

1986

LDS Hospital v. Industrial Commission of Utah, Second Injury Fund and Anna Webster: Brief of Appellant

Utah Supreme Court

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DOCKET NO. 86 0046

IN THE SUPREME COURT OF THE STATE OF UTAH

LDS HOSPITAL,	:	
	:	
Defendant and Appellant,	:	
	:	
vs.	:	Case No. 860046
	:	
INDUSTRIAL COMMISSION OF UTAH,	:	
SECOND INJURY FUND and	:	
ANNA WEBSTER,	:	No. 6
	:	
Respondents.	:	

BRIEF OF APPELLANT

Appeal from an Order of the Industrial Commission of Utah which held that the Respondent Webster (1) was partially dependent notwithstanding over \$85,000 in savings and (2) that the Second Injury Fund was not liable for dependency benefits beyond the initial 312 weeks of benefits.

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APR 11 1986

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES PRESENTED ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT.	6
ARGUMENT	8
 <u>Point I.</u> THE DETERMINATION THAT THE RESPONDENT WEBSTER WAS PARTIALLY DEPENDENT WAS NOT WITHIN THE LIMITS OF REASONABLENESS OR RATIONALITY, AND THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT DID SO	 8
 <u>Point II.</u> THE INDUSTRIAL COMMISSION COMMITTED REVER- SIBLE ERROR WHEN IT FAILED TO SET OUT ANY STANDARD OR GUIDELINE BY WHICH TO DETER- MINE WHETHER THE CLAIMANT AS A SURVIVOR OF A WORKER WHO DIED AS A RESULT OF AN INDUS- TRIAL ACCIDENT WAS PARTIALLY DEPENDENT AFTER THE TERMINATION OF THE 312 WEEK PERIOD	 12
 <u>Point III.</u> THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO REQUIRE THE RESPONDENT TO USE ANY PORTION OF THE CORPUS OF HER SAVINGS OF \$85,504.72, AND CONSIDERED ONLY THE INTEREST ON THIS AMOUNT	 14
 <u>Point IV.</u> THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO HOLD OR TAKE JUDICIAL NOTICE OF THE FACT THAT AN ANNUAL CLOTHING EXPENSE OF \$2,400.00 WAS EXCESSIVE	 18
 <u>Point V.</u> THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT REQUIRED THE APPELLANT TO PAY AMOUNTS BEYOND THE EQUIVALENT OF 312 WEEKS OF BENEFITS AS SET OUT IN UTAH CODE ANNOTATED SECTION 35-1-68, AND IT REFUSED TO ORDER THE SECOND INJURY FUND TO PAY DEPENDENCY BENEFITS AFTER THE 312 WEEK PERIOD AS PROVIDED IN UTAH CODE ANNOTATED SECTION 35-1-70	 18
 CONCLUSION	19
 ADDENDUM	21

TABLE OF AUTHORITIES

Cases

<u>Akin v. Akin Distributors, Inc.</u> , 386 P.2d 769 (Okla. 1963)	16
<u>Board of Education of Alpine School District v. Olsen</u> , 684 P.2d 49, 51 (Ut. 1984)	9, 13
<u>Farnsworth v. Industrial Commission</u> , 534 P.2d 897 (Ut. 1975)	11, 14
<u>Terrinoni v. Westward Ho!</u> , 418 So.2d 1143 (Fla. App. 1982)	17

Statutes and Rules

Utah Code Annotated § 35-1-67 (Supp.1985)	3
Utah Code Annotated § 35-1-68 (Supp.1985).	2,3,4,5,7,14,18,19
Utah Code Annotated § 35-1-68(2)(b)(i) (Supp.1985)	10
Utah Code Annotated § 35-1-68(2)(b)(ii) (Supp.1985)	10
Utah Code Annotated § 35-1-68(2)(b)(iii) (Supp.1985)	10
Utah Code Annotated § 35-1-70 (1953)	3, 4, 9, 19, 21

Other Authorities

99 C.J.S. Workmen's Compensation § 134(2)	15
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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was the determination by the Industrial Commission that the repondent, Anna Webster, was partially dependent within the limits of reasonableness or rationality when taking into account the clear fact that without dependency benefits the respondent has \$85,504.72 in savings and has sufficient funds to meet her stated expenses and support herself in the style to which she is accustomed?

2. Did the Industrial Commission commit reversible error when it failed to set out any standard or guideline by which to determine the dependency of survivors of workers killed as a result of industrial accidents after the termination of the 312 week initial dependency period?

3. Did the Industrial Commi'ssion commit reversible error when it refused to require the respondent to invade the corpus of her \$85,504.72 in savings, if necessary, and when it considered only the interest on this amount and failed to consider the amortization of her mortgage in September of 1985 in determining her dependency?

4. Did the Industrial Commission commit reversible error when it failed to hold that an annual clothing expense of \$2,400 was excessive?

5. Did the Industrial Commission commit reversible error when it required the appellant to pay amounts beyond 312 weeks as set out in Utah Code Annotated § 35-1-68 and refused to

order the Second Injury Fund to pay dependency benefits after the 312 week period as provided in Utah Code Annotated § 35-1-70.

STATEMENT OF THE CASE

On July 20, 1979, Mr. Gene Webster, husband of the respondent, Anna Webster, and an employee of LDS Hospital was involved in a motorcycle accident which occurred while he was in the course of his employment. Temporary total disability benefits commenced in August 1979 (Record at 139)(Record hereinafter referred to as "R."). On February 23, 1981, Mr. Webster's status was changed to permanent total disability and benefits were paid accordingly (R.10). On December 15, 1982, Mr. Webster died due to complications arising out of his industrial accident (R. 16, 139). After Mr. Webster's death, Mrs. Webster received dependency benefits for the equivalent of 312 weeks from the date of the injury as required in Utah Code Annotated (hereinafter U.C.A.) § 35-1-67 and § 35-1-68 (Contained in Addendum) as ordered by the Industrial Commission (R. 14, 139). The record shows that between 1979 and the date benefits ended in 1985, weekly compensation paid to Mr. Webster and to his wife after his death, amounted to \$55,848.00 (R. 14), not including medical expenses in the amount of at least \$78,166.16 (R. 14). On the date of termination of benefits Mrs. Webster was receiving \$179.00 per week or \$716.00 per month (R. 10, 46).

Upon completion of the equivalent of 312 weeks of benefits, payments to Mrs. Webster were terminated in 1985 (R.10,

31). Mrs. Webster requested continued benefits (R. 21-23, 29) from the Second Injury Fund which request was refused, notwithstanding the language in U.C.A. § 35-1-70 (contained in Addendum). Mrs. Webster then applied for a dependency review provided for in U.C.A. § 35-1-68 (R.30).

A hearing was held before an Administrative Law Judge of the Industrial Commission on June 26, 1985, (See ALJ's Findings of Fact, Conclusions of Law and Order in Addendum). The Administrative Law Judge, in an order dated July 2, 1985, held Mrs. Webster to be partially dependent and awarded her \$89.50 per week or \$358.00 per month continuing until otherwise ordered (R. 78-80). A transcript of the proceedings was ordered and an extension for filing a Motion for Review obtained (R. 107-108). The Motion for Review was filed with the Industrial Commission on August 26, 1985, in compliance with the order of the Administrative Law Judge (R. 122-123).

During the pendency of the consideration of the Motion for Review the employer requested the Second Injury Fund to pay benefits beyond the 312 week period to the claimant and survivor of Mr. Webster pursuant to U.C.A. § 35-1-70 (contained in Addendum), which so provides (R. 136). The Second Injury Fund refused (R. 137), and the defendant requested that the Industrial Commission order the Second Injury Fund to comply with U.C.A. § 35-1-70 (R. 138).

In an opinion dated January 9, 1986, the Industrial Commission denied the Motion for Review and affirmed the Administrative Law Judge's determination of partial dependency (R. 139-141). (See Order Denying Motion for Review contained in Addendum.) The Commission also refused to require the Second Injury Fund to pay the benefits beyond the 312 week period.

The appellant's Petition for Review was filed with the Clerk of this Court January 21, 1986 (R. 143-144). The Docketing Statement was filed February 6, 1986.

STATEMENT OF FACTS

The facts in this case are not in dispute. After the death of Mrs. Webster's husband in 1982, she received dependency benefits for the equivalent of 312 weeks after the date of the injury of her husband as required by U.C.A. §35-1-68. (Mr. Webster was injured in 1979.)

At the time of the hearing before the administrative law judge, at which time Mrs. Webster requested continued dependency benefits beyond 312 weeks, it was shown that she had on deposit in various savings accounts \$85,504.72 (R. 48, 88). The claimant testified that the total annual interest on this amount was \$8,093.33 (R. 59-60, 80, 90). She additionally testified that she received monthly social security disability payments in the amount of \$493.60 (R. 86) and that her monthly retirement benefit from LDS Hospital was \$120.94 (R. 44, 88). It was shown that in her checking account she had on deposit a balance of \$1,528.87 (R. 91). Her stated yearly income plus cash on hand at the time of the hearing was \$16,996.68. Mrs. Webster's stated yearly

expenses were \$16,024.00 (R. 87), which included an annual estimated clothing expense of \$2,400 (R. 48-49, 87).

However, in September 1985, her yearly mortgage expense of \$2,592.00 was reduced to the annual property tax of \$405.95 due to the fact that the mortgage was paid in full that month, meaning a reduction in annual expense of \$2,187.00 (R. 50-51). Mrs. Webster's monthly mortgage payment prior to payment in full in September 1985 was \$231.00 (R. 50-51). Because Mrs. Webster did not need to make three payments in 1985 her expenses were reduced by \$693.00, reducing the annual stated expenses of Mrs. Webster for 1985 from \$16,024.00 to \$15,331.00. Her financial status for 1985 based on information she provided is summarized as follows:

INCOME SUMMARY

12 months x \$493.60 (Social Security)	\$ 5,923.20
12 months x \$120.94 (Pension)	1,451.28
Interest on Savings of \$85,504.72	8,093.33
Cash on hand (checking account)	<u>1,528.87</u>
TOTAL AVAILABLE INCOME (1985)	\$16,996.68

EXPENSE SUMMARY

Stated estimated expenses	\$16,024.00
less 3 house payments (3 x \$231.00)	<u>693.00</u>
MRS. WEBSTER'S ACTUAL TOTAL EXPENSES (1985)	\$15,331.00

SUMMARY OF ARGUMENT

U.C.A. § 35-1-68 requires that the dependency review at the end of the 312 week period be based on the applicant's circumstances existing "at the time of the dependency review." Even without taking into account the corpus of the \$85,504.72 in savings that Mrs. Webster had on deposit at the time of the dependency review, her stated interest income and cash on hand, which totaled \$16,996.69, exceeded her yearly stated expenses of \$16,024.00 (R.87). This is true even if no deduction is made for the \$2,400.00 annual clothing expense and monthly \$231.00 mortgage expense which ended in September of 1985 (R.51). Her actual expenses less three \$231.00 mortgage payments was \$15,331.00.

Accordingly, there was more than adequate income to meet Mrs. Webster's stated living expenses in 1985 without taking into account the reduction in expenses as indicated by the payoff of the mortgage and the inordinately high estimated yearly clothing expense of \$2,400.00.

Considering that dependency after the initial 312 week period is to be determined based on the circumstances and conditions at the time of the dependency review, the appellant maintains that the Administrative Law Judge and the Industrial Commission erred when they determined that the claimant was partially dependent. With the reduction of three mortgage payments of \$231.00 each, totalling \$693.00, Mrs. Webster's 1985

estimated annual expenses of \$16,024.00 was reduced to \$15,331.00. This was well within the established annual income of the claimant of \$16,996.68. Even a lower figure of \$15,467.81, arrived at by disallowing the amount of cash on hand evidenced in Mrs. Webster's checking account, still would allow the respondent to spend \$200.00 per month for clothes which she claimed was her accustomed lifestyle.

For 1986, Mrs. Webster's expenses are reduced by 12 payments of \$231.00 each or \$2,772 which, by adding back the property tax obligation of \$405.95, would mean a total annual expense reduction of \$2,366.05 for 1986 for a total expense in 1986 of \$13,657.95.

The appellant maintains that it is painfully clear that even without considering the \$85,504.72 which the claimant had on deposit, her income was sufficient to cover her stated expenses.

The \$85,504.72 the claimant-respondent had in savings should be considered as an asset, and the applicant should also be required to utilize this amount for her expenses. In taking into account this large sum of money, she can hardly be dependent and, in fact, by most standards would be considered affluent.

The self-insured employer should not be forced to build the applicant's estate which is what the Industrial Commission has accomplished by refusing to require the claimant-respondent to utilize any portion of the of the principal of her substantial savings.

To compound the lack of rationality of its decision, the Industrial Commission provided no standard upon which to judge whether the survivor of an employee who has died as a result of an industrial injury is dependent at the time of the dependency review. Rather, the Commission simply stated in its denial of the appellant's motion for review:

The Commission finds this [the award] to be an equitable compromise between the interest of the two parties. (R. 141) (emphasis added)

While compromise may be appropriate in a settlement, it is not a standard upon which to determine whether a decedent's survivor is wholly or partially dependent.

Finally, the appellant maintains that although U.C.A. § 35-1-68 requires initial payment of dependency benefits beyond the 312 week period by the employer upon a finding on continued dependency, reimbursement is contemplated by U.C.A. § 35-1-70, otherwise, this statutory provision is void of any meaning.

ARGUMENT

POINT I

THE DETERMINATION THAT THE RESPONDENT WEBSTER WAS PARTIALLY DEPENDENT, WAS NOT WITHIN THE LIMITS OF REASONABLENESS OR RATIONALITY, AND THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT DID SO.

Decisions of the Industrial Commission regarding workers' compensation when considered on appeal to the Supreme Court must fall within limits of reasonableness or rationality. As stated in Board of Education of Alpine School District v. Olsen, 684 P.2d 49, 51 (Ut. 1984):

The decision below, that Olsen [the claimant] was an employee for purposes of Workers' Compensation is entitled to some deference, but it is subject to judiciary review to assure that it falls within the limits of reasonableness or rationality.

A. Dependency was not determined based on the facts and circumstances at the time of the hearing

Utah law is clear that after a dependent of an employee who has died receives the equivalent of no more than 85% of the state average weekly wage at the time of injury for a period not to exceed six years from the date of the injury (U.C.A. § 35-1-68(2)(b)(i)), that further consideration of dependency after that period is to be based on the operative facts and circumstances at the time of the continued dependency hearing. As stated in U.C.A. § 35-1-68(2)(b)(iii):

The issue of dependency shall be subject to review by the Commission at the end of the initial six-year period and annually thereafter. If at any such review it is determined that, under the facts and circumstances existing at that time, that the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or non dependent person and shall be paid such benefits as the Commission may determine pursuant to Subsection (2)(c)(ii). (emphasis added)

That this is the case is reiterated in U.C.A. § 35-1-68(2)(c)(ii) which states:

Benefits to persons determined to be partly dependent pursuant to Subsection (2)(b)(iii) shall be determined by the Commission in keeping with the circumstances and conditions of dependence existing at the time of the dependency review and will be paid in a weekly amount not exceeding the maximum

weekly rate that partly dependent persons would receive if wholly dependent. (emphasis added)

The Administrative Law Judge (hereinafter ALJ) did not follow the requirement of taking into consideration all facts and circumstances that were in existence at the time of the hearing. This is evidenced by his statement made to appellant's counsel at the time of the hearing:

Well, counsel, your point is misplaced. Case law provides that dependency is determined at the time of death. (R. 63)

Presumably, the ALJ's decision, which was affirmed by the Industrial Commission, was based on a misapprehension of the law.

B. The Respondent Webster was not dependent on the workers' Compensation dependency benefits of \$716.00 per month at the date of the earning even without taking into account the principle of \$85,504.72 in savings.

The appellant maintains that the standard which should be applied in determining dependency is whether the survivor of the deceased worker is reliant on the dependency benefits received prior to termination of the 312 week period as necessary to maintain that dependent in his or her accustomed station in life. (See Farnsworth v. Industrial Commission, 534 P.2d 897 (Ut. 1975) contained in Addendum.) In applying this standard to the fact situation, the claimant is not dependent.

The claimant's stated yearly expenses were \$16,024.00. (R.87). However, this figure assumed a continued monthly mortgage payment of \$231.00 which actually ended in September of 1985 (R.

50-51) and an annual clothing expense of \$2,400.00 (R. 48-49, 87). Even so, the claimant had adequate funds without invading the corpus of her \$85,504.72 in savings to cover these expenses. Her stated yearly income for 1985 plus cash on hand as indicated in the most current banking statement (R.91) is summarized as follows:

<u>1985</u>	
12 months x \$493.60	\$5,923.20 12
months x \$120.94	1,451.28
Interest.	8,093.33
Cash on Hand.	1,520.87
<u>TOTAL INCOME</u>	<u>\$16,996.68</u>
Stated Expense	\$16,024.00
Less 3 months of mortgage payments (\$3 x \$231)	\$ 693.00
<u>EXPENSES</u>	<u>\$15,331.00</u>

As can be readily seen, without touching her substantial savings and not allowing for the amortization of the mortgage which occurred in September of 1985 or questioning the credibility of a \$2,400.00 annual clothing expense, the claimant had adequate funds to meet her yearly expenses and maintain her in her accustomed station in life in 1985.

Accordingly, the appellant asserts that the Industrial Commission rendered a decision which was not within the limits of reasonableness or rationality and the Order of the Industrial Commission should be reversed and dependency denied.

POINT II

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO SET OUT ANY STANDARD OR GUIDELINE BY WHICH TO DETERMINE WHETHER THE CLAIMANT AS A SURVIVOR OF A WORKER WHO DIED AS AS RESULT OF AN INDUSTRIAL ACCIDENT WAS PARTIALLY DEPENDENT AFTER THE TERMINATION OF THE 312 WEEK PERIOD.

In Board of Education of Alpine School District v. Olsen, 684 P.2d 49, 51 (Ut. 1984), this Court stated:

In reviewing interpretations of general questions of law, such as the one before us, we apply a correction-of-error standard, with no deference to the expertise of the Industrial Commission.

The Court will search vainly for any sort of standard applied by either the Industrial Commission or the Administrative Law Judge as a test for determining dependency. Instead, the Industrial Commission stated in its denial of the appellant's Motion for Review in the Record at page 141:

As there are no legislative guidelines in this area, the Commission feels that in this particular case the Administrative Law Judge fairly fashioned the award of continued benefits by taking into account the interest income the claimant received from her savings and excluding the corpus. The Commission finds this to be an equitable compromise between the interests of two parties and therefore must deny the defendant's first motion for review.

The term "dependency" is not defined in the Utah Code and there are no Utah cases determining the meaning of "dependency" or "dependent" after the 312 week initial dependency period.

The case of Farnsworth v. Industrial Commission, 534 P.2d 897, 899 (Ut. 1975), defined "dependent" in a case when the worker died very close to the time of the industrial accident as "one who looks to another for support", and that the true criteria of dependency was whether "one has a reasonable expectation of continuing or future support to receive such contributions as are necessary and needed to maintain him in his accustomed station in life."

Therefore, it is necessary to look to at least the claimed expenses of the person claiming dependency and the circumstances at the time of the dependency hearing to determine if the claimant is dependent on the workers' compensation benefits being received at the time of the termination of these benefits. The Industrial Commission failed to analyze the claimant's expenses and her dependency on the workers' compensation benefits. In failing to do this and to apply the previously mentioned standard, i.e. dependency on the workers' compensation benefits, the appellant maintains that the Industrial Commission committed reversible error and entered a "compromise" order (R.141) which is totally beyond what is contemplated in U.C.A. § 35-1-68. Furthermore, the Commission provided no basis for its decision. The weekly compensation figure of \$89.50 seems to have been pulled from thin air with little or no analysis as to respondent's income versus expenses and dependency on the \$716.00 monthly dependency benefit received prior to termination.

POINT III

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO REQUIRE THE RESPONDENT TO USE THE CORPUS OF HER SAVINGS OF \$85,504.72, AND WHEN IT CONSIDERED ONLY THE INTEREST ON THIS AMOUNT.

In the Administrative Law Judge's Findings of Fact and Conclusions of Law and Order, he determined as follows:

. . . [T]he Administrative Law Judge finds that the interest earned by a surviving spouse should be included as income, however, the applicant should not be forced to invade the principle or corpus, in order to meet the every day necessities of life. (R.79)

In addition, the Industrial Commission in the Order Denying the Motion for Review filed by the Appellant stated as follows in this regard:

In this case, the issue is narrowed to whether or not a claimant need exhaust all financial resources before a finding of dependency is appropriate. As there are no legislative guidelines in this area, the Commission feels that, in this particular case, the Administrative Law Judge fairly fashioned the award of continued benefits by taking into account the interest income the claimant received from her savings and excluding the corpus. (R.141)

In other words, the Commission held that the claimant was not required to utilize any of the corpus of the \$85,504.72 in savings that she had accumulated. This runs directly contrary to the authorities available on the subject.

99 C.J.S. Workmen's Compensation § 134(2) at page 457 states as follows with regard to the principle that survivors of a workman who has died as a result of an industrial accident are

required to look to their own resources:

. . . [I]t has been held that under particular circumstances one who refrains from the use of resources reasonably available to him for his own support is not dependent on a person who is supporting him. One is not a dependent who has otherwise reasonable support, that is, one cannot be said to be a dependent who has sufficient means at hand for supplying present necessities judging these according to his class and position in life.

This standard seems to be in accordance with the decision in the case of Akin v. Akin Distributors, Inc., 386 P.2d 769 (Okla. 1963), (See Addendum) where the Oklahoma Supreme Court determined that a mother was not dependent on her deceased child when she had an income of \$700.00 per month, received income on leased property in the amount of \$15,000.00 per year, owned stock with an estimated value of \$50,000.00, one Cadillac automobile and eight riding horses.

The Akin case involves a situation where the decedent died immediately following the accident, not a case where there was a three and one-half year delay between the time the injured employee suffered his accident and the date he died with continuing dependency benefits to his spouse after the date he died. Nevertheless, the basic principle is the same, and the claimant should be required to look to available assets. The Oklahoma Supreme Court considered shares of stock an asset not just the dividends. In the instant case, the Industrial Commission entered an order which in the Akin case would have required only the consideration of dividends and not the underlying stock.

Another case which is probably the most closely on point is Terrinoni v. Westward Ho!, 418 So.2d 1143 (Fla. App. 1982) (See Addendum). In this case, it was initially determined at the time of the decedent's death that his mother was dependent upon him. However, after she had received \$155,000.00 in workers' compensation dependency benefits, they were terminated because the court below determined that the claimant was not dependent upon the workers' compensation death benefits to maintain her customary standard of living after receiving these benefits. The Florida statute was different than Utah's statute in that it allowed dependency to be determined only at the time of the employee's death. The Utah statute provides for a second determination after the end of the six-year period based on the facts and circumstances at the time of the continued dependency hearing. The Florida court determined that because the claimant had received \$155,000.00 in benefits that her dependency terminated, and she had sufficient funds to maintain her accustomed station in life. Appellant maintains that the same is true for the respondent, Mrs. Webster.

It has been demonstrated in ARGUMENT POINT I that Mrs. Webster has enough income without invading principal to maintain herself in the style to which she is accustomed. In addition, she should be required to use her savings because the test for dependency must take into account "all the facts and circumstances in existence at the time of the dependency review

hearing" (See U.C.A. § 35-1-68). Because the corpus of \$85,504.72, Mrs. Webster's savings, was not taken into account by the Industrial Commission, this requirement was not met. The respondent, contrary to well-settled authorities, was not ordered to use the resources reasonably available to her.

By its order, the Industrial Commission has required the appellant to finance the building of respondent's substantial estate. Appellant maintains that surely no such result was ever intended by the legislature, and the order of the Industrial Commission is contrary to law and constitutes reversible error.

POINT IV

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE
ERROR WHEN IT FAILED TO HOLD OR TAKE JUDICIAL
NOTICE OF THE FACT THAT AN ANNUAL CLOTHING
EXPENSE OF \$2,400.00 WAS EXCESSIVE.

The claimant estimated at the time of the hearing and in her answers to interrogatories that her yearly clothing expense on a stated total annual expense of \$16,024.00 (not taking into account the fully amortized mortgage in September 1985) was \$2,400.00 per year. (R. 49, 87) The appellant-defendant maintains that this is so excessive as to shock the conscience, and the Commission should have taken judicial notice of this fact. The Industrial Commission erred in allowing this total expense.

POINT V

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT REQUIRED THE APPELLANT TO PAY AMOUNTS BEYOND THE EQUIVALENT OF 312 WEEKS OF BENEFITS AS SET OUT IN UTAH CODE ANNOTATED SECTION 35-1-68, AND IT REFUSED TO ORDER THE SECOND INJURY FUND TO PAY DEPENDENCY BENEFITS AFTER THE 312 WEEK PERIOD AS PROVIDED IN UTAH CODE ANNOTATED SECTION 35-1-70.

U.C.A. § 35-1-70 states as follows:

If any wholly dependent persons, who have been receiving the benefits of this title, at the termination of such benefits are yet in a dependent condition, and under all reasonable circumstances should be entitled to additional benefits, the Industrial Commission may, in its discretion, extend indefinitely such benefits; but the liability of the employer or the insurance carrier involved shall not be extended, and the additional benefits allowed shall be paid out of the special fund provided for in subdivision (1) of section 35-1-68.

(U.C.A. § 35-1-68(1) refers to the Second Injury Fund.)

As provided in U.C.A. § 35-1-70, the Industrial Commission did indeed extend dependency benefits of the respondent, but when the employer requested that the Second Injury Fund pay the continued dependency benefits as provided in U.C.A. § 35-1-70, the Second Injury Fund refused (R. 137). Furthermore, when the respondent requested the Industrial Commission to order the Second Injury Fund to pay, it refused to do so (R. 138, 139-141).

The appellant maintains that the Second Injury Fund and the Industrial Commission have both failed to comply with the requirements of U.C.A. § 35-1-70. The overwhelming evidence shows that the respondent Webster is not dependent and that she

has substantial assets to support herself in her "accustomed station in life." However if this Court determines that she continues to be dependent, the continued dependency benefits past the 312-week period should be paid by the Second Injury Fund and not the employer. Accordingly, the Appellant requests that the Industrial Commission's order be reversed and the Second Injury Fund be ordered to pay Mrs. Webster's continuing benefits in the event they are upheld.

CONCLUSION

It is abundantly clear that the respondent Webster has more than enough funds to maintain her in her "accustomed station in life" without invading the corpus of the \$85,504.74 which constitute her savings.

Nevertheless, if it were necessary for her to do so, Utah law suggests and the authorities are clear that all of a person's assets who claims to be dependent must be considered when determining this issue. The insurer or employer should not be required to preserve a substantial estate for the person claiming dependency. The accumulation of \$85,000.00 would be considered by many to constitute affluence. If the Industrial Commission's order is carried to its logical extention, a person who has millions of dollars of real property or stock could be determined to be dependent because he or she would not be required to sell any of it. The Industrial Commission's order

that Mrs. Webster need not use any of the corpus of her savings is contrary to the authority on the issue and is repugnant to ordinary common sense. This order should be reversed.

Finally, U.C.A. § 35-1-70 makes it clear that after the initial dependency period of 312 weeks or its equivalent, that any additional dependency is to be paid by the Second Injury Fund. Nevertheless, the Industrial Commission refused to order the Second Injury Fund to pay the additional dependency benefits which the ALJ ordered and which the Commission affirmed, thereby further constituting error.

In light of the reasons set out herein, the appellant, LDS Hospital, respectfully requests that this Court reverse the decision of the Industrial Commission on the issue of dependency. In the alternative, appellant requests that this Court order that the continued dependency benefits be paid by the Second Injury Fund.

DATED this 11th day of April, 1986.

Respectfully submitted

KIRTON, McCONKIE & BUSHNELL

By: 
Larry R. White
Attorneys for Appellant

ADDENDUM

Item

U.C.A. § 35-1-67 (Supp. 1985)	Exhibit A
U.C.A. § 35-1-68 (Supp. 1985)	Exhibit B
U.C.A. §35-1-70 (1953)	Exhibit C
ALJ's Findings of Fact, Conclusions of Law, and Order, July 2, 1985.	Exhibit D
Order of Commission Denying Motion for Review August 26, 1985.	Exhibit E
<u>Akin v. Akin Distributors, Inc.</u> , 386 P.2d 769 (Okl. 1963).	Exhibit F
<u>Farnsworth v. Industrial Commission</u> , 534 P.2d 897 (Ut. 1975)	Exhibit G
<u>Terrinoni v. Westward Ho!</u> , 418 So. 2d 1143 (Fla. App. 1982)	Exhibit H

EXHIBIT A

35-1-67

LABOR — INDUSTRIAL COMMISSION

DECISIONS UNDER FORMER LAW

Retroactive application of 1971 amendment.

In paragraph dealing with injuries not specified, former language "not exceeding in any case two hundred weeks" simply stated a limitation of 200 weeks on any award and was not intended to represent the "whole

man" against which a percentage of disability should be applied; 1971 amendment substituting "312 weeks" for "two hundred weeks" was in the nature of a clarification or amplification so that application of percentage of disability to 312 weeks in award governed by statute prior to 1971 amendment was not an improper retroactive application of the amendment. *Oakland Constr. Co. v. Industrial Comm.* (1974) 520 P 2d 208.

35-1-67. Permanent total disability — Amount of payments — Vocational rehabilitation — Procedure and payments. In cases of permanent total disability the employee shall receive 66 $\frac{2}{3}$ % of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay weekly compensation payments for more than 312 weeks. A finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer the employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to the vocational rehabilitation division, out of the second injury fund provided for by Subsection 35-1-68 (1), not to exceed \$1,000 for use in the rehabilitation and training of the employee; the rehabilitation and training of the employee shall generally follow the practice applicable under Section 35-1-69, relating to the rehabilitation of employees having combined injuries. If the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah in writing that the employee has fully cooperated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, the commission shall order that there be paid to the employee weekly benefits at the rate of 66 $\frac{2}{3}$ % of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of the second injury fund provided for by Subsection 35-1-68 (1), for such period of time beginning with the time that the payments, as in this section provided, to be made by the employer or its insurance carrier terminate and ending with the death of the employee. No employee shall be entitled to any such benefits if he fails or refuses to cooperate with the division of vocational rehabilitation under this section.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund under Subsection 35-1-68 (1), including those injured prior to March 6, 1949, shall receive not less than ~~[\$110]~~ \$120 per week when paid only by the second injury fund, or when combined with compensation payments

of the employer or the insurance carrier. The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability is required in those instances. In all other cases where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in Sections 35-1-65, 35-1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

History: L. 1917, ch. 100, § 78; C.L. 1917, § 3139; L. 1919, ch. 63, § 1; R.S. 1933, 42-1-63; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-63; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 5; 1971, ch. 76, § 6; 1973, ch. 67, § 4; 1974, ch. 13, § 1; 1975, ch. 101, § 5; 1977, ch. 150, § 1; 1977, ch. 151, § 3; 1977, ch. 156, § 6; 1979, ch. 138, § 2; 1981, ch. 286, § 1; 1983, ch. 356, § 1; 1985, ch. 160, § 1.

Compiler's Notes.

The 1975 amendment substituted "85% of the state average weekly wage" for "66 ⅔ % of the state average weekly wage" four times in the first paragraph and once in the last paragraph; increased the minimum benefit per week from \$35 to \$45 in the first paragraph; inserted "not to exceed the average weekly wage of the employee at the time of the injury" twice in the first paragraph; increased the benefit per week from \$50 to \$60 at the end of the third paragraph (deleted by the 1977 amendment) and near the end of the fourth paragraph (deleted by the 1977 amendment); and substituted "July 1, 1975" for "July 1, 1974" in the fourth paragraph (deleted by the 1977 amendment).

The 1977 amendment by chapter 151 substituted "spouse" for "wife" in the first paragraph.

The 1977 amendment by chapter 156 made the same changes as the 1977 amendment by chapter 151; combined the first two paragraphs into one paragraph; inserted the second paragraph; and deleted the former third and fourth paragraphs which read: "Commencing July 1, 1971, all persons who are permanently and totally disabled and on that

date or prior thereto were receiving compensation benefits from the special fund provided for by section 35-1-68(1) shall be paid compensation benefits at the rate of \$60 per week.

"Commencing July 1, 1975, all persons who were permanently and totally disabled on or before March 5, 1949, and were receiving compensation benefits and continue to receive such benefits shall be paid compensation benefits from the special fund provided for by section 35-1-68 (1) at a rate sufficient to bring their weekly benefit to \$60 when combined with employer or insurance carrier compensation payments."

The 1977 amendment by chapter 150, in the two paragraphs deleted by the 1977 amendment by chapter 156 (quoted above) substituted "1977" for "1971" and "1975" and substituted "\$75" for "\$60."

The 1979 amendment increased the minimum benefit in the second paragraph from \$75 to \$85.

The 1981 amendment substituted "second injury fund" for "special fund" throughout the section; and increased the amount in the second paragraph from \$85 to \$100.

The 1983 amendment substituted "under this section" at the end of the first paragraph for "as set forth herein"; increased the minimum amount in the first sentence of the second paragraph from \$100 to \$110; and made minor changes in phraseology, punctuation and style.

Effective Date.

Section 2 of Laws 1985, ch. 160 provided: "This act takes effect upon approval by the governor, or the day following the constitutional time limit of Article VII, Sec. 8 without the governor's signature, or in the case

EXHIBIT B

35-1-68

LABOR — INDUSTRIAL COMMISSION

of a veto, the date of veto override." Approved March 18, 1985.

Prior accidents contributing to disability.

Employee who was permanently and totally disabled due to a combination of prior and present accidents was entitled to lifetime benefits payable from the special fund provided for in 35-1-68. *McPhie v. Industrial Comm.* (1977) 567 P 2d 153.

Statute of limitations.

This section governs permanent total disability claims and contains no statute of limitations for such claims; therefore, where employee suffered an injury in October of 1961 and notice of injury and claim was properly given and filed in accordance with requirements of 35-1-99 and 35-1-100, and employee was found to have suffered permanent partial disability and received 40 weeks of compensation through December of 1964 and payment of medical bill through 1966,

employee's claim filed in December of 1982 for permanent total disability resulting from slow deterioration of a condition caused by 1961 injury was timely filed under this section and, under 35-1-78, industrial commission had continuing jurisdiction to award permanent total disability compensation. *Mecham v. Industrial Comm. of Utah* (1984) 692 P 2d 783.

Total disability.

Where an employee demonstrates that he can no longer perform his normal duties as a result of a work-related accident, and that he cannot be rehabilitated, the burden shifts to the employer to prove that suitable, steady work is available, considering the age, mental capacity, and education of the employee, in order to preclude a determination of total and permanent disability under the odd-lot doctrine. *Marshall v. Industrial Comm. of Utah* (1984) 681 P 2d 208.

35-1-68. Second Injury Fund — Injury causing death — Burial expenses — No dependents, payments to Default Indemnity Fund — Payments to dependents. (1) There is created a Second Injury Fund for the purpose of making payments in accordance with Chapters 1 and 2 of this title. This fund shall succeed to all monies heretofore held in that fund designated as the "Special Fund" or the "Combined Injury Fund" and whenever reference is made elsewhere in this code to the "Special Fund" or the "Combined Injury Fund" that reference shall be deemed to be to the Second Injury Fund. The state treasurer shall be the custodian of the Second Injury Fund and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of that fund. The attorney general shall appoint a member of his staff to represent the Second Injury Fund in all proceedings brought to enforce claims against it.

(2) If injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in Section 35-1-81, and further benefits in the amounts and to the persons as follows:

(a) If the commission has made a determination that there are no dependents of the deceased, it may, prior to a lapse of one year from the date of death of a deceased employee, issue a temporary order for the employer or insurance carrier to pay into the Default Indemnity Fund the sum of \$30,000. When the amount in the Default Indemnity Fund reaches or exceeds \$500,000, the \$30,000 shall thereafter be paid into the Second Injury Fund. If the amount in the Default Indemnity Fund falls below \$500,000 at any time after reaching the initial \$500,000, the commission shall direct payments into either the Second Injury Fund or the Default Indemnity Fund as may be required so as to maintain the Default Indemnity Fund at or near \$500,000. Before payment into either fund, the \$30,000 shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and death. If a dependency claim is filed subsequent to the issuance of such an order and, thereafter, a determination of dependency is made by the commission, the award shall first be paid out of the sum deposited for credit to the Default Indemnity Fund or the Second Injury Fund by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier. If no dependency claim is filed within one year

from the date of death, the commission's temporary order shall become permanent and final. If no temporary order has been issued and no claim for dependency has been filed within one year from the date of death, the commission may issue a permanent order at any time requiring the carrier or employer to pay \$30,000 into the Second Injury Fund. Any claim for compensation by a dependent must be filed with the commission within one year from the date of death of the deceased.

(b) (i) If there are wholly dependent persons at the time of the death, the payment by the employer or insurance carrier shall be 66 $\frac{2}{3}$ % of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week, to continue during dependency for the remainder of the period between the date of the death and not to exceed six years or 312 weeks after the date of the injury.

(ii) The weekly payment to wholly dependent persons during dependency following the expiration of the first six-year period described in Subsection (2)(b)(i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons during that initial six-year period, reduced by 50% of any weekly federal social security death benefits paid to those wholly dependent persons.

(iii) The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or non dependent person and shall be paid such benefits as the commission may determine pursuant to Subsection (2)(c)(ii).

(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six-year period from the date of death of the employee. This presumption shall not apply after the initial six-year period and, in determining the then existing annual income of the surviving spouse, the commission shall exclude 50% of any federal social security death benefits received by that surviving spouse.

(c) (i) If there are partly dependent persons at the time of the death, the payment shall be 66 $\frac{2}{3}$ % of the decedent's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week, to continue during dependency for the remainder of the period between the date of death and not to exceed six years or 312 weeks after the date of injury as the commission in each case may determine and shall not amount to more than a maximum of \$30,000. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependency existing at the date of injury, and any amount awarded by the commission under this subsection must be consistent with the general provisions of this title.

(ii) Benefits to persons determined to be partly dependent pursuant to Subsection (2)(b)(iii) shall be determined by the commission in keeping with the circumstances and conditions of dependency existing at the time of the dependency review and may be paid in a weekly amount not exceeding the maximum weekly rate that partly dependent person would receive if wholly dependent.

(iii) Payments under this section shall be paid to such persons during their dependency by the employer or insurance carrier.

(d) If there are wholly dependent persons and also partly dependent persons at the time of death, the commission may apportion the benefits as it deems just

and equitable; provided, that the total benefits awarded to all parties concerned shall not exceed the maximum provided for by law.

(e) If there are wholly or partly dependent persons at the time of death and the total amount of the awards paid by the employer or its insurance carrier to said dependents, prior to the termination of dependency, including any remarriage settlement, does not exceed \$30,000, the employer or its insurance carrier shall pay the difference between the amount paid and \$30,000 into the Second Injury Fund provided for in Subsection (1).

History: L. 1917, ch. 100, § 79; C.L. 1917, § 3140; L. 1921, ch. 67, § 1; R.S. 1933, 42-1-64; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-64; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 6; 1971, ch. 76, § 7; 1973, ch. 67, § 5; 1975, ch. 101, § 6; 1977, ch. 151, § 4; 1977, ch. 156, § 7; 1979, ch. 138, § 3; 1984, ch. 80, § 1.

Compiler's Notes.

The 1975 amendment added the last two sentences to subsec. (1) (deleted in 1979); substituted "85% of the state average weekly wage" for "66 ⅔ % of the state average weekly wage" in subds. (2)(b)(i), (2)(c)(i) and former subsec. (5) (deleted in 1979); increased the minimum benefit per week from \$35 to \$45 in subds. (2)(b)(i), (2)(c)(i) and former subsec. (5) (deleted in 1979); and inserted "not to exceed the average weekly wage of the employee at the time of the injury" after "four such dependent minor children" in subd. (2)(b)(i).

The 1977 amendment by chapter 151 substituted "spouse" for "wife" near the middle of subd. (2)(b)(i).

The 1977 amendment by chapter 156 made the same change as the 1977 amendment by chapter 151; substituted "in section 35-1-81" near the beginning of present subsec. (2) for "herein"; and added the last sentence of former subsec. (4) (deleted in 1979) relating to reviewing the issue of dependency at the time application was made for additional benefits from the special fund.

The 1979 amendment inserted subsec. (1); designated the former introductory paragraph as subsec. (2); substituted subd. (2)(a) for former subd. (1) which read: "If there are no dependents, the employer and insurance carrier shall pay into the state treasury the sum of \$15,600. Any claim for compensation must be filed with the commission within one year from the date of death of the deceased, and, if at the end of one year from the date of death of the deceased, no claim for compensation shall have been filed with the commission, the said sum of \$15,600 shall be paid at that time into the state treasury by the

employer or the insurance carrier. This payment shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and his death. Such payment shall be held in a special fund for the purposes provided in this title; the state treasurer shall be the custodian of such special fund, and the commission shall direct the distribution thereof. If the commission has reasonably determined that there are no dependents of the deceased, it may order the employer or insurance carrier to pay into the state treasury the sum specified in this subsection to be held in that special fund for a period of one year from the death of the deceased. Any claim filed within that year for which an award is made by the commission shall be paid out of the sum deposited by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier"; redesignated former subsec. (2) as subd. (2)(b)(i); inserted "by the employer or insurance carrier" after "payment" near the beginning of subd. (2)(b)(i); added subds. (2)(b)(ii) to (2)(b)(iv); redesignated former subsec. (3) as subd. (2)(c)(i); added subds. (2)(c)(ii) and (2)(c)(iii); redesignated former subsec. (4) as subd. (2)(d); deleted the last two sentences of former subsec. (4) which provided that the employer or insurance carrier would pay benefits to dependents out of the special fund as provided by former subsecs. (2) and (3), and to review the issue of dependency at the time application was made for additional benefits from the special fund; deleted former subsec. (5) which provided benefits to dependents at the rate of 66 ⅔ % of the deceased's average weekly wages at the time of the injury, but not more than 85% of the state average weekly wage, with a minimum of \$45 per week out of the special fund beginning with the time that payments made by the employer or its insurance carrier terminate and ending upon the termination of said dependency; redesignated former subsec. (6) as subd. (2)(e); increased the maximum award in subd. (2)(e) from \$15,600 to \$18,720; and substituted "second injury fund" for "special fund" at the end of subd. (2)(e).

EXHIBIT C

WORKMEN'S COMPENSATION

35-1-71

hired and regularly employed elsewhere, to pay into the special fund, provided by this section and 35-1-70, the amount provided by 35-1-68, if she leaves no dependents. *United Airlines Transport Corp. v. Industrial Comm.*, 110 U. 590, 175 P. 2d 752.

Collateral References.

Workmen's Compensation—867.
99 C.J.S. Workmen's Compensation § 204.

Compensation as affected by external infection from, or subsequent incident of, original injury, 7 A. L. R. 1186, 102 A. L. R. 790.

Construction and effect of provisions in relation to new or new and further disability, 72 A. L. R. 1125.

Previous loss or mutilation of member as affecting amount or basis of compensation under Workmen's Compensation Act, 30 A. L. R. 979.

Right to compensation for new or aggravated injury as result of medical or surgical treatment, 127 A. L. R. 1108.

Settlement of claim or recovery against physician or surgeon or one responsible for his malpractice on account of aggravation of injury as affecting right to compensation, 98 A. L. R. 1392.

35-1-70. Additional benefits in special cases.—If any wholly dependent persons, who have been receiving the benefits of this title, at the termination of such benefits are yet in a dependent condition, and under all reasonable circumstances should be entitled to additional benefits, the industrial commission may, in its discretion, extend indefinitely such benefits; but the liability of the employer or insurance carrier involved shall not be extended, and the additional benefits allowed shall be paid out of the special fund provided for in subdivision (1) of section 35-1-68.

History: L. 1917, ch. 100, § 79; C. L. 1917, § 3140, subsec. 7; L. 1921, ch. 67, § 1; R. S. 1933 & C. 1943, 42-1-66.

Definitions.

Word "employer" is used in this section to encompass an employer in a situation where the employment status is localized in Utah. *United Airlines Transport Corp. v. Industrial Comm.*, 110 U. 590, 175 P. 2d 752.

Duty to pay into special fund.

This chapter does not evidence legisla-

tive intent to require an employer whose employee is killed while temporarily engaged in employment in Utah, although hired and regularly employed elsewhere, to pay into the special fund, provided by 35-1-69 and by this section, the amount provided by 35-1-68, if she leaves no dependents. *United Airlines Transport Corp. v. Industrial Comm.*, 110 U. 590, 175 P. 2d 752.

Collateral References.

Workmen's Compensation—836.
99 C.J.S. Workmen's Compensation § 296.

35-1-71. Dependents—Presumption.—The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

(1) A wife upon a husband with whom she lives at the time of his death.

(2) Children under the age of eighteen years or over such age, if physically or mentally incapacitated, upon the parent, with whom they are living at the time of the death of such parent, or who is legally bound for their support.

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as a dependent unless he is a member of the family of the deceased employee, or bears to him the relation of husband or wife, lineal descendant, ancestor, or brother or sister. The word "child" as used in this title shall include a posthumous child, and a child legally adopted prior to the injury. Half brothers and

INDUSTRIAL COMMISSION OF UTAH

CASE No.85000250

ANNA WEBSTER, Widow of
GENE WEBSTER, deceased,

Applicant,

vs.

L.D.S. HOSPITAL
(SELF-INSURED),

Defendant

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East Broadway, Salt Lake City, Utah, on June 26, 1985, at 8:30 a.m.; same being pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: The Applicant was present and represented by Virginius Dabney, Attorney at Law.

The Defendant was present and represented by Larry White, Attorney at Law.

At the conclusion of the evidentiary hearing, the parties requested that the Administrative Law Judge take the matter under advisement until June 28, at noon, to allow them an opportunity to reach a settlement of the case. No settlement having been received by noon on June 28, 1985, the Administrative Law Judge is prepared to enter the follow.

FINDINGS OF FACT:

The Applicant herein, Anna Webster, is the widow of Gene Webster, who sustained a fatal industrial injury on July 20, 1979, while in the course or scope of his employment with the defendant, L.D.S. Hospital. The injured worker eventually died from his injuries on December 15, 1982. On January 26, 1983, the Industrial Commission entered an Order providing for the payment of death benefits to the surviving spouse of the deceased, Anna Webster, the Applicant herein. As the result of that Order, the Applicant was paid death benefits at the rate of \$179.00 per week through March 20, 1985, by the Defendant.

On or about March 15, 1985, the Applicant filed an application for continuing death benefits from the Defendant, pursuant to Section 35-1-68, Utah Code Annotated.

ANNA WEBSTER, Widow
GENE WEBSTER, Deceased
FINDING OF FACT
PAGE TWO

Section 35-1-68 (b)(iv) provides that "...In determining the then existing annual income of the surviving spouse, the Commission shall exclude 50% of any Social Security Death Benefits received by that surviving spouse." The Applicant's present income consists of the \$479.00 per month she receives from Social Security for a disability award due to her rheumatoid arthritis, and \$120.00 per month which she receives from the L.D.S. Hospital retirement plan. Prior to the termination of the benefits by the Defendant, she was also receiving \$716.00 in compensation benefits, for a total monthly income of \$1,315.00. The Applicant's expenses are approximately \$1,300.00. As the result of the death of her husband, the Applicant collected \$36,000.00 in life insurance proceeds, and as the result of the death of her mother, she received \$9,000.00. The Applicant testified that she has \$85,000.00 in money market certificates. As the result of those certificates, the Applicant earned approximately \$8,000.00 last year in interest income. However, she did not invade any of her savings until the Defendant terminated her benefits, whereupon she spent \$2,600.00 of her savings. It was also revealed that the Applicant would be paying off her mortgage in September of 1985, and accordingly would no longer have that monthly expense.

Without considering the interest income, it would appear at first blush that the Applicant would be wholly dependant on the benefits provided by the Defendant, since they constitute over one half of her monthly income. The Defendant, by and through counsel, has taken the position that the Applicant should place her \$85,000.00 in high yielding annuities, and that by doing so, she would realize a higher income than she receives from her money market certificates. However, the Administrative Law Judge feels that the Defendant, is missing the point. The point being, that it is not the Applicant's responsibility to find the highest yielding investment so that the insurance carrier may be benefited. However, the Administrative Law Judge does feel that the interest income should be considered in determining the Applicant's disposable income. In other words, the Administrative Law Judge finds that the interest earned by a surviving spouse should be included as income, however the Applicant should not be forced to invade the principal or corpus, in order to meet the everyday necessities of life. After considering all of the evidence on the file, the Administrative Law Judge feels that the fairest finding in this case, would be a finding of partial dependency. Further, the Administrative Law Judge finds that the Defendant should pay the Applicant \$89.50 per week or \$358.00 every four weeks which sum represents one half of the allowance for full dependency.

With respect to the annual dependency review called for in Section 68 of the Act, the Defendant shall send an Affidavit of Dependency form, which will be promulgated by the Commission in the near future, to the Applicant. The form should be sent at least sixty (60) days prior to the one (1) year anniversary of the date of this Order. The form will be sent to the defendant and the Industrial Commission by Mrs. Webster. The Defendant shall not suspend or terminate benefits to Mrs. Webster after the anniversary date of this order, unless the Affidavit of Dependency indicates a significant change in her income level, either by increasing or decreasing.

ANNA WEBSTER, Widow
GENE WEBSTER, Deceased
FINDING OF FACTS
PAGE THREE

CONCLUSIONS OF LAW:

Anna Webster is now partially dependent for support purposes.

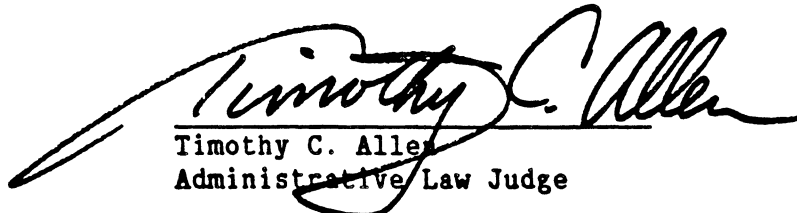
ORDER:

IT IS THEREFORE ORDERED that Defendant, L.D.S. Hospital (Self-Insured) pay Anna Webster, compensation at the rate of \$89.50 per week commencing effective March 21, 1985, and continuing until further order of the Commission.

IT IS FURTHER ORDERED that Defendant, L.D.S. Hospital (Self Insured), shall send a Dependency Affidavit form to Anna Webster no later than sixty (60) days from the anniversary date of this Order. In the event there has been a substantial increase in Mrs. Websters' income, then the defendant may terminate benefits after the anniversary date of this Order, and the Applicant shall be entitled to a hearing before the Industrial Commission.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof specifying in detail the particular errors and objections, and unless so filed this Order shall be final and not subject to review or appeal.

allc:sa
10


Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
2 day of July, 1985
ATTEST:

/s/ Linda J. Strasburg

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on July 2, 1985 a copy of the attached Findings of Fact, Conclusions of Law and Order was mailed to the following persons at the following addresses, postage paid:

Anna Webster, 3864 South 850 West, Bountiful, Utah 84010

Virginus Dabney, Attorney, 412 Kearns Building, Salt Lake City, Utah 84101

Scott Wetzel Services, 833 East 400 South Suite 104, Salt Lake City, Utah 84102

Larry White, Attorney, 330 South 300 East, Salt Lake City, Utah 84111

INDUSTRIAL COMMISSION OF UTAH

By Barbara

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000250

ANNA WEBSTER, Widow of
GENE WEBSTER, Deceased,

Applicant,

vs.

L.D.S. HOSPITAL (Self-insured),

Defendant.

ORDER DENYING

MOTION FOR REVIEW

On July 2, 1985, an Administrative Law Judge of the Commission issued an Order requiring the Defendant in the above-captioned case to pay continued dependency death benefits to the widow/claimant, Anna Webster. The Defendant filed two separate Motions for Review asserting two different defenses. The first Motion for Review, filed August 28, 1985, argues that the widow/claimant is not a dependent because of the other financial resources available to her. The second Motion for Review, filed October 8, 1985, argues that if the Commission should find that the claimant was a dependent of the deceased, that the additional dependency death benefits should be paid out of the Second Injury Fund, and not by the Defendant Self-insured Employer. The Commission is of the opinion that both Motions for Review should be denied. A review of the file follows.

On July 20, 1979, the now-deceased husband of the claimant sustained multiple injuries to the head and body in a motorcycle accident which occurred while he was making a delivery for the Defendant while in the course of his employment. The Defendant Self-insured Employer began the payment of temporary total disability benefits in August of 1979. On February 23, 1981, these benefits were changed to permanent total disability benefits because of a physician report prepared by Dr. Robert Baer which indicated that the condition of the claimant's husband continued to deteriorate. On December 15, 1982, the claimant's husband died due to complications associated with the accident-caused arteriosclerotic cerebrovascular disease. On January 10, 1983, the claimant filed an application for death benefits. On January 26, 1983, the Commission issued an Order requiring the Defendant to pay an additional 116 weeks of benefits at \$179.00 per week. These ordered benefits, added to the already-paid 196 weeks of benefits, amounted to 312 weeks of death benefits at the maximum rate of \$179.00 per week.

Based on the January 16, 1983, Order, the Defendant continued to pay benefits to the claimant through March of 1985. In February of 1985, the claimant wrote a letter to the Second Injury Fund seeking information regarding continued benefits after the initial 312 weeks paid by the Defendant. The Second Injury Fund responded to her, in a letter dated March 4, 1985, that

ANNA WEBSTER
ORDER DENYING MOTION FOR REVIEW
PAGE TWO

due to the May 1979 amendment to U.C.A. 35-1-68, the employer/carrier, and not the Second Injury Fund, was liable for any additional dependency benefits beyond the initial 312 weeks. Consequently, on March 15, 1985, the claimant filed an Application for Hearing to have the matter regarding continued benefits determined by an Administrative Law Judge. The Defendant answered the Application stating that the Defendant had already paid the 312 weeks of benefits specified in U.C.A. 35-1-68, and therefore, should not be liable for any additional benefits.

On June 26, 1985, the hearing was held. On July 2, 1985, the Administrative Law Judge issued his Findings of Fact, Conclusions of Law and Order awarding the claimant continued dependency benefits to be paid by the Defendant Self-insured Employer. The benefits were computed to be \$89.50 per week, which amounted to one half the maximum rate of \$179.00 per week which the Defendant paid to the claimant during the initial 312 weeks. In determining the amount of benefits to be paid by the Defendant, the Administrative Law Judge took into consideration income the claimant was receiving from other sources as compared against her regular living expenses. Other income included Social Security benefits she received for her own rheumatoid arthritis, retirement benefits due her deceased husband from the Defendant, and interest she earned on a money market account with a corpus of \$85,000.00. The Administrative Law Judge found that the claimant should not be required to invade the corpus of the money market account in order to meet her living expenses, and also ordered the continued benefits to be paid until a substantial change in the claimant's dependency status occurred.

On August 28, 1985, the Defendant filed the first Motion for Review. That Motion for Review objects to the Administrative Law Judge's finding that the claimant should not be required to invade the corpus of her money market account. The Motion argues that, at the time of the hearing, the claimant should not have been considered a dependent, as she had sufficient resources to provide for her necessities without the benefit of continued workers' compensation death benefits. The Defendant further argues that the Administrative Law Judge failed to take into consideration the reduction of her expenses which would occur in October 1985 due to her completing the payments for the mortgage on her home. The Defendant points out that once the mortgage was paid off, the claimant could pay all her listed expenses without the continued benefits, and without ever invading the corpus of her savings. The Defendant argues that based on these considerations, the Administrative Law Judge should have denied the claimant continued death benefits as she was not dependent on outside income.

On October 8, 1985, the Defendant wrote a letter to the Second Injury Fund requesting the Second Injury Fund to agree to pay the continued death benefits ordered by the Administrative Law Judge in the July 2, 1985, Order. This request was denied by the Second Injury Fund on October 3, 1985. Once again the Second Injury Fund pointed out that the May 1979 amendment to U.C.A. 35-1-68 relieved the Second Injury Fund for the previously specified liability for continued death benefits beyond the initial 312 weeks. On October 18,

ANNA WEBSTER
ORDER DENYING MOTION FOR REVIEW
PAGE THREE

1985, the Defendant presented the Commission with a request to overrule the Administrative Law Judge, and order the continued benefits to be paid out of the Second Injury Fund.

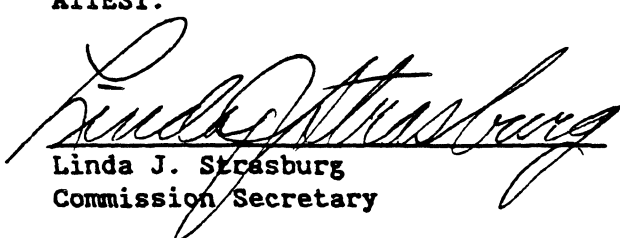
Regarding the Defendant's first Motion for Review, the Commission notes that the issue arises due to the lack of a concrete definition of dependency as specified in the Workers' Compensation Act. In this case, the issue is narrowed to whether or not a claimant need exhaust all financial resources before a finding of dependency is appropriate. As there are no legislative guidelines in this area, the Commission feels that in this particular case, the Administrative Law Judge fairly fashioned the award of continued benefits by taking into account the interest income the claimant received from her savings and excluding the corpus. The Commission finds this to be an equitable compromise between the interests of the two parties, and therefore, must deny the Defendant's first Motion for Review.

The Defendant's second Motion for Review must also be denied. The Commission is satisfied that the intent of the legislature's May 1979 amendment to U.C.A. 35-1-68 was to relieve the increasing financial burden placed on the Second Injury Fund. The legislature provided this relief by deleting the language in U.C.A. 35-1-68 specifying that the Second Injury Fund would be liable for continued dependency benefits. The code section which the Defendant feels contradicts this interpretation (U.C.A. 35-1-70) by specifying a 312-week limitation on benefits from the carrier is not applicable to continued dependency death benefits. That section applies to "special cases" which are not specifically provided for by other code sections. As the Commission finds no clear contradiction in the reading of U.C.A. 35-1-68, and U.C.A. 35-1-70, the Defendant's second Motion for Review is also denied.

IT IS THEREFORE ORDERED that the Defendant's Motions for Review submitted on August 28, 1985, and October 8, 1985, are denied and the Administrative Law Judge's Order dated July 2, 1985, is hereby affirmed.

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
9th day of January, 1986.

ATTEST:


Linda J. Strassburg
Commission Secretary


Stephen M. Hadley, Chairman


Walter T. Axelgard, Commissioner


Lenice L. Nielsen, Commissioner

CERTIFICATE OF MAILING

I certify that on January 16, 1986, a copy of the attached Order Denying Motion for Review in the case of Anna Webster issued January 9, 1986, was mailed to the following persons at the following addresses, postage paid:

Erie V. Boorman, Administrator
Second Injury Fund
P.O. Box 45580
Salt Lake City, UT 84145-0580

Virginus Dabney, Attorney at Law
412 Kearns Building
136 South Main Street
Salt Lake City, UT 84101

Anna Webster
3864 South 850 West
Bountiful, UT 84010

Scott Wetzel Services
833 East 400 South, Suite 104
Salt Lake City, UT 84102

✓ Larry White, Attorney at Law
330 South 300 East
Salt Lake City, UT 84111

THE INDUSTRIAL COMMISSION OF UTAH

By DeAnn Seely
DeAnn Seely

equipping a help-your-self laundry, it is conceivable that a seller of washing machines might be willing to reduce the price of such articles in that situation although the purchaser's purpose be not that of resale of the articles. To draw a distinction in the purchaser's intended use of the articles bought seems unsatisfactory as such appears of small significance to the seller. The evidence here is equally inconclusive. One gets the impression that "usual retail price" is an indefinite term. We cannot say that the evidence defined the intention of the parties to the contract in using the term with greater clarity than this court defined it as applied to Sec. 93.

In *Stemmons, Inc. v. Universal C. I. T. Credit Corporation*, Okl., 301 P.2d 212, 216, we held that "ordinary course of trade" as used in 46 O.S. 1951 § 93 applied to a sale by one automobile dealer to another if such sale was in the seller's ordinary course of trade, whether the sale be retail or wholesale, and pointed out that Sec. 93, *supra*, does not require that the purchaser be an innocent purchaser or without knowledge of the mortgage, but only that the property be sold in the ordinary course of trade.

[5,6] We are of the opinion that the language of the statute, *supra*, was intended by the Legislature to encompass all transactions between persons who, in their ordinary business dealings, effected a sale and purchase for a consideration sufficient to support a simple contract. Had the Legislature intended that transactions in the ordinary course of trade be limited to sales at retail some indication of such requirement could have been expressed in the statute.

The judgment is affirmed.

BLACKBIRD, C. J., and DAVISON, JOHNSON, and JACKSON, JJ., concur.

IRWIN and BERRY, JJ., concur in result.

WILLIAMS, J., dissents.

386 P.2d—49

Bernice L. AKIN, Petitioner,

v.

**AKIN DISTRIBUTORS, INC., and
Pacific Employers Insurance
Company, Respondents.**

No. 40211.

Supreme Court of Oklahoma.

Nov. 5, 1963.

Original proceeding to review an order of the State Industrial Court denying death benefits to mother of a deceased employee. The Supreme Court, Irwin, J., held that finding that claimant was not dependent upon her deceased son within meaning of death benefit provisions of Compensation Act was reasonably supported by the evidence.

Affirmed.

1. Workmen's Compensation —473

That claimant, up to time of death of deceased son was able to take care of herself does not necessarily preclude her from being classed as dependent of deceased son for workmen's compensation purposes. 85 O.S.1961 § 1 et seq.

2. Workmen's Compensation —416

Reasonable expectation of continuing of future support and maintenance seems to be true criterion as to who are dependents for workmen's compensation purposes. 85 O.S.1961 § 1 et seq.

3. Workmen's Compensation —420

Where claimant is able to provide himself with all necessities that are of pecuniary value, without aid of employee, fact that deceased employee may have made contributions to claimant during his lifetime and there was reasonable expectation of continuing contributions does not necessarily mean that claimant is eligible for death benefits under Workmen's Compensation Act. 85 O.S.1961 § 1 et seq.

4. Workmen's Compensation —1939

Finding by State Industrial Court as to dependency under death benefit provi-

sions of Workmen's Compensation Act will not be disturbed on review where such finding is reasonably supported by competent evidence. 85 O.S.1961 § 1 et seq.

5. Workmen's Compensation \S 1939

On questions of fact Supreme Court cannot weigh evidence but is bound by order of State Industrial Court, if it is reasonably supported by the evidence.

6. Workmen's Compensation \S 1480

Finding of State Industrial Court that claimant was not dependent upon her deceased son within meaning of death benefit provisions of Compensation Act was reasonably supported by the evidence. 85 O.S. 1961 § 1 et seq.

Syllabus by the Court.

A finding by the State Industrial Court as to dependency, under the death benefit provisions of the Workmen's Compensation Act, will not be disturbed on review where such finding is reasonably supported by competent evidence.

Original proceeding to review an order of the State Industrial Court denying death benefits to mother of deceased employee. Order sustained.

Farmer, Woolsey, Flippo & Bailey, by Lawrence Johnson, Tulsa, for petitioner.

Donovan & Rogers, Gerard K. Donovan, Tulsa, for respondents.

IRWIN, Justice.

Bernice L. Akin filed a claim against Akin Distributors, Inc., and its insurance carrier, Pacific Employers Insurance Company, to recover death benefits under the Workmen's Compensation Act, for and on behalf of herself as the only dependent heir of Hugh Lewis Akin, Deceased. Bernice L. Akin is the mother of the decedent.

The respondent insurance carrier challenged the claim and one of the grounds relied upon was that claimant was not dependent upon the decedent for her livelihood and support.

The trial judge denied recovery for the reason that claimant was not dependent upon decedent within the terms and meaning of the Workmen's Compensation Act. The order of the trial judge denying recovery was sustained by the court en banc and claimant has petitioned for a review of the order denying recovery.

FACTS

Claimant's husband died in 1930 and she established a retail food store in Tulsa and later established a second store. Her two sons, Brown, then 15 years of age, and decedent, then 11 years old, continued their education and held part time jobs and assisted their mother. They sold their home and purchased an acreage east of Tulsa with the title being in the three of them as joint tenants with right of survivorship.

Akin Food Distributors, Inc., was later organized to handle and sell packaged and canned goods at wholesale and decedent was elected vice president of the corporation in charge of sales at a salary of \$700.00 per month. Decedent owned no stock in the corporation.

Claimant owned a house and lot in Tulsa; decedent had moved the house and sold it; he then supervised the construction of a business building or warehouse on the vacant lot which is leased for \$15,600.00 per year; it is mortgaged and the lease rentals are applied to the indebtedness. Claimant now owns an undivided one-third interest in the lot and building.

Claimant also owns an undivided one-third interest in the warehouse occupied by Akin Distributors, Inc., which rents for \$15,000.00 per year and the rentals are applied to the mortgage indebtedness. In addition to the real estate, claimant owns stock in Akin Distributors, Inc., which has an estimated value of \$50,000.00 and is clear of liens; \$2,000.00 invested in other stock; one cadillac automobile and 8 riding horses.

Claimant was receiving \$200.00 per month from her retail stores and after she sold them for \$21,000.00 and paying the in-

debtedness against them, she had \$9,000.00 remaining. The retail stores were sold after the death of decedent. Claimant had received \$400.00 per month salary from Akin Distributors, Inc., and at the time of trial her salary had been increased to \$500.00 per month; she also had a stock dividend of \$450.00 and an annual bonus of \$1186.00, which she has not withdrawn.

Decedent had been married and had two sons. He and his wife were divorced but he had regularly paid money to his divorced wife for her support and the support of their minor children. Decedent's divorced wife and minor children died in the accident which caused decedent's death.

Decedent had lived in the same home with claimant except for the short time he and his wife occupied an apartment. After the acreage was purchased, decedent had built a barn, tenant house, a car port, a concrete driveway and had repaired the place in general. He worked about the place in the mornings and evenings; he plowed, seeded, cut and baled hay and looked after the horses, cattle and hogs and tended to the sale of the livestock and feed.

While decedent was living with claimant he paid her \$50.00 a month, and on two or three occasions, gave her more than \$50.00, and he regularly purchased groceries.

Under this set of facts, the trial judge found, and the same was approved by the Court en banc, that claimant was not a dependent heir of decedent within the terms and meaning of the Workmen's Compensation Act.

CONCLUSIONS

Claimant contends that the true criterion as to who are dependents is the reasonable expectation by a surviving heir of continuing future support and maintenance; that it matters not the petitioner up to the time of the death of decedent was able to take care of herself. In support of this contention, she cites and relies on *Robber-son Steel Company v. State Industrial Court*, Okl., 354 P.2d 211; *Sample v. State*

Industrial Commission, Okl., 262 P.2d 889; *Oklahoma State Highway Department v. Nash*, Okl., 297 P.2d 412; *G. I. Construction Co. v. Osborn*, 208 Okl. 554, 257 P.2d 1056; *Stubblefield v. Sebastian*, Okl., 340 P.2d 265; *Dierks Forests, Inc. v. Parnell*, Okl., 331 P.2d 392; and *Oklahoma State Highway Department v. Peters*, Okl., 291 P.2d 825.

We do not find the above cases necessarily controlling in the case at bar. In each of the cases the question of dependency was firmly established by competent evidence showing claimant had received benefits from the decedent workman which constituted substantial services or contributions which were relied upon for partial support and maintenance and there was reason to expect they would have continued in the future except for the intervention of death. Also, an examination of all the above described cases show that we sustained the order appealed from.

[1,2] We agree with the rule of law that the fact that claimant up to the time of the death of decedent was able to take care of herself does not necessarily preclude her from being classified as a dependent of her deceased son. We are also mindful that the purpose of the Workmen's Compensation Act is to provide the Workmen's dependents in the future with something in substitution for what has been lost by the workman's death, and, consequently, to establish dependency, the applicant for compensation must show that he or she had reasonable grounds to anticipate future support from the decedent. This reasonable expectation of continuing of future support and maintenance seems to be the true criterion as to who are dependents. See *Oklahoma State Highway Department v. Peters*, Okl., 291 P.2d 825.

[3] However, we are also mindful that where a claimant is wholly able to provide herself or himself with all the necessities that are of pecuniary value, without the aid of the employee, the fact that deceased employee may have made contributions to

the claimant during his lifetime and there is reasonable expectations of continuing contributions, does not necessarily mean that claimant is eligible for death benefits under the Workmen's Compensation Act. See *Fox-Vliet Wholesale Drug Co. v. Chase*, Okl., 288 P.2d 391, which considers similar principles of law which are controlling under the facts in the case at bar. In that case we said:

"Without doubt the legislative expression that death benefits are payable 'to the dependents of the deceased employee as defined herein' refers to persons who presently or in reasonable future expectancy were in some degree actually relying on the said employee for necessary support and maintenance and persons not wholly able to exist or sustain themselves at a station in life comparable to that of the employee without the financial aid of the said employee, and who are heirs at law of the deceased as defined by the Descent and Distribution statutes.

"In other words, under language of the statute of clear and unmistakable meaning, an adult heir of a deceased employee, which heir is not a legal dependent, and was and is wholly self-supporting, or who was and is wholly able to provide himself with all the necessities that are of pecuniary value, without the aid of the said employee, is not eligible for death benefits as provided for in the Workmen's Compensation Act."

In *Sammons v. Faye Construction Co.*, Okl., 367 P.2d 1021, we said:

"* * * Occasional benefits or sporadic gifts and donations from an adult decedent workman will not, standing alone, establish partial dependence upon such workman unless the evidence, viewed as a whole, also shows that these benefits, instead of being a mere casual gratuity, constituted substantial services or contributions which were relied upon for necessities of life and there was reason to expect that they

would have continued in the future except for the intervention of death."

[4-6] This Court has repeatedly held that a finding by the State Industrial Court as to dependency, under the death benefit provision of the Workmen's Compensation Act, will not be disturbed on review where such finding is reasonably supported by competent evidence. See *Sammons v. Faye Construction Company*, supra; *Fox-Vliet Wholesale Drug Co. v. Chase*, supra; and *In re Updike's Heirs*, Okl., 282 P.2d 230. We are bound by the rule that on questions of fact, we cannot weigh the evidence but are bound by the order of the State Industrial Court when it is reasonably supported by competent evidence. There is competent evidence reasonably supporting the order of the commission.

Having determined that the order of the Industrial Court must be sustained, we find it unnecessary to determine the specifications of error urged by the Respondent. Also, the question of revivor heretofore presented by the parties is moot and need not be considered.

Order sustained.



Roy F. SPEED, Plaintiff in Error,
v.

George E. WHALIN, Defendant in Error.
No. 40194.

Supreme Court of Oklahoma.
Nov. 5, 1963.

Action by employee against employer for injuries sustained when employee fell off roof of house. The District Court, Oklahoma County, Boston W. Smith, J., sustained a demurrer to the evidence, and the employee appealed. The Supreme Court, Halley, V. C. J., held that evidence was insufficient to establish that there was

sequence, none that Stringham could not have averted the collision by exercising due care, none that there was no adequate warning because of an unlighted truck, none except one isolated accident sometime before, none that indicated any kind of hazard save the misguided diesel, none that the Commission should have put up signs, reduced the speed limit, or that it unreasonably exercised its authorized statutory discretion under the facts of this case. Contrariwise, unless we indulge speculation or emotion based on unwarranted assumption of undemonstrated pertinent facts, we or the jury could arrive at no other conclusion than that indulged by the trial court. On the other hand, it would strain reason to conclude, under the facts of this case, that there was anything but one negligence,—that of Trone—or that of Stringham,—or a concurrence of both, which was the concurring or sole proximate cause of the incident here,—wholly divorced from State involvement. Those issues persist, perhaps, for a trial on the merits among the remaining litigants, since this appeal has to do only with liability as to the defendant Road Commission.

ELLETT, TUCKETT, CROCKETT
and MAUGHAN, JJ., concur.



**Lorin R. FARNSWORTH, father of Matt
Robert Farnsworth, Deceased,
Plaintiff,**

v.

**The INDUSTRIAL COMMISSION of Utah
et al., Defendants.**

No. 13910.

Supreme Court of Utah.

April 24, 1975.

Father of deceased minor workman was denied benefits under Workmen's Compensation Act by the Industrial Commission and he appealed. The Supreme

534 P.2d—57

Court, Maughan, J., held that deceased workman's father, who was legally blind, who had relied upon workman to transport him to veterans hospital and doctor's office, and to perform yard work at his home and his father's home, and whose wife had been employed for 12 years and who received veteran's disability benefit of \$548 per month and civil service annuity of \$220 per month was not entitled to benefits as a dependent.

Decision of the Industrial Commission sustained.

1. Workmen's Compensation §412

"Dependency" within statute permitting award of workmen's compensation benefits to persons who were dependent on deceased worker 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. U.C.A.1953, 35-1-68(3), 35-1-71.

See publication Words and Phrases
for other judicial constructions and
definitions.

2. Workmen's Compensation §476

Deceased minor workman's father, who was legally blind, who relied on the workman for transportation to veterans hospital and doctor's office, who relied on workman to perform yard work around the home and to aid him in taking care of his parents' home, and who received veteran's disability benefits of \$548 per month and civil service annuity of \$220 per month and whose wife worked did not have the type of "dependency" relationship with the deceased workman necessary to permit him to recover under the Workmen's Compensation Act. U.C.A.1953, 35-1-68(3), 35-1-71.

See publication Words and Phrases
for other judicial constructions and
definitions.

J. Anthony Eyre, Kipp & Christian, Salt Lake City, for plaintiff.

Vernon B. Romney, Atty. Gen., Frank V. Nelson, Asst. Atty. Gen., Salt Lake City, for defendants.

MAUGHAN, Justice:

Matt Robert Farnsworth, a 19-year-old, sustained fatal injuries in the course of his employment, when the truck he was operating overturned. The claimant, Lorin R. Farnsworth, is the father of decedent, and he filed a claim before the Industrial Commission, asserting that he was partially dependent on his son and thus was entitled to the benefits provided by Section 35-1-68(3), U.C.A.1953. Upon hearing before a trial examiner, the claim of the applicant was denied. Upon review before the Industrial Commission the determination of the trial examiner was affirmed on the ground that although the applicant may have been dependent upon deceased for certain activities, the dependency, as expressed by the evidence, was not the type contemplated and intended within the meaning of the Workmen's Compensation Act.

Applicant is classified as legally blind and has been unemployed for the past eighteen years. At the time of his son's death, applicant was receiving a veteran's disability benefit of \$548 per month and a civil service annuity of \$220 per month. Applicant's wife has been gainfully employed for twelve years. Decedent was regularly employed since his graduation from high school in June, 1973. He died January 17, 1974. Claimant has one other minor son, Mark, residing with him. Mark graduated from high school in June, 1974, and had previously been employed during the summer of 1973, although at the time of the hearing he was not employed, while convalescing from surgery.

Applicant's claim of partial dependency is predicated upon the services his son performed and not upon direct financial assistance. The decedent had read his fa-

ther's mail and other documents, transported him to the Veterans Hospital and doctor's office for medical treatments, and performed chores such as yard work about his father's house. The decedent transported his father about the town to pay utility bills and other obligations, although claimant admitted the primary purpose of this service was to get him out of the house. The applicant further undertook the responsibility for caring for his parents' home and decedent had performed many of these tasks, such as filling the coal stoker, doing yard work, and snow removal. The applicant sometimes reimbursed his son for the gasoline expense incurred in performing these services. Since Matt's death, his brother, Mark, has performed the services previously rendered by decedent for their father.

In this review plaintiff contends that he was partially dependent upon his son within the meaning of the Workmen's Compensation Act.

Section 35-1-71, U.C.A.1953, specifies two classes, who are legislatively presumed to be wholly dependent for support upon a deceased employee. The statute further provides:

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as a dependent unless he is a member of the family of the deceased employee, or bears to him the relation of husband or wife, lineal descendant, ancestor, or brother or sister. . . .

By the express terms of Section 35-1-71, U.C.A.1953, the subject matter of the statute concerns those persons who are "*dependent for support* upon a deceased employee." The case law of this state has consistently limited dependency to those fact situations wherein the deceased had contributed financial assistance or com-

parable assistance such as growing food, which was used in supporting the dependent.¹

In *Rigby v. Industrial Commission*,² this court stated:

Whether one person is dependent upon another within the meaning of the Workmen's Compensation Act is primarily a question of fact. It is the exclusive province of the Industrial Commission to determine the facts and to draw legitimate inferences therefrom. It is also, in the first instance, the province of the Commission to determine from such facts and inferences whether dependency does or does not exist. When, however, the established facts and inferences reasonably deductible therefrom can lead to but one conclusion, a question of law is presented which this court, upon proper application, must review.

This court explained:³

In this case the burden was on plaintiff to establish dependency. The Workmen's Compensation Act creates no presumption that a father is dependent upon his son for support and maintenance. To entitle plaintiff to compensation in this case, it must affirmatively be made to appear that at the time of the injury (1) plaintiff relied upon his son, in whole or in part, for his support and maintenance; (2) that had the son not been killed plaintiff would in all probability have received some assistance from his son; (3) that it was reasonably necessary for the son to render his father some financial aid in order that the father might continue to live in a condition suitable and becoming to his station in life.

In the *Rigby* case this court observed the upon the record it appeared that the father had relied upon his son for financial aid and that if the son had lived, he would have, in all probability, continued to render financial assistance. This court characterized the serious issue to be whether it could be determined as a matter of law that the father could not have continued to live in a condition suitable and becoming to his station in life without any assistance from his son. After reviewing the facts, this court concluded that the Commission could reasonably infer the father had sufficient funds for his support and maintenance according to his station in life; and therefore, it could not be held as a matter of law that the father was dependent upon his son for support and maintenance.

[1] In *Utah Galena Corp. v. Industrial Commission*⁴ this court cited with approval authority which expressed the view that 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. This concept was reiterated in *Park Utah Consolidated Mines Co. v. Industrial Commission*:⁵

A dependent is one who looks to another for support, and the true criterion is whether one has a reasonable expectation of continuing or future support—to receive such contributions as are necessary and needed to maintain him in his accustomed station in life.⁶

1. *Daly Mining Co. v. Industrial Comm.*, 67 Utah 483, 248 P. 125 (1926).

2. 75 Utah 454, 458, 286 P. 628 (1930).

3. At p. 459 of 75 Utah, at p. 630 of 286 P.

4. 78 Utah 495, 501, 5 P.2d 242 (1931).

5. 84 Utah 481, 488, 36 P.2d 979 (1934).

6. Also see *Bradshaw v. Ind. Comm.*, 103 Utah 405, 135 P.2d 530 (1943), wherein dependency was determined in terms of financial support, and *Roller Coaster Co. v. Ind. Comm.*, 112 Utah 532, 189 P.2d 709 (1948), where the finding of partial dependency was predicated on the son's contributions of cash, groceries, and care of a garden which furnished vegetables and other produce for the family.

[2] In the instant action, the assistance rendered by decedent to his father was not comparable to financial assistance to maintain him in his accustomed station in life. It was greater, it was the love, affection, and companionship of a dutiful child; and deserving of the highest commendation.

Such assistance, as is here shown, commendable as it is, does not establish dependency within the Workmen's Compensation Act, the purpose of which is to provide compensation for the probable financial loss suffered by dependents on account of the death of the decedent.

The decision of the Industrial Commission is sustained.

HENRIOD, C. J., and ELLETT, CROCKETT and TUCKETT, JJ., concur.



ZIONS FIRST NATIONAL BANK, a corporation, Plaintiff and Respondent,

v.

FIRST SECURITY BANK OF UTAH, N.A., a corporation, Defendant and Appellant,

v.

Don ALLEN, dba Mount Nebo Cattle Company, Intervenor, Respondent and Cross-Appellant,

v.

J. B. J. FEEDYARDS, INC., a corporation, et al., Involuntary Defendants.

No. 13725.

Supreme Court of Utah.

April 15, 1975.

Bank, which had security interest in cattle owned by shipper, brought conversion action against defendant bank, which had security interest in cattle of corporation which was in business of buying and selling cattle. The shipper intervened. The Fourth District Court, Utah County,

George E. Ballif, J., entered judgment against defendant, and defendant appealed and intervenor cross-appealed. The Supreme Court, Tuckett, J., held that evidence that, inter alia, corporation received cattle under agreement with shipper that title would pass upon payment but that payment was not made, was sufficient to sustain finding that ownership of cattle in question did not pass to corporation but remained in shipper; but that defendant bank was entitled to offset for cost of feeding cattle which had been attached by defendant.

Judgment affirmed.

1. Secured Transactions Ⓒ116

Bank, which had security interest in cattle of corporation which was in business of buying and selling cattle, could claim no security interest in cattle which remained in ownership of shipper, who had agreed to sell cattle to corporation, with title to pass upon payment, but who had not been paid.

2. Appeal and Error Ⓒ1010.1(6)

Supreme Court's review in cases raising questions of fact rather than issues of law goes only to problem of whether findings of trial court are supported by substantial evidence.

3. Appeal and Error Ⓒ1012.1(3)

Supreme Court will not upset findings of trial court unless evidence clearly preponderates to the contrary.

4. Secured Transactions Ⓒ116

In conversion action by plaintiff bank, which had security interest in cattle owned by shipper, against defendant bank, which had security interest in cattle of corporation which was in business of buying and selling cattle, evidence that, inter alia, corporation received cattle under agreement with shipper that title would pass only upon payment, which payment was not made, was sufficient to sustain findings that ownership of cattle in question did not pass to corporation but remained in shipper and did not become subject to financing

TERRINONI v. WESTWARD HO!

Fla. 1143

Cite as, Fla.App., 418 So.2d 1143

since the support poles for the signs were set in concrete prior to 8 December 1971, the signs were lawfully in existence on that date, thus compensation is due. We agree that DOT had the burden of proving a violation of Section 479.11(1), disagree with the other contentions, and affirm.

National Advertising, the owner of two outdoor signs located in Duval County, was cited by DOT for violation of Section 479.11(1). The parties stipulated that both signs were within 660 feet of the right-of-way of I-95. However, National Advertising contends that these signs fell within the statutory exception of Section 479.11(2).

The parties further stipulated that at least the poles for the two structures were erected prior to 8 December 1971. There was uncontradicted testimony that there were no advertising faces on the poles until on or about 26 April 1972.

On 6 November 1981, DOT entered its final order directing that the signs be removed without compensation.

[1] This court held in *Henderson Sign Service v. DOT*, 390 So.2d 159 (Fla. 1st DCA 1980), that the burden of proving entitlement to any of the exceptions of Chapter 479 is upon the one claiming the exception. Therefore, National Advertising had the burden of proving it fell within the exception of Section 479.11(2). This it failed to do.

[2] In *LaPointe Outdoor Advertising v. Florida DOT*, 398 So.2d 1370 (Fla.1981), the Florida Supreme Court ruled that no compensation need be made for removal of signs that were not lawfully in existence on 8 December 1971. In view of the definition in Section 479.01(1), bare poles do not constitute a "sign" within the meaning of Section 479.24(1). National Advertising's emphasis on the word "intended" in Section 479.01(1) is misplaced. This word clearly refers to a present intent to advertise or to inform the public, not to an intent to build a sign sometime in the future. Therefore, since National Advertising's signs were not lawfully in existence on 8 December 1971, no compensation is due.

AFFIRMED.

THOMPSON, J., concurs.

BOOTH, J., dissents with opinion.

BOOTH, Judge, dissenting:

I respectfully dissent and would reinstate the recommended order of the hearing officer requiring that compensation be paid for the taking of private property in this case. Florida Statutes, Section 479.24, is susceptible of a construction that compensation be paid for signs begun prior to, but not completed until after, December 8, 1971. That construction should prevail in accordance with the basic principle of statutory construction that, where more than one interpretation of a statutory enactment is possible, the court avoid the interpretation which may render the enactment unconstitutional.



Alfred TERRINONI (deceased) by Ann Terrinoni, Appellants,

v.

WESTWARD HO! and Kent Insurance Company, Appellees.

No. AG-228.

District Court of Appeal of Florida,
First District.

Aug. 23, 1982.

Rehearing Denied Sept. 20, 1982.

Mother of deceased employee appealed from order of deputy commissioner finding that her dependency under the Workers' Compensation Act had ended. The District Court of Appeal, Ervin, J., held that: (1) evidence demonstrated that mother had been dependent upon her son at the time of his death, but (2) mother who was her son's

sole beneficiary and heir and had received all the benefits to which she was entitled, some \$155,000 from a combination of sources, was no longer a dependent.

Affirmed.

1. Workers' Compensation ⇐1481

Evidence that decedent gave his mother \$125 each month, that he helped pay off the mortgage on her house, that he helped her with the household purchases and expenses, and that she was not receiving court-ordered alimony from her former husband, although she was receiving social security benefits, sustained finding that decedent's mother was dependent upon the decedent at the time of his death. West's F.S.A. § 440.16.

2. Statutes ⇐223.2(34)

Provisions of statute setting forth compensation to be paid for death of worker should be read in pari materia to achieve the statutory purpose of protecting the workers' dependents against hardships that arise from the workers' death arising out of employment and occurring during employment and of preventing those who depend on workers' wages from becoming charges on the community. West's F.S.A. § 440.16.

3. Statutes ⇐202, 206

Statutory language is not to be assumed to be superfluous; statute must be construed so as to give meaning to all words and phrases contained within that statute.

4. Workers' Compensation ⇐419, 1715

Dependency for purposes of workers' compensation is a question of fact to be determined by the circumstances of the case; it must be shown that the claimant, because of physical or mental incapacity, or lack of means, is dependent upon the deceased for support; actual and substantial support must have been received by the claimant from the decedent and the support must be shown to have been made regularly with reasonable expectation to be made in

the future; casual gifts at irregular intervals will not support a claim based on dependency; test is whether the claimant relies on the contributions to maintain his or her customary standard of living and whether, in the absence of continuance of support, lifestyle of the claimant would be materially altered. West's F.S.A. § 440.16.

5. Workers' Compensation ⇐476

Decedent's mother who, following his death, received approximately \$155,000 from a combination of sources due to being her son's sole heir and beneficiary was no longer a dependent and workers' compensation could be terminated. West's F.S.A. § 440.16.

Stephen Marc Slepín of Slepín, Slepín, Lambert & Waas, Tallahassee, for appellants.

Kathleen V. McCarthy, Hialeah, for appellees.

ERVIN, Judge.

In this workers' compensation case, the mother of a deceased employee appeals the order of the deputy commissioner finding that her dependency under the Workers' Compensation Act has ended, and that, as a matter of law, she was not entitled to dependency benefits under Section 440.16(1)(b)4, Florida Statutes (1979). We affirm.

In its cross-appeal, the employer, Westward Ho!, and its carrier appeal the deputy's finding that at the time of decedent's death he was an employee of Westward Ho!. The employer/carrier argues that decedent was an independent contractor not covered by the Act. We affirm the deputy's order as to decedent's employee status without opinion.¹

[1] The deceased was a police sergeant for the City of Coral Gables. He was killed on October 11, 1980, in an armed robbery while picking up the receipts in his off-duty

1. The deputy found that decedent's death did not arise out of and in the course of his employment with the City of Coral Gables. This find-

ing was not appealed and the city's motion to be dismissed as a party has been granted by unpublished order of this court.

job with Westward Ho! restaurant. Appellant is the 63-year-old divorced mother of decedent. The deputy found that appellant was dependent on the deceased at the time of his death, and appellees do not argue otherwise. Such finding is supported by competent, substantial evidence. The record shows the decedent gave his mother \$125 in cash each month, helped pay off the mortgage on her house, and helped with her household purchases and expenses. Appellant's former husband is under court order to pay alimony, but she does not receive payments. Although appellant worked at a clothing store and began receiving Social Security benefits in April, 1980, the deputy found that she was unable to support herself.

The deputy's finding that appellant's dependency ended is based on the fact that by December 31, 1980, she had received all benefits due her as her son's sole heir and beneficiary. She received a total of approximately \$155,000 from a combination of sources. As to that issue, the deputy concluded: "In order to give any meaning to § 440.16(2)(d), Florida Statutes [The statute is in fact Section 440.16(1)(b)4, Florida Statutes (1979).] . . . , it is clear that it is contemplated that the dependency of a parent under the Workers' Compensation Act can end." Section 440.16(1)(b)4 states:

440.16 Compensation for death.—

(1) If death results from the accident within 1 year thereafter . . . , the employer shall pay:

* * * * *

(b) Compensation . . . in the following percentages of the average weekly wages to the following persons entitled thereto on account of dependency upon the deceased, . . . :

* * * * *

4. To the parents, 25 percent to each, such compensation to be paid during the continuance of dependency.

The deputy ordered the e/c to pay death benefits from the date of accident through December 31, 1980.

Appellant argues that dependency status is fixed on the date of the employee's death; that she qualified for benefits by virtue of her dependency on the employee and his compensable death, and that the policy of workers' compensation is to preclude continuous litigation. Thus, she continues, benefits cannot be terminated, for if a post-mortem event can terminate dependency and one's workers' compensation rights, then another event can reinstate dependency, consequently she concludes that the legislature did not intend to allow this open-ended condition leading to perpetual litigation and unmanageable administration.

Appellant supports this argument with a passage from Professor Larson:

Once rights as a dependent under an award have been acquired, the majority—but by no means unanimous—view is that they are not lost by a subsequent change in the dependent's financial position, nor by any change short of the events, such as remarriage or attainment of a specified age, expressly terminating compensation by statute. Getting a self-supporting job, for example, or an inheritance from the deceased or others, or being adopted, or contracting a marriage later annulled, or living with and being supported by a man without benefit of marriage, will not interrupt the right to benefits as a dependent. While this may produce occasional results inconsistent with the spirit and purpose of compensation protection, the administrative convenience of crystallizing of rights as of some definite date once and for all probably counterbalances this objection.

2 Larson, *The Law of Workmen's Compensation* § 64.43 at 11-209 (1981).

However, this section is susceptible to another interpretation, especially when bolstered by the plain meaning of the statute. According to Larson, rights as a dependent can be lost by an event expressly terminating compensation by statute. Section 440.16(2) expressly states that the dependence of a spouse of a deceased employee shall terminate with remarriage; the dependence

of a child shall terminate with the attainment of eighteen years of age, twenty-two years of age if a full-time student, or upon marriage. Dependency is deemed not to continue past these events. The legislative intent is clearly to allow for termination of dependency.

There is no statutory language limiting termination of a parent's dependency to the happening of a specific event. Perhaps the legislative intent was to allow for flexibility in the individual situations concerning parents.

[2] We consider that the provisions of Section 440.16 should be read *in pari materia* to achieve the statutory purpose to protect workers' dependents against hardships that arise from workers' deaths arising out of employment and occurring during employment, and to prevent those who depend on workers' wages from becoming charges on the community. See, *McCoy v. F.P. & L.*, 87 So.2d 809 (Fla. 1956). Here, a termination of benefits would not thwart such purpose.

[3,4] Statutory language is not to be assumed superfluous; a statute must be construed so as to give meaning to all words and phrases contained within that statute. *Vocelle v. Knight Brothers Paper Co.*, 118 So.2d 664 (Fla. 1st DCA 1960). Meaning must be given to the legislature's clear and unambiguous words "[S]uch compensation to be paid during the continuance of dependency." "Continuance" is the time during which something exists or lasts; duration. The American Heritage Dictionary 288 (1979). "Dependency," for purposes of workers' compensation, is a question of fact to be determined by the circumstances of the case. Thus, it must be shown that the claimant, because of physical or mental incapacity, or lack of means, is dependent on the deceased for support; that actual and substantial support must have been received by claimant from deceased, and that such support must be shown to have been

made regularly with reasonable expectation to be made in the future, and that casual gifts at irregular intervals will not support a claim based on dependency. *Panama City Stevedoring Co. v. Padgett*, 149 Fla. 687, 6 So.2d 822, 823 (1942). The test is whether the claimant relies on the contributions to maintain his or her customary standard of living and, whether in the absence of continuance of support, the lifestyle of the claimant would be materially altered. See, *Paul Spellman, Inc. v. Spellman*, 103 So.2d 661, 664 (Fla. 2nd DCA 1958); *Larson & Sons Developing, Inc. v. Ashley*, IRC Order 2-3051 (1976).

[5] Claimant is not dependent upon the workers' compensation death benefits to maintain her customary standard of living. The evidence, including claimant's testimony, shows that her standard of living is no less than it was while her son was alive.

The plain meaning of the language and the facts frustrate claimant's contention that "there is no warrant in law" for holding that dependency at death does not fix entitlement to benefits where the dependent receives an inheritance as a result of the death, as well her argument that once a parent's dependency is established at any point in time, it continues regardless of changed circumstances.

The section in the Act concerning the dependency of parents has remained essentially unchanged since 1935.² The phrase at issue appears to have been interpreted only once in *Palm Beach Dairy Co. v. Ryan*, 154 Fla. 648, 18 So.2d 537 (1944). There the deceased employee had lived with his mother who was dependent on him for support. The employee had been earning \$17.50 per week at the time of his death. The insurance carrier had paid compensation to the deceased's mother for 47 weeks at the rate of \$6.25 per week. The carrier stopped payment because some half-brothers had entered into a contract to pay the mother

2. When this section appeared in Florida's first Workmen's Compensation Act, it read as follows:

To the parents, 25 per centum to each. Such compensation shall be paid during the continuance of dependency. S. 16(c)(5) Ch. 17481, Laws of Fla. (1935).

\$15.00 per week for a limited period. The court stated:

The question presented is whether such payments had the effect of relieving the mother of dependency as contemplated by Section 440.16, . . . and thereby destroy her claim for compensation.

We think this question requires a negative answer. Who are dependents under the Workmen's Compensation Act is relative and may be influenced by many factors, but it is not limited to such as have a bare subsistence living or purchase a limited income from other sources. *Somewhere along the road from rags to affluence, the right to workman's compensation would no doubt be surrendered* but we hold this point to be above the bare subsistence level.

Id., 18 So.2d at 537. (emphasis supplied)

In *Ryan*, benefits were paid to maintain the mother's customary standard of living. Here, unlike *Ryan*, the parent, after receiving approximately \$155,000.00, if not affluent, could hardly be considered at "the bare subsistence level." We believe that *Ryan* implies that there can be a dependency cut-off point.

Further support for our position is found in *Edelblut, Inc. v. Ford*, IRC Order 2-2489 (1974), in which a finding of dependency of the deceased employee's mother and minor siblings was affirmed, but which held also that once the mother secured employment, dependency terminated and payments should have been halted. Although the mother secured employment more than a year before the judge's order was entered, the judge found the dependency to be continuing and ordered the e/c to pay compensation. On appeal the Commission stated that the act "provides for death benefits to be paid to the parents of a deceased employee from the date of death to such time as dependency has terminated." With the advent of the deceased employee's mother securing employment, her status as a dependent terminated, and payments should have also terminated. The Commission reversed the judge's order with instructions to award death benefits only from the date of death to the date of employment.

We believe the above considerations outweigh any need for administrative convenience requiring crystallizing claims as of a definite date. At this point we need only observe that the Act, by its nature, allows for modification of orders in other situations.

Accordingly, the order of the deputy is **AFFIRMED**.

ROBERT P. SMITH, Jr., C.J., and SHAW, J., concur.



Clarence Edward STINSON, Appellant,

v.

STATE of Florida, Appellee.

No. AI-109.

District Court of Appeal of Florida,
First District.

Aug. 23, 1982.

Rehearing Denied Oct. 1, 1982.

Appeal from Circuit Court, Duval County; Thomas D. Oakley, Judge.

Clarence Edward Stinson, in pro. per., for appellant.

Jim Smith, Atty. Gen., and Barbara Ann Butler, Asst. Atty. Gen., Jacksonville, for appellee.

PER CURIAM.

The judgment below is affirmed. *Knight v. State*, 394 So.2d 997 (Fla.1981)

BOOTH and SHIVERS, JJ., concur.

JOANOS, J., dissents with written opinion.

CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing Brief of Appellant was mailed, first class postage prepaid, this 11th day of April, 1986, to the following:

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