I N T H E S U P R E M E C O U R T O F F L O R I D A

MacDON LUMBER COMPANY and MASSACHUSETTS BONDING & INSURANCE COMPANY, Petitioners, vs. MRS. FANNIE MAE STEVENSON and FLORIDA INDUSTRIAL COMMISSION, Respondents.	PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA INDUSTRIAL COMMISSION.

B R I E F

upon behalf of

P E T I T I O N E R S

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STATEMENT OF THE CASE

This is a Workmen's Compensation case. The Petitioners are the employer and insurance carrier. The respondents are the claimant and the Florida Industrial Commission. The claimant, Fannie Mae Stephenson, the mother of William L. Stephenson, deceased, filed a claim with the Florida Industrial Commission claiming dependency on the 17 year old employee.

The Deputy Commissioner entered an order finding that partial dependency existed, awarded 50% of the maximum dependency benefits.

The Full Commission purported to affirm the award but disagreed with the manner of payment. In revising the manner of payment the Full Commission ordered 100% dependency benefits.

The following symbols and abbreviations will be used in this brief:

R for Record on Appeal
A for Appendix to Petitioner's Brief

STATEMENT OF FACTS

A concise statement of the facts of this case is set forth in the Petition for Writ of Certiorari, under the heading: "Statement of Facts of Cause" and in the interest of brevity is adopted here by reference.

POINTS INVOLVED ON APPEAL

I. Can the mother of a minor boy be dependent upon him when his earnings do not exceed the cost of support, when husband's earnings are ample for the family.

II. Does the delivery of irregular earnings of 17 year old son to his mother constitute the regular contributions toward the support and maintenance as required by law for proof of dependency.

III. Did the Full Commission err in finding that the award of the deputy was supported by competent substantial evidence.

IV. Was there any authority of law for the Full Commission to modify the award of the Deputy Commissioner in effect doubling the award.

V. Was the claimant's dependency on her 17 year old son, if it ever existed, terminated when she returned to her husband, who was earning $500.00 per month, following the death of her son.

A R G U M E N T

POINT I

Can the mother of a minor boy be dependent upon him when his earnings do not exceed the cost of support, when husband's earnings are ample for the family.

In order for a minor wage earner to have someone dependent upon him, the wage earner must earn more than their own cost of support. This Court adopted this view in deciding the case of Cross vs. Sumter County, 152 Fla.___, 13So2d 219, with these words:

> "At no time could the contributions made have exceeded the cost of support."

9 Schneider, Workmen's Compensation Text 5, Section 1901, states the general rule to be:

> "If a son pays the mother no more than the reasonable value of his board and lodging, she is generally not considered dependent upon him for support."

and again at page 64 in section 1915:

> "Only that portion of the contribution that was used by the mother for her own support can be considered in her application for compensation."

2 Larson's Workmen's Compensation Law 104 summerizes the law in these words:

> "It has been frequently held that if the decedent's contribution is offset by the value of the board and room received, he is doing no more than to

'pull his own weight', with nothing left over to represent support of dependents."

In the case at bar the minor son's gross earnings, according to the testimony most favorable to the claimant, did not exceed $200.00 for at least 22 weeks prior to his death. This is less than $1.30 per day. The decedent has not been employed prior to this 22 week period - he left Florida to go to Rockford, Illinois because he could not find employment in Orlando. Thus, the period over which the maximum of $200.00 must be prorated is actually longer than 22 weeks. One of the two sisters with whom the decedent lived during the 22 week period prior to his death, estimated that his earnings had not exceeded $100.00 for the period. That would make his daily average earnings 65 cents per day. All of the witnesses for claimant, including the claimant, testified that the only employment that the deceased had ever had was "odds and ends."

One of the three employers for whom the decedent was supposed to have worked during the 22 week period preceding his death, testified that the claimant had earned $11.75 from him. Another of these employers testified that she had not employed the decedent but that she had given him a quarter on three or four occasions. The third alleged employer had moved and his whereabouts was unknown to the claimant's family. This employer, at most, employed the deceased for two weeks.

The Deputy Commissioner, in making her award did not make any findings of fact as to the amount the claimant had earned during the 22 week period preceding his death.

She made no findings of fact as to the deceased's earnings at any other period. There was no finding of fact as to how much money the decedent turned over to his mother. There was no finding of fact that decedent's earnings exceeded his cost of support. There was no finding of fact that the decedent had made regular contributions to the claimant.

There were no findings of fact on any of these vital elements of proof of dependency because there were no facts in the record from which such findings could be made which would be supported by competent substantial evidence. The findings of fact were not made because, if findings of fact based on the evidence had been made, using the evidence most favorable to the claimant, there could not have been a decision favorable to the claimant.

The claimant has the burden of proof of dependency. Panama City Stevedoring Co. vs. Padgett, 149 Fla. 687, 6 So2d 822. This must include proof that at the time of the accident claimant was dependent on the deceased for support, that actual and substantial support was being received by claimant from deceased, that such actual and substantial support had been regularly made. The facts in the record of this case do not support any of these burdens of proof that the claimant must meet. During the 22 weeks, which obviously is almost six months, preceding the accident of deceased, he had only earned a maximum of $200.00. The only money that claimant received in the three weeks preceding the death of the minor son was from her husband. During the entire 22 week period,

and for a long time prior thereto claimant's husband was earning $500.00 per month. It is obvious from the record that one of the major causes of the separation of claimant and her husband was due to her dissatisfaction with the standard of living he permitted for the family. The mere fact that the wife would like to have a higher standard of living (and one which the husband could probably afford) does not make her a dependent upon someone else. The husband has the right to set the standard of living. Astor vs. Astor, Fla., 1956, 89 So2d 645.

POINT II

Does the delivery of irregular earnings of 17 year old son to his mother constitute the regular contributions toward the support and maintenance as required by law for proof of dependency.

This Court has decided on several occasions that the contributions to a dependant must be regular actual and substantial. In Panama City Stevedoring Co. vs. Padgett, supra, the Court reversed a decision awarding compensation because the contributions were not regular. In Cross vs. Sumter County, supra, compensation was denied for this and other reasons. The facts in that cited case are similar to those of the case at bar. In the cited case, the deceased was 16 years of age, he had turned over to his parents the money he had received from prior earnings. He had been working for the employer for 11 days at time of death - the one week's pay had been turned over to his father. The Court observed in its opinion, as previously cited:

> "At no time could the contributions made have exceeded the cost of support."

The Court also said in its opinion:

> "This Court has considered the matter, however, and has determined that before a claimant may be deemed dependent within the law it must be shown that because of physical or mental incapacity or lack of means actual dependency for support exists; that actual and substantial support has been made regularly; and that there is reasonable expectation that it will be made in the future. It was determined, also, that casual gifts at irregular intervals will not support a claim based on dependency. Panama City Stevedoring Co., Inc., et al v. Padgett, 149 Fla. 687, 6 So2d 822."

In the case at bar, the claimant's testimony, without the support of competent medical testimony, is that she was "ailing", and because of that she could not work. She testified that she had given up a job of housework because she "didn't like the situation there.." (R 100C page 47). Her own testimony clearly shows that she and her husband were having marital difficulties. After twenty three years of marriage they separated for three months - June, July and August, 1958. She went to Rockford, Illinois where her three married daughters were living. At one point in her testimony she says that she went there because she and her husband separated - at another point she testified that she went there partly because of her marital difficulties and partly because her 17 year old son, who was living with his sisters, was ill. While she was living with one or the other of her daughters and separated from her husband she did not receive his support. She lived with the daughters three months, working part of this time, then

visited relatives and returned to Orlando to reconcile with her husband.

The rule of law quoted above from the Padgett case includes the element that the support must have been "actual and substantial" and that it must be made "regularly". The claimant in the case at bar has not shown, even in generalities, what the cost of her support was, or that the minor son's earnings were enough to defray the cost of his own support and have some left over. The testimony on this point is that between the two of them, the mother and son, they did not earn enough to be able to support themselves in Illinois, therefore they lived with one or the other of two daughters. Their combined earnings were only sufficient to contribute part of their cost of the food.

The inescapable truth is that both mother and son were living with and at the expense of the two married daughters. The whole family was subsisting while the parents were having their marital differences.

The Deputy Commissioner sluffed over all of the basic elements of dependency without making any findings of fact. She assumed a conclusion, cited a lot of law and ordered that the carrier pay compensation and attorneys fees.

In her summary of the evidence, the deputy stated:

> "In March of 1957, the claimant went to Illinois, partially because the deceased had appendicitis and partially because she was having trouble with her husband. She stayed in Illinois until

> August of 1957, during which time her son worked at odds and ends, giving her his earnings.
> ***
> "She testified that they had returned to Florida from Illinois because her son could not get steady employment in the North."

The real basis for the deputy's decision is that since the husband of claimant would not support her due to their marital differences, the insurance carrier should. The Deputy's order is repleat with references to this marital problem, such as:

> "When she came back to Florida from Illinois in August of 1957, she lived with her husband for two or three days, but after an argument she and her son moved out and rented an apartment, at which time her son agreed to support her. After he was killed, she went back to her husband. ***
> ***
> "At the second hearing, the claimant was recalled and testified that her husband had given her a total of $30.00 during the past three weeks. She stated that he had threatened to kill her if she asked him for support. Except for the three months which she spent in Illinois, more of the support money had come from her husband than her son. A letter from the claimant to her husband dated July 27, 1957, was received into evidence as claimant's Exhibit 1. The gist of this letter is that she wished him happiness with a prospective wife named "Kitty".

The Deputy let her natural sympathy for a fellow woman cloud her judicial processes and reached a conclusion which would aid the woman in trouble. There is no finding of fact of the value of the support given to claimant by the two daughters while she was living with them in Illinois. There is no finding of fact as to whether the deceased earned in the year 1958, or any part thereof, more than his cost of support. The members of the family reported who the employers of the deceased had been. They estimated the amount he earned from these employers. One daughter said he sent about $100.00 to his mother,

the mother said he sent about $200.00 to her. Two of the employers were called by the carrier, one testified that he had paid deceased $11.75, another denied that she had employed the "sick" boy but testified that on about three occasions she had given him a quarter. The third employer had moved and his whereabouts was unknown. The Deputy did not make a finding of fact which testimony she believed. The Deputy merely makes the conclusion:

> "That the claimant was partially dependent on decedent at the time of his death and that this dependency was approximately 50 per cent."

POINT III

> Did the Full Commission err in finding that the award of the deputy was supported by competent substantial evidence.

The Deputy Commissioner paid lip service to the rule of law laid down in Hardy vs. City of Tarpon Springs, Fla. 1955, 81 So2d 503; Straehla vs. Bendix-We-Launder-Rite, Fla., 1955, 81 So2d 657 and Andrews vs. Strecker Body Builders, Fla., 1957, 92 So2d 521 wherein it is required that the deputy's order show that she has considered all of the proper evidence presented before her. In the case at bar, the Deputy Commissioner paid lip service to this law by saying:

> "1. That the claimant was partially dependent on decedent at the time of his death and that this dependency was approximately 50 per cent."

The next three pages of her order are recital and review of cases which concern and authorize partial parential dependency. We have no quarrel with this recital of the law or the law quoted. It just cannot be stretched

to fit the facts in evidence in this case. In the cases cited there obviously were findings of fact supported by evidence which recited earnings, cost of self support, or the fact of self support, and regular, actual and substantial support of a dependent. In the present case there is no evidence upon which such a finding of fact could be predicated.

The Deputy concludes, without evidence recited in the order or findings of fact based on competent substantial evidence to support the conclusions:

> "It is clear from the testimony that the decedent contributed to the support of the claimant to the best of his ability. Her own ability to support herself is not such as to preclude her being his dependent for her capacity is limited by her lack of training and her poor health.
>
> "2. That the dependency of the claimant did not end when she returned to her husband.
>
> "It is clear from the testimony that for the past few years claimant's husband has given her a bare subsistence support."

The Full Commission paid lip service to the line of decisions of this Court which requires that the Full Commission consider whether the Deputy's order is supported by competent substantial evidence. In paying this lip service the Full Commission obviously failed to read the record, the brief of these petitioners or listen to the oral argument. They took the order of the Deputy, carefully recited that they had performed their duty and set forth:

> "The employer and carrier controverted this claim on the ground that the deceased's mother was not a dependent and he had no other dependents. The

> Deputy Commissioner found, inter alia, that, although the mother received some contribution toward her support from her husband, with whom she lived off and on, that she also received practically everything the deceased earned as a contribution toward her support. In her comprehensive order, the Deputy Commissioner discussed the cited Supreme Court cases dealing with dependency both pro and con, and concluded her Order by finding the claimant to be 50 per cent dependent upon the deceased employee at the time of his death and awarded the claimant compensation for 175 weeks."

It may at first blush seem rather harsh for the writer of this brief to say that the full commission failed to consider the record, brief of petitioners and the oral argument but this is obvious when their change in the amount of the award is considered. The argument on this point is under another point in this brief. The Deputy found 50 per cent disability. She awarded the claimant 25 per cent of the deceased employee's wages for fifty per cent of the time - 175 weeks. The Full Commission apparently adopted her findings of fact of 50 per cent disability and disagreed with her method of paying it. In changing the method of paying it they should have cut the amount of the weekly payment by 50 per cent and increased the period of payment. They would have reached this conclusion if they had been aware of the facts in the case. As a matter of fact, if they had been aware of the facts of the case they would have determined as they did in Cross vs. Sumter County, supra, that there were no facts in the record to support the Deputy's award of compensation.

This Court should reverse the decision of the

Full Commission and deny compensation because no findings of fact can be devised which would be supported by competent substantial evidence which would justify an award to claimant.

The Deputy failed to follow the rule of law set out by this Court in Andrews vs. Strecker Body Builders, supra, in which it is said:

> "It is because of the vital importance of the deputy's findings of fact that an order should show that he has considered all of the proper evidence presented to him. Inadequate findings of fact unsupported by competent substantial evidence will not be permitted to stand.*** This does not mean that the deputy is required to recite the evidence in detail. However, his order should show that he considered all of it. Conversely the order is insufficient if it shows on its fact that he has considered only a limited segment of the competent evidence bearing on an issue."

In the case at bar the deputy carefully obeyed the part of the quoted rule of law requiring recital of the evidence. The Deputy utterly failed to comply with the balance of the rule as stated in the cited case which is stated in these words:

> "On the other hand, the order should reflect the fact that he (the Deputy) has actually undertaken to evaluate all of the evidence and has taken into consideration the lay testimony as well as the expert."

In the case at bar, we are not confronted with the differences in lay and expert testimony. We are, however confronted with an analigous situation - the difference between the gross earnings of a minor son, the cost of his support, the conflict in evidence as to his cost of support, and the amount of money which he could contribute to his mother, the

amount of money that was in fact required for her support and where it came from. We are also confronted with a determination of fact on what constitutes "actual and substantial support" which is "made regularly".

The Deputy utterly failed to make any findings of fact as contrasted to conclusions of the deputy on the "actual and substantial support". If the deputy had followed the mathematical approach as was used in Spellman vs. Spellman, Fla. 1958, 103 So2d 661, and all the other Florida cases, she would have had to deny compensation.

The presumtion of dependency which exists in favor of the widow and minor children of a deceased employee does not exist as to the dependency of a mother on her minor son. To meet the burden of proof required to show dependency of a mother on her minor son, the mother, of necessity, must produce evidence which is more certain than generalities. The claimant did not do so in this case.

Definite proof by claimant in a mother-son dependency extends to the element of "made regularly". This Court has uniformly held that the "made regularly" is a past tense requirement. No time limit has ever been firmly fixed in Florida. The proof in all the cases except the Spellman case, supra, has involved years. In the Spellman case the deceased had been working at his new job which made him independant and capable of not only supporting himself but contributing to his mother for seven or eight weeks. He had actually passed the

first basic period of his employer determining that his work was satisfactory. He had taken home several pay-checks and had contributed a part of them to his elderly, invalid mother who obviously didn't have a husband earning $500.00 a month and who was setting the standard of living for the family. There was no reason to believe that the deceased Spellman would not continue his job and contribution. In the case at bar, the deceased was injured on the first day of his employment, died the next day. Divine guidance or guessing are the only methods for determining that he would have earned enough to support himself and have sufficient funds to make "actual and substantial support" to his mother. The same guessing game would have to be used to determine that there was not going to be another reconciliation between the parents. Another guess would have to be made that the job of the deceased was regular and that he would be capable of keeping the job. In assuming or guessing this latter fact, the Deputy had to make an assumption which the deceased had violated on each previous employment that he had - that is that the deceased would continue to be employed.

The premise upon which this award was made is entirely in futuro.

The Deputy Commissioner failed in all particulars in performing her duty as a Deputy Commissioner. The Full Commission had an opportunity to review these errors and correct the order as is its administrative duty. It

not only failed but it added to the error by blindly adopting the alleged findings of fact and then misconstruing the law as to the compensation awarded.

POINT IV

Was there any authority of law for the Full Commission to modify the award of the Deputy Commissioner in effect doubling the award.

For the purposes of this part of the argument, make the violent assumption that the petitioners think that there is competent substantial evidence to support the award of the Deputy's order. The Deputy found that the mother of the minor employee was dependent upon him for half of her support. That determination of the Deputy was translated into a finding of fact of 50 per cent dependency which was then supported by various applicable citations that a dependency can be partial in nature. The Florida Statutes 440.16 (2)(e) clearly limits parental dependency to 25 per cent of the average weekly wage and limited to 350 weeks as provided in 440.16 (2). The Deputy, having determined that the mother was entitled to one-half the maximum allowed by law provided for the payment of the allowed dependency for half the maximum number of weeks at the maximum rate under the law. This had the net effect of giving the claimant the number of dollars contemplated by the statute in that deceased's average weekly wage was stipulated to be $54.00. The Full Commission in its order

as heretofore mentioned, purports to find that there is substantial competent evidence to support the Deputy's order. The Full Commission did not modify the Deputy's order by saying that the claimant was 100 per cent dependent upon the deceased. In fact they say:

> "We do disagree, however, with the Deputy's manner of making the award, that is, for a period of only 175 weeks. There does not appear to be any such provision in Section 440.16, Florida Statutes, for making the award in this fashion. In most cases of dependency, the dependent is only partially dependent upon the deceased employee. The statute explicitly provides that compensation will be paid in certain percentages for a period not to exceed 350 weeks."

The Full Commission correctly determined that dependency can be partial, they apparently have no quarrel with the 50 per cent in this case but they modified the Deputy's order in such a manner as to award 100 per cent dependency. If they drafted their order with the same care which they "closely examined the record" as they recited in the order, this Court should in a proper manner examine their order, the order of the Deputy and the record from which that order was made, and issue a writ of certiorari to the Florida Industrial Commission ordering that compensation be denied.

POINT V

> Was the claimant's dependency on her 17 year old son, if it ever existed, terminated when she returned to her husband, who was earning $500.00 per month, following the death of her son.

This case is not like any of the reported cases. In all the reported cases the mother was dependent because

she did not have a husband or because such husband's ability to earn was less than the demands of a standard of living commensorate with the family's station in life. In the case at bar, the husband earned a good salary even in this day of inflation. His monthly income was ten times the proposed weekly income of his son in the son's new job.

The claimant and her husband had marital difficulties in early 1958 which climaxed in early June by the claimant leaving home and going to the apartments of the daughters in Rockford, Illinois. During June, July and August 1958 the claimant and her husband were separated. They had a "talk" during this period when they met at a relative's home up north. They agreed to reconcile when they both reached Orlando. They reconciled at the home of their older son in Orlando, the husband gave his wife $30.00, they obtained an apartment, lived together a few days, separated, the mother took the deceased minor son, set up separate housekeeping. The minor son found a job, was injured on the first day of employment, died the next day, and the parents reconciled again. All these events took place in about two weeks.

If the minor son's alleged contributions of earnings from his work at "odds and ends" to his mother both before and after June 1958 should be construed by this Court as to constitute "actual and substantial support" which was "made regularly", therefore justifying dependency, that dependency terminated when the mother

and father reconciled after the minor's death.

Actually if the mother had been a dependent on the son prior to the end of August, such dependency terminated when the parents reconciled at the older son's home and the father gave the mother thirty dollars. At that time the deceased was unemployed and had been so for several weeks - he had returned home because he was not able to find employment in Rockford. During this period his mother could not be dependent upon him because he wasn't earning. The deceased was not employed by the petitioner in this case long enough for the fruits of his labors to benefit the mother - the employment had not ripened into a situation which would afford dependency.

After the death of the employee the mother and father again reconciled. This reconciliation terminated any dependency which could be gleaned from the testimony of the claimant or her witnesses. 440.16(2)(e) Florida Statutes was not drafted to supplement or alternate with 65.10 Florida Statutes. The Florida Industrial Commission and its deputies have no authority of law to replace the Circuit Court by transferring the obligation of a husband "having ability to maintain or contribute to the maintenance of his wife" to the employer of a minor son who was so employed for less than one day.

The reconciliation of the claimant and her husband which took place at the older son's home near the end of August terminated any alleged dependency which could have

existed from June 1957 until the end of August, 1957. The fact that the couple did not stay reconciled would not regenerate dependency if it can be gleaned from the record that dependency existed from June to August, 1957.

The Deputy Commissioner permitted her emotions to control her deliberations in this compensation case, thereby reached a rule of man instead of a rule of law. The Full Commission affirmed the theory of the Deputy Commissioner without considering the law or the facts, and modified the decision in violation of the law.

CONCLUSION

It is respectfully submitted that "equity and justice" require not the conclusion of the Full Commission and its Deputy but the legal determination that dependency of the claimant Fannie Mae Stephenson on the deceased William L. Stephenson, a minor, age 17 did not exist.

If this Court denies this petition for writ of certiorari or does not grant certiorari, the compensation door will be open for every parent who receives any part of a minor child's earnings, irrespective of whether the earnings are sufficient to defray the cost of support of such minor. The parents have a legal obligation to support a minor child. If the minor child contributes to his parents a part of his cost of support, he is merely assisting his parents by reducing the amount of money which his parents must furnish to meet their obligation. His death, no matter how tragic or

how great a misfortune to the parents, terminates the demands on their pocketbook to support the minor child. The money that he was contributing to this parents for his own support should not then be perverted, misconstrued and determined to be support of his parents.

It is further respectfully submitted that to permit a married couple, the husband of which is earning in excess of $500.00 per month, to "milk" an employer under the pretense of the mother being dependent on a minor son when the minor son's earnings had been at best less than his own cost of support is an extremely dangerous precedent.

It is further respectfully submitted that the order of the Florida Industrial Commission and the order of its deputy fails to meet the standard set by this Court as to finding of facts, consideration of all the evidence in the record, and the substantial competent evidence rule.

Respectfully submitted,

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