

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508002

FRANCISCA GUEVARA RODRIGUEZ,  
WIDOW AND GUARDIAN OF  
EBER SUSTAITA GUEVARA,  
MARLEN SUSTAITA GUEVARA, and  
ERENDRIA MAGALY SUSTAITA GUEVARA,  
MINOR CHILDREN AND DEPENDENTS OF  
MODESTO HERRERA, DECEASED EMPLOYEE CLAIMANTS NO. 1

LAVONA KAY HAURY, WIDOW OF FRANCISCO  
JAVIER SUSTAITA, DECEASED EMPLOYEE CLAIMANT NO. 2

BUSTER ROBERTS LOGGING, EMPLOYER RESPONDENT NO. 1

AMERICAN INTERSTATE INSURANCE COMPANY,  
CARRIER RESPONDENT NO. 1

DEATH & PERMANENT TOTAL DISABILITY  
TRUST FUND RESPONDENT NO. 2

**OPINION FILED OCTOBER 4, 2007**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

Claimants No. 1 were represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Claimant No. 2 was represented by HONORABLE ORVIN W. FOSTER, Attorney at Law, Mena, Arkansas.

Respondents No. 1 were represented by HONORABLE MICHAEL RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

This case was the subject of a hearing on January 10, 2006, by Administrative Law Judge J. Mark White. Following a decision by ALJ White, an appeal, and cross-appeals, the

Full Commission on July 10, 2006, remanded this case for additional proceedings and to take additional evidence. This case was assigned to me on remand after ALJ White's departure from the Commission.

On remand, I named Lavona Haury as a party to this proceeding. Thereafter, a Prehearing Order for a second hearing was entered on January 25, 2007, and a second hearing was held in the claim on April, 10, 2007, in Little Rock, Arkansas. Following the second hearing, I determined that the black and white photocopies of photographs and an identification card received at the 2006 hearing were of insufficient visual quality to comply with the directives in the Full Commission's July 10, 2006, remand. At my request, Mr. Davis produced for the record the original identification card that was photocopied for the 2006 hearing which bears a photograph of Modesto Sustaita Herrera. Also, at my request, Mr. Foster produced for the record four pages of color reprints of the decedent that were also photocopied at the 2006 hearing. Thereafter, I closed the record on July 18, 2007. The record consists of (1) the April 10, 2007, hearing transcript<sup>1</sup> and the exhibits

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<sup>1</sup>Cited hereafter as "2007 hearing T."

contained therein, (2) Claimant No. 1's proffered Exhibit 2 (the January 10, 2006, hearing transcript<sup>2</sup> under separate cover), (3) the Full Commission's Order filed on July 10, 2006, (4) the four pages of color reprints of Lavona Kay Haury's photographs<sup>3</sup> provided to me by Mr. Foster, and (5) the original identification card for Modesto Sustaita Herrera provided to me by Mr. Davis. I have "blue-backed" to designate as part of the record items (3), (4), and (5).

The Prehearing Order entered on January 25, 2007, set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. A person died on December 9, 2004.

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<sup>2</sup>Cited hereafter as "2006 hearing T."

<sup>3</sup>The color reprints include a 3x5 photograph of a man wearing a white shirt. Since I cannot locate a black and white photocopy of this photograph in the 2006 hearing exhibits, I will not consider this photograph in rendering a decision.

3. The respondents have not paid any dependency death benefits to date except that the respondents did initiate fatality death benefits and paid for a period of five weeks to Lavona Haury until a dispute arose as to the identity of the deceased employee and his dependents.
4. The decedent earned an average weekly wage of \$500.
5. If Lavona K. Haury is found to be the legal widow of the decedent, Lavona K. Haury was wholly and actually dependent upon the decedent within the meaning of the Arkansas Workers' Compensation Law.

By agreement of the parties, the issues to be litigated and resolved at the present time are limited to the following:

1. The employment relationship, if any, between the decedent and the alleged employer.
2. The proper identification of the decedent.
3. Whether the claimants herein are proper dependents entitled to dependency death benefits under the Act.

