

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F108515

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

OPINION FILED NOVEMBER 27, 2007

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 represented by HONORABLE LEE MULDROW,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents No. 1 appeal from the decision of the Administrative Law Judge finding that Wade Finley III was wholly and actually dependent upon the deceased employee at the time of his death. Claimant filed an untimely cross appeal on the issue of average weekly wage. In an Order filed March 14, 2007, claimant's cross-appeal was dismissed. Based upon our de novo review of the entire record and

without giving the benefit of the doubt to either party, we find that the claimant has failed to meet his burden of proof. Therefore we find that the decision of the Administrative Law Judge must be reversed and this claim for dependency benefits denied and dismissed.

The facts in this claim are not in dispute. Wade Finley Jr. was an employee of respondents on July 19, 2001, when he sustained an electrocution injury resulting in his death. At time of his death, the claimant was married to Amy Finley and the couple had no children. In April of 2001, the Finleys consulted the Department of Obstetrics and Gynecology at UAMS for the purpose of assisting Ms. Finley in becoming pregnant. On June 27, 2001, Ms. Finley underwent transvaginal egg retrieval which were subsequently joined with the claimant's sperm in a laboratory setting, creating 10 embryos or zygotes. Two embryos were implanted into Ms. Finley's uterus on July 2, 2001, but ultimately resulted in miscarriage. Of the remaining eight embryos, four were frozen or cryopreserved, and four did not survive and were discarded. On June 26, 2002, approximately eleven months

after the claimant's death, Ms. Finley returned to UAMS to undergo another In Vitro Fertilization procedure. Upon thawing the four remaining embryos, two were not viable. The remaining two viable embryos were implanted into Ms. Finley's uterus resulting in a singleton pregnancy. Wade Finley III was born on March 4, 2003.

During her pregnancy, Ms. Finley obtained a court order from the Circuit Court of Lonoke County establishing paternity. The Order entered February 14, 2003, states:

That upon delivery of the child, borne by the Petitioner Amy R. Finley - now pregnant, that the State Registrar of the Arkansas Department of Health, Division of Vital Records, shall enter and state upon the certificate of birth that Wade W. Finley, Jr., now deceased, is the father of this child;

And that, thereafter, all State and Federal Agencies of the United States of America, shall uphold the findings of this Court's conclusion of paternity - in Amy R. Finley the mother and Wade W. Finley, Jr. the father - for any and all lawful purposes; and, that this child is the legitimate child of Amy R. Finley and Wade W. Finley, Jr. for any and all lawful purposes, both State and Federal.

Accordingly, it is undisputed that Wade Finley III is the legitimate child and heir of the claimant. However, it is not our duty to determine legitimacy; rather, we are charged with determining whether at the time of claimant's death, Wade Finley III was a person wholly and actually dependent upon the claimant. A.C.A. § 11-9-527(c) and (h). The Administrative Law Judge and the parties cite several cases which address whether posthumously conceived children qualify as "children" within the definition of the Social Security Act. In each of the cases cited, the issue involved legitimacy and intestacy law and consent. Legitimacy, intestacy, inheritance, and consent are not at issue. Consequently these cases have no persuasive authority. Moreover, as this is an issue of first impression, there is no authoritative case law to follow.

A.C.A. § 11-9-704(c) (3) specifically provides that "Administrative law judges, the commission, and any reviewing courts shall construe the provisions of this chapter strictly." In Lawhon Farm Services v. Brown, 335 Ark. 272, 984 S.W.2d 1 (1998) the Supreme Court stated:

Strict construction means narrow construction. Arkansas Conference Seventh Day Adventists v. Benton City Board of Equalization, 304, Ark. 95, 800 S.W.2d 426(1990), and Thomas v. State, 315 Ark. 79, 864 S.W.2d 835(1993), we wrote that strict construction requires that nothing to be taken as intended that is not clearly expressed. The doctrine of strict construction is to use the plain meaning of the language employed. Holaday v. Fraker, 323 Ark. 552, 915 S.W.2d 280(1996). Even when statutes are to be strictly constructed, however, they must be construed in their entirety, harmonizing each subsection where possible. MenArk Pallet Co. v. Lindsey, 558 Ark. App. 309, 950 S.W.2d 468 (1997).

A.C.A. § 11-9-527(c) 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..." Furthermore, "All questions of dependency shall be determined as of the time of the injury." A.C.A. § 11-9-527(h). We may not liberalize, broaden, or narrow these provisions. A.C.A. § 11-9-1001. The issue presently before this Commission is whether Wade Finley III was wholly and actually dependent upon the claimant on July 19, 2001. The answer to this question is

"No." On July 19, 2001, Wade Finley III was not a person nor a child and therefore could not have been a "person wholly and actually dependent upon the claimant."

The Arkansas Workers' Compensation Act does not define the term "person" as used in section 527. However, section 527 does list individuals that may receive dependency benefits as: widow, widower, child, parent, brother, sister, grandchildren, and grandparent. A "child" is defined as "a natural child, a posthumous child, a child legally adopted prior to injury of the employee, a stepchild, an acknowledged illegitimate child of the deceased or of the spouse of the deceased, and a foster child." As Wade Finley III is a posthumous child of the claimant's, it must then be determined if "at the time of the claimant's injury," this posthumous child fell within this definition. Again, the answer is "No."

It is undisputed that at the time of the claimant's injury, Ms. Finley was not pregnant; she was not expecting to bear the claimant's posthumous child. The stipulated facts unquestionable reveal that, at best, at the

time of the claimant's injury, the Finleys had potentially four frozen zygotes or embryos. The future status of these zygotes or embryos was unknown on July 19, 2001.

Nevertheless, it cannot be argued that these zygotes or embryos rose to the level of a person within the meaning of the law. Even the Arkansas criminal code does not recognize an "unborn child" as a "person" unless it is "in utero at any stage of development" or until it is a "living fetus of twelve (12) weeks or greater gestation." A.C.A. § 11-5-102(13)(B)(i)(a) and (b). As the zygotes or embryos were cryopreserved at the time of the claimant's death, they did not rise to the definition of a person on that date; they were not in utero, nor were they a living fetus at least twelve weeks of age. Moreover, the Consent Form signed by the Finleys on May 1, 2001, clearly advised them that "The legal status of frozen embryos is not known." Thus, at the time of consent, the claimant and his spouse were put on notice as to the unknown legal status of frozen embryos.

Accordingly, strictly construing the Act, we find that at the time of the claimant's death, the only person or

persons wholly and actually dependent upon the claimant was Amy Finley, his wife. On July 19, 2001, the frozen zygotes or embryos were not in utero nor were they a living fetus of at least twelve weeks, and could not therefore be classified as a posthumous child at that time. Therefore, following the legislative mandate to strictly construe the workers' compensation act, we find that the claimant has failed to meet his burden of proof.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The respondent appealed the Administrative Law Judge's December 27, 2006 opinion, finding that the preponderance of the evidence establishes that Wade Finley, III, had a reasonable expectation of support from his

father, the deceased claimant, and that Wade Finley, III, is entitled to dependency benefits pursuant to A.C.A. § 11-9-527(c) (1987). The Majority erroneously reversed the Administrative Law Judge's findings and concluded that the claimant did not meet the required burden of proof. Based upon a de novo review of the record in its entirety, I find Wade Finley, III, had a reasonable expectation of support from his father, the deceased claimant, and that Wade Finley, III, is entitled to dependency benefits pursuant to A.C.A. § 11-9-527(c) (1987). Furthermore, I find that the claimant did meet the required burden of proof. As such, I must respectfully dissent.

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 (IVF/ET) procedure. The IVF/ET consent form set out four steps of the procedure:

1. Development of ovarian follicles, i.e. the ripening of eggs.
2. Transvaginal ultrasound guided aspiration of the oocytes (eggs).
3. Fertilization and development of the embryo.
4. Transfer of the embryos back into your uterus.

The IVF/ET consent form also provided a section dealing with Patient Billing and Insurance. The IVF/ET consent form states:

If your insurance or HMO does not cover IVF, you will be asked to make a deposit equivalent to the cost of an average IVF cycle prior to your egg retrieval. The estimated cost of for a single IVF cycle is between \$8,000 and \$9,000 dollars. This includes physician fees, medication charges, ultrasounds, blood tests, embryo culture fees, cryopreservation, etc. The actual hospital and physician charges incurred will be applied to your deposit. Any funds remaining in your account at the end of your IVF active cycle will be refunded. If your charges exceed your deposit, you will be billed for the balance at the end of your active cycle. *You will receive current itemized statements of charges every month from both the University Hospital and Medical College Physician's Group (MCPG).* You may not receive a final

statement for all active cycle charges until up to 60 days after the cycle ends. Any refund due to you after an active cycle should be received by you approximately 60 days from the date of the last IVF cycle charge. (Emphasis added).

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. This contract states:

Each of you hereby agrees and acknowledge that any of your sperm, egg, or embryo(s) which the physician determines the exercise of reasonable medical judgment are non-viable or otherwise not medically suitable for cryopreservation or embryo transfer may be disposed in accordance with the University Hospital policy.

You should understand that there is a fee for freezing the embryos and a monthly storage fee. You will be informed of the exact amount of this fee at the time the cryopreservation is performed. It is expected that this monthly fee will be paid in a timely manner.

On June 27, 2001, thirty-one (31) 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 (2) of the fertilized embryos were implanted into her uterine cavity and four (4) 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.

The Majority erroneously found that the preponderance of the evidence does not establish that Wade Finley, III, had a reasonable expectation of support from his father, the deceased claimant, and that Wade Finley, III, is entitled to dependency benefits pursuant to A.C.A. § 11-9-527(c) (1987).

The first issue at hand is who has been determined to be the biological father of Wade Finley, III. However, this matter is seemingly not disputed due to an Order of the Circuit Court of Lonoke County, Arkansas, which found Wade W. Finley, Jr., now deceased, to be 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." As such, the issue of Wade Finley, III's paternity is now undisputable and is not on appeal.

The second, and perhaps most important issue at hand, is when the embryo became viable. If it is found that the embryo was viable when conceived, then benefits must be awarded. Ark. Code Ann. § 11-9-527(c) provides in pertinent part, "... compensation for the death of an employee shall be paid to those persons who were wholly or actually dependent upon the deceased employee..." Furthermore, "All questions of dependency shall be determined as of the time

of injury." Ark. Code Ann. § 11-9-527(h). I find that the embryo became viable at conception, which occurred during the claimant's lifetime, and therefore, the embryo was wholly and actually dependant at the time of injury.

Ark. Code Ann. § 28-9-209(c) states:

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.

The term "conception" is defined in The American Heritage Dictionary of the English Language (4th Edition) as follows:

(A) Formation of a viable zygote by the union of the male sperm and female ovum; fertilization.

(B) The entity formed by the union of the male sperm and the female ovum; an embryo or zygote.

Dorland's Illustrated Medical Dictionary (30th Edition) defines "conception" as follows:

The fertilized ovum; the resulting cell from the union of the male and female gamete (sperm and ovum) more precisely, the cell after synopsis at the

completion of fertilization until the first cleavage.

It is therefore determined that under current Arkansas law that a child is conceived when the sperm and the egg are joined. The claimant gave his consent on May 1, 2001, for conception to occur between his sperm and his wife's egg. The embryos became viable at conception. This is evidenced by the fact that thirty-one (31) eggs were removed and fertilized, but only ten (10) remained viable after being fertilized with the claimant's sperm. Those ten (10) embryos were then frozen, which the claimant consented to. As such, the embryo, a viable being, must be a dependant at the time of injury.

Furthermore, the Finleys also signed a separate consent form for participation in the IVF program and human embryo cryopreservation program. This contract states:

Each of you hereby agrees and acknowledge that any of your sperm, egg, or embryo(s) which the physician determines the exercise of reasonable medical judgment are non-viable or otherwise not medically suitable for cryopreservation or embryo transfer may be disposed in accordance with the University Hospital policy.

This contract determines that the physicians determine whether an embryo is either viable or non-viable. Embryos that are non-viable are destroyed. The embryo that resulted in Wade Finley, III, was not destroyed, further evidencing that the physicians felt him to be a viable being.

The Majority found that even though Wade Finley, III, is a posthumous child of the claimant's, he does not fall within the definition of a "child" at the time of the claimant's injury. A "child" is defined as "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 of the spouse of the deceased, and a foster child." The Majority erroneously determined that because the claimant's wife was not pregnant at the time of the injury, that the child was not a "person" within the meaning of the law.

The Majority's argument is erroneous at best. First, even the Majority cites the fact that the Arkansas Workers' Compensation Act does not define the term "person" as used in Ark. Code Ann. § 11-9-527(h). Therefore, it

cannot be presumed or speculated that the embryo is not a person or viable being. In fact, a child is a "person" because under Arkansas law, a child is conceived when the sperm and the egg are joined, creating an embryo. As such, an embryo is a viable being or person under the law.

Second, the Majority cites a criminal statute which does not recognize an unborn child as a person unless it is "in utero at any stage of development" or until it is a "living fetus of (12) weeks or greater gestation." Ark. Code Ann. § 11-5-102(13)(B)(i)(a) and (b). Clearly the criminal statute's intent is not relevant in this particular case, due to the sheer fact that it is primarily dealing with the legality and/or illegality of an abortion. Just because abortion is legal within the first twelve (12) weeks of conception does not mean that the embryo is not viable or a "person." Additionally, this argument proposes that a wife, less than twelve weeks pregnant at the time of her husband's death, would be precluded from recovering benefits for that child under workers' compensation. Not only is that an ethically immoral decision for this Commission to make,

but it stands to reason that this Commission would not find that a pregnant woman less than twelve weeks pregnant at the time of her husband's death, would be precluded from recovering benefits.

Furthermore, it appears that laws enacted by civil courts are more pertinent to this particular situation than laws enacted for criminal courts. In Aka v. Jefferson Hospital Association, 344 Ark. 627, 42 S.W.3d 508 (2001), the Supreme Court of Arkansas found that a viable fetus is a "person" within the meaning of the Arkansas wrongful death statute. The Court in Aka relied upon the passage of Amendment 68 in 1988 which declares that "[t]he policy of Arkansas is to protect the life of every unborn child from *conception* until birth, to the extent permitted by the Federal Constitution." (Emphasis added). Ark. Const. Amend. 68, § 2. Additionally in Aka, the Court found that by Federal interpretation, the state's interest in protecting the life of a fetus begins at viability. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (plurality). It is therefore apparent that under Aka, which

relied heavily on federal interpretations, that the embryo in the present matter, which began at conception and was determined viable by medical staff, should be considered a "person" within the meaning of the law.

It is therefore evident that the embryo is a viable being. First, a child was conceived when the embryo was formed. Second, the embryo was viable because it was not destroyed by the physicians pursuant to the contract. Third, recent case law in civil courts dealing with the wrongful death of a fetus and relying heavily on federal constitutional interpretation, have found that a viable fetus is a "person" within the meaning of the law.

The third issue in the present case is whether the viable embryo was wholly and actually dependent upon the claimant. 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, supra; 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). Due to the fact that the embryo was viable at the time of the claimant's injury, the Commission must decide whether the embryo was wholly and actually dependent upon the claimant. I find that the embryo was wholly and actually dependent upon the claimant at the time of the injury.

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, supra.

“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, supra, (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.

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". 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."

In the present 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.

Furthermore, the Finleys also signed a consent form for participation in the IVF program and human embryo cryopreservation program. This contract states:

You should understand that there is a fee for freezing the embryos and a monthly storage fee. You will be informed of the exact amount of this fee at the time the cryopreservation is performed. It is expected that this monthly fee will be paid in a timely manner.

As such, the claimant was providing monthly preservation fees to keep the embryos frozen. Had the claimant not continued paying this fee every month, the embryos would have been destroyed. This is evidence that the embryos were wholly and actually dependent upon the claimant at the time of the injury.

Additionally, it is also important to note that under current state law and recent United States Court of Appeals decisions, a viable embryo would be considered to be dependent upon a deceased 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 Administrative Law Judge 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 evidence that the claimant paid a monthly fee to keep the embryo viable. As such, I find that Wade Finley, III is entitled to dependency benefits under the Arkansas Workers' Compensation Act.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner