

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1212974

Susie Henley, (Deceased), Employee,
v.
Otis Spunkmeyer, Inc., Employer, and
Trumbull Insurance Company c/o The Hartford, Carrier, Respondents,
Ex Parte: David Henley Appellant,
And Jeannette Padgett, Joel Padgett, and Maurice Padgett Respondents.

MOTION TO DISMISS APPEAL

Respondents Otis Spunkmeyer, Inc. and Trumbull Insurance Company c/o The Hartford hereby move to dismiss the appeal in the above-reverenced matter with prejudice. Appellant David Henley has failed to meet the service requirements set forth in S.C. Code Ann. § 1-23-380(A)(2) and Rule 203, SCACR, and, therefore, this Court lacks appellate jurisdiction over this appeal.

The Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission that is the subject of this appeal ("Commission Decision") was served on the parties via electronic mail on March 19, 2019. (Exh. A). Appellant timely filed his Notice of Appeal on April 18, 2019 and served it on the other parties to the proceeding below on the same date. However, the Notice of Appeal did not include

evidence that the Notice of Appeal had been served on the Commission, which this Court noted in a deficiency letter to Appellant's counsel dated April 22, 2019.

Appellant has attempted to correct that deficiency by forwarding a Certificate of Service indicating the Notice of Appeal was served on the Commission on April 25, 2019. (Exh. B). Thus, pursuant to the Certificate of Service, service on the Commission was made more than 30 days after receipt of the Commission Decision.

Section 1-23-380 of the South Carolina Administrative Procedure Act provides, in pertinent part, that proceedings for appellate review of a Commission decision "are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency ... Copies of the notice of appeal must be served upon the agency and all parties of record." S.C. Code Ann. § 1-23-380(1). Pursuant to Rule 203(b)(6), "[w]hen a statute allows a decision of the administrative law court or agency (administrative tribunal) to be appealed directly to the Supreme Court or the Court of Appeals, the notice of appeal shall be served on the agency ... and all parties of record within thirty (30) days after receipt of the decision." Rule 203(b)(6), SCACR. In addition, the notice of appeal must be filed "within the time required to serve the notice of appeal under Rule 203(b)(6)" and "shall be accompanied by ... [p]roof of service showing that the notice has been served on the agency ... and all parties of record." Rule 203(d)(2)(B), SCACR. While the time for performing many actions under the Appellate Court Rules may be extended under Rule 263, the "time for serving the notice of appeal under Rule[] 203" is excepted from Rule 263 and cannot be extended for any reason. Rule 263(b), SCACR.

In other words, for all claims arising after July 1, 2007, as is the case with this claim, “the thirty-day deadline applies to service on an agency and proof of such service is required when a party files the notice of appeal with the Court of Appeals.” Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 96, 668 S.E.2d 795, 797-798 (2008). Appellant’s failure to serve the Commission within 30 days of receipt of the Commission Decision deprives this Court of appellate jurisdiction and, as a result, this appeal should be dismissed with prejudice.

This motion conforms with Rules 240 and Rule 267, SCACR.

May 1, 2019

McANGUS GOUDELOCK & COURIE, LLC



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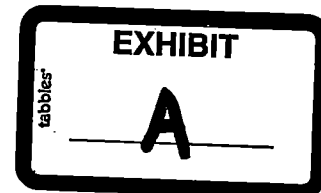
(843) 576-2900

*Attorneys for Respondents Otis Spunkmeyer, Inc.
and Trumbull Insurance Company c/o The Hartford*

From: appeals@wcc.sc.gov
Sent: Tuesday, March 19, 2019 12:59 PM
To: Heather Cullum; JOYCECHEEKS@GMAIL.COM; Mundi George; TINSLERJ@GMAIL.COM;
WATSONLAWFIRM@SC.TWCBC.COM; APPEALS@WCC.SC.GOV
Subject: Full Commission Order - WCC#:1212974 - HENLEY
Attachments: OB7FD5.pdf

Attached is the Full Commission Order for WCC#: 1212974

R08 ORD - Full Commission Order - 3/19/2019 - ORDER#: 80393 - WCC #: 1212974



**DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

**COMMISSION PANEL: THE HONORABLE SUSAN S. BARDEN, THE HONORABLE R.
MICHAEL CAMPBELL, II, THE HONORABLE AVERY B. WILKERSON, JR.**

SCWCC FILE NO.: 1212974

Susie Henley, (Deceased)

Employee/Claimant,

v.

Otis Spunkmeyer Holdings, Inc.,

Employer and

Trumbull Insurance Company,

Carrier/Defendants.

On Remittitur from the South Carolina Court of Appeals

Filed:

March 19, 2019

STATEMENT OF THE CASE

On September 12th, 2012, Deceased Employee Susie Henley was involved in an injury by accident arising out of and in the course of her employment with Otis Spunkmeyer, Inc., which resulted in her death. Defendants admitted the accident and death were causally related to her employment. On April 14th, 2015, the single Commissioner conducted a hearing to determine to whom benefits were payable, and in what amount. The single Commissioner issued his Decision and Order on August 7th, 2015. David Henley requested review by the Full Commission, which heard oral arguments on November 17th, 2015, and issued its Decision and Order on February 8th, 2016. David Henley appealed the Full Commission decision to the South Carolina Court of Appeals.

