

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F108515

WADE W. FINLEY, JR. (DECEASED), EMPLOYEE	CLAIMANT
FARM CAT, INC., EMPLOYER	RESPONDENT NO. 1
CUNNINGHAM LINDSEY, CARRIER/TPA	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED DECEMBER 27, 2006

This matter comes before Administrative Law Judge Barbara Webb on the record.

Claimant represented by Mr. Kenneth Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents No.1 represented by Mr. Lee Muldrow, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by Mr. Terry Pence, Attorney at Law, Special Funds, Little Rock, Arkansas.

STATEMENT OF THE CASE

A Pre-hearing Telephone Conference was held in this case before Administrative Law Judge Cynthia Estes Rogers on October 10, 2005. Pursuant to a letter from Administrative Law Judge Cynthia Estes Rogers dated October 10, 2005, the parties were advised this claim would be considered on a stipulated record. The stipulated record was filed on February 24, 2006, and is comprised of

- (1) Stipulation of Facts with Exhibits A and B
- (2) Index of Medical Exhibits (Exhibit C)
- (3) Index on Non-Medical Exhibits (Exhibit D)
- (4) Deposition of Amy Finley taken on June 22, 2005

This case was subsequently assigned to this Administrative Law Judge for the purpose of conducting all further proceedings, including the decision in the case. In addition to the stipulated record, I have blue-backed a copy of the October 10, 2005 letter from Administrative Law Judge Cynthia Estes Rogers; the Claimant's Brief filed April 28, 2006, the Respondent's Brief filed April 28, 2006, and the May 1, 2006 letter from Respondent's counsel. Based on the stipulated record, the following stipulations were agreed and jointly submitted by the parties:

1. An employee/employer/carrier/TPA relationship existed among the parties, Wade W. Finley, Jr. ("Finley"), Farm Cat, Inc., and Cunningham Lindsey Claims Management on July 19, 2001.

2. On that date, Finley died due to electrocution; Finley's death is acknowledged to have arisen out of and in the course of his employment with Farm Cat, Inc.

3. At the time of his accidental death, Finley was being paid salary of \$500 per week. Said salary formed the basis for workers' compensation insurance premium calculation.

4. In addition to reported salary, Finley received weekly reimbursements for other expense items which averaged as follows: company truck payments (\$95.26), medical insurance (\$69.23), fuel allowance (\$46.15), cellular phone (\$13.38), vehicle insurance (\$14.85), travel allowance (\$69.23), and entertainment allowance (\$57.69).

5. At the time of his accidental death, Finley was married to Amy Finley, and the couple had no children.

6. On April 12, 2001 -- three and one half months before Finley's death -- the couple consulted the Department of Obstetrics and Gynecology at UAMS for the

purpose of assisting Ms. Finley in becoming pregnant. The method chosen was in vitro fertilization ("IVF").

7. On June 27, 2001, Ms. Finley underwent transvaginal egg retrieval. Subsequently, in a lab, Ms. Finley's eggs were mixed with Finley's sperm, resulting in the creation of ten (10) embryos.

8. Two (2) embryos were transferred to Ms. Finley's uterus on July 2, 2001. Ms. Finley had an early miscarriage with this initial IVF attempt.

9. Of the additional eight (8) embryos, four (4) were discarded because they were not viable, and four (4) were frozen (cryopreserved).

10. On June 26, 2002, Ms. Finley returned to UAMS to undergo another IVF procedure. Two (2) of the embryos had not survived cryopreservation, but the other two (2) were transferred to Ms. Finley's uterus. Ms. Finley conceived a singleton pregnancy.

11. The IVF procedure is described in more detail in Dr. Dean M. Moutos' letter dated July 30, 2003. (Exhibit A to Stipulated Record).

12. The first positive pregnancy test was obtained July 10, 2002. Wade Finley, III was born on March 4, 2003.

13. The fact of paternity was acknowledged in an order signed by Judge Lance L. Hanshaw on February 14, 2003, pursuant to an *ex parte* proceeding.

By agreement of the parties, the issues to be litigated are

1. Whether Wade Finley III is a dependent of the deceased and entitled to benefits.

2. If benefits are awarded, what is the applicable compensation rate.

CONTENTIONS

The claimant contends that Wade Finley III is the dependent child of Wade Finley, Jr. (deceased) and should therefore be entitled to weekly compensation benefits.

Respondents contend that Wade Finley III is not entitled to dependency benefits.

FACTUAL BACKGROUND

On April 2, 2001, the Finleys consulted with the Department of Obstetrics and Gynecology at University of Arkansas for Medical Sciences regarding in vitro fertilization (IVF) procedures to assist the couple in giving birth to a child after several years of unsuccessful attempts to conceive and consultation with fertility experts. On May 1, 2001, Wade and Amy Finley signed a consent form agreeing to participate in the IVF and embryo transfer procedure. In addition, on the same date, the Finleys also signed a separate consent form for participation in the IVF program and human embryo cryopreservation program.

On June 27, 2001, thirty-one eggs were harvested from Mrs. Finley's ovaries and ten of them were fertilized with the sperm of Mr. Finley. On July 2, 2001, two of the fertilized embryos were implanted into her uterine cavity and four remaining fertilized embryos were stored by cryopreservation at a temperature of -196 C to sustain the viability of the fertilized eggs. Although a pregnancy was confirmed, Mrs. Finley had a very early miscarriage approximately two weeks after the first IVF transfer procedure.

On July 19, 2001, Wade Finley, Jr. was killed as a result of an electric shock while washing his company truck with an electric power washer. At her husband's death, Amy Finley contacted the clinic to notify them of her husband's death and to confirm that the embryos would remain frozen.

On June 26, 2002, approximately eleven months after the death of Wade Finley, the two remaining viable embryos were transferred into Amy Finley's uterus resulting in a positive pregnancy test for a single pregnancy on July 10, 2002, and confirmed by ultrasound on July 26, 2002, with an estimated due date of March 14, 2003. On February 14, 2003, paternity of the unborn child to be borne by Amy R. Finley was declared by Order of the Circuit Court of Lonoke County, Arkansas, to be Wade W. Finley, Jr., now deceased, as the father of the child. In addition, the Circuit Court ordered that "all state and federal agencies of the United States of America shall uphold the findings of this Court's conclusion of paternity" – concluding that the child was the legitimate child of Amy R. Finley and Wade W. Finley, Jr. "for any and all lawful purposes". On March 4, 2003, approximately twenty months after the death of Finley, his child, Wade Finley, III, was born.

DISCUSSION

The primary issue in this case is whether a child born twenty months after the accidental death of his biological father is entitled to dependency benefits pursuant to the Arkansas Workers' Compensation Act. This is a case of first impression in Arkansas.

It is undisputed that Wade Finley, Jr. and Amy Michelle Roper were legally married on October 4, 1990, and lived together as husband and wife until his accidental death on July 19, 2001. It is also undisputed that the couple participated in an IVF procedure at UAMS during Wade Finley's lifetime resulting in the cryopreservation of embryos. It is further undisputed that after the death of her husband, Amy Finley underwent a second in-vitro attempt using the two surviving embryos which had been

frozen and stored during Wade Finley's lifetime which resulted in a successful pregnancy and the birth of a son, Wade Finley, III.

I. DEPENDENCY BENEFITS

Claimants contend that the child is entitled to dependency benefits under the Arkansas Workers' Compensation Act in light of the fact that the father knowingly participated and consented in the in-vitro process, including the storage of extra embryos for subsequent transfer for implantation in his wife's uterus. Respondents contend that at the time of Finley's death, his child, Wade Finley, III, had not yet been born and could have had no reasonable expectation of support.

Ark. Code Ann. § 11-9-527(c)(1987) provides, in pertinent part:

Compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee ...

(1)(A)(i) To the widow if there is no child, thirty-five percent (35%) and the compensation shall be paid until her death or remarriage.

(ii) However, the widow shall establish, in fact, some dependency upon the deceased employee before she will be entitled to benefits as provided in this section ...

(2) To the widow or widower if there is a child, the compensation payable under subdivision (c)(1) of this section and fifteen percent (15%) on account of each child ...

The Arkansas Workers' Compensation Act defines "child" to include "a natural child, a posthumous child, a child legally adopted prior to the injury of the employee, a stepchild, an acknowledged illegitimate child of the deceased or the spouse of the deceased, and a foster child." A.C.A. § 11-9-102(10)(1987).

In the instant case, there is no dispute over whether Wade Finley, III, is a posthumous and natural child of the deceased. However, to establish entitlement to

dependency benefits in Arkansas, the child must establish that at the time of the injury he was “wholly and actually dependent upon the deceased employee.” *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1971). The Arkansas Courts have held that dependency is a question of fact rather than a question of law, and the issue is to be resolved based on the facts present at the time of the compensable injury. *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1971); *Hoskins v. Rogers Cold Storage*, 52 Ark. App. 219, 916 S.W.2d 136 (1996); *Fordyce Concrete v. Garth*, 84 Ark. App. 256, 139 S.W.3d 154 (2003).

Prior to 1976, the statute only required “actually dependent.” Thereafter, it was amended to read “wholly and actually dependent.” The Arkansas Supreme Court has held that the term “wholly dependent” applies to those ordinarily recognized in law as a dependent and thus created a “conclusive presumption that a minor child is wholly dependent upon a parent.” *Doyle’s Concrete Finishers vs. Moppin*, 260 Ark. 167, 594 S.W. 2d 243 (1980). Persons who are ordinarily recognized in law as dependents, including a wife and children, and to whom the employee owes a duty of support, are “wholly dependent under our workers’ compensation law.” *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 230, 615 S.W.2d 380 (1981); *Fordyce Concrete vs. Garth*, 84 Ark. App. 256 (2003).

“Actually dependent” does not require total dependency. The Arkansas Court of Appeals has held that a child needs not to have received support from his father to be entitled to benefits; he needs only establish “a reasonable expectation of support.” *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 230, 615 S.W.2d 380 (1981) (minor

child awarded dependency benefits where parents separated prior to father's death and father provided partial support without court order); *Bankston v. Prime West Corp*, 271 Ark. 727 (Ark. App. 1981) (a child denied dependency benefits since deceased was not her natural father and did not support her at time of his death; a legitimate child denied dependency benefits in light of evidence that he was never supported by father from birth; and a illegitimate child awarded dependency benefits based on reasonable expectation of support in light of evidence of continuing relationship and financial support prior to father's death).

In *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998), the Arkansas Supreme Court declined to apply dictionary definitions to the words "wholly" and "actually" and upheld the Commission's award of death benefits where the deceased did not have custody of the children and did not pay court-ordered child support but contributed to their welfare by spending money to help buy their groceries, school supplies, and other expenses. See, *Fordyce Concrete v. Garth*, 84 Ark. App. 256, 139 S.W.3d 154 (2003). In *Roach Mfg. Co. v. Cole*, the Arkansas Supreme Court not only affirmed the denial of dependency benefits to a widow that made no effort to seek support from her estranged husband, but also affirmed the award of benefits to the minor child on the basis that the child had a "reasonable expectation of support". 265 Ark. at 913. The Court observed that the child was not able to act for herself during her father's absence and her necessary expenses would naturally increase as she grew older, with the concurrent possibility that her mother would not be able to maintain the child in "her accustomed mode of living". *Id.*

In the instant case, the preponderance of the evidence establishes that Wade Finley, III, is the natural son of the decedent although he was born posthumously. Although it is clear that the child will never live with his natural father, there is evidence that his father intended to provide support for him. In the IVF Consent Form executed by Wade Finley, Jr. on May 1, 2001, he acknowledged and agreed, as follows:

I, Wade Finley, the husband of Amy Finley, acknowledge that I have fully reviewed and understand the contents of this consent form. I have had the opportunity to discuss it with the physicians. I have had the opportunity to ask questions, and they have been answered to my satisfaction. I also consent to have a sample of my semen (sperm) collected by masturbation to fertilize the eggs obtained from my wife. I will recognize any children born after the IVF procedure as my legitimate offspring.

At the same time, Wade and Amy Finley executed a Control and Disposition of Embryo(s) Statement providing that control and direction of disposition of any embryos resulting from the insemination of the tissues remained with the couple or surviving single parent.

Since 1987, it has been statutorily mandated in Arkansas that all accident and health insurance companies include in vitro fertilization as a covered expense. Ark. Code Ann. § 23-85-137(a); 23-86-118(a). The Legislature has provided that a child conceived through artificial insemination of a married woman is to be treated as the legitimate child of both the husband and the wife. Ark. Code Ann. § 28-9-209 (C) provides, in pertinent part:

Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of husband is presumed unless the contrary is shown by clear and convincing evidence.

Further, Ark. Code Ann. § 28-9-210 (a) provides that “posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate”.

The United States Court of Appeals for the Ninth Circuit, in a Social Security case originating from Arizona, held that posthumously conceived children generally qualify as “children” within the definition of the Social Security Act and were presumed to be dependent for purposes and entitlement to child’s insurance benefits since they were legitimate under applicable Arizona law. *Gillett-Netting, et.al. vs. Jo Anne B. Barnhart*, 371 F. 3d 593, (9th Cir. 2004). In *Gillett-Netting*, the father was diagnosed with cancer after his wife had begun fertility treatments using her husband’s sperm. He delayed the start of chemotherapy until after he had a chance to deposit his sperm at the University of Arizona Health Science Center. He died two months later and after his death, his wife finally became pregnant using IVF and gave birth to twins eighteen months after his death. After his death, the mother filed an claim for child’s survivor benefits under the Social Security Act. The Administrative Law Judge denied the benefits finding that the twins were not dependent on the father at the time of his death since they were not in existence. The ALJ was affirmed by the United States District Court for the District of Arizona. The Ninth Circuit reversed the district court, holding that the twins were the father’s legitimate children and were conclusively deemed dependent upon the father at the time of his death. In so holding, the Ninth Circuit Court of Appeals noted that it was not necessary to reach the argument that to deny benefits to posthumously conceived children would violate the children’s right to equal

protection. 371 F. 3d 593 (9th Cir. 2004); *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002) (holding that a posthumously conceived child could inherit from a deceased sperm donor under Massachusetts intestacy law where parentage is established and the donor consented both to reproduce posthumously and to support any resulting child); *Stephan v. Comm’r of Soc. Sec.*, 386 F.Supp. 1257 (M.D. Fla 2005) (posthumously-conceived child denied benefits based on Florida inheritance laws specifically requiring provision in decedent’s will for support of child); See, Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor’s Benefits for Posthumously Conceived Children*, 32 Loy. L.A. L. Rev. 251 (1999); Also see, Julie E. Goodwin, *Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 Conn. Pub. Int. L.J. 208 (2005); Carole M. Bass, *What if You Die, And Then Have Children?*, *Trusts & Estates* (April, 2006) 21, 25 (listing Arkansas as one of twelve states that provide that a child conceived before death, but born alive afterwards, is treated as living at decedent’s death and is entitled to inherit no matter when, after the parent’s death, the child is born).

Under current Arkansas law, there is no legal presumption of dependency. Likewise, there is no statutory requirement under the Arkansas Workers’ Compensation Act that a posthumous child be born within a certain limit of time after the death of the injured worker or that the deceased consented to reproduce posthumously. Nor is there a requirement that the support of the posthumous child be provided for in the decedent’s will. While the particular facts of the case at hand may be a situation not

contemplated by the Legislature, it seems unlikely that the Legislature is not familiar with the legal issues arising from the various assisted reproductive technologies in light of their actions regarding mandated insurance for IVF procedures and intestate succession laws which protect the rights of children born through artificial insemination.

In light of the preponderance of the evidence, I find that it is reasonable to conclude that Wade Finley, Jr. contemplated the possibility of offspring born from the IVF procedures and recognized any children born as his legitimate offspring with the concurrent obligations and reasonable expectation by such offspring for support. This child, as in *Roach Mfg, supra*, clearly could not act for himself and there is no evidence of any other means of actual support for this child.

Based on my review of the credible evidence in the case, I find that Wade Finley, III is entitled to dependency benefits under the Arkansas Workers' Compensation Act.

II. APPLICABLE RATE OF COMPENSATION

The respondent has paid widow's benefits to Mrs. Finley based on an average weekly wage of \$500.00. However, claimant argues that Finley additionally received weekly reimbursements of \$369.75 for truck payments, medical and vehicle insurance, fuel, travel and entertainment allowance, and cellular phone. Therefore, the claimant contends that the proper amount for the average weekly wage of Mr. Finley should be \$869.75.

Ark. Code Ann. § 11-9-102(19) defines wages as:

“wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident **including reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, ...**”

The respondent contends that Finley worked in a family business and expense reimbursement was generous and related to business costs. They contend that expense reimbursement does not constitute income and should not be factored into the average wage calculation. I can find no authority which permits the inclusion of expense reimbursements in the calculation of wages. See generally, *Taylor v. Lubritech*, 75 Ark. App. 68, 54 S.W.3d 132 (2001); *Tabor v. Levi Strauss & Co.*, 33 Ark. App. 71, 801 S.W.2d 311 (1990); *Hazen v. Federal Express Corporation*, Full Workers' Compensation Commission, 2002 AWCC 213 (F011598 filed November 13, 2002).

III. ATTORNEY'S FEES

Based on the foregoing, I find that the claimant's attorney is entitled to a twenty-five percent (25%) statutory attorney's fee of compensation for dependency benefits awarded to the claimant's son, Wade Finley, III, as a result of the findings herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. An employee/employer/carrier/TPA relationship existed among the parties, Wade W. Finley, Jr. ("Finley"), Farm Cat, Inc., and Cunningham Lindsey Claims Management on July 19, 2001.
3. On that date Finley died due to electrocution; Finley's death is acknowledged to have arisen out of and in the course of his employment with Farm Cat, Inc.

4. At the time of his accidental death, Finley was being paid salary of \$500 per week. Said salary formed the basis for workers' compensation insurance premium calculation.
5. In addition to reported salary, Finley received weekly reimbursements for other expense items which averaged as follows: company truck payments (\$95.26), medical insurance (\$69.23), fuel allowance (\$46.15), cellular phone (\$13.38), vehicle insurance (\$14.85), travel allowance (\$69.23), and entertainment allowance (\$57.69).
6. At the time of his accidental death, Finley was married to Amy Finley, and the couple had no children.
7. On April 12, 2001 -- three and one half months before Finley's death -- the couple consulted the Department of Obstetrics and Gynecology at UAMS for the purpose of assisting Ms. Finley in becoming pregnant. The method chosen was in vitro fertilization ("IVF").
8. On June 27, 2001, Ms. Finley underwent transvaginal egg retrieval. Subsequently, in a lab, Ms. Finley's eggs were mixed with Finley's sperm, resulting in the creation of ten (10) embryos.
9. Two (2) embryos were transferred to Ms. Finley's uterus on July 2, 2001. Ms. Finley had an early miscarriage with this initial IVF attempt.
10. Of the additional eight (8) embryos, four (4) were discarded because they were not viable, and four (4) were frozen (cryopreserved).
11. On June 26, 2002, Ms. Finley returned to UAMS to undergo another IVF procedure. Two (2) of the embryos had not survived cryopreservation, but

the other two (2) were transferred to Ms. Finley's uterus. Ms. Finley conceived a singleton pregnancy.

12. The IVF procedure is described in more detail in Dr. Dean M. Moutos' letter dated July 30, 2003 (attached as Exhibit A).
13. The first positive pregnancy test was obtained July 10, 2002. Wade Finley, III was born on March 4, 2003.
14. The fact of paternity was acknowledged in an order signed by Judge Lance L. Hanshaw on February 14, 2003, pursuant to an *ex parte* proceeding.
15. Wade Finley, III, is the natural, posthumous child of Wade Finley, Jr.
16. Wade Finley, Jr. consented to the IVF and cyropreservation procedures.
17. Wade Finley, Jr. acknowledged and agreed to recognize all offspring from the IVF procedures as his own legitimate children.
18. The preponderance of the evidence establishes that Wade Finley, III, had a reasonable expectation of support from his father, Wade Finley, Jr.
19. The preponderance of the evidence establishes that Wade Finley, III, is entitled to dependency benefits pursuant to A.C.A. § 11-9-527(c)(1987).
20. The preponderance of the evidence establishes that the average weekly wage at the time of Finley's death upon which dependency benefits should be calculated is \$500.00 per week.

AWARD

The respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge