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Utah Court of Appeals

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Reply

IN THE UTAH COURT OF APPEALS

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CYNTHIA DAHL, widow of Steven B. Dahl, deceased,	:	
Plaintiff-Appellant,	:	
v.	:	No. 860215-CA
THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH, REVLON SERVICE, INC., and/or LIBERTY MUTUAL and/or DEFAULT INDEMNITY FUND,	:	Category No. 6
Defendants-Respondents,	:	

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APPELLANT'S REPLY BRIEF

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

THE CASES RELIED UPON BY RESPONDENTS ARE EITHER DISTINGUISHABLE FROM THE PRESENT CASE OR SUPPORTIVE OF APPELLANT'S POSITION.

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REPLY BRIEF

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STATEMENT OF THE CASE

As originally set forth in Appellant's Brief, this is a Workman's Compensation case involving the claim of a dependent spouse for death benefits.

STATEMENT OF FACTS

No additional facts are necessary for a determination of the issues in this matter. Appellant relies on her original Statement of Facts.

SUMMARY OF ARGUMENT

The "dependency standard" in Utah is far broader than the dependency standards set forth in the cases from foreign jurisdictions relied upon by Respondents. Appellant was a dependent spouse at the time of her husband's death.

ARGUMENT

POINT I

THE CASES RELIED UPON BY RESPONDENTS ARE EITHER DISTINGUISHABLE FROM THE PRESENT CASE OR SUPPORTIVE OF APPELLANT'S POSITION

With the exception of Hancock, et al v. Industrial Commission of Utah, 198 P.169 (1921), the cases cited by Respondents are either irrelevant or distinguishable, and Appellant should be awarded her statutory death benefits of $30,000.00.

The Hancock, supra., case cited by Respondent Default Indemnity Fund, establishes and explains the Utah test of dependency. Although the facts in that case do not fit the present situation, the law does. That test of dependency was based upon the Delaware case of In Benjamin F. Shaw Co. v. Palmatory, 7 Boyce (Del.) 105 ATL, at page 418, quoting:

> 'It is not sufficient that the contributions of the employe were used in paying the living expenses of the claimant, but it must be

> shown that the contributions of the employe were relied upon by the dependent for his or her means of living judging this by the class and position of life of the dependent.'
>
> * * *
>
> 'However, test of dependency, generally speaking, is whether the claimant relied upon the employe's contributions for his supporting wholly or partially judging this by what would be reasonable living expenses for persons in the same class and position. Support as used within the meaning of the statute is of a broader import than food, clothing and shelter, and may include all such means of living as would enable the claimant to live in a style and condition and with a degree of comfort suitable and becoming to his station in life.' Id.

This same philosophy was again approved in the Utah case of Farnsworth v. Industrial Commission, 534 P.2d 897 (Utah 1975):

> . . . dependency within the terms of the statute does not mean absolute dependency for the necessities of life, but rather that the applicant looked to and relied on the contributions of the workman in whole or in part as a means of supporting and maintaining himself in accordance with his social position and accustomed mode of life. Id. at 899.

The foreign cases relied upon by Respondents adhere to a more narrow interpretation of the word "support" and are not as broad as the Utah standard. For example, in Penn Sanitation Co. v. Hoskins, 10 P.Cmwlth. 528, 312 A.2d 458 (1973), cited by Respondents Revlon Service, Inc. and Liberty Mutual, the Court concluded it was bound by a support order entered five weeks earlier, which provided only for the couple's two children. Because the support order was acquiesced in by the wife, she was

not entitled to claim she had been supported by her deceased husband for purposes of dependency under the Workman's Compensation statute.

Likewise, S & S Associates, Inc. v. WCAB (Hochman), 465 A.2d 57 (Pa.Cmwlth. 1983), cited by the same Respondents, is too narrow an interpretation. The case is also distinguishable on the facts. Although the Claimant in that case was also relying on the fact that her deceased husband was paying the mortgage payments, the parties had been separated for almost three years and had established separate lives for themselves. The decedent, Mr. Hochman, was living in the parties' house with another woman, and Mrs. Hochman was living in an apartment in Boston with her daughter whom she was supporting, and she sought no support order for her husband during this period. They both worked and paid their own expenses. In light of these facts, the court felt that mortgage payments were not support and reversed the Workman's Compensation Appeal Board.

The Colorado case of City of Aurora v. Claimant in Death of Corr, 689 P.2d 659 (Colo.App. 1984), cited by Respondents Revlon Service, Inc. and Liberty Mutual, involved a factual situation where each party had been paying his or her own living expenses while each was earning equal salaries. The facts in Aurora, supra., do not indicate the amount or nature of the joint obligations which were incurred in the marriage, nor the ability of the claimant to pay those obligations. The Colorado court, stating there were not enough facts to support the Commission's

decision to grant the claimant relief, reversed the Commission and affirmed the hearing officer's order, which initially denied the petition. These foreign cases may illustrate one point - that the question of support or dependency, as it relates to the payment of debts of the parties, is a factual question and not a question of law.

In the instant case, the Dahls' lives had not become as separate and distinct as the three-year separation in Hochman, supra, and the parties had substantial liabilities. The payments by Mr. Dahl toward their joint debts and mortgage was a primary concern of Mrs. Dahl. In fact, she gave up her claim to temporary support of $750.00 in exchange for Mr. Dahl agreeing to assume the mortgage and other financial obligations of the parties. Prior to that understanding, she even contributed $200.00 per month for a period of three months to assist her husband in the payment of these debts. It is undisputed that Mrs. Dahl was unable on her salary to make the $800.00 per month mortgage payments and that she was $5,000.00 in arrears in the payments when this matter was presented to the Industrial Commission.

The 1984 joint tax return indicates the total earnings of the parties of $59,286.99 [Respondents', Default Indemnity Fund and Industrial Commission of Utah, Brief, Appendix 3]. This was the standard that allowed Appellant and her husband to live in the style and condition suitable to their station in life as referred to in the Utah cases of Hancock and Farnsworth, supra.

Being solely obligated to pay the mortgage and other debts was the reality which claimant had to face upon the death of her husband. In reference to Mrs. Dahl's returning to the home after the death of her husband, Respondent's, Default Indemnity Fund, Brief states: "This self imposed and created burden should not obliterate the intent and meaning of 'a most beneficent law'" [Respondent's Brief, P. 15]. Can it be said that a threatened mortgage foreclosure, deficiency judgment and possible bankruptcy are "self imposed?" This "most beneficent law" should and must take into account the realty of the parties' intertwined obligations which were incurred during the course of the marriage and were present at the time of Mr. Dahl's death and upon which claimant was jointly liable. It should make due allowance for that loss when one of the joint obligors ceases to make his agreed monthly contribution to the joint debts and obligations of the parties. Contrary to Respondents' contentions, this form of dependency is <u>real</u> and not imaginary.

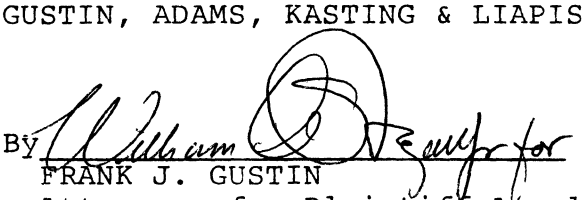
The Administrative Law Judge did not want to hear about the financial difficulties Mrs. Dahl was having as a result of her husband's failure to pay the mortgage payments. He sustained counsel Pixton's objections to that evidence who stated, as part of her objection: "Her [Mrs. Dahl's] expenses today I think are totally irrelevant to her dependency on August 1" [R-52]. His view of the overall case was simply erroneous and did not follow established Utah law.

CONCLUSION

The Administrative Law Judge, applied a narrow view of dependency and erroneously disregarded the Utah law as set forth in the cases of Hancock and Farnsworth, supra. The Industrial Commission, affirming that decision, was also reversible error, and the decision of the Industrial Commission should be reversed and Appellant be awarded the $30,000.00 death benefit to which she is entitled as the spouse of the decedent under the Workman's Compensation statutes.

RESPECTFULLY SUBMITTED this 5th day of March, 1987.

GUSTIN, ADAMS, KASTING & LIAPIS

By 
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MAILING CERTIFICATE

I hereby certify that on the 5th day of March, 1987, four true and correct copies of the foregoing Appellant's Reply Brief were ~~mailed, postage prepaid,~~ HAND-DELIVERED to the following:

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