In the opinion filed on May 9th, 2018, the Court found that substantial evidence supports the Appellate Panel's conclusion that David Henley does not qualify as Deceased Employee's surviving spouse. However, the Court directed the Appellate Panel to make sufficiently detailed findings on the issue of whether David Henley would nonetheless qualify as a dependent—whether wholly or partially--pursuant to Section 42-9-120.

FINDINGS OF FACT

After reviewing the Court's decision and re-reviewing all the evidence, we make the following Findings:

1. We find that David Henley was not wholly dependent. We base this finding on the fact that David Henley was not living with Deceased Employee on the date of her death, had not lived with her for approximately one year prior to her death, and had his own income in the form of approximately \$1000/month in Social Security disability payments. We further base this finding on the dependency investigator's interview with Deceased Employee's sister (not a potential beneficiary), who stated that "no one" was totally dependent financially upon Deceased Employee (See Hearing Transcript, pages 13, 26-28, 46-47, 49, 51, 53, and 73; See also Defendants' APA #1, e.g., pages 2-6, 8, 20, 31, and 33).

2. As to the issue of partial dependency, the dependency investigator determined that there was no concrete evidence of any regular incremental payments by Deceased Employee to any person, including David Henley. We give this evidence great weight. Nor did Henley presented any written evidence at the Hearing of payments made to him by Deceased Employee (See Hearing Transcript, pages 13-14 and 30-31; evidence as a whole).

3. As to the issue of partial dependency, Deceased Employee's daughter (Jeanette Padgett) described herself and her siblings to the dependency investigator as "dependent" upon Deceased Employee. Jeanette Padgett also described David Henley as "dependent." We considered this evidence, but Jeanette's definition of "dependent" is that of a layperson. See Hearing Transcript, pages 40-41; Full Commission Order, Finding of Fact #11, dated February 8, 2016).

4. As to the issue of partial dependency, Deceased Employee would sometimes buy groceries for David Henley when she visited him. However, Jeanette Padgett or Joel Padgett would sometimes pay for the groceries instead (Hearing Transcript, pages 48, 84, and 99-100).

5. As to the issue of partial dependency, David Henley admittedly gave money to Deceased Employee from time to time to pay for Deceased Employee's bills. This factor differentiates David Henley from Jeanette, Joel, and Maurice Padgett, as the Padgett children only received money/support from their mother/Deceased Employee, never providing any money/support to Deceased Employee. We also rely on the Western Union Transfers document showing various transfers of money from David Henley to Deceased Employee. David Henley presented no evidence of payments of money made to him by Deceased Employee (Hearing Transcript, e.g., pages 54 and 58-120; Western Union Transfers from David Henley to Deceased Employee).

6. We find David Henley's testimony--that he needed assistance from Deceased Employee "consistently" to help him make ends meet--inconsistent with his later testimony that he was "just sending money to [Deceased Employee] to help pay bills with" (Hearing Transcript, page 49; Cf. page 54).

7. As to the issue of partial dependency, although David Henley was covered under Deceased Employee's health insurance plan, he paid his portion of the premium every month (Hearing Transcript, pages 54-55 and 105).

8. As to the issue of partial dependency, we do not find David Henley's testimony to be fully reliable, as he, in an effort to be found Deceased Employee's surviving spouse, testified that he and Deceased Employee were planning to reunite prior to her death. Of all the witnesses/interviewees in the dependency investigation, not a single person other than David Henley stated that he and Deceased Employee were planning to reunite. We note that the dependency investigation report, to which no party objected, states Deceased Employee's sister--who does not claim benefits in this case--told the dependency investigator that "Susie was planning to divorce her second husband, Mr. Henley, and confirmed that the two of them had been separated for approximately for [sic] one to one and a half years." Nor were any of Deceased Employee's children aware of any such plan to reunite. For the reasons set forth in this finding, we cannot rely on David Henley's testimony as far as his alleged dependency is concerned (Hearing Transcript in its entirety; as to the testimony of Deceased Employee's children, see pages 58-120; Defendants' APA #1, page 5; Hearing Transcript, page 51, as to David Henley's testimony that he and Deceased Employee were going to move back in together).

9. David Henley was not partially dependent upon Deceased Employee for support. In fact, he gave money to Deceased Employee from time to time for her to pay bills. He also gave his stepchildren money from time to time. We do not find that Deceased Employee's occasional purchases of groceries sufficient to render David Henley a partial dependent. As David Henley is not a surviving spouse, the burden of proof is his to prove dependency. We find he does not meet his burden for the reasons stated supra (See Hearing Transcript, page 71).

RULINGS OF LAW

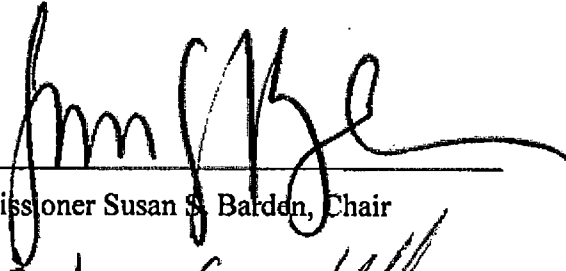
1. Based upon the preceding Findings of Fact, we conclude that Jeanette, Maurice, and Joel--as Deceased Employee's non-dependent surviving children--are entitled receive benefits in three equal shares pursuant to Section 42-9-140(A).

ORDER OF THE APPELLATE PANEL

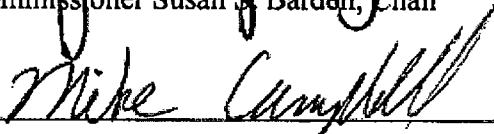
IT IS THEREFORE ORDERED that Defendants shall pay 500 weeks of benefits in a lump-sum in equal one-third shares to Claimant's surviving, non-dependent children.

ORDER

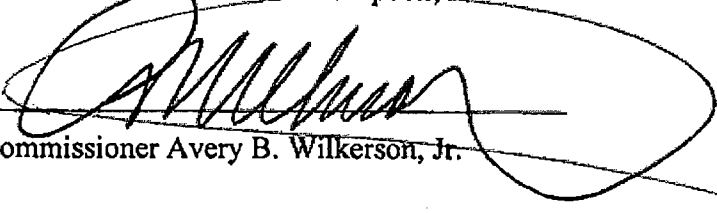
AND SO IT IS ORDERED!



Commissioner Susan S. Barden, Chair



Commissioner R. Michael Campbell, II



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on March 19, 2019

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Workers Compensation Commission

W.C.C. FILE NO. 1212974

APPELLATE CASE NO. 2019-000661

RECEIVED
APR 25 2019
SC Court of Appeals

SUSIE HENLEY, (DECEASED) EMPLOYEE/CLAIMANT.....APPELLANT,

v.


OTIS SPUNKMEYER, HOLDINGS, INC., EMPLOYER, and

TRUMBULL INSURANCE COMPANY, CARRIER/DEFENDANTS.....RESPONDENTS.

CERTIFICATE OF SERVICE

I certify that I served a copy of the Notice of Appeal and Certificate of Service on the S.C. Workers' Compensation Commission on April 25, 2019, by delivering a copy to the front desk of their office at the following address:

S.C. Workers Compensation Commission
1333 Main St #500
Columbia, SC 29201


Joyce Farr Cheeks
Law Office of Joyce Farr Cheeks, P.C.
2026 Assembly Street, Suite 205 (29201)
Post Office Box 881
Columbia, South Carolina 29201
(803) 256-3352 office
(803) 233-1540 fax
Attorney for Appellant

Columbia, S.C.
April 25, 2019



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAY 03 2019
SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1212974

Susie Henley, (Deceased), Employee,

v.

Otis Spunkmeyer, Inc., Employer, and
Trumbull Insurance Company c/o The Hartford, Carrier, Respondents,

Ex Parte: David Henley Appellant,

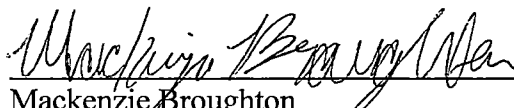
And Jeannette Padgett, Joel Padgett, and Maurice Padgett Respondents.

PROOF OF SERVICE

I certify that on the 1st day of May 2019, I served Respondents Otis Spunkmeyer Inc. and Trumbull Insurance Company c/o The Hartford's, **Motion to Dismiss Appeal** on the other parties to this appeal by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorneys of record as follows:

Joyce Farr Cheeks, Esq.
LAW OFFICE OF JOYCE FARR CHEEKS, P.C.
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R. Jamison Tinsley, Esq.
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*Counsel for Respondents Jeannette Padgett,
Joel Padgett and Maurice Padgett*


Mackenzie Broughton
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McAngus, Goudelock & Courie LLC
P.O. Box 650007
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*Attorneys for Respondents Otis Spunkmeyer, Inc.
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Reply To

HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

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MAY 08 2019

SC Court of Appeals

May 1, 2019

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Susie Henley (deceased) v Otis Spunkmeyer Holdings, Inc. and Trumbull
Insurance Company c/o The Hartford
Date of Accident: September 19, 2012
WCC File No.: 1212974
Our File No.: 2071.12167
Claim No.: YKT07685
Appeal No.: 2019-000661

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Motion to Dismiss Appeal, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the enclosed self-addressed, stamped envelope. Also enclosed is our firm's check in the amount of \$50 for filing the motion.

If you have any questions, please do not hesitate to contact me.

Yours truly,

McAngus Goudełock & Courie, LLC



Helen F. Hiser

Enclosures

cc: Joyce Farr Cheeks, Esquire
R. Jamison Tinsley, Esquire

mgc

**INSURANCE
DEFENSE**

POST OFFICE BOX 12519

COLUMBIA, SC 29211

2071.12167/HFH/mtb

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals