

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. E518461

SCOTT GRIMES (DECEASED), EMPLOYEE **CLAIMANT**
CABLE GRIMES, NATURAL DAUGHTER OF SCOTT GRIMES

**ARKANSAS DEPARTMENT OF CORRECTION,
EMPLOYER** **RESPONDENT NO. 1**

**PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER** **RESPONDENT NO. 1**

**DEATH AND PERMANENT TOTAL
DISABILITY TRUST FUND** **RESPONDENT NO. 2**

OPINION FILED JANUARY 3, 2006

Submitted on the record before Administrative Law Judge Cynthia Estes Rogers.

Claimant represented by Ms. Emily S. Paul, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. Richard S. Smith, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas.

This case was submitted on briefs to determine the issue of whether Cable Grimes was wholly and actually dependent upon Scott Grimes at the time of his compensable injury, thereby entitling her to benefits.

According to the Prehearing Order filed August 3, 2005, the parties stipulated to the following:

1. Employer/employee/carrier relationship on November 29, 1995.
2. Claimant sustained a compensable injury on November 29, 1995, and died as a result.
3. Average weekly wage: \$417.73.

4. Public Employee Claims Division accepted the claim and paid benefits to Cable Grimes, but the Death and Permanent Total Disability Trust Fund has at all times contested her entitlement to benefits under Arkansas Code Annotated §11-9-527.

5. Scott Grimes was the natural father of Cable Grimes, who was born on August 12, 1982.

6. Cable Grimes has had Down's Syndrome since birth.

7. After the February 7, 1991, Court Order, Scott Grimes did not pay any child support to his daughter Cable Grimes.

8. After the February 7, 1991, Court Order, Sheila McCool voluntarily sent money to Scott Grimes to be used for the support of her two other daughters, Wynter and Failla.

9. After the February 7, 1991, Court Order, Sheila McCool voluntarily paid for health and life insurance on all three of her daughters.

10. After the February 7, 1991, Court Order, Scott Grimes had very little or no contact with his daughter, Cable Grimes.

11. As a natural child of Scott Grimes, Cable Grimes receives monthly Death (Survivor) benefits from Scott Grimes' Social Security account.

12. As a natural child of Scott Grimes, Cable Grimes receives monthly payments from the State of Arkansas from Scott Grimes' retirement fund.

13. After Scott Grimes' death, the Arkansas Legislature approved a Claims Commission award to the natural children of Scott Grimes (Cable, Wynter and Failla) of \$50,000 to be split between them, plus scholarships. Wynter and Failla have used these scholarships; Cable has not.

14. Should the Commission find that Cable Grimes is entitled to benefits from the Death and Permanent Total Disability Trust Fund, the Public Employee Claims Division is entitled to a reimbursement of \$13,299.46.

15. The parties agree that the evidentiary depositions of Attorney Jan Scussel, dated May 20, 2004, and Judge Robin Mays, dated July 28, 2005, are to be a part of the record in this case.

16. The parties agree that the following documents shall be admitted to the record: the 1984 Divorce Decree; the 1991 Order of the Juvenile Court Judge; Cable Grimes' birth certificate; and, Scott Grimes' death certificate.

17. The parties agree that the stipulated facts herein, together with the depositions identified in Stipulation No. 15 and the documents identified in Stipulation No. 16, and the trial briefs of the parties shall compromise the entire record in this case.

Claimant contends that Cable Grimes was wholly and actually dependent upon Scott Grimes at the time of his injury and death and that she is, therefore, entitled to benefits as a result.

Respondents No. 1, the Arkansas Department of Correction and Public Employee Claims Division, contend that Cable Grimes was wholly and actually dependent upon Scott Grimes at the time of his injury and death and is, therefore, entitled to benefits.

Respondent No. 2, the Death and Permanent Total Disability Trust Fund, contends that Cable Grimes was not wholly and actually dependent upon Scott Grimes at the time of his compensable injury and death and is, therefore, not entitled to benefits.

STATEMENT OF THE CASE

The facts of this case are generally undisputed. The marriage of Scott and Sheila Grimes (now McCool) produced three children, Wynter, Failla, and Cable. Cable was born with Down's Syndrome on August 12, 1982. On July 5, 1984, the Jefferson County Chancery Court entered a divorce decree that included an order for Scott Grimes to pay child support in the amount of \$200.00 per month for the three children of the marriage, as well as house payments on the home occupied by Sheila Grimes and the children; the order also required Scott Grimes to maintain health and dental insurance for the children, who were in the custody of Sheila Grimes.

On February 7, 1991, the Jefferson County Juvenile Court entered an order modifying the custody arrangement entered in the divorce decree, giving custody of Wynter and Failla to Scott Grimes and retaining custody of Cable with Sheila Grimes McCool. The February 7, 1991, order was silent as to all other issues, including child support and health and dental insurance for the children.

On November 29, 1995, Scott Grimes sustained a compensable work injury and died, as a result. Respondents No. 1 paid survivor benefits under Ark. Code Ann. § 11-9-527 to all three children; however, Respondent No. 2, the Death and Permanent Total Disability Trust Fund, has declined to pay benefits to Cable, contending that she was not "wholly and actually" dependent upon her father, Scott Grimes, at the time of his injury and death.

As was agreed by the parties, a deposition taken on May 20, 2004, of Jan Scussel, who was Scott Grimes' attorney during the 1991 Juvenile Court proceeding, was introduced as an exhibit. She was offered, with no objection, by Respondent No. 2 as an expert witness in the area of family law. She testified specifically about her

opinion of the effect of the 1991 Juvenile Court order and its silence as to the issue of child support. She testified that the parties had been involved in a hearing for three days, at that time; and, rather than continue with the hearing, the parties agreed to the order that was finally entered, splitting custody of their three children. She testified that it was the parties' desire that neither Scott Grimes nor Sheila Grimes McCool would pay any amount of child support to the other, since they had agreed to the split-custody arrangement. She testified that this was why the order was silent as to that issue. Ms. Scussel testified that she had "always won" cases wherein she argued that a "silent" order meant that no child support was to be paid and that she "always lost" the case when she argued that a "silent" order created a duty to pay child support.

Ms. Scussel testified that another reason the parties agreed to no child support was because Cable Grimes was receiving approximately \$500.00 per month in Social Security, as a result of having Down's Syndrome, and held a Medicaid card.

As was also agreed by the parties, a deposition taken on July 28, 2005, of Judge Robin Mays, who was a circuit/chancery judge in Pulaski County for fourteen years, was introduced as an exhibit. She was offered, with no objection, by claimant as an expert witness in the area of family law. She testified that because there was an outstanding divorce decree addressing the issue of child support in effect at the time the 1991 Juvenile Court order was entered, and because that divorce decree was never abated, then it was still in effect, and the child support issue being "silent" in the 1991 Juvenile Court order left the issue of child support unmodified from the original divorce decree.

Judge Mays testified that because Scott Grimes assumed custody of two of the three children in 1991, then a judge, at "some point" would have to rework the child

support; but, because that had not been done, the child support amount was still accruing at the rate it was originally set until the children reached the age of majority. She testified that because of the split-custody arrangement agreed upon by Scott Grimes and Sheila Grimes McCool, each parent was in effect supporting all three children.

Jan Scussel testified in her deposition that, in addition to representing Scott Grimes, she was also personal friends with he and his wife, Susie. She testified that she *thought* she recalled Sheila Grimes McCool, at some point after the 1991 Juvenile Court order, trying to do something about child support, or that perhaps the Office of Child Support Enforcement had threatened something; however, nothing had ever actually been filed in regard to that issue after 1991. Moreover, the parties stipulated that Scott Grimes had paid no support on behalf of Cable Grimes after the 1991 Juvenile Court order and had had little to no contact with Cable Grimes from that time until the time of his death in 1995.

Ms. Scussel testified, however, that Mr. Grimes was a “gift-giver,” and that “he didn’t leave out Cable,” meaning that he may have, and probably did, send her birthday gifts and Valentine’s Day gifts, for example, but Ms. Scussel unequivocally testified that he would absolutely *not* have sent Sheila McCool any *money* for Cable, because he would not have trusted that it would be used for Cable’s support. Ms. Scussel further testified that gifts are not considered “support” under family law.

Ms. Scussel also testified that Scott Grimes would keep Cable for Sheila Grimes McCool, when Ms. McCool needed help. She testified that Mr. Grimes may have bought Cable clothes and food during the times he kept her for Ms. McCool.

FINDINGS OF FACT

1. The stipulations agreed to herein are accepted as fact;
2. Claimant Cable Grimes has proven by a preponderance of the evidence that she was wholly and actually dependent upon the decedent, Scott Grimes, at the time of his injury and death;
3. Claimant Cable Grimes is entitled to benefits from the Death and Permanent Total Disability Trust Fund;
4. As was stipulated, the Public Employee Claims Division is, therefore, entitled to a reimbursement of \$13,299.46 from the Death and Permanent Total Disability Trust Fund.

DISCUSSION

Arkansas Code Annotated § 11-9-527(c) states in pertinent part:

[C]ompensation for the death of an employee shall be paid to those persons who were *wholly and actually dependent* upon the deceased employee . . .

[Emphasis added.] Arkansas Code Annotated § 11-9-527(h) states that all questions of dependency “shall be determined as of the time of the injury.”

Arkansas Code Annotated § 11-9-527(d)(2) states:

A physically or mentally incapacitated child . . . shall be entitled to compensation as a dependent of the deceased employee without regard to age or marital status.

In this case, there is no question that Cable Grimes was the natural born child of the deceased, Scott Grimes. There is also no question that Cable Grimes has Down’s Syndrome. However, the question is: Was Cable Grimes “wholly and actually dependent” upon Scott Grimes at the time of his injury? In this examiner’s opinion, the evidence is sufficient to establish that claimant Cable Grimes was wholly

and actually dependent upon Scott Grimes and is, therefore, entitled to maximum benefits.

Although there appear to be no Arkansas appellate court decisions precisely on point with the specific facts set forth in this case, appellate courts have applied the principles of law at issue in this case to various fact situations, arriving at differing results. In the instant case, it was stipulated that Scott Grimes paid no child support for Cable Grimes after the 1991 Juvenile Court order and, according to the stipulations, had “little to no” contact with his daughter between 1991 and 1995. A review of the history of Ark. Code Ann. § 11-9-527 and the record of the Arkansas appellate courts’ interpretation of it are helpful in understanding why Cable Grimes was, despite those stipulations, “wholly and actually dependent” upon her father at the time of his injury.

Originally, the term “wholly dependent” was construed to refer to those ordinarily recognized in law as dependents. A conclusive presumption therefore arose to the effect that a wife or child of a deceased employee who was killed in the course and scope of his employment was a dependent for purposes of the statute. *See Chicago Mill & Timber Co. v. Smith*, 228 Ark. 876, 310 S.W.2d 803 (1958).

In 1976, the General Assembly amended § 11-9-527 to provide that a widow or widower shall establish “actual” dependency before she or he will be entitled to benefits. The Arkansas Supreme Court interpreted that change as eliminating the conclusive presumption and requiring a widow to establish facts showing dependency upon the decedent before being entitled to benefits. *Roach Mfg. Co. V. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979). The Supreme Court held that dependency was to be determined in light of the surrounding circumstances, citing *Smith v. Farm Service*

Coop., 244 Ark. 119, 424 S.W.2d 147 (1968), and in light of prior events and not controlled by an unusual, temporary situation, citing *Nolen v. Wortz Biscuit Co.*, 210 Ark. 446, 196 S.W.2d 899 (1946).

In *Roach, supra*, a deceased father had not supported his wife or child at all for eleven months preceding his death. As the wife and child were not living with the employee at the time of his death, there was no presumption of dependency and there was a requirement of some showing of actual dependency. The Full Commission found that the child had a “reasonable expectation of future support” and awarded her maximum benefits under the Act. The Commission also found, however, that the wife had not established dependency to *any* degree and denied her benefits. The Supreme Court affirmed both findings, holding that because the widow had not attempted to obtain support for herself, she was unable to meet the requirement; but the child, “*unable to act for herself*,” was not bound by the ruling with respect to the widow and was dependent, as she had a reasonable expectation of support from the deceased worker. [Emphasis added.]

In *Doyle’s Concrete Finishers v. Moppin*, 268 Ark. 167, 594 S.W.2d 243 (1980), a minor child living with his divorced mother was receiving child support from the father of \$108.00 per month, an amount not sufficient for his total support. The Commission found him to be entitled to maximum benefits. In affirming the Commission, the Supreme Court pointed out that if in *Roach, supra*, a child who received *no* financial support was entitled to maximum benefits it “must be said that a child who receives some financial support should be entitled to no less than maximum benefits.” The Court emphasized that in *Roach* it was held that when the widow and child are not living with the employee at the time of his death, there must

be some showing of actual dependency to support an award of full benefits. In *Moppin*, as in *Roach*, the claimant was not living with the deceased employee at the time of his death.

The language used in *Roach* and *Moppin* was carried forward in the subsequent cases of *Continental Insurance Co. v. Richards, Adm'r*, 268 Ark. 671, 596 S.W.2d 333 (1980); *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 230, 615 S.W.2d 380 (1981); *Bankston v. Prime West Corporation*, 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981). The Court of Appeals stated in *Pinecrest Memorial Park, Inc. v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983):

This line of cases has made it clear that “at least in situations where the surviving spouse or child is living apart from the deceased at the time of his death” the test of “wholly dependent” is met by proof of that legal status and that “actually dependent” does not require a showing of total dependence. A finding of some measure of actual support *or* a *reasonable expectation* of it will suffice. Whether this “actual dependence” exists is a question of fact for the Commission to determine.

[Emphasis added.]

Subsequent to the passage of Act 796 of 1993, the Supreme Court decided *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998), in which the Commission had awarded death benefits to a deceased employee’s three children where the deceased did not have custody and did not pay child support, but was found to have contributed to the children’s support in other ways, such as buying food, school clothes and supplies, and helping pay for their travel arrangements. The respondent-employer and insurer appealed, arguing that the strict construction of the workers’ compensation statutes, as required by Act 796 of 1993, compelled a holding that the

children were not “wholly and actually” dependent on the deceased at the time of the injury, and that they were, therefore, not entitled to dependents’ benefits.

Appellants in *Lawhon* sought to have the Court define the words “wholly” and “actually” according to their dictionary definitions. The Supreme Court stated that appellants’ view of a strict construction of this part of the statute would require the children to prove that, at the time of their father’s death, they were entirely or completely dependent upon him for support. The Court concluded as follows:

Applying the dictionary definitions urged by Lawhon would mean that a minor child would never be entitled to death benefits specified in 11-9-527(c)(3) where the parents were divorced and the child received any support whatever from the surviving parent. That would be an absurd result, and we will not adopt such an interpretation. . . . We are confident our General Assembly could not have intended the result suggested by [appellants].

Id. at 281, 984 S.W.2d at 5.

The Court in *Lawhon* also noted that the General Assembly is presumed to be familiar with the Court’s interpretations of its statutes; and, if it disagrees, it can amend the statutes, as it did when the word “actually” was added to the provisions of Ark. Code Ann. § 11-9-527, subsequent to the Court’s decision in *Chicago Mill & Lumber Co. v. Smith, supra*. “Without such amendments, however,” the Court noted, “the appellate courts’ interpretations of the statutes remain the law.” *Lawhon Farm Servs., supra*.

As recently as 2003, the Court of Appeals held, in *Fordyce Concrete v. Garth*, 84 Ark. App. 256, 139 S.W.3d 154 (2003), applying the principles of *Lawhon, supra*, that two sons of the deceased, who had only “sporadically” contributed to their welfare by spending money for gifts and for certain needs such as food and clothing,

were wholly and actually dependent upon the deceased claimant; they were awarded dependency benefits. The Court in *Garth* held, citing *Roach Mfg. Co., supra*:

The fact that the boys' mothers did not secure child-support payments or more consistent and substantive contributions from the boys' father *did not mean* that the boys no longer had any reasonable expectation of support from the father.

[Emphasis added.]

As was noted above, the parties in the instant case have stipulated that Scott Grimes paid no child support on behalf of his daughter, Cable Grimes, after the 1991 Juvenile Court order and until his death in 1995; further, it was stipulated that he had “little to no” contact with her during this period, as well. However, Jan Scussel testified in her deposition that Scott Grimes was a “gift-giver” and did not leave Cable out. She further testified that he and his wife took care of Cable on occasions when Sheila Grimes McCool needed help and that during those periods, he may very well have bought Cable food and/or clothing. Most importantly, though, is the fact that the 1984 order of child support issued by the Chancery Court with Scott and Sheila Grimes' divorce was still in effect, never having been abated or modified as to that issue.

All parties agree that the 1991 Juvenile Court order was “silent” as to the issue of child support. The question then becomes, what is the effect of that “silence”? Ms. Scussel testified that she had “always won” cases wherein she argued that a “silent” order meant that no child support was to be paid and that she “always lost” the case when she argued that a “silent” order created a duty to pay child support; as such, it was her opinion that the “silent” order meant no support was to be paid. That may very well have been her experience. However, in *this* case, there was *already* a

“duty” to pay child support in effect at the time the “silent” order was entered – that being the duty created from the 1984 order, which had never been abated or modified. Judge Robin Mays testified, as a former chancellor of many years, that because the original child support order was still in effect at the time the 1991 Juvenile Court order was entered and the issue of child support was “silent” in that subsequent order, then the original order of child support was still in effect. I agree.

Ms. Scussel also testified, as Scott Grimes’ former attorney, that it was the parties’ intent in 1991 that the order be “silent” on the issue of child support because they had agreed that neither would pay child support to the other, since they were splitting custody of the children and because Cable Grimes received Social Security due to her Down’s Syndrome. It may, in fact, be the case that they “agreed” to this arrangement, off the record, to “no support” and that Cable Grimes does receive some independent resources as a result of her disability, but there is nothing in the 1991 Juvenile Court order itself that would indicate any of that. To this examiner, that is troublesome.

The Arkansas Supreme Court, in *Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998), held that a parent has a legal duty to support his minor children, regardless of the existence of a support order, and that neither the dissolution of the marriage tie, nor awarding custody of the children, either permanently or temporarily, to the mother, relieves the father of his obligation to support them. Moreover, the Court held in *Fonken*, that the action of appellee’s mother, in telling appellant to stop paying child support, and his reliance thereupon, were insufficient to relieve him of his legal obligation to his minor child. The Court stated, “Even when the support

obligation may be affected by contract, the duty cannot be bartered away permanently to the detriment of the child.”

In this case, Cable Grimes’ parents may have had some sort of unwritten agreement that there was no longer any obligation to pay child support; however, as cited above in *Fonken*, that “agreement” was insufficient to relieve Scott Grimes of his legal obligation to Cable Grimes and was, moreover, in violation of the 1984 child support order that was still in effect. As was previously noted, the Supreme Court held in *Roach Mfg. Co., supra*, wherein the mother had not attempted to obtain support and the child, *unable to act for herself*, was receiving *no support* from her father, the deceased, prior to his death, that the child had a reasonable expectation of support. Likewise here, Cable Grimes, being a minor at the time of her father’s death, and being mentally incapacitated – regardless of her age – was unable to act for herself to pursue her right to child support from her father. However, that inability, on her part, to act does not invalidate her reasonable expectation of support from him.

Cable Grimes, as the natural born child of the deceased, Scott Grimes, was clearly “wholly” dependent on him. Moreover, when applying the applicable case law in light of all the surrounding circumstances of this case, including the existence of the 1984 child support order that was still in effect, it is this examiner’s opinion that Cable Grimes had a reasonable expectation of support from Scott Grimes, and she was, therefore, “actually” dependent on him at the time of his injury and death. For these reasons, it is this examiner’s opinion that claimant Cable Grimes has proven by a preponderance of the evidence that she was wholly and actually dependent upon the decedent, Scott Grimes, at the time of his injury and death and is entitled to maximum benefits, as a result.

AWARD

Respondent No. 2 is directed to pay the claimant Cable Grimes benefits in accordance with the findings of fact above.

Respondent No. 2 is directed to reimburse the Public Employee Claims Division the amount of \$13,299.46, as was stipulated, in light of the findings of this case.

Respondent No. 2 is directed to pay the claimant's attorney, Ms. Emily Paul, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge