

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612946

PATSY JONES, GRANDMOTHER AND GUARDIAN OF KIERRA WILLIAMS, ALLEGED MINOR DAUGHTER, AND KEVION WILLIAMS, ALLEGED MINOR SON OF KEVIN LEE KIRBY (DEC'D.), EMPLOYEE	CLAIMANT
GULF RICE OF ARKANSAS II, LLC, EMPLOYER	RESPONDENT NO. 1
AG-COMP SIF CLAIMS, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JANUARY 22, 2010

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

Claimant represented by the HONORABLE BILL STANLEY,
Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by the HONORABLE GUY ALTON
WADE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 waived appearance.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondent No. 1 appeals an opinion and order
of the Administrative Law Judge filed August 25, 2009.
In said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. Claimants have established, by a preponderance of the credible evidence of record, that they are illegitimate, minor children of the decedent, Kevin Kirby, and Lakeisha Williams, and that they are entitled to compensation as dependents of the decedent pursuant to Ark. Code Ann. §11-9-527(c) (3) (Repl. 2007).
4. Kevion Williams and Kierra Williams are each entitled to compensation of \$49.00 each beginning November 18, 2006, (fifteen percent [15%] of the decedent's average weekly wage) as well as \$114.00 per week as a class to be divided equally between them (thirty-five percent [35%] of the decedent's average weekly wage) for a total compensation of \$212.00 per week, payable to Patsy Jones, grandmother and guardian of the claimant's herein.
5. Respondents #1 have controverted claimant's entitlement to dependency benefits.
6. Claimant's attorney, Mr. Bill Stanley, is entitled to the maximum statutory attorney's fee on the benefits awarded, one-half ($\frac{1}{2}$) of which is the responsibility of the claimants out of benefits awarded and one-half ($\frac{1}{2}$) the responsibility of respondents #1 pursuant to Ark. Code Ann. §11-9-715.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by

a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 25, 2009, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in

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accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant established by a preponderance of the evidence that Kevion and Kierra are the illegitimate minor children of the decedent, Kevin Kirby and LaKeisha Williams and that they are entitled to compensation as dependents of the decedent pursuant to Arkansas Code Ann. § 11-9-527(c)(3) (Repl. 2007). Based upon my de novo review of the record, I find that the claimant failed to prove paternity of the minor children, Kevion and Kierra Williams or their entitlement to dependency benefits.

Mr. Kevin Kirby was employed by the respondent employer and on November 17, 2006, he sustained crush

injuries which resulted in his compensable death on November 17, 2006. The respondents have paid related funeral expenses as well as appropriate hospital, medical and related expenses. At this time, the claimant claims that Kevion and Kierra are the illegitimate children minor children of the decedent, Kevin Kirby and LaKeisha Williams, a minor, and that they are entitled to dependency benefits.

LaKeisha Williams testified that she lives in Earle, Arkansas with her brother and mother, Patsy Jones, who is the guardian for Kierra Williams and Kevion Williams. Ms. Williams testified that she and Mr. Kirby got together at a house party and continued to sneak around. She stated that her mother did not know that she was seeing Mr. Kirby because he was a lot older. She was 12 years of age at this time. She became pregnant and on March 21, 2005, Kevion was born. Ms. Williams was 13 years old at the time. Mr. Kirby's name was not on the birth certificate. Almost a year later, Kierra was born while Mr. Kirby was incarcerated. Again, Mr. Kirby's name does not appear on Kierra's birth certificate.

Ms. Williams testified that the only person that knew that she was going out with Mr. Kirby was her

sister, Fatima. It was not until she got pregnant with Kevion that her mother found that she was pregnant.

Mr. Kirby was in jail seven or eight months and during the time that Kierra was born. Some letters were introduced into the record that were allegedly written by Mr. Kirby while he was incarcerated.

However, some of the letters are in cursive and others are in print and his signature does not appear on any of these letters. His name does not appear anywhere on any of these letters and some of the pages are missing as well. Ms. Williams has a third child, Demarian Gillian who was born April 1, 2008. Mr. Kirby is alleged to be Demarian's father.

Ms. Williams receives social security benefits due to her learning disability. She takes medication for this disability but she does not know what her diagnosis is. She also testified that she did not apply for social security benefits for her children.

The testimony of Ms. Patsy Jones was given. Ms. Jones is LaKeisha Williams' mother. She testified that it was Mr. Kirby's decision to keep his name off the birth certificates so he did not go to jail for statutory rape. Ms. Jones was the one that applied for social security benefits for Kevion and Kierra. She testified that Ms. Williams and Mr. Kirby were never

married, did not live together and there was never a request for child support filed.

Ms. Jones testified that Mr. Kirby's name does not appear on the birth certificates of Kevion and Kierra, nor is she aware of whether Mr. Kirby claimed on any other kind of document or information including state or federal income tax returns that they were his children. She also did not ever take LaKeisha to visit Mr. Kirby while he was in prison for those seven or eight months.

Ms. Jones testified that the hospital bills with regard to the births of Kierra and Kevion were paid by Medicaid. She also testified that no DNA tests were completed.

The respondents offered the testimony of Ms. Tammy Hester, who is the branch manager/claims representative for the claim involving Mr. Kirby. Ms. Hester stated that the claim was accepted as compensable and that the death was a compensable consequence of his injury. She testified that she learned there was a potential for a dependency claim as she investigated this matter and she contacted Mr. Kirby's mother, Shirley Kirby. She also inquired of Ms. Jones. Ms. Hester requested further documentation such as birth certificates, any child support documentation or any

other information. Ms. Hester testified that Ms. Jones offered to get DNA tests and that Ms. Hester asked that she be provided copies. As of the date of the hearing, there was no DNA testing performed. Ms. Hester testified that she never received any kind of income tax returns or other records or anything where Mr. Kirby acknowledged Kevion and Kierra as his children. The claimant's W-4 and employment application do not list any children.

Arkansas Code Annotated § 11-9-527(c) (3)

provides as follows:

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:

(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;

(4) To the parents, twenty-five percent (25%) each;

(5) To brothers, sisters,
grandchildren, and grandparents,
fifteen percent (15%) each.

In my opinion, a review of the evidence fails to demonstrate that Kevion and Kierra are the illegitimate children of Kevin Kirby. There was no documentation whatsoever introduced into the record of a DNA or paternity test. There were no tax returns or even Mr. Kirby's W-4 which indicated that he had children. Kevion and Kierra's birth certificates were introduced into the record, but these failed to indicate their father. The only documents produced were letters allegedly written by Mr. Kirby while he was in jail. These letters are unsigned and in various styles of handwriting. LaKeisha Williams claims these letters were received by her from Mr. Kirby while he was incarcerated, but her testimony is the only evidence that these letters were actually written by him.

Further, Mr. Kirby and Ms. Williams were never married nor were there any paternity proceedings or requests for child support with respect to either Kevion or Kierra. They do not even bear Mr. Kirby's last name. The only evidence linking Kevion and Kierra to Mr. Kirby is the testimony of Ms. Williams, a minor who began a relationship with Mr. Kirby when she was 12 years old.

Ms. Jones' testimony that Ms. Williams and Mr. Kirby had a relationship is also suspect at best. Ms. Jones has a vested interest in the outcome as there will be payments to her as guardian of Kierra and Kevion.

A review of this evidence demonstrates that there is nothing whatsoever which could independently support a determination that Mr. Kevin Kirby was Kierra and Kevion Williams' father. In my opinion, to find that he was, in fact, the father of these minors, would require conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Accordingly, I find that there is insufficient evidence to prove that the deceased, Kevin Kirby, was the father of minors, Kevion and Kierra Williams.

Therefore, for those reasons set forth above, I find that the decision of the Administrative Law Judge should be reversed.

KAREN H. MCKINNEY, Commissioner