454.78 weeks, which, when multiplied by the applicable compensation rate, is equal to \$210,972.44, less the burial expenses (\$13,431.42), less guardian *ad litem* attorney's fees (\$1400.00) subject to a Form 61 Attorney Fee Petition approved by the Commission, equals a total amount of \$196,141.02, which is subject to change pending approval of the Form 61 by the Commission.

8. In accordance with §42-9-290, Maurice Padgett is entitled to one-third (1/3) of the total sum of the commuted death benefits, less burial expenses and guardian *ad litem* attorney's fees subject to a Form 61 Attorney Fee Petition approved by the Commission, in the amount of \$65,380.34. A final amount of compensation is subject to change and will be determined upon approval of the Form 61 by the Commission.

9. In accordance with §42-9-290, Joel Padgett is entitled to one-third (1/3) of the total sum of the commuted death benefits, less burial expenses and guardian *ad litem* attorney's fees subject to a Form 61 Attorney Fee Petition approved by the Commission, in the amount of \$65,380.34. A final amount of compensation is subject to change and will be determined upon approval of the Form 61 by the Commission.

10. In accordance with §42-9-290, Jeanette Padgett is entitled to one-third (1/3) of the total sum of the commuted death benefits, less burial expenses and guardian *ad litem* attorney's fees subject to a Form 61 Attorney Fee Petition approved by the Commission, in the amount of \$65,380.34. A final amount of compensation is subject to change and will be

determined upon approval of the Form 61 by the Commission.

11. Pursuant to §42-9-290, §42-9-340, Regulation 67-902, and Regulation 67-904, the Defendants performed a good faith dependency investigation in this matter and satisfied their obligations and are fully discharged of any obligations and liabilities for workers' compensation benefits of any kind arising out of this claim after making payments as set forth above herein.

12. Pursuant to §42-9-290 and §42-9-140(A), the Employer has already paid the funeral expenses of Claimant, totaling \$13,431.42.

13. The findings of fact as set forth are construed to be conclusions of law as applicable. This appeal followed.

### **FACTS**

The substantial evidence of record conclusively reveals the following facts:

Appellant David Henley is a double amputee. His first amputation, his left leg, occurred during the time he lived with decedent. The right leg amputation occurred after he moved into a separate residence, but decedent assisted with his care and support through both amputations until the day she died. (R. p.92, ll.24-25; R.p.93, ll.2-15.)

Appellant and decedent applied for a marriage license on March 1, 2010, after living together approximately seven years. (R.p.200, Marriage License; R. p.88, ll.20-25; R. p.89, ll. 1-5.) Both reported on their license application that this would be their second marriage. (R.p.200, Marriage License.) They had their wedding ceremony on March 6, 2010. Appellant was 53 years old and decedent was 45 years old. Appellant, decedent's children and her sister all believed she was divorced when she married Appellant because she told them she was divorced. (R.p.62, ll. 14-21; R. p.81, ll. 20-23; R. p. 82, ll. 3-6, 11-20; R. p. 95, ll.1-5, 15-17; R. p.111, ll.14-16; R. p.142, ll.20-25.).

Decedent had three children when she and Appellant began living together around 2003. Her two youngest children, twins Jeanette Padgett (daughter) and Joel Padgett (son), were about 16 years old and her oldest son Maurice Padgett was about 18 at the time. Decedent's twin daughter Jeanette gave birth to her first child the same year and her second child the following year in 2004. (R. p.104, ll.17-25; R. p.105, ll. 4-15.)

From the time decedent and Appellant began living together in 2003 one or both of the twins consistently lived with them, along with the daughter's two children. (R. p.106, ll. 10-25; R. p.109, ll. 20-23; R. p.110, ll 1-4; R.p.139, ll.8-13.) Decedent assisted her children financially until she died—almost to a fault. (R. p. 125, ll.11-25; R. p.126, ll.7-9, 23-25.) The twins chose not to work after they reached adulthood because they knew their mother, decedent, would give them money when they ran short or out. Instead of working, they relied heavily on decedent to help pay their and the grandchildren's living expenses. (R. p.134, ll. 2-17, 20-25; R. p. 135, ll. 1-11; R. p.136, ll. 1-3.) After they reached adulthood, the twins made few if any financial contributions to the household expenses when they lived with Appellant and decedent. (R. p.139, ll. 11-22.)

Decedent and Appellant began having financial problems after his first amputation. Appellant testified without contradiction that he and decedent mutually agreed about a year before she died that he would move to a separate residence because of their finance related problems, but they were planning to move back together when she was killed at work. (R. p.64, l. 23-R. p.65, l. 4; R. p.78, l. 24-R. p.79, l. 5; R. p.92, ll.5-7; R. p. 96, ll.14-17, 20-24; Significantly, at the time decedent and Appellant were having financial problems and he moved to a separate residence, decedent's adult twins and her grandchildren were all living in the house with them. (R. p. 110, ll.1-4; R. p.122, ll.1-25; R.p.123, ll. 1-9; R. p.149, ll. 12-14.) Decedent's twin son testified that decedent and Appellant "fussed about [son] not contributing to the household expenses" while he

was living with them. (R.p.139, ll. 14-16.) Appellant testified without contradiction that at the time of her death decedent had moved from the house into an apartment and was living alone because the apartment did not have room for decedent's children and grandchildren. He further testified that he and decedent had resolved their differences and were planning to reunite when she was killed at work. (R. p.96, ll.4-24.)

Appellant testified without contradiction that he and decedent continued to have regular sexual relations beginning the first weekend he moved out of the house and throughout the entire time they lived in separate residences and decedent cared for him after his second amputation. (R. p. 92, ll.12-24; R. p.93, ll. 6-17; R. p.94, ll.6-9; R. p.96, ll.10-11.) He testified that they continued to help each other with bills and decedent regularly cooked, washed clothes and bought and brought groceries for him. Decedent also retained appellant on her health insurance. (R. p.93, ll.11-19; R. p.99, ll. 15-25, R. p. 100, ll. 1-2.) Appellant testified that his only income source was Social Security disability and he needed decedent's help to make ends meet and to take care of his activities of daily living, and she did it consistently and continuously. (R. p.94, ll.12-25.)

Decedent's twins confirmed that Appellant was a father to them and they and decedent regularly visited him after he moved into a separate residence. (R. p.129, ll.9-22; R. p. 145, ll.1-25.) They confirmed that decedent also bought and brought groceries and supplies to Appellant when she visited. (R. p. 129, ll. 9-16.) Decedent's twin son testified that his mother loved and cared for Appellant but he did not and would not know about their future plans or their sex life because his mother did not confide in her children about her marital relationship. (R p.141, ll. 22-25.; R. p. 144, ll. 21-25; R. p.154, ll. 17-24.) Daughter also testified that decedent did not talk with her children about her marriage issues. (R. p. 127, ll 16-19; R. 129, ll.23-25; R. p. 130, ll.1-4; R. p. 141, ll.22-24.) However, the Tuten investigator testified without objection that daughter acknowledged to

him that Appellant was dependent on decedent at the time of decedent's death. (R. p. 59, ll. 10-15.)

Appellant first learned that the court could not locate a divorce decree for decedent's first marriage after he filed for decedent's death benefits and employer conducted its dependency investigation. (R. p.102, ll. 10-17.) He testified that decedent believed and told him that she was divorced from her first husband. (Tr. p. 95, ll.1-18.)

Decedent's first husband testified and the evidence shows that he divorced his first wife about six months before he married decedent, his second wife, on July 15, 1988. (R. p. 169, ll. 6-9, 18-20; R. p. 214, Divorce Decree and Order.) He testified that he and decedent lived together about four months. (R. p. 170, ll.2-3.) A Greenwood county court order of separation filed January 1, 1990, reveals that decedent's first husband initiated the divorce action on July 6, 1989. (R. p. 214-216.) Decedent's first husband was 28 years old at the time, represented by private counsel and had been divorced previously. Decedent was 23 years old, represented by a legal services agency, and had never been through a divorce. (R. p. 169, l. 21-24; R. p. 173, ll. 7-25.) Decedent's first husband testified and the order confirms that they resolved all property issues between them. (R. p. 172, ll. 16-24.) He testified that he thought decedent got a divorce and she probably thought he did. (R. p. 174, ll. 4-7.) He married his third and present wife in a church wedding ceremony around 2003. (R. p.175, ll. 2, 25.) Decedent married appellant seven years later in 2010. (R. p. 200.)

## **ARGUMENTS**

The Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel. Under the scope of review established in the APA, the appellate court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is

“clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.”

S.C. Code Ann. § 1-23-380(5)(e).

Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.

“In a workers' compensation appeal, an appellate court can reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5) (Supp. 2014). This court may not "substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse whe[n] the decision is affected by an error of law." *Stone v. Traylor Bros.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005).

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) (internal quotation marks omitted).” *Thomas v. 5 Star Transportation*, Opinion No. 5298 (Ct. App. 2015)

**I. THE SUBSTANTIAL EVIDENCE IN THE RECORD DOES NOT SUPPORT THE APPELLATE PANEL'S FINDING AND CONCLUSION THAT APPELLANT DAVID HENLEY DOES NOT QUALIFY AS DECEDENT'S SURVIVING SPOUSE PURSUANT TO S.C. CODE §42-1-175.**

SC. Code Ann. § 42-9-290 (2015) provides if an employee dies as the result of an accident arising out of the course of employment, the employer must provide death benefits to dependents wholly dependent on the decedent's earnings for support. "A surviving spouse shall be conclusively presumed to be wholly dependent for support on a deceased employee." S. C. Code Ann. §42-9-110.

"The term 'surviving spouse' includes only the decedent's wife or husband living with or dependent for support upon the decedent at the time of the decedent's death or living apart from the decedent for justifiable cause or by reason of desertion by the decedent at such time." S.C. Code Ann. § 42-1-175.

The Appellate Panel, in affirming the single commissioner, held that Appellant David Henley is entitled to no benefits in this matter because:

- a. the panel could not find that decedent and Appellant entered into their marriage in good faith;
- b. Decedent was aware of an impediment to marriage;
- c. the impediment to marriage was never removed in this case;
- d. Mr. and Mrs. Henley were living apart for no justifiable cause; and,
- e. insufficient evidence existed to conclude that Appellant and Mrs. Henley "were planning to reunite, other than [Mr. Henley's] self-serving testimony?"

The Appellate Panel concluded that Appellant was not entitled to any benefits as decedent's surviving spouse because the facts here differed from the facts in Thomas v. 5 Star Trnsportation for the following reasons:

- a. Decedent was clearly aware of an impediment to marriage;

b. The impediment was never removed; and,

c. Even if the good faith exception applies, decedent and Mr. Henley were living apart intentionally and insufficient evidence exists to conclude they were planning to reunite, other than Mr. Henley's self-serving testimony.

In *Thomas*, the South Carolina Court of Appeals articulated the "good faith [marriage] exception," and relied on a North Carolina Supreme Court case with facts which closely mirror the facts in this case. *Thomas v. 5 Star Transportation*, Opinion No. 5298, Ct. App., Filed Feb. 18, 2015. The North Carolina case applied South Carolina law in finding that the husband and wife entered into a good faith marriage. *Bowlin v. Bowlin*, 285 S.E. 2d 273, 274, 276 (N.C. Ct. of Appeals, 1981). "The South Carolina Workers' Compensation Act was tailored after the North Carolina Act and opinions of the North Carolina Supreme Court construing such Act are entitled to great weight with the appellate courts of this state." *Thomas v. 5 Star Transportation*, Opinion No. 5298, Ct. App., Filed Feb. 18, 2015; *Holley v. Owens Corning Fiberglas Corp.*, 301 S.C. 519, 523, 392 S.E.2d 804, 806 (Ct. App. 1990), *cert. granted, opinion adopted*, 302 S.C. 518, 397 S.E.2d 377 (1990).

In *Bowlin*, "[w]ife did not learn [decedent] husband was not divorced from his previous wife when they married until she applied for social security benefits after he died. Husband "had told her that he had been to his lawyer's office and received some papers and that he had torn them up. The next day they went to South Carolina and were married." *Id.* On the day they married, husband stated he was divorced in wife's presence. *Id.* The N.C. Supreme Court found decedent husband's "good faith belief that he was legally divorced on the date of his marriage is supported by his mother's testimony that [he] said that he was divorced." *Id.* The court noted, "More importantly, there is no evidence to the contrary." *Id.* The court found it could not imply wrong or fraud to husband and held he and wife entered into the marriage ceremony in good faith. *Id.*" *Thomas v. 5 Star Transportation*, Opinion No. 5298, Ct. App., Filed Feb. 18, 2015.

In *Thomas*, wife filed a workers' compensation claim for benefits after husband was killed in an on-the-job accident. Wife had applied for social security benefits after husband died and found out for the first time that husband's divorce from his previous wife was not final until almost five (5) months after her marriage ceremony to husband. Husband's employer denied that wife was entitled to workers compensation benefits because her marriage to husband was void. The Court of Appeals held the Appellate Panel erred in finding wife was husband's putative spouse because no South Carolina Court has recognized the putative marriage doctrine. The Court of Appeals affirmed the Appellate Panel's decision on other grounds, however, holding that "the only evidence as to whether [husband] knew of an impediment to his marriage with [wife] was [wife's] testimony he said he was divorced from [his previous wife]. He was served with a summons and complaint for divorce from [his previous wife] more than two months prior to the marriage ceremony with wife." *Thomas v. 5 Star Transportation*, Opinion No. 5298, Ct. App., Filed Feb. 18, 2015. The Court held that, much like *Bowlin*, the employer in *Thomas* presented no evidence that decedent husband knew he could not marry when he and his second wife had their marriage ceremony. The *Thomas* Court found additionally that decedent and wife continued to act as husband and wife after the impediment was removed. Accordingly, the Court found that wife was decedent's surviving spouse because she and decedent married in good faith." *Thomas v. 5 Star Transportation*, Opinion No. 5298, Ct. App., Filed Feb. 18, 2015.

In the instant case, as in *Thomas* and *Bowlin*, the substantial, overwhelming and undisputed evidence clearly shows that Appellant and decedent married in good faith. The Tuten Investigation reports of various recorded statements and the testimony of the parties/witnesses reflect the following:

David Henley, purported surviving spouse of deceased: “David was not certain when Susie and her first husband, George [Williams], were married, but he did recall that their marriage ended in divorce. David married the decedent in March of 2010 in Lexington County. (R. p.190, Tuten Investigation.)

Jeanette Padgett, daughter of deceased: Jeanette confirmed that her mother was married two times throughout the course of her life. Her first husband was named George Williams and the two of them were married around 1988 or 1989 and were divorced before the decedent married her second husband, David Henley. (R. p.191, Tuten Investigation.)

Annie Buckett, sister of deceased: “Annie stated her sister [the decedent] had been married two times throughout the course of her life. Her first husband was named George Williams and the two of them were married and divorced a long time ago... Annie stated that Susie married her second husband, David Henley, around... February of 2010.” (R. p. 193-194, Tuten Investigation.)

Cheryl Spencer, friend of deceased: Decedent “was married two times throughout the course of her life.” She married her first husband “long ago. That marriage, according to Cheryl, ended in divorce... [Decedent] married her second husband, David, around 2009 or 2010.”

(R. p.192-193, Tuten Investigation.)

In addition to the statements above given by decedent’s closest relatives and friends, the evidence includes the marriage license and certificate of decedent and David Henley, which shows they were married on March 16, 2010. Both parties stated that this was their second marriage.

Here, as in *Thomas* and *Bowlin*, there is no evidence decedent was aware of an impediment to her marriage to Appellant. Rather, the substantial, overwhelming and uncontroverted evidence as to whether decedent knew of an existing impediment to her marriage with Appellant clearly shows that decedent believed and told everyone she was divorced from her first husband. Even her first husband testified that decedent probably believed he had gotten a divorce from her. (R. p. 174, ll. 4-7.) Here, as in *Thomas*, there is no evidence decedent knew she could not marry when she and Appellant had their marriage ceremony. “More importantly, the record is devoid of any evidence to the contrary.” *Bowlin*, at 276; *Thomas*, (“Much like *Bowlin*, 5 Star presented no evidence [decedent] did not know he could not marry when he and wife had their marriage ceremony.)

The appellate panel's finding that decedent knew she was still married erroneously rests on surmise, conjecture, or speculation and implies wrong or fraud to decedent. *Thomas v. 5 Star Transportation*, Opinion No. 5298, Ct. App., Filed Feb. 18, 2015 ("The court cannot imply wrong or fraud to husband and held [decedent] and wife entered into the marriage ceremony in good faith."). The substantial and overwhelming evidence in the record clearly shows that both decedent and Appellant entered into their marriage in good faith.

The appellate panel further found that even if the good faith exception applies and Appellant is determined to be decedent's surviving spouse, decedent and Appellant were living apart intentionally and insufficient evidence exists to conclude they were planning to reunite other than Appellant's self-serving testimony. "Sworn testimony, albeit self-serving, is still evidence." *Jones v. Leagan*, 384 S.C. 1, 12, 681 S.E.2d 6, 384 (Ct. App., 2009). Glaringly, the panel did not find that Appellant's testimony lacked credibility but did specifically find that decedent's first husband's testimony "was void of credibility." Further, none of the parties presented any evidence or testimony contradicting Appellant's testimony that he and decedent were planning to reunite. Moreover, the statement of Appellant's Aunt Anita Etheridge supports his testimony. (Statement in W.C. Record.) Based on the credible, substantial and uncontroverted evidence, the panel erred in failing to find that Appellant and decedent were planning to reunite.

Pursuant to S.C. Code §42-1-175, the term "surviving spouse" includes only the decedent's wife or husband living with or dependent for support upon the decedent at the time of the decedent's death or living apart from the decedent for justifiable cause or by reason of desertion by the decedent at such time. "There is no specific formula for the definition of 'justifiable cause' under the statute. *Rogers v. University Motor Inn*, 103 N.C. App. 456, 461, 405 S.E.2d 770 (1991). The panel erroneously determined that no justifiable cause exists for intentionally living.

The Appellate Panel also found that Appellant and decedent were living apart for no justifiable cause. North Carolina Supreme Court addressed the issue of 'justifiable cause' in the workers' compensation setting, holding that "the relevant time period for determining justifiable cause is the months immediately preceding [the decedent's] death." *Rogers v. University Motor Inn*, 103 N.C. App. 456, 461, 405 S.E.2d 770, 773 (1991) (internal quotation marks omitted). That Court also has held that the Commission "must consider the complexity and history of the particular relationship in order to determine whether the appellant was separated for justifiable cause." *Id.* See, also 99 C.J.S. *Workers' Compensation* § 263 ("The words 'justifiable cause,' as employed in the workers' compensation acts, have the meaning given to them in separation and divorce cases.) The S. C. Supreme Court held a spouse does not need grounds that would merit a fault-based divorce in order to live separate and apart from the other spouse). *Theisen v. Theisen*, 394 S.C. 434, 442, 716 S.E.2d 271, 275 (2011).

The substantial and overwhelming evidence here shows that in the months immediately preceding Appellant's move into a separate residence, he and decedent were having disagreements over financial issues. His left leg was recently amputated and he had to adjust and adapt to this major life change. Additionally, decedent's adult daughter, adult son and 2 grandchildren regularly resided with them. Decedent's son and daughter chose not to work because they knew decedent would give them money and fill in the gap when they ran short or out of money. According to Appellant's uncontroverted testimony, he and decedent were having financial difficulties and agreed that he would move to a separate residence. Considering the nature, complexity and history of their relationship and decedent's habit of paying her children's expenses, decedent and Appellant were separated for justifiable cause yet maintained their dependent and intimate relationship.

Appellant and decedent married in good faith and Appellant is decedent's surviving spouse. As decedent's surviving spouse, he is conclusively presumed to be wholly dependent on the decedent. Accordingly, this Panel must reverse the single commissioner's decision and find that Appellant is the surviving spouse of decedent and thereby entitled to a conclusive presumption of dependency and other applicable benefits as decedent's surviving spouse.

**II. THE APPELLATE PANEL'S ORDER VIOLATES THE REQUIREMENTS OF S.C. CODE §42-17-40 WITH REGARD TO THE COMMISSION'S DUTY TO MAKE ADEQUATE FINDINGS AND CONCLUSIONS.**

Appellant David Henley argued, alternatively, that he was a dependent of the decedent, either wholly or partially, even if he does not qualify as decedent's surviving spouse pursuant to S.C. Code §42-1-175.

The Appellate Panel found and concluded that decedent's adult children and minor grandchildren were not dependent upon decedent at the time of her death. The panel then found and concluded that decedent left no dependents in this matter." (R, p.40.) However, the panel failed to make separate findings regarding Appellant's alternative argument that he was wholly or partially dependent based on the facts and circumstances in this case.

The Appellate Panel's order stated that decedent left no dependents but it fails to elucidate the basis for the finding of fact as to Appellant. The Order amply discusses the dependency of decedent's children and grandchildren, but is void of any discussion of the applicability of the dependency statutes to Appellant.

The Workers' Compensation Commission is the finder of fact. S.C. Code Ann. § 42-17-40(A) (Supp. 2010) provides that an award under the Workers' Compensation Act requires the order to include "a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue". The South Carolina Supreme Court has held the Commission is required to

make findings of fact which are "sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings." *Airco, Inc. v. Hollington*, 269 S.C. 152, 160, 236 S.E.2d 804, 808; *Nettles v. Spartanburg Sch. Dist. 7*, 341 S.C. 580, 590, 535 S.E.2d 146, 151 (Ct. App. 2000) (holding the Appellate Panel has a statutory duty to make a finding of fact for all "essential factual issues").

In this case, it may be appropriate to remand this matter to the Workers' Compensation Commission so the Commission may make sufficiently definite and detailed findings concerning the question of Appellant's dependency, in whole or in part, in accordance with the facts at the time of the accident. S. C. Code §42-9-120.

**III. EVEN IF HE IS NOT DECEDENT'S SURVIVING SPOUSE, APPELLANT WAS DEPENDENT ON DECEDENT FOR SUPPORT AS ANTICIPATED IN THE S.C. WORKERS' COMPENSATION ACT AND ENTITLED TO BENEFITS ACCORDINGLY.**

"One may be deemed wholly dependent either through a conclusive statutory presumption under section 42-9-110 or through a factual demonstration under section 42-9-120." *Adams v. Texfi Indus.*, 320 S.C. 213, 216, 464 S.E.2d 109, 111 (1995). In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident. S. C. Code §42-9-120.

The facts at the time of the accident show that Appellant was a double amputee and totally and permanently disabled. His only source of income and support was Social Security disability and the assistance decedent provided. It is indisputable that Appellant was divorced, believed decedent was divorced and married decedent in good faith. He treated her children so well that they referred to him as their father. Appellant and decedent's son and daughter all testified that decedent continued to care and provide for him even after he moved into a separate residence. They

continued to share bills. Decedent washed his clothes, cooked his food, bought his groceries, and she and/or the children delivered the groceries to him. Appellant testified without contradiction that he and decedent continued to have regular sexual relations, alternating between his house and her house. Daughter confirmed to the investigator that Appellant was dependent on decedent.

The Act clearly provides that persons other than spouses or children may be considered dependents if their actual dependency is shown by the evidence. “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. South Carolina Second Injury Fund v. Young, 392 S.E.2d 807, 808-809, 301 S.C. 524 (S.C. App., 1990); Day v. Day, 216 S.C. 334, 342, 58 S.E.2d 83, 86-87 (1950).

It is undisputed that Appellant was legally qualified to marry, believed decedent was divorced and married decedent in good faith, not learning of her prior undissolved previous marriage until after her death. It is also undisputed that decedent and Appellant maintained a marital dependency relationship, including sexual relations, until her death despite their living in different residences. Further, it is undisputed that decedent continued to support, provide and care for Appellant after he became a double amputee and he relied on her for the reasonable necessities of life. Appellant was wholly or at least partially dependent upon decedent until the day she died. Under these unique facts and circumstances, there is neither any reason nor any authority for denying Appellant dependent benefits.

Workers' Compensation death benefits may also be distributed among partially dependent persons and non-dependent children. S.C. Code Ann §42-9-140 (C) provides that “If the deceased

employee leaves a partial dependent or dependents as defined in Section 42-9-120, the employer shall pay compensation to those dependents, in accordance with Section 42-9-290, and the remainder of the commuted amounts provided for in Section 42-9-290...to his nondependent children.”

By failing to find Appellant dependent upon decedent, either wholly or partially, and totally denying any benefits to him, the appellate panel went against the weight of authority and the evidence while serving no apparent beneficial purpose. The facts and substantial evidence in this particular case as discussed above, dictate a finding that pursuant to the Act, Appellant was wholly or partially dependent for support upon decedent whom he believed in good faith to be his wife.

### **CONCLUSION**

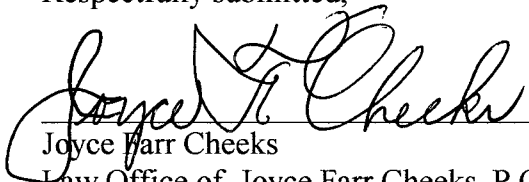
Based on the foregoing, the substantial and overwhelming evidence shows the only and irrefutable conclusion is that Appellant David Henley is decedent Susie Henley’s surviving spouse because they both entered into their marriage with a good faith belief that they could marry. As such, Mr. Henley is conclusively presumed to be wholly dependent for support on the decedent Susie Henley. Moreover, even if this Court determines that Appellant does not meet the conclusive statutory presumption that he was wholly dependent on the decedent, the Court should find from the uncontroverted facts and circumstances at the time of decedent’s accident that Appellant was wholly dependent on decedent and entitled to benefits accordingly.

Alternatively, if the Court determines that Appellant was not wholly dependent upon the decedent, the evidence is uncontroverted that he was at least partially dependent upon decedent for more than three months prior to her death. Accordingly, the Court should find that Appellant was at least partially dependent upon decedent and award the appropriate benefits pursuant to S.C. Code §42-9-140(C) and the Act.

For the reasons stated, this Court should reverse the Appellate Panel's decision and find that Appellant was wholly or partially dependent upon decedent at the time of and at least three months prior to decedent's death. Alternatively, this Court should remand this matter to the Workers' Compensation Commission to make sufficiently detailed findings concerning the question of Appellant's dependency, in whole or in part, in accordance with the facts at the time of the accident.

S. C. Code §42-9-120.

Respectfully submitted,



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