

RENDERED: August 13, 1999; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court Of Appeals**

NO. 1998-CA-002691-WC

SUN ELECTRIC COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF  
THE WORKERS COMPENSATION BOARD  
ACTION NO. WC-96-77424

The Estate of CHARLES BROWN JR.;  
ROBERT D. NEACE; J. KEVIN KING,  
Chief Arbitrator; JOHN B. COLEMAN  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: BUCKINGHAM, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge. Sun Electric Company appeals from an order of the Workers' Compensation Board which affirmed a decision of the Administrative Law Judge (ALJ). The ALJ found that Candace<sup>1</sup> and Nicholas Brown qualified for benefits as dependents of the decedent, Charles Brown Jr., and that Sun was responsible for attorney's fees for pursuing an unsuccessful appeal under Ky. Rev. Stat. (KRS) 342.320(2)(c).

---

<sup>1</sup> In the ALJ's Opinion and Order, her name was spelled "Candice." However, the Board's opinion and the briefs submitted by both parties to the Board and this Court have spelled her name "Candace."

On September 23, 1996, Charles Brown Jr. suffered a fatal accident in the course and scope of his employment with Sun. Charles was married to Sheri Brown. At the time of Charles's death, Sheri had four children: Samantha and Christopher Campbell,<sup>2</sup> and Nicholas<sup>3</sup> and Candace Brown. Sheri filed for death benefits as Charles' surviving spouse and sought benefits for Nicholas and Candace under KRS 342.750(1)(b). Sun voluntarily paid survivor benefits to Sheri but contested the payment to Candace and Nicholas due to lack of actual dependency.

The evidence submitted to the ALJ established that Sheri and the decedent were married on September 13, 1996. Nicholas was born on September 14, 1993. The decedent was not the biological father of Nicholas but was living with him at the time of the accident that claimed his life. Candace was born on June 5, 1996, with the decedent listed as her biological father. The evidence before the ALJ was in dispute as to whether Candace lived with the decedent or the decedent's parents. Sheri testified that during the 10 days of the marriage Nicholas and Candace spent the night with the decedent's parents because she and the decedent were moving. Sheri also testified that on August 13, 1996, Candace had surgery in Cleveland after which she stayed with the decedent's parents. She also testified that the decedent's parents would not return Candace after Charles Brown's death.

---

<sup>2</sup> Samantha and Christopher Campbell were fathered by Carrington H. Campbell.

<sup>3</sup> Nicholas' last name was changed to Brown shortly after Charles' death. His name was previously Campbell because Sheri was living with Carrington Campbell at the time of Nicholas' birth. However, Sheri testified that she believes his biological father was David Lawless.

Affidavits of Christine Litreal, the decedent's sister, Carolyn Brown, the mother of the decedent, and Charles Brown Sr., the decedent's father, which contradicted the testimony supplied by Sheri, were made a part of the record. The affiants testified that they felt the decedent was sterile and not the biological father of Candace and that Candace had lived with the decedent's parents from the time that she was nine weeks old until September 30, 1996. Further, the decedent's parents testified that Sheri and the decedent did not provide monetary support for Candace during her stay.

The ALJ believed Sheri's testimony and concluded that both Nicholas and Candace lived with the decedent and were entitled to benefits. The ALJ ordered Sun to pay attorney's fees, pursuant to KRS 342.320(2)(c), for its unsuccessful appeal from a decision of the arbitrator. The Board affirmed the ALJ's decision and remanded the case to the ALJ for an award of additional attorney's fees against Sun for its appeal to the Board. This appeal followed.

Sun contends on appeal that the Board erred by determining that KRS 342.750(1)(b) does not require children to be actually dependent upon the decedent for them to receive benefits. Sun insists that in order for claimants to obtain income benefits under KRS 342.750(1)(b), they must meet the standards set forth in KRS 342.075. KRS 342.750 provides that:

If the injury causes death, income benefits shall be payable in the amount and to or for the benefit of the persons following, subject to the maximum limits specified . . . .

(1) (b) To the widow or widower, if there is a child or children living with the widow or widower, 45 percent of the average weekly wage of the deceased, or 40 percent, if such child is not or such children are not living with a widow or widower, and in addition thereto, 15 percent for each child. Where there are more than two (2) such children, the indemnity benefits payable on account of such children shall be divided among such children, share and share alike.

In order for a claimant to obtain the benefits specified in KRS 342.750, the requirements of KRS 342.075 must be satisfied. See White v. Stewarts Dry Goods Co., Ky., 531 S.W.2d 504 (1976). According to KRS 342.075(1) (b), children under the age of sixteen years and living with or supported by the decedent at the time of death are presumed to be dependent. If the claimant is not presumed to be a dependent, the evidence must show that the claimant is living in the household of the employee at the time of the accident or bears to the employee the relation of father, mother, husband, or wife, father-in-law or mother-in-law, grandfather or grandmother, child or grandchild, or brother or sister of the whole or half blood and is actually dependent. KRS 342.075(3).

Sun insists that the ALJ's finding under KRS 342.750(1) (b) that Nicholas and Candace were dependent on the decedent is not supported by substantial evidence. The ALJ found the testimony of Sheri to be persuasive and concluded that both Nicholas and Candace were living with the decedent at the time of

his death and thus were presumed to be dependents.<sup>4</sup> Sun maintains that Candace should not be presumed to be a dependent because she was living with her grandparents and not with the decedent at the time of his death. Sun also asserts that Candace was not actually dependent on the decedent because he did not support her. Sun also argues that although Nicholas lived with the decedent, he was supported by his mother and the State of Ohio.

In considering evidence, the ALJ has the right to believe or disbelieve all or any portion of the evidence before him. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). Where conflicting evidence is presented, the ALJ is free to accept or reject the evidence presented. Shields v. Pittsburgh & Midway Coal Mining Co., Ky. App., 634 S.W.2d 440, 444 (1982). Where an employer appeals an adverse decision, the question before this Court is whether the decision of the Board is supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). In this case, the decision of the ALJ is supported by substantial evidence, and we may not substitute our judgment for that of the ALJ. Wolf Creek, 673 S.W.2d at 736. The fact that the evidence may also support a finding favorable to Sun makes no difference. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Sun asserts that KRS 342.075(1) should be interpreted as a rebuttable presumption of dependency. However, the presumptions of dependency under this statute have been held to be conclusive

---

<sup>4</sup> The ALJ determined that Nicholas was the decedent's stepchild. Pursuant to KRS 342.085(1), "child," as used in KRS 342, includes stepchildren.

and cannot be defeated or rebutted by extraneous testimony where the dependent child or children meet the provisions of the statute. Reynolds Metal Co. v. Glass, 302 Ky. 622, 195 S.W.2d 280,284 (1946). See also Johnson v. Kentucky Color & Chemical Co., 285 Ky. 358, 147 S.W.2d 686 (1941).

Lastly, Sun contends that the ALJ erred by granting an award of attorney's fees under KRS 342.310 because its appeal from the arbitrator resulted in a delay of the children's benefits. Sun maintains that its appeal was reasonable and in good faith, and, therefore not an unreasonable proceeding. Contrary to Sun's argument, the ALJ awarded attorney's fees pursuant to KRS 342.320(c), not KRS 342.310. KRS 342.320(c) requires an employer to pay a claimant's attorney's fees when an employer appeals the benefit determination of an arbitrator or ALJ and does not prevail on appeal. Because Sun did not prevail on its appeal of the arbitrator's and ALJ's determinations, there was no error.<sup>5</sup>

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey K. Neiheisel  
Thomas C. Lyons  
KEVIN L. MURPHY &  
ASSOCIATES  
Covington, Kentucky

---

<sup>5</sup> Because we have determined that Sun's appeal lacks merit, we need not address whether this portion of the appeal should be dismissed for its failure to name claimant's attorney as a party on appeal to the Board.

BRIEF FOR APPELLEES  
THE ESTATE OF  
CHARLES BROWN JR.,  
and ROBERT D. NEACE:

Robert D. Neace  
Florence, Kentucky