

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707823

ALBERTO OLVERA (DECEASED), EMPLOYEE	CLAIMANT
WHITE OAK CONSTRUCTION, INC., EMPLOYER	RESPONDENT NO. 1
AMERICAN INTERSTATE INS. CO., INSURANCE CARRIER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED MARCH 28, 2011

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed August 27, 2010. 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 of this claim.
2. The employer/employee/carrier relationship existed on July 26, 2007.
3. The claimant, Alberto Olvera, died in a work-related accident on July 26, 2007.
4. Respondents No. 1 paid the medical expenses and funeral expenses arising out of the accident on July 26, 2007.
5. The claimant's average weekly wage at the time of his death was \$423.89.
6. At the time of his accidental death, Alberto Olvera was not married and had no children.
7. The preponderance of the evidence establishes that Jesus Cabello Verde and Flora Olvera Moran were either wholly, or in part, supported by their son, Alberto Olvera, for one year prior to his death.
8. The preponderance of the evidence establishes that Jesus Cabello Verde and Flora Olvera Moran had a reasonable expectation of support from their son Alberto Olvera.
9. The preponderance of the evidence establishes that Jesus Cabello Verde and Flora Olvera Moran are entitled to dependency benefits pursuant to Ark. Code Ann. § 11-9-527(c)(4)(1987) and § 11-9-111, in the amount of 25% of the average weekly wage of \$423.89, or \$106.00 each.

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 27, 2010, 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

Olvera (Dec'd.) - F707823 4

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 respectfully dissent from the majority's opinion finding that the claimant's parents were entitled to dependency benefits. After conducting a de novo review of the record, I find that the claimant's parents have failed to prove by a preponderance of the evidence entitlement to dependency benefits.

The claimant was employed by the respondent as a construction worker. On July 26, 2007, the claimant died from injuries he sustained after he fell from a roof. At the time of his death the claimant was 33 years old and was a Mexican citizen working in the United States under a work visa. The claimant's mother,

Flora Olvera Moran, and father, Jesus Verde Cabello, live in Estancia, Mexico.

Mr. Cabello testified that his son worked in the United States for eight months for the respondent employer without permission and returned to Mexico in order to obtain a work visa. After receipt of the visa, he returned to the United States and worked for the respondent employer for six months before his death.

Mr. Cabello testified that his son sent money to him and his wife in Mexico from the United States and that money was used to support them and the claimant's brothers and sisters remaining in Mexico. He explained that his son worked in the United States until November of 2006 and returned to the United States in March of 2007. During the time his son returned to Mexico, he did not send them money orders. He had one remaining son living with him and his wife in Mexico. Their primary expenses consisted of food, water and electric bills, and prescription medication for his blood pressure. Mr. Cabello testified that he borrowed more than \$500.00 from his sister-in-law for him and his wife to get across the border.

Mr. Cabello testified that the first transfer to Flora Olvera Moran from his son was on August 21, 2006. He stated that he and his wife were struggling to

pay the bills after his son's death since their son was the one who supported them. Mr. Cabello testified that he had last worked two years ago as a babysitter making six hundred pesos per week. He primarily had worked as a welder in the past but his vision was bad and that is why his son looked after them. He explained that he has stopped working due to health reasons and receives social security from the Mexican government in the amount of 2,800 pesos per month which began in 2008. His wife did not work and he denied that she had previously worked as a transitory worker.

Mr. Cabello testified that his son would send money every 15 days more or less from the United States and they would limit their expenses to the amount they received from him. He explained that the claimant also sent money in 2006 and 2007. The money was sent in his wife's name and used to buy food and cover other expenses. He did not maintain a bank account and did not have records of how the money was spent. His wife would receive the cash and would spend it for the whole family, including their four other children. He stated that each time his son would do a money transfer, he would get a receipt but that he did not know what happened to the receipts.

Mr. Cabello testified that he has three other children who are married with their own families and they do not help support him and his wife. In fact, they ask him and his wife for help.

He testified that the claimant told him that he lived in Little Rock and did not have an automobile. The claimant also was not married nor did he have any children. Mr. Cabello stated that the claimant had supported him and his wife since 1990 until the time of his death. His son had previously worked recharging fire extinguishers in Mexico.

Flora Olvera Moran testified that she had been married to Mr. Cabello since 1971 and that they had five children, including the claimant. She testified that the claimant worked for the respondent employer in the United States and would send money back to her and her husband until his death. The claimant finished elementary school and then started working in Mexico for Philadelphia of San Juan del Rio replenishing fire extinguishers. He came to the United States and worked for the respondent employer but returned to Mexico for a short period of time. He then returned to the United States and worked for the respondent employer. Ms. Moran testified that she completed the fourth grade and has been a housewife since her marriage and that she has

not worked outside the home during her marriage. She has one son, Emanuel, that lives with her and her husband. They have three other children who are married and have families of their own. She and her husband own their home and they pay electric and water bills and taxes. Their only source of income now is her husband's pension. They also received money from the claimant prior to his death.

Ms. Moran estimated that it takes approximately 8,000 pesos per month to keep her household running. Her husband's pension is about 2,000 pesos per month. She explained that since her son's death two years ago, they have been living on a shoestring budget. Her son, Emanuel, had previously worked in a kitchen of a restaurant earning only 60 to 70 pesos per week, but had been unemployed for approximately six months.

She testified that she started getting checks from the claimant in 2006 when he was in the United States. She explained that the claimant also provided financial support when he was working in Mexico and that he had lived with them. Ms. Moran testified that they did not have a bank account. She also had payment documents with the claimant's name on them from the respondent employer. Ms. Moran testified that the

claimant would send the money directly to her and she would distribute the money with her husband. She also used some of the money to support her other children. She received the payments every 15 or 20 days, but that the claimant also had expenses. The claimant told her that he was renting a house with his co-workers in the United States and had to share expenses for light and water.

She last saw the claimant in December of 2006 in Mexico and that he returned to the United States during the first week of May of 2007. She did not receive money from him during the period of time he was in Mexico, because he did not work during that six-month period of time. Ms. Moran testified that she did not receive income from any other family members during 2006 or 2007. She handled the money in the household and paid the bills in cash. She testified that her son called her every eight days with a cell phone. She explained that the cell phone was often paid by credit from other family members, but was sometimes paid with her husband's pension or by the money she received from the claimant. Ms. Moran explained that the payments reflected in the transactions were spent on food, clothing, shoes, water, electricity, gas, and medications.

The payment records reflect that money transfers were made to Flora Olvera Moran, as follows:

March 27, 2006, in the amount of 2,152.00 Pesos

April 17, 2006, in the amount of 7,117.00 Pesos (\$642.00)

May 15, 2006, in the amount of 3,237.00 Pesos (\$290.40)

May 27, 2006, in the amount of 2,158.90 Pesos (\$193.66)

June 5, 2006, in the amount of 7,290.00 Pesos (\$645.99)

July 3, 2006, in the amount of 11,200.00 Pesos (\$1,004.12)

August 21, 2006, in the amount of 21,280 Pesos (\$1,070.00)

September 11, 2006, in the amount of 6,518 Pesos (\$589.05)

November 21, 2006, in the amount of 8,648.00 Pesos (\$786.37)

May 21, 2007 in the amount of 1,070.00 Pesos (\$95.99)

July 16, 2007, in the amount of 8,580.00 Pesos (\$796.61)

July 25, 2007, in the amount of 5,345.00 Pesos (\$491.91)

The claimant's parents contend that they are entitled to dependency benefits because they were dependent on the claimant for financial support at the time of his death. They also contend they are entitled

to 25% each of the claimant's average weekly wage. My review of the record demonstrates that the claimant has failed to meet his burden of proof.

Ark. Code Ann. §11-9-527(c) (4) provides as follows:

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

Further, Ark. Code Ann. §11-9-527(h) and (i) provides:

(h) Determination of Dependency.
All questions of dependency shall be determined as of the time of the injury.

(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.

(2) In any claim for partial dependency where the average weekly contributions for support were not

such as to entitle all dependents to compensation in the aggregate sum of seven dollars (\$7.00) per week, the dependents shall receive compensation for a period not to exceed four hundred fifty (450) weeks in an amount not to exceed the amount of average weekly contributions of the deceased employee for the support of the dependents.

In my opinion, a review of the evidence fails to demonstrate that the claimant's parents were wholly and actually dependent on the claimant for support. The statute mandates that compensation be paid to "those persons who were wholly and actually dependent upon the deceased employee." Dependency is a fact question to be determined in light of the surrounding circumstances. Fordyce Concrete v. Garth, 84 Ark. App. 256, 139 S.W.3d 154 (2003). "Actual dependency" does not require a finding of total dependency; it may be established by showing either actual dependency or a reasonable expectancy of future support, even if no actual support has been provided. Death & Permanent Total Disability Trust Fund v. Rodriguez, 104 Ark. App. 375, S.W.3d (2009); Hoskins v. Rogers Cold Storage, 52 Ark. App. 219, 916 S.W.2d 136 (1996); Pinecrest Mem. Park v. Miller, 7 Ark. App. 185, 646 S.W.2d 33 (1983). The question of dependency is determined as of the time of

the decedent's injury. Ark. Code Ann. § 11-9-527(h); Hoskins, supra.

The facts in evidence simply do not support a finding that the claimant's parents were wholly and actually dependent on him. The money orders in the record do not show who purchased them. They only indicate they were sent from the United States. Mr. Campello testified that sister-in-law lives in Houston. These payments could have just as easily have come from the sister-in-law and not the claimant. There is absolutely no evidence they were from claimant. Speculation and conjecture to conclude it came from claimant. 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).

Further, Ms. Moran and Mr. Campello testified that they had some check stubs in their possession indicating payments from the respondent employer to the claimant. However, they failed to produce them at the hearing. Moreover, there were no bank receipts, deposit receipts, and absolutely no evidence as to what the money from these money orders was used for. All we have

is the Mr. Campello and Ms. Moran's self-serving testimony that it was used to pay household expenses and to help the claimant's siblings. Further, I note that the conversion of pesos to dollars would depend on the day that the money was received or sent not current data.

I note that when the claimant returned to Mexico both parents testified that the claimant was not working. It is curious that they were able to live with the additional person in the household without the claimant's alleged income or support. Moreover, it is noted absolutely no monies were received by the parents during the first two months after the claimant returned to the United States to work for the respondent employer after he obtained the work visa. This is further evidence that the parents were not wholly and actually dependent on the claimant.

Therefore, after considering the evidence of record, I cannot find that the claimant's parents were wholly and actually dependent on him. When I consider the fact that there is no name whatsoever on the money orders indicating who sent them, the fact that there is no bank deposits, canceled checks or paid bills to show what the money was used for and the fact that the money

orders only show six payments in the year preceding the claimant's death, I cannot make a finding of dependency.

Even if they were actually and wholly dependent, they are only entitled to 25% total. Not 25% each. Ark. Code Ann. §11-9-111(a) provides Compensation payable to certain alien dependents:

(a) Compensation to alien nonresidents of the United States or Canada shall be the same in amount as provided for residents, except that alien nonresident dependents in any foreign country shall be limited to the surviving wife or children or, if there is no surviving wife or children, to the surviving father or mother whom the employee has supported, either wholly or in part, for the period of one (1) year prior to the date of the injury.

(b) Upon its own motion or upon application of an interested party, the Workers' Compensation Commission may order the payment of all future compensation to be paid in one (1) lump sum, which shall be equal to one-half ($\frac{1}{2}$) of the face value of all future installments of compensation.

A review of this statute indicates that only one parent is entitled to payment. Not both as the claimant argues.

Therefore, we must interpret the statute. Recently, the Court of Appeals gave this outline for statutory

interpretation in Hempstead Cty. Hunting Club v. Ark.

P.S.C., 2009 Ark. App. 511, S.W.3d (2009):

The question of the correct interpretation and application of an Arkansas statute is a question of law, which we decide de novo. Cooper Realty Inv., Inc. v. Arkansas Contractors Licensing Bd., 355 Ark. 156, 160, 134 S.W.3d 1, 3 (2003); see also Baker Refrigeration Systems, Inc. v. Weiss, 360 Ark. 388, 395, 201 S.W.3d 900, 903 (2005). When examining an issue of statutory construction, our cardinal rule is to give effect to the intent of the legislature. Arkansas Gas Consumers, Inc. v. Arkansas Public Service Comm'n, 354 Ark. 37, 49, 118 S.W.3d 109, 118 (2003). Where the language of a statute is clear and unambiguous, this court determines legislative intent from the ordinary meaning of the language used. McMickle v. Griffin, 369 Ark. 318, 323, 254 S.W.3d 729, 735 (2007). The statute should be construed so that no word is left void, superfluous, or insignificant; and meaning and effect must be given to every word in the statute if possible. Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 338-39, 969 S.W.2d 190, 191-92 (1998).

Where the meaning is unclear, our review becomes an examination of the whole act. Barclay v. First Paris Holding Co., 344 Ark. 711, 718, 42 S.W.3d 496, 500 (2001). We reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part. Id. This court looks to the language of the statute, the subject matter, the

object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. Arkansas Gas Consumers, Inc., 354 Ark. at 49-50, 118 S.W.3d at 116.

. . . This court does not engage in statutory interpretations that defy common sense and produce absurd results. Southwestern Bell Telephone, L.P. v. Director of Arkansas Employment Sec. Dep't, 93 Ark. App. 303, 309, 218 S.W.3d 317, 321 (2005).

It is clear that the statute's intent and plain meaning is that only one parent of an alien would receive benefits. The statute says "surviving father or mother" not and. The obvious meaning of this provision is that only one parent can collect any kind of dependency benefits. Therefore, I find that only one parent is entitled to benefits pursuant to Ark. Code Ann. §11-9-111.

Further, if these payments were from the claimant to his mother, a finding which I do not make, she is the only one that can prove dependency pursuant to Ark. Code Ann. §11-9-111. The evidence fails to show that the claimant sent payments and supported his parents for the statutorily mandated one year. Ms. Moran and Mr. Campello testified that for at least six months prior to his death, the claimant lived in Mexico

to get a work visa then returned to United States. For the period of November 2006, through May of 2007 the claimant was living in Mexico and made no payments. The only evidence of actual payments made indicates that payments were made only six times in the year prior to the claimant's death: one in August, September, November and May and two in July. The claimant allegedly returned to the United States in March of 2007 but the record does not show any payments made to Ms. Moran for at least two months after he returned to work for the respondent employer. Moreover, the payments in the record only show that payments were made to the claimant's mother. No payments were made to the claimant's father. The record also contains evidence that the claimant's father was actually working as a child care worker during the time the claimant was in the United States working for the respondent employer.

Simply put, I cannot find that the parents of the deceased claimant can prove that they are entitled to dependency benefits. However, if I were to making such a finding, a finding I do not make, Ark. Code. Ann. §11-9-111 precludes the father from receiving benefits. Only the mother would be entitled to benefits.

Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner