

1983

Donnita Tuom, Widow of Daniel Tuom v. Duane Hall Trucking, State Insurance Fund and Industrial Commission of Utah : Petitioner's Brief

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IN THE SUPREME COURT
OF THE STATE OF UTAH

DONNITA TUOM, Widcw of Daniel)
Tuom,)

Petitioner,)

Case No. 19162

vs.)

DUANE HALL TRUCKING, STATE)
INSURANCE FUND and INDUSTRIAL)
COMMISSION OF UTAH,)

Respondents.)

PETITIONER'S BRIEF

Writ of Review from
Industrial Commission of the State of Utah

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Clk, Supreme Court, Utah

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BEFORE THE SUPREME COURT
OF THE STATE OF UTAH

JOHNITA TUOM, Widow of Daniel)
Tuom,)

Petitioner,)

vs.)

Case No. 19162

DUANE HALL TRUCKING, STATE)
INSURANCE FUND and INDUSTRIAL)
COMMISSION OF UTAH,)

Respondents.)

PETITIONER'S BRIEF ON APPEAL

NATURE OF CASE

This is a Review of a Final Order of the Industrial Commission of Utah denying petitioner death benefits under Utah's Workmen's Compensation Laws.

DISPOSITION IN LOWER ADMINISTRATIVE BODY

The Industrial Commission of Utah affirmed the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order denying petitioner's request for death benefits on the grounds that petitioner was not a "dependent" of her deceased common law husband.

RELIEF SOUGHT ON APPEAL

Petitioner requests this Honorable Court to review, reverse and remand the order of the Industrial Commission of Utah for the purpose of awarding death benefits to petitioner

as the lawful widow and dependent, actual and presumed, of her deceased husband.

STATEMENT OF FACTS

Daniel Lawrence Tuom died on September 5, 1981 of multiple injuries sustained from a truck accident on August 26, 1981 in Coalville, Utah. The accident occurred during the course of decedent's employment with respondent Duane Hall Trucking Co.

Petitioner, Mrs. Donnita Tuom, filed her claim for dependent benefits on March 12, 1982, alleging that she is the surviving and dependent spouse of decedent. (R.2.)

The State Insurance Fund responded to petitioner's claim by denying that she was the wife of decedent because Utah law does not recognize common law marriage. (R.3.) An amended answer further clarified the Fund's denial of benefits by implying that decedent entered into a second common law relationship in Utah and, therefore, decedent had unilaterally dissolved the prior common law relationship with Donnita Tuom. (R.10, R.37.)

At the hearing held July 27, 1982, petitioner submitted significant evidence showing that: (a) Mrs. Tuom was married to the decedent in a common law relationship commencing in the State of Idaho in 1971; (b) Mrs. Tuom and decedent then moved to the State of Virginia and lived together as man and wife for approximatey four years; (c) Mrs. Tuom and decedent next moved back to the State of Idaho for one and one-half

years; and finally (d) Mrs. Tuom and decedent moved to the State of Oregon where they continued to live as man and wife until Mrs. Tuom separated from her husband in June of 1980 because Daniel Tuom was seeing another woman, thus making the present relationship intolerable. (R.22.) Donnita left Oregon to stay with her family in Idaho. Several months later, Daniel Tuom left Oregon to meet with "the other woman" in the State of Utah where he became employed with the respondent, Duane Hall Trucking, Inc.

During the time of their separation, the decedent visited with Donnita on at least three occasions, lasting from approximately three to seven days each (R.39), and spoke with her at least monthly. According to Mrs. Tuom's testimony, the parties discussed their future relationship and hoped for a reconciliation. They took no action to formally dissolve or terminate the marital relationship.

Upon separation Mrs. Tuom lived initially with her brother and then with her sister in Idaho. At no time did she create any extra-marital relationship, nor did she live with another person of the opposite sex. Between June 13, 1980, the date Mrs. Tuom separated from her husband while a resident of Oregon, and September 1981, the date of his death, Daniel Tuom had contributed to his wife the following support:

- (a) The sum of \$1,500.00 cash in June 1980 (R.41);
- (b) The sum of \$250.00 cash in October 1980 (R.41);

(c) The sum of \$100.00 cash in November 1980 (R.42);
(d) The use of his truck and other personal property (R.42);

(e) Other additional money and support on an as-needed basis, provided he could afford the same (R.43); and

(f) The use of other personal property acquired during the marriage.

Upon Mrs. Tuom's arrival in Nampa, Idaho, she became enrolled at Boise State College and obtained employment earning a net income of approximately \$550.00 to \$600.00 per month. (R.44, 46.)

Against this income, Mrs. Tuom had the following expenditures:

House payment (rent as of date of death) - \$260.00 to \$280.00 per month;

Home maintenance - \$50.00 per month;

Home insurance - \$10.00 per month;

Gas - \$80.00 per month;

Electricity - \$35.00 to \$40.00 per month;

Water - \$15.00 to \$17.00 per month;

House taxes - \$25.00 per month;

Auto insurance - \$75.00 per month;

Schooling - \$67.00 per month (\$400.00 per semester);

Auto gas - \$60.00 per month;

Auto repair - \$20.00 per month;

Food - \$100.00 per month;

Drugs - \$10.00 per month;

Doctor and dentist bills - \$20.00 per month.

TOTAL: \$831.00 per month.

In addition to the money given her by her husband, and in order to temporarily support her needs, Mrs. Tuom's sister moved in with her to help offset household costs. At best, this would reduce her own requirements, but only as long as she relied upon the charity of her sister.

At the time of his death, Daniel Tuom's wages were \$8.00 per hour. He worked an average of 12 hours per day, six days per week. (R.1.) Daniel Tuom's weekly gross income approximated \$704.00, more than four times Mrs. Tuom's earning ability.

The Administrative Law Judge properly found that a common law marriage did exist between Daniel and Donnita Tuom, and the same was never formally terminated. (R.142.) The State finally conceded this fact, but took the position that Daniel Tuom's unilateral action terminated the marriage even though no lawful proceeding in any state was instituted.

The unilateral action of Daniel Tuom, relied upon by the State Fund to deny petitioner's claims, arose out of Daniel's illicit relationship with Arlene Browning whom he had met in Oregon and began living with in Vernal, Utah in approximately March 1981. (R.109.) Arlene's move to Utah preceded Daniel's by three months. During their cohabitation, the only apparent reason Arlene Browning purported to be the

wife of Daniel Tuom was for the collection of life insurance benefits upon his death. (R.118, 120.) Petitioner contends that Arlene unilaterally adopted the status of wife when Daniel was taken to the hospital after the industrial accident of August 1981. (R.116.) Arlene Browning admitted that she did not marry Daniel Tuom "in the eyes of society".

ARGUMENT

I. PETITIONER IS THE SURVIVING SPOUSE OF DECEDENT.

It is clear from the factual evidence elicited at the hearing, as well as the finding of the Administrative Law Judge, that the petitioner is, in fact, the surviving spouse of the deceased employee.

The marital relationship was initially created in the State of Idaho, which recognizes common law marriages. Section 32-201 of the Idaho Code provides:

Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations.

Section 32-202 of the Idaho Code further provides that:

Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

The facts in the instant matter demonstrate that consent was freely and voluntarily given between Donnita and Daniel Tuom; that a mutual assumption of marital rights, duties

and obligations was acknowledged (R.19); that the couple held themselves out as man and wife continuously since 1971, both using the name of Tuom, filing joint tax returns (Group Exhibit A-1); purchasing property held in joint ownership (Exhibits A-3, 4, 5, 11), operating joint checking and savings accounts (Exhibits A-6, 12), and generally acting as man and wife. See Metropolitan Life Insurance v. Johnson, 103 Id. 122, 645 P.2d 356 (1982); Hamby v. J. R. Simplot Co., 94 Id. 794, 498 P.2d 1267 (1972).

After moving to the State of Virginia, which does not statutorily recognize common law marriage, but arguably will give full faith and credit to the recognized relationship created in the State of Idaho, the parties moved back to the State of Idaho where they continued their marital relationship. Oregon, the Tuoms' last marital residence, recognized the marital relationship created in the State of Idaho. See Boykin v. State Industrial Accident Commission, 355 P.2d 724 (Ore. 1960); Walker v. Hildenbrand, 410 P.2d 244 (Ore. 1966); Johnson v. Georgia Pacific Corp., 581 P.2d 108 (Ore. App. 1978).

Donnita and Daniel Tuom separated, without dissolving their marriage, prior to Daniel's move to the State of Utah in March 1981. In Schurler v. Industrial Commission, 43 P.2d 696 (Utah 1935), this Court recognized the possibility that a common law marriage, consummated in a state where such marriages are valid, would in fact be valid in the State of Utah. Id. at

697. See also, Loughren v. Loughren, 292 U.S. 216, 54 S.Ct. 684 (1934).

Respondent State Insurance Fund argues that despite the admitted common law marital relationship, Daniel Tuom absolved that relationship by his unilateral actions and misdeeds. Respondent's argument is not well founded in public policy and lacks statutory or judicial support. This Court, in Hilton v. Roylance, 69 Pac. 660 (Utah 1902), settled that precise contention long ago:

So the marriage relation differs from other contractual relations in that, when the status is once created, the state becomes an interested party, and thereafter the marriage, with the rights and duties assigned by the law of matrimony, is not subject, as to its continuance, dissolution or effects, to the mere intention and pleasure of the contracting parties. The marriage, with its privileges, obligations, rights and duties which are or may be assigned by the law of matrimony for the establishment of families and the multiplication and education of humankind, continues during the life of the parties, and no dissolution of the status can be effected simply by the mutual consent or agreement of the parties. It is regulated and controlled, and can be dissolved only through the sovereign power of the state whenever justice to either or both parties or the welfare of the public demands it. Id. at 663.

The major issue in contention at the hearing of this matter was appropriately and correctly decided by the Administrative Law Judge: Donnita Tuom was the surviving spouse of Daniel Lawrence Tuom at the date of his death.

II. PETITIONER, AS SURVIVING SPOUSE, IS A
DEPENDENT OF THE DECEDENT BY OPERATION
OF LAW.

The question of dependency of a surviving spouse has been controlled, since 1917, by Utah Code Ann. §35-1-71, which provides, in pertinent part, as follows:

The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

(1) . . .

(2) For purposes of payment to be made under subsection (2)(b)(i) of section 35-1-68, a surviving husband or wife shall be presumed to be wholly dependent upon a spouse with whom he or she lived at the time of the employee's death.

In 1979, the Utah legislature deviated from the "living with" standard by adopting a modification to §35-1-68 which eliminated the "living with" standard and provided any surviving spouse a conclusive presumption of dependency for a period of six years from the date of death. Chap. 138, §3, Laws of Utah (1979). That section, 35-1-68, Utah Code Ann., clearly provides as follows:

. . . (2) In case 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) . . .

(b)(i) If there are wholly dependent persons at the time of death, the payment by the employer or insurance carrier shall be 66-2/3% 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 \$45.00 per week plus \$5.00 for a dependent spouse and \$5.00 for each dependent minor child under the age of 18.

* * *

(v) 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.

A clear and unambiguous reading of §35-1-68 dispenses with any questions of surviving spousal dependency occurring within six years from the date of death, rendering §35-1-71(2) a redundant provision. For unknown reasons, however, §35-1-71 (2) was not modified to be consistent with the conclusive presumption provided by §35-1-68.

Notwithstanding that the inconsistency may or may not be due to legislative oversight, this Court has found that:

when a person is confronted with inconsistent statutes, by one of which he would be subject to duties or restraint, and by the other he would be exempt therefrom, he is entitled to the benefit of the statute most favorable to his freedom of action.

Basin Flying Service. v. Pub. Serv. Comn., 531 P.2d 1303, 1305 (Utah 1975). Section 35-1-68, by not imposing a "living with" standard, is most favorable to petitioner and more consistent with a liberal construction of the Worker's Compensation Act to provide benefits, and thus should be accorded preference over

§35-1-71.

Moreover, it is submitted that judicial construction of legislative acts should give greater weight to the more recent and more specific pronouncement of the legislature. Osuala v. Aetna Life & Cas., 608 P.2d 242, 243 (Utah, 1980); 2 J. Sutherland, Statutes and Statutory Construction, §§4703, 5201, 5204 (3d ed. 1943). Thus, the conclusive presumption granted under §35-1-68, the most recent and specific legislative provision, is applicable to all surviving spouses irrespective of their cohabitation. Indeed, many states have adopted such standards in recognition of a spouse's loss. See 2 Larson, Workmen's Compensation Law, §62, et seq. (1976) (hereinafter cited as Larson's).

It is unreasonable and unjust to deprive a lawful spouse of monetary compensation for the loss of her mate simply because she does not live with her mate at the time of death. The right to sue for such loss, having been legislatively replaced by a specific schedule of benefits, compels a construction of the statute that would preserve the right of a spouse to recover for a death loss. This Court has said that ". . . rules of law shall be so interpreted and applied to the variegated problems which arise that they will comport with reason and do justice in the given situation." Young v. Barney, 433 P.2d 846, 847 (Utah 1967).

A surviving spouse not limited to the exclusive remedy

of worker's compensation clearly could sue at common law for more than loss of income alone: to-wit, loss of community, emotional support, etc. Additionally, a spouse would not lose her standing to sue by reason of temporary separation. One must question whether a surviving spouse, who is not entitled to recover worker's compensation benefits simply because she was not a "live in" dependent, could regain her standing to sue the employer for negligence in causing her mate's death.

Finally, the term "conclusive presumption", as used in §35-1-68, is a phrase of legal art well known to practitioners. Black's Law Dictionary defines its import as "putting an end to the factual inquiry; final; irrebuttable; decisive and beyond dispute". A conclusive presumption is, thus, an irrebuttable presumption and of legal effect which is not permitted to be overcome by any proof of fact otherwise. Earley v. Industrial Commission, 265 P.2d 390, 391 (Utah 1953). As surviving spouse, Donnita Tuom is conclusively presumed to be wholly dependent by operation of law under §35-1-68.

III. PETITIONER WAS CONSTRUCTIVELY "LIVING WITH" DECEDENT AT THE DATE OF DEATH.

Assuming, arguendo, that §35-1-71(2) controls the definition of dependency, irrespective of the more specific statement located within §35-1-68, the phrase "living with" in §35-1-71(2) should be given a liberal constructive meaning. It is an established principle that a remedial civil statute is

to be accorded liberal construction in order to accomplish the purpose for which it was established. 3 Sands, Sutherland on Statutory Construction, §60.01 (4th ed. 1974). The purpose of the remedial workman's compensation legislation is to provide benefits to claimants. Construing the phrase "living with" to mean something other than a narrow concept of actual cohabitation at the time of death furthers such purpose.

This Court has recognized a liberal constructive meaning of the phrase "living with" by deeming a wife to be "living with" her husband, whether actual or not, until the marital relationship has been so deliberately severed that the wife obviously no longer looks to the husband for support. Diaz v. Industrial Commission, 80 Utah 77, 13 P.2d 307, 311 (1932). See additional case citations, Larson's, §62.40.

Where the separation of the marital relationship is due to the husband's misconduct or desertion, the wife is constructively deemed to be "living with" him and is entitled to the benefits of the husband on the theory that he remains legally liable for her support. Ranger Insurance Company v. Industrial Commission, 15 Ariz. App. 45, 485 P.2d 869 (1971). Cruelty on the part of the husband justifiably causing the wife to leave him is treated the same as desertion by the husband and does not break the relationship of "living with" the husband. Larson's, §62.40.

The issue in many cases appears to turn upon whether

or not the separation was voluntary. Llewelyn v. Industrial Commission, 115 Utah 31, 202 P.2d 160, 162 (1949); Diaz v. Industrial Commission, 80 Utah 77, 13 P.2d 307, 311 (1932). In the instant matter, it cannot be said that Mrs. Tuom voluntarily separated from her husband as the reasons for that separation were due to the husband's improper acts relating to another woman. Mrs. Tuom would have been justified in seeking a divorce, but her uncontradicted testimony was that she desired to continue the relationship of man and wife and hoped their differences would be reconciled. The mere fact that the husband continued to see and live with another woman in an illicit relationship should not act as a forfeiture of Mrs. Tuom's statutory rights. In Diaz v. Industrial Commission, 80 Utah 77, 13 P.2d 307 (1932), the court noted:

Let it not be minimized nor pushed aside that the rights of the dependents specified in the statute were created for their benefit independently of the rights of the employee, so and as the authorities teach, they may not become a public charge, and such rights should not be denied them, unless clearly forfeited or abrogated by them. Id. at 313.

See also, Liberty Mutual Insurance Company v. Ellis, 99 Ga. App. 486, 109 S.E.2d 70 (1959); Harge v. Leonard Bell & Son, 12 A.2d 568, 206 N.Y.S.2d 613 (1960); Clark v. Industrial Commission, 10 Ariz. App. 486, 460 P.2d 22 (1969).

Mrs. Tuom supplied significant, substantial and uncontroverted evidence demonstrating: (a) that she is the common law wife of the decedent and had lived with him as man

and wife for ten years, relying upon his support; (b) that said relationship was never dissolved; (c) that she involuntarily left the presence of her husband by reason of her husband's infidelity, and did not abrogate any future rights for the collection of support or statutory benefits; (d) she had hoped for a reconciliation; and (e) that during the course of the separation, she spoke frequently and visited with her husband, while at the same time enjoying and relying upon the financial support provided her during separation. These facts are sufficient to demonstrate that Mrs. Tuom constructively lived with the decedent, Daniel Lawrence Tuom, and accordingly should be entitled to the presumptions of §35-1-71(2) and the benefits of Utah workmen's compensation laws without a specific demonstration of dependency in fact. [This demonstration also supports a finding of dependency in fact. Diaz v. Industrial Commission, Id at 313.]

As surviving spouse, Donnita Tuom should be constructively deemed to have been living with the decedent at the time of his death and thus entitled to the presumption offered under §35-1-71.

IV. PETITIONER WAS ACTUALLY DEPENDENT UPON
DECEDENT FOR SUPPORT AT THE TIME OF
HIS DEATH.

Assuming Mrs. Tuom is not entitled to claim the presumptions of the sections above cited, she has demonstrated by clear and convincing evidence that she is in fact dependent

upon Daniel Tuom for support, and was so dependent as of the date of his death.

As a general rule, many factors must be regarded to prove or disprove dependency: the actual receipt of support, a legal obligation of support, the existence of a relationship during separation demonstrating the possibility of a continuation of the marital relationship, or the wife's acquiescence of the separation tantamount to a repudiation of future support. Most authorities agree that a claimant need not demonstrate that without decedent's contributions, she would have lacked the necessities of life. See Larson's, at §63.11. While many states hold that a legal obligation alone cannot support a finding of dependency, a growing number of states have adopted the contraview, and Utah appears to among those jurisdictions as evidenced by the recent change in §35-1-68 cited above. See also, Llewelyn v. Industrial Commission, 115 Utah 31, 202 P.2d 160 (1949), and Larson's, at §63.31 (n.55).

The specific finding of the Administrative Law Judge, which claimant submits to be totally unsupported by the evidence elicited, and the Administrative Law Judge's conclusions are set forth as follows:

In accordance with the statute [35-1-71] . . . the Administrative Law Judge finds that the applicant, Donnita Tuom, is not entitled to worker's compensation benefits, in that she was not living with the deceased at the time of his death, in fact, he was living with another woman at that time. The decedent provided no support for the

applicant, nor was there any indication that he intended to provide any support for her since the time of her separation. (R.143-144.)

While the Administrative Law Judge is the finder of fact and normally his views would not be questioned on appeal, neither is he allowed to disregard or disbelieve uncontroverted evidence. "The Commission was in duty bound to fairly and impartially consider all the evidence relating to a material issue, and was not permitted to single out some portion of it and give it undue weight to the exclusion of other evidence of equal importance . . . The Commission may not arbitrarily or capriciously disregard evidence or disbelieve testimony." Diaz v. Industrial Commission of Utah, 13 P.2d at 312.

Contrasting the uncontroverted testimony provided by the applicant against the Administrative Law Judge's finding aptly demonstrates the arbitrary and capricious nature of his ruling:

The decedent provided no support to the applicant. . . .

The Administrative Law Judge totally disregards \$1,500.00 cash given applicant in June 1980 (R.41); \$250.00 in October 1980 (R.41); \$100.00 in November 1980 (R.42); and use of personal and other property during the separation (R.42-43).

. . . Nor was there any indication he intended to provide any support since the time of her separation. (R.144.)

Not only was actual support provided to Mrs. Tuom within the period of five months after the date of separation, but

substantial testimony recalled several visits of up to seven days each, monthly telephone calls and continuing use of personal property considered by the decedent to be his own personal property. The most interesting aspect of this factual finding is the legal conclusion implied by it, to-wit: a forfeiture of Mrs. Tuom's statutory rights based upon the irresponsible avoidance of legal and moral obligations of support to Donnita Tuom, his wife of ten years duration. This Court, in McGarry v. Industrial Commission of Utah, 63 Utah 81, 222 Pac. 592, 594 (1923), emphasized that the legal obligation of support to those depending upon the person owing that obligation is a material factor in determining dependency. Also cited with approval by the Court in McGarry was the case of Merrill v. Penasco Lumber Co., 27 N.M. 632, 204 Pac. 72 (1922):

But just as the existence of the marital status does not of itself prove dependency, so that lack of actual support by the husband does not of itself negative dependency. The failure to support is only one circumstance for consideration. The reasons for it, the length of its continuance, the mutual attitude and means of the parties, the probable resumption of duty, and other similar matters may have a distinct bearing on the subject. If dependency were determined only by the fact of contribution to support, a wife and children might be dependent one week and cease to be the next according to the caprice of the husband and father. Such a theory lacks support from authority. 204 Pac. at 73.

Just as the Court was able to speculate as to the probable outcome of a petition to modify a support obligation

contained in a decree of separate maintenance in the case of Jewelyn v. Industrial Commission, 115 Utah 31, 202 P.2d 160 (1949), it is argued that Mrs. Tuom would have been entitled to receive an award of support had she sought the same from the district courts of Idaho or Utah. Daniel Tuom earned in excess of \$700.00 per week against Donnita's approximately \$600.00 per month earnings; Donnita expended in excess of \$250.00 per month in actual expenditures over her earnings and relied upon the support received from her family and sister in order to maintain her level of needed support. It is submitted that a district court would have evaluated the respective positions of the parties in the event a divorce was sought, and after fairly determining obligations, property distribution and earning ability, a court would have ordered Mr. Tuom pay support to Mrs. Tuom, finding her to be dependent. It is inappropriate for the Administrative Law Judge to hold that simply because Daniel Tuom paid no regular support, he therefore owed no support. The legislature could not have intended to exclude from benefits a surviving wife who had the misfortune of being neglected earlier by an irresponsible husband. See Rocky Mtn. Helicopter, Inc. v. Carter, 652 P.2d 893, 896 (Utah 1982) (the court used similar language to find dependency of neglected minor children).

CONCLUSION

It is respectfully submitted that the Industrial Commission of Utah committed the following errors of law in

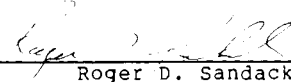
this matter:

1. Failure to consider the conclusive presumption of dependency offered under §35-1-68;
2. Failure to properly apply the presumptions of §35-1-71 in that Donnita Tuom should be constructively deemed to be "living with" decedent at the time of his death;
3. Acting arbitrarily and capriciously by completely disregarding uncontroverted evidence of actual dependency; and
4. Denying petitioner's claim based upon findings which are not supported by substantial evidence.

Accordingly, the Commission's order denying benefits should be reversed and remanded for the purpose of awarding death benefits to Donnita Tuom as the lawful and wholly dependent spouse of Daniel Lawrence Tuom, deceased.

RESPECTFULLY SUBMITTED this 18th day of July, 1983.

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CERTIFICATE OF MAILING

THIS IS TO CERTIFY that two true and correct copies of
the foregoing Petitioner's Brief were mailed postage prepaid
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