In addition, the parties raised various evidentiary objections at the April 10, 2007, hearing which will be addressed herein.

### **DISCUSSION**

#### **ISSUE 1: Evidentiary Objections Raised During The April 10, 2007, Hearing.**

Mr. Davis proffered as an exhibit at the April 10, 2007, hearing the entire record from the previous January 10, 2006, hearing. Mr. Foster objected to introduction of those portions of the record consisting of documents in Spanish and hearsay testimony in two or three unspecified portions of the January 10, 2006, transcript. Mr. Ryburn objected to the entire transcript since the ALJ's findings following that hearing were vacated, and Mr. Ryburn specifically objected to the documents in Spanish and to any hearsay in the transcript. Mr. Davis replied that the Spanish documents need to be in the record to determine what has been translated. I took the evidentiary arguments under advisement pending an opportunity to review the January 10, 2006, transcript.

Later in the hearing, however, the parties specifically agreed to incorporate Lavona Haury's January 10, 2006, testimony into the April 10, 2007, hearing record. (2007 hearing T. 131) The parties also agreed to incorporate

Tony Parr's January 10, 2006, testimony into the April 10, 2007, hearing record (2007 hearing T. 143)

With regard to the remaining portions of the January 10, 2006, transcript and any hearsay contained therein, I note that the Arkansas Supreme Court has previously explained in St. Paul Ins. Co. v. Touzin, 267 Ark. 539, 592 S.W.2d 447 (1980):

First, the compensation law provides that the Commission is not bound by technical rules of evidence or procedure, but may "conduct the hearing in a manner as will best ascertain the rights of the parties." [Citation omitted]. Professor Larson discusses at length the cases construing such provisions in workers' compensation statutes. He concludes that the factfinders are expected to adhere to basic rules of fair play, such as recognizing the right of cross examination and the necessity of having all the evidence in the record. On the other hand, a compensation commission undoubtedly has expertise much superior to that of a jury in the weighing of testimony and should therefore be left to determine the probative value of hearsay testimony and other proof that might not be admissible in a court of law. Larson, *Workmen's Compensation Law*, §§ 79.00 and 79.80-79.84 (1976).

In the present case, the Affidavit of Jose Angel Sustaita Nieto submitted as Exhibit 2G at the January 10, 2006, hearing is neither an original document or a certified copy of the original document. In fact, the document in the record is a facsimile. I find that the document does not

meet the requirement in the Full Commission's July 10, 2006, remand order "that affidavits...be certified or original in order to establish authenticity." This document will therefore not be considered further.

The documents submitted into evidence in Spanish at the January 10, 2006, hearing will remain in the record to be considered only for comparison purposes to their English translations submitted at the January 25, 2007, hearing as Mr. Davis requested.

Finally, to the extent that the January 10, 2006, testimony of Alvino Guajardo and Francisca Rodriguez contains some degree of hearsay, I note that the Full Commission's remand order did not specifically exclude from evidence the January 10, 2006, hearing testimony of these witnesses. All parties had an opportunity to review the January 10, 2006, hearing transcript before the April 10, 2007, hearing, and both witnesses were available for and underwent cross-examination at the April 10, 2007, hearing. Under these circumstances, the January 10, 2006, hearing testimony of Alvino Guajardo and Francisca Rodriguez will be accepted into the record in their entirety to be accorded such weight as the Commission deems appropriate. St. Paul Ins. Co. v. Touzin, supra.

On page 21 of the 2007 hearing transcript, Mr. Davis also objected to Mr. Guajardo answering a question as to which of two documents in the hearing record are "more legal." In light of Mr. Guajardo's response that he did not understand the question, I find moot Mr. Davis' objection to the question posed to Mr. Guajardo.

On page 37 of the hearing transcript, Mr. Davis objected to Mr. Guajardo answering a question seeking an opinion as to whether or not the decedent ever intended to return to Mexico. In light of Mr. Guajardo's response that he had an idea what the decedent's intentions were, I find moot Mr. Davis' objection to the question.

**ISSUE 2: Proper Identification Of The Decedent.**

Anthony Parr indicated that he and Buster Roberts employed the deceased under the name Cresenciano Lerma Pina (and the nickname "Pineapple"). Lavona Haury presented evidence that she married the decedent under the identity Francisco Javier Sustaita in June of 2000 and lived with him until his death in 2004. Francisca Guevara Rodriguez presented evidence that the decedent is actually Modesto Sustaita Herrera whom she married in Mexico in 1986, whom she last saw alive in June of 1996, and with whom she had four children.

Lavona Kay Haury has therefore filed a claim for dependency benefits as the widow of the decedent. Francisca Guevara Rodriguez and her three minor children have also filed a claim for dependency benefits as the widow and minor children of the decedent.

**Crescentiano Lerma Pina Identity.**

Anthony Parr testified that the decedent had worked for Mr. Parr and Buster Roberts in the logging business a little over a year when the fatal accident occurred in December of 2004. (2006 hearing T. 85-86) Mr. Parr testified that the decedent used the name Crescentiano Lerma Pina on his employment application and used that name at work. (2006 hearing T. 85)

**Francisco Javier Sustaita Identity.**

Lavona Kay Haury testified that she married Francisco Javier Sustaita. (2006 hearing T. 132) Ms. Haury testified that she learned that her husband was using the name Crescentiano Pina when she was cleaning and saw his check stubs in a drawer. (2006 hearing T. 108) Ms. Haury testified that when she asked her husband, he indicated that he was using the name Crescentiano Pina for the Social Security number and that Crescentiano Pina was a man who got

into a bunch of trouble and went back to Mexico. (2006 hearing T. 108)

Ms. Haury also presented into evidence an Arkansas marriage license indicating that Lavona Kay Haury married an individual identified as Francisco Javier Sustaita in June of 2000. (2007 hearing T. Clt. 2 Exh. 1) Ms. Haury brought photographs to the 2006 hearing that she identified as her husband, including photographs of Ms. Haury and her husband together. These photographs were photocopied for the 2006 hearing (2006 hearing T. Clt. Exhs. 2F and 3), and as discussed above, I later made color reprints of these photographs part of the record on July 18, 2007.

Mr. Parr testified that the first time he learned of the decedent's Francisco identity was when authorities came to the woods when the fatal accident occurred. (2006 hearing T. 86) Mr. Parr testified that the decedent had identified Lavona as his wife. (2006 hearing T. 86) Mr. Parr testified that the decedent and his wife and another employee (Jerry) all stayed at the same household. (2006 hearing T. 90) Mr. Parr testified that he had never heard anything about the decedent possibly having another wife. (2006 hearing T. 88)

Prior to the 2007 hearing, all parties stipulated that Lavona Haury was wholly and actually dependent on the

decedent within the meaning of the Arkansas Workers' Compensation Law if Lavona Kay Haury is found to be the legal widow of the decedent. (2007 hearing T. Comm. Exh. 1)

**Modesto Sustaita Herrera Identity.**

At the 2007 hearing, Francisca Guevara Rodriguez presented into evidence, consistent with the Commission's remand order, an English translation of her 1986 marriage license to Modesto Sustaita Herrera and English translations of birth certificates of her four children with Modesto Sustaita Herrera. (2007 hearing T. Clt. 1 Exh. 1)

Francisca Guevara Rodriguez testified that she viewed the body of the decedent in Mexico before his burial and that the decedent was her husband, Modesto. (2007 hearing T. 92) She also viewed Ms. Haury's photographs photocopied as Claimant's Exhibits 2D and 2E into evidence at the 2006 hearing and testified that these photographs were photographs of Modesto. (2006 hearing T. 58) Additionally, she testified that she learned from a sister-in-law's telephone call that Modesto had died. (2006 hearing T. 58)

She further testified that she last saw Modesto alive on June 2, 1996. (2006 hearing T. 67) She testified that she and Modesto never divorced. (2006 hearing T. 66) She testified that Modesto had tried to enter the United States

twice before, but he was returned to Mexico. However, he was successful in entering the United States on his third attempt. (2006 hearing T. 65) She testified at the 2006 hearing that Modesto was sending money back to Mexico for her and her children and that she relied on that money. (2006 hearing T. 65-66) At the 2006 hearing, she testified that she did not keep records of the money that she received, although she testified that she did have deposit receipts. (2006 hearing T. 70-71)

A photocopy of an identification card purporting to contain a photograph of Modesto Sustaita Herrera circa 1995-1996 was made part of the record at the 2006 hearing. Because the black and white photocopy of the photograph on the card was essentially indiscernible, I requested and received from Gary Davis the original identification card with a color photograph. As discussed above, I have "blue-backed" that card to designate the card as part of the record.

Alvino Guajardo testified at the 2006 hearing that he was a legal assistant to a Dallas attorney, Pablo Alvarado, who was one of several consulting lawyers to the Mexican Consulate. (2006 hearing T. 11) Mr. Guajardo testified that he was involved in this matter in two regards. The first

contact related to permits obtained by Jose Angel Sustaita Nieto to transport the deceased by automobile from the United States to Mexico. (2006 hearing T. 12) The second contact related to Francisca Guevara Rodriguez going to a local government office in Mexico requesting assistance in obtaining any benefits due because her husband had died. (2006 hearing T. 15) Mr. Guajardo testified that computer records indicate that Francisca Guevara Rodriguez went to the government office in Ciudad Victoria, Tamaulipas, to ask for assistance on December 17, 2004. (2006 hearing T. 80)

After talking to relatives of Modesto Herrera, Mr. Guajardo concluded that the deceased was actually Modesto Herrera. (2006 hearing T. 22) With regard to whether the decedent was in fact the Francisco Javier Sustaita that his identity documents indicated, at the 2006 hearing Mr. Guajardo testified that he had the wife of the real Francisco in Mexico on standby to testify that Francisco was alive in Mexico. (2006 hearing T. 36)

At the 2007 hearing, a witness identified himself as the real Francisco Javier Sustaita Herrera. (2007 hearing T. 61) This witness testified that he observed the deceased before he was buried and that the deceased was his brother, Modesto. (2007 hearing T. 66) However, this 2007 witness

identifying himself as Francisco also testified that he was not married and had never been married. (2007 hearing T. 63)

After hearing the live testimony at the 2007 hearing and observing the demeanor of the witnesses, I find credible the witnesses and testimony presented at both hearings except Mr. Guajardo's testimony regarding discussions he had with relatives of Modesto before the 2006 hearing. In light of Francisco's testimony that he has never been married, I do not rely in any way on Mr. Guajardo's hearsay discussions with individuals purporting to be relatives Francisco or Modesto. In all other respects, I find credible Mr. Guajardo's testimony, as well as the testimony presented by the other witnesses at the 2006 hearing and the 2007 hearing.

**Identity Conclusions:**

Ms. Haury's testimony persuades me that the decedent's work identity of Cresentiano Lerma Pina was a false identity which the decedent used along with Mr. Pina's Social Security number for employment with Mr. Parr and Mr. Roberts. No claimant has come forward alleging that the decedent's true identity is Cresentiano Lerma Pina or alleging to be a family member, dependent or spouse to an individual whose true identity was Cresentiano Lerma Pina.

I also find that the preponderance of the evidence establishes that the decedent married Lavona Kay Haury using the name Francisco Javier Sustaita. In reaching this conclusion, I am persuaded by Mr. Parr's testimony that the decedent lived with Ms. Haury and identified her as his wife. I am also persuaded by Ms. Haury's testimony that she married the decedent in 2000. I am persuaded by the photographs brought by Ms. Haury to the 2006 hearing and by the marriage license which Ms. Haury submitted into evidence at the 2007 hearing. The photographs of the decedent with Ms. Haury and the marriage license corroborate Ms. Haury's testimony that the decedent in fact married and lived with her as husband and wife.

However, the preponderance of the evidence also persuades me that the decedent was born to parents, Benjamin Sustaita and Trinidad Herrera, on June 15, 1959, and was named Modesto Sustaita Herrera by his parents. The greater weight of the evidence also persuades me that Modesto Sustaita Herrera married Francisca Guevara Rodriguez in Mexico on or about July 6, 1986, and had the four children with her whose birth certificates are in the record.

I find that the identities of Francisca Rodriguez's husband and children are established in the record by

Francisca's testimony and by English translations of a marriage certificate and birth certificates which I find credible.

I find that the identity of the decedent as Modesto Sustaita Herrera is established in the record by the testimony of Francisca Rodriguez at the 2006 and 2007 hearings and the testimony of Francisco Javier Sustaita Herrera at the 2007 hearing. Both identified the body of the decedent before he was buried as Modesto. I find that their testimony is corroborated by facial similarities between the identification card photograph of Modesto circa 1995 or 1996 and the decedent's two photographs taken with Lavona Haury on June 6, 2000. The facial similarities that I perceive in these photographs include the eye color, hair color, hair style, nose, chin, and eyebrows.

**ISSUE 3: Whether The Claimants Herein Are Proper Dependents Entitled To Dependency Death Benefits Under The Act.**

Arkansas Code Annotated §11-9-527 provides in part:

(c) BENEFICIARIES - AMOUNTS. Subject to the limitations as set out in §§ 11-9-501 - 11-9-506, compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee in the following percentage of the average weekly wage of the employee and in the following order of preference:

(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;

. . .

(3) (A) To one (1) child if there is no widow or widower, fifty percent (50%).

(B) If more than one (1) child, and there is no widow or widower, fifteen percent (15%) for each child, and in addition thereto, thirty-five percent (35%) to the children as a class, to be divided equally among them[.]

. . .

(i) PARTIAL DEPENDENCY. (1) If the employee leaves dependents who are only partially dependent upon his or her earnings for support at the time of injury, the compensation payable for partial dependency shall be in the proportion that the partial dependency bears to total dependency.

In addition, Arkansas Code Annotated §11-9-102(20) (A) states that:

"Widow" shall include only the decedent's legal wife, living with or dependent for support upon him at the time of his death[.]

In assessing who, as between Lavona Haury and Francisca Rodriquez, was the decedent's "legal wife" at the time of his death, Arkansas Code Annotated §9-12-101 provides that no second marriage shall be contracted during the life of a husband or wife unless that first marriage has been dissolved through divorce. See generally, Standridge v. Standridge, 298 Ark. 494, 769 S.W.2d 12 (1989).

However, more than one presumption exists against bigamous marriage which the Arkansas Court of Appeals described and applied as follows in Clark v. Clark, 19 Ark. App. 280, 719 S.W.2d 712 (1986):

Under Ark. Stat. Ann. § 55-108 (Repl. 1971), a bigamous marriage is void from its inception, and no decree of any court is required to declare it so. *Smiley v. Smiley*, 247 Ark. 933, 448 S.W.2d 642 (1970); *Goset v. Goset*, 112 Ark. 47, 164 S.W. 759 (1914). However, it is a longstanding presumption of law that a marriage entered in due form is valid, and the burden of proving a marriage invalid is upon the party attacking its validity. It is presumed that, when a man and woman are married, and one has a living spouse, the former spouse has been divorced at the time of the marriage. *Higgins v. Higgins*, 266 Ark. 953, 588 S.W.2d 454 (1979); *Lathan v. Lathan*, 175 Ark. 1037, 1 S.W. 67 (1928); *Cash v. Cash*, 67 Ark. 278, 54 S.W. 744 (1899).

Further, there is the additional presumption that the former spouse was dead at the time of the second marriage. *Goset v. Goset*, 112 Ark. 47, 164 S.W. 759 (1914). The presumptions of divorce from or death of a previous spouse are so strong that they exist despite the fact that overcoming them involves proof of a negative, i.e., proof of no

divorce and/or proof that the previous spouse is still living. *Estes v. Merrill*, 121 Ark. 361, 181 S.W. 136 (1915).

Here, appellant failed in his burden of proving his marriage to appellee was invalid. The only testimony tending to rebut the presumption that appellee's former spouse had been divorced was that of the parties' testimony that appellee had not obtained a divorce. There was no evidence at all that appellee's former spouse had not divorced appellee. The evidence was not sufficient to overcome the presumption of divorce. Neither did appellant produce any proof that appellee's former spouse was alive, which leaves intact the presumption that he was dead.

In the present case, unlike the circumstances in Clark, I find that the presumption against bigamy has been overcome. In the present case, unlike in Clark, the preponderance of the evidence establishes that Modesto's first wife, Francisca, was still alive at the time of his 2000 marriage to Lavona Haury. In addition, Alvino Guajardo explained divorce recording in the Civil Registry in Mexico, and Mr. Guajardo found no record of a divorce in the records of the relevant Civil Registry office in Mexico. (2000 hearing T. 18-20, 44-45) Although no one has attempted to search for a divorce decree through the courts of the United States, I note that Francisca Rodriguez credibly testified that she and Modesto were never divorced. (2007 hearing T. 91) In addition, the preponderance of the evidence

establishes that Modesto was working in the United States under a false identity when he died and was married in the United States in 2000 under a second false identity before he died. I find that this evidence rebuts any presumption that Modesto Sustaita Herrera legally divorced Francisca Rodriguez in Mexico or in the courts of the United States before he married Lavona Haury in June of 2000 using a false identity. Since the preponderance of the evidence establishes that Modesto did not divorce Francisca Guevara Rodriguez before marrying Lavona Haury, then Francisca Guevara Rodriguez (not Lavona Haury) was the decedent's legal wife at his death. Because I find that Lavona Haury was not the decedent's legal wife, I find that she cannot be entitled to dependency benefits as his widow under the Arkansas Workers' Compensation Law.

As for Francisca Guevara Rodriguez and the minor children of Modesto Sustaita Herrera, dependency benefits are payable only to a widow and qualifying children who are either "wholly and actually dependent" on the decedent or at least "partially" dependent on the deceased employee. In order to establish that she is wholly and actually dependent, a wife must establish facts showing dependency on the decedent before being entitled to benefits. Lawhon Farm

Services v. Brown, 335 Ark. 272, 984 S.W.2d 1 (1998). For minor children, however, "wholly and actually" dependent status can be established through either actual support or a reasonable expectation of support. Id.; Roach Manufacturing Co. v. Cole, 265 Ark. 908, 582 S.W.2d 268 (1979).

In the present case, I find that Francisca Guevara Rodriguez has failed to establish that she was actually dependent, in whole or in part, on her husband at the time of his accident on December 9, 2004. In this regard, I note that Francisca Rodriguez indicated at the 2006 hearing that she had last received money from her husband one and one-half years before his accident. (2006 hearing T. 79) In addition, she testified that he at one point sent her \$100 per month and that she had receipts from the bank indicating the deposits. (2006 hearing T. 70-71) The Commission specifically noted the lack of documentation in the record of the 2006 hearing to support Francisca Rodriguez's claim that she received money from the decedent when the Commission remanded this case on July 10, 2006, for additional evidence. Nevertheless, Francisca Rodriguez, again at the 2007 hearing, failed to offer into evidence any documentation to supplement her testimony as to when she received \$100 per month from her husband. Even assuming

that at some point between 1996 and 2004 Modesto sent Francisca \$100 per month for a period of time, Francisca has failed to present any evidence documenting when over the eight years preceding Modesto's death those payments occurred. The evidence before me simply fails to establish any financial dependence of Francisca on Modesto for any period after he left in 1996 and clearly establishes a lack of dependence the last one and one-half years before Modesto died. Francisca has therefore failed to establish that she is entitled to an award of benefits as a dependent widow.

English translations of birth certificates in the 2007 hearing record confirm that the claimants, Erendria, Marlen, and Eber, had not yet reached 18 years of age at the time of their father's accident and death. While the evidence shows that these minor children were not receiving any actual support from the decedent for one and one-half years before his death, under the statutory interpretations of the Arkansas Supreme Court, I understand that these minors by virtue of their age were entitled to an expectation of support sufficient to establish that they were wholly and actually dependent on their father at the time of his accident within the meaning of the Arkansas Workers'

Compensation Law. See Roach Manufacturing Co. v. Cole, 265 Ark. 908, 582 S.W.2d 268 (1979).

I therefore find for the reasons discussed herein that the claimants, Eber Sustaita Guevara, Marlen Sustaita Guevara, and Erendria Magaly Sustaita Guevara, are proper dependents entitled to dependency benefits under the Arkansas Workers' Compensation Law but that Francisca Guevara Rodriguez and Lavona Kay Haury have each failed to establish by a preponderance of the evidence that either is entitled to dependency benefits under the Arkansas Workers' Compensation Law.

**ISSUE 4: The Employment Relationship, If Any, Between The Decedent And The Alleged Employer.**

Respondent No. 1 states that federal law prohibits fraudulent use of a Social Security number, and Respondent No. 1 contends that an employment contract cannot be based on fraud or illegal activity.

Respondent No. 2 also contends that the alleged employment relationship was illegal and that therefore as between Buster Roberts Logging and the decedent there was no "employee", "employer", or "employment" within the meaning of Arkansas Code Annotated § 11-9-102.

My research indicates that these arguments are inconsistent with the relevant language of Arkansas Code

Annotated § 11-9-102(9)(A) (Repl. 2002) which originated in its current form in Section 2 of Initiated Measure 4 of 1948 and provides in relevant part:

“Employee” means any person, including a minor, *whether lawfully or unlawfully employed* in the service of an employer under any contract of hire...(emphasis added)

I note that the earlier Arkansas Workers' Compensation Law, Act 319 of 1939, contained the exact same relevant language but *without* the comma following the word “minor”:

“Employee” means any person, including a minor whether lawfully or unlawfully employed in the service of an employer under any contract of hire...

Applying the last antecedent rule of statutory construction, the absence of a comma after the word “minor” in the 1939 Act might support an argument that the legislature intended to limit covered illegally employed persons to illegally employed minors. However, the Arkansas Courts in construing other statutes have refused to apply the last antecedent rule of statutory construction where the modifying phrase at issue is preceded by a comma, as is our current statutory definition of “employee.” For a discussion of commas and relevance of the last antecedent rule in statutory interpretation in Arkansas cases, see McCoy v. Walker, 317 Ark. 86, 876 S.W.2d 252 (1994);

Richardson v. State, 314 Ark. 512, 863 S.W.2d 572 (1993).

Therefore, I find that the presence of a comma after the word "minor" in the Initiated Measure adopted by the People in 1948 indicates a legislative intent that all legally or illegally employed persons be considered "employees" within the meaning of the Arkansas Workers' Compensation Law regardless of whether the person is or is not a minor. Furthermore, although the Arkansas Courts have not yet engaged in a statutory interpretation of the language at issue, Professor Larson has indicated that the state courts construing this language have held that illegally employed aliens are covered by the Act. See 3 Larson, Workmen's Compensation Law § 66.03 Footnote 4-6 and accompanying text (1998). Accord Champion Auto Body v. Industrial Claim Appeals Office, 950 P.2d 671 (Colo. Ct. App. 1997).

To the extent that Respondent No. 1 has suggested in the alternative that the Immigration Reform and Control Act of 1986, 8 U.S.C. §1324a (2000) et seq. and Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002) pre-empt a state workers' compensation benefits award to an undocumented alien, I note that the respondents cite no authority so holding, and I note that numerous state courts have rejected the argument that IRCA pre-empts state law remedies,

including workers' compensation remedies, for undocumented aliens. See generally cases cited and discussed in Coma Corp. v. Kansas Dept. of Labor, 283 Kan. 625, 154 P.3d 1080 (2007); Balbuena v. IDR Realty LLC, 6 N.Y. 3d 338, 812 N.Y.S.2d 416, 845 N.E.2d 1246 (2006); and Design Kitchen and Baths v. Lagos, 388 Md. 718, 882 A.2d 817 (2005).

Respondent No. 1 has also offered into evidence a copy of 18 U.S.C. § 1028, a criminal statute pertaining to identification documents. With regard to this federal statute, I note that the respondents have not offered any identification documents into the record, and the respondents have not offered any authority or persuasive rationale indicating how a federal criminal statute regarding identification documents would pre-empt a state law remedy in workers' compensation to an undocumented alien.

For the foregoing reasons, I find that the decedent was an employee of the respondent employer within the meaning of the Arkansas Workers' Compensation Law notwithstanding the decedent's use of another person's identity and Social Security number in the decedent's employment with the employer. I also find that federal law does not pre-empt an award of dependency benefits under the Arkansas Workers'

Compensation Law related to the death of Modesto Sustaita Herrera.

**ISSUE 5: Controversion And Attorney's Fees.**

Respondent No. 1 has previously contended that Respondent No. 1 did not controvert anyone's entitlement to benefits but simply stopped paying benefits to Lavona Haury to allow for an evidentiary hearing permitting the Commission to determine the appropriate beneficiaries, if any. (2007 hearing T. Comm. Exh. 6 p. 10) Even if this accurately describes Respondent No. 1's initial intent and actions, I also note that Respondent No. 1 filed an appeal of ALJ White's original benefit award and argued before the Full Commission that none of the claimants are entitled to benefits. (Id. 11) Under these circumstances, even if Respondent No. 1 had arguably not previously controverted benefits, Respondent No. 1 had clearly controverted benefits to all claimants at the point that Respondent No. 1 cross-appealed ALJ White's February 27, 2006, benefit award.

Respondent No. 2 contends that the decedent, because of his undocumented alien status, did not have an employment relationship within the meaning of the Arkansas Workers' Compensation Law. Based on this contention, I find that

Respondent No. 2 has also controverted the benefits awarded herein.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. A person died on December 9, 2004.
3. The respondents have not paid any dependency death benefits to date except that the respondents did initiate fatality death benefits and paid for a period of five weeks to Lavona Haury until a dispute arose as to the identity of the deceased employee and his dependents.
4. The decedent earned an average weekly wage of \$500.
5. If Lavona K. Haury is found to be the legal widow of the decedent, Lavona K. Haury was wholly and actually dependent upon the decedent within the meaning of the Arkansas Workers' Compensation Law.
6. The decedent's true identity is Modesto Sustaita Herrera.
7. The decedent married Francisca Guevara Rodriguez on July 6, 1986, and had four children with Francisca.

8. The decedent was still married to Francisca Guevara Rodriguez when the decedent married Lavona Kay Haury on June 6, 2000; Lavona Kay Haury was therefore not the decedent's legal wife and is not a proper party to receive dependency benefits under the Arkansas Workers' Compensation Law in this claim.
9. Francisca Guevara Rodriguez was the legal wife of the decedent on the date of his injury.
10. Francisca Guevara Rodriguez was not financially dependent on the decedent, in whole or in part, at the time of his accident and death; Francisca Guevara Rodriguez is therefore not entitled to receive dependency benefits under the Arkansas Workers' Compensation Law in this claim.
11. Eber Sustaita Guevara, Marlen Sustaita Guevara, and Erendria Magaly Sustaita Guevara were minor children of the decedent at the time of his accident and death; these three claimants are proper parties entitled to receive dependency benefits under the Arkansas Workers' Compensation Law in this claim.

12. The decedent was an employee of Buster Roberts Logging, as the term "employee" is defined in Arkansas Code Annotated § 11-9-102(9)(A) (Repl. 2002), notwithstanding that the claimant was working in this country under a false identity and another individual's Social Security number.
13. Federal law does not pre-empt an award of dependency benefits in this claim.
14. Respondent No. 1 and Respondent No. 2 have both controverted the claim for benefits awarded herein.

**AWARD**

The respondents are directed to pay dependency benefits for Eber Sustaita Guevara, Marlen Sustaita Guevara, and Erendria Magaly Sustaita Guevara in accordance with Arkansas Code Annotated § 11-9-527 and the findings of fact set forth herein. All accrued benefits shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

Gary Davis is entitled to a 25% attorney's fee on the benefits awarded herein, one-half of which is to be paid by the claimants and one-half to be paid by the payor-respondent in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge