

FINAL AWARD ALLOWING COMPENSATION  
(Affirming in Part and Reversing in Part  
Award and Decision of Administrative Law Judge)

Injury No.: 02-046033

Employee: Kevin G. Politte (deceased)

Dependents: Patricia Politte  
Jazlyn Sheeley (Jazlyn Carol Politte)  
Jared Sheeley (Jared Glennon Politte)

Employer: Arrowhead Contractors

Insurer: American Family Mutual Insurance Company

Date of Accident: May 14, 2002

Place and County of Accident: Pevely, Jefferson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated November 29, 2004. The award and decision of Administrative Law Judge Dinwiddie is attached and incorporated to the extent it is not inconsistent with this award and decision.

### I. Stipulations of Parties

The parties agreed that the death of the employee, Kevin G. Politte, deceased, was due to an accident arising out of and in the course of his employment. The employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Laws; the employer's liability was insured by American Family Mutual Insurance Company; the employer had notice of the injury and resultant death of the employee; the claim for compensation was filed within the time prescribed by law; and the employee's average weekly wage as of the date of the accident was \$465.88 resulting in a compensation rate of \$310.59 for any death benefits.

The parties further stipulated that due to the compensability of the death claim, pursuant to section 287.240(1) RSMo the employer/insurer was liable for burial expenses in the amount of \$3,818.54.

### II. Disputed Issues

A Claim for Compensation as well as an Amended Claim for Compensation had been filed due to the death of the deceased employee, alleging there are/were three dependents entitled to workers' compensation death benefits pursuant to the provisions of section 287.240 RSMo. The three alleged dependents are Patricia Politte, mother of the deceased employee; Jazlyn Sheeley, niece of the deceased employee; and Jared Sheeley, nephew of the deceased employee. The answer filed by the employer/insurer denied that any of the three were dependents as defined by section 287.240 RSMo, and consequently were not entitled to death benefits.

The award of the administrative law judge dated November 29, 2004, contained the following conclusions: Patricia Politte, mother of the deceased, was not a dependent as defined by section 287.240 RSMo, and was not entitled to death benefits; Jazlyn Sheeley and Jared Sheeley were both partial dependents as defined by section 287.240 RSMo and were entitled to certain death benefits; and employer/insurer was liable for burial expenses in the amount of \$3,818.54 as stipulated.

An Application for Review was timely filed with the Labor Commission by employer/insurer alleging that the award issued by the administrative law judge was erroneous in finding that Jazlyn Sheeley and Jared Sheeley were partial dependents as defined pursuant to section 287.240 RSMo, and entitled to any death benefits.

### III. Facts

As of the date of death of the deceased employee, the indisputable and uncontroverted evidence was that the deceased employee had never been married and never had any children. Accordingly none of the three alleged dependents can be conclusively presumed to be totally dependent for support upon the deceased employee, since none of them were either a surviving spouse of the deceased employee or a child of the deceased employee. Section 287.240(4)(a)(b) RSMo.

The applicable statutory provision pertaining to the instant claim is section 287.240 RSMo; and has been interpreted by our appellate courts in the case of *Henley v. Tan Company, Inc.*, 140 S.W.3d 195 (Mo.App. S.D. 2004) as follows:

Pursuant to Section 287.240 of the Workers' Compensation Law, "dependents" of a deceased employee are entitled to certain death benefits and compensation:

(4) The word "dependent" as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, ...

....

(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years.... In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such other cases if there is more than one person wholly dependent the death benefit shall be divided equally among them.

Section 287.240(4)(b). This section creates two classes of dependents: the first consisting of relatives by blood or marriage who are in fact actually dependent upon the wages of the deceased employee for full or partial support, and the second consisting of those who are conclusively presumed to be totally dependent. Section 287.240.

[7] Where, as here, Claimants are not among those statutorily classified as "conclusively presumed to be totally dependent," Claimants have the burden of proving that (1) they were related to Employee by blood or marriage and (2) they were actually dependent for support, in whole or in part, upon Employee's wages at the time of her injury.<sup>6</sup> Section 287.240; See *Phillips v. Air Reduction Sales Co.*, 337 Mo. 587, 85 S.W.2d 551, 556 (1935).

[8, 9] The question of actual dependency is a question of fact to be determined in accordance with the facts at the time of the employee's injury. *Ricks v. H.K. Porter, Inc.*, 439 S.W.2d 164, 167 (Mo. 1969); See *Ferguson v. Hood*, 541 S.W.2d 19, 22 (Mo.App.1976). The word "dependent" ordinarily means in "need of aid or support," "not self-sustaining." *Dykes v. Thornton*, 282 S.W.2d 451, 454 (Mo.1955). While a "partial dependent" is one who has some means, but not sufficient means for his support, a "total dependent" is one who has no means whatever to support himself. *Id.* "Dependence within the meaning of the Workmens' Compensation Law does not mean absolute dependency for the necessities of life, but rather that the claimed dependent looked to and relied upon the contributions of the employee, in whole or in part, as a means of supporting and maintaining himself." *Craig v. Calvert*, 572 S.W.2d 235, 237 (Mo.App.1978) (*quoting Dykes at 454*). It is not necessary to show that the employee was "legally liable" for the support of the claimant. *Stillwell v. Universal Const. Co.*, 922 S.W.2d 448, 453 (Mo.App. W.D.1996).

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<sup>6</sup> The parties agree that Claimants meet the first criteria of being related to Employee by blood or marriage. The issue here is limited to Claimants' actual dependency on Employee's wages.

In the award issued by the administrative law judge alleged dependent Patricia Politte was found to have failed to make any case that she was a partial dependent of the deceased employee as of the date of his injury, and the

Commission affirms all findings and conclusions made by the administrative law judge denying her claim as a partial dependent.

The remainder of the Commission decision will concern itself only with whether or not the remaining two dependents, Jazlyn Sheeley and Jared Sheeley, proved their respective allegations of actual dependency pursuant to section 287.240 RSMo. The remaining two alleged dependents, Jazlyn Sheeley and Jared Sheeley, hereinafter referred to as the minor dependents, attempted to establish their entitlement to death benefits as dependents of the deceased employee through the testimony of Glennon Politte, Linda Dunn, Denise Gonzalez and Patricia Politte; and through three exhibits, i.e., a Decree of Adoption, Exhibit A; a Certificate of Death, Exhibit B; and a Drivers Application for Employment, Exhibit C.

In summary fashion the testimony of Linda Dunn was as follows: she was a friend of Patricia Politte; she testified that during a telephone conversation with Patricia Politte, she heard the deceased employee's voice in the background, and during the telephone conversation Patricia discussed the planned contribution toward the care of the two minor children to be made by the deceased employee; and once, Patricia Politte told her the deceased employee would be making the next house payment. All of this testimony of Linda Dunn was timely objected to by the employer/insurer as based on inadmissible hearsay.

Denise Gonzalez testified to the following: she was a friend of Patricia Politte; she was aware of the adoption efforts of Patricia Politte concerning the two minor children; she was present during a conversation in which the deceased employee indicated he would help raise the two minor children; and the deceased employee indicated that he would split the bills down the middle with Patricia. The employer/insurer timely objected to all this testimony as being based on inadmissible hearsay.

Glennon Politte testified as follows: he is the grandfather of the deceased employee; the deceased employee indicated in conversations with Glennon Politte that the deceased employee wanted to help the two minor children; and the deceased employee indicated in a conversation to Glennon Politte that he was willing to do what it took to help his mother raise the two minor children. Timely hearsay objections were also made concerning the testimony of Glennon Politte.

Mr. Glennon Politte further testified that on at least two occasions Patricia Politte tendered Glennon Politte checks she received from the deceased employee, while the deceased employee was a member of the United States Army. Each check was purportedly in the amount of \$200.00. Glennon Politte, at the request of Patricia Politte, cashed these checks (according to his testimony). At trial there were no copies of these checks or any credible documentary evidence to support this testimony.

In summary fashion the testimony of Patricia Politte was as follows: she filed for adoption of the two minor dependents, Jazlyn and Jared, in approximately August, 2001; the adoption decree was entered January 11, 2002; the deceased employee entered the United States Army in March of 1998 and was discharged/returned home in March, 2002; during March of 2002 he was not working; the deceased employee lived in his mother's house from the time of his discharge until his fatal accident of May 14, 2002; prior to her adoption of the two minor children, Patricia Politte testified that she and other family members had discussions as to the caring and upbringing of the two minor dependents; the deceased employee was not involved in these family discussions or conversations; the family eventually decided that Patricia Politte should take custody and in the summer of 2001, Patricia Politte became the foster mother of the two minor dependents; she testified that the deceased employee and her would discuss co-parenting the children in the future at her house; Patricia Politte testified that she estimated that the deceased employee may have given her approximately \$2,500.00 while in the service but she did not testify as to any specific purpose for this money; and Patricia Politte testified to one payment of \$200.00 the deceased employee made to her after being discharged from the service in March 2002.

Patricia Politte could not provide any copies of checks, statements, or any credible documentary evidence to support her allegations that any actual support was provided by the deceased employee. Patricia Politte testified to a check register that allegedly indicated a payment to "mom of \$200.00", but she did not produce the check register at trial.

The employer/insurer sponsored into evidence the Adoptive Home Study filed with the Honorable Carol Kennedy

Bader, Circuit Judge, 23<sup>rd</sup> Judicial Circuit, from the Division of Family Services, dated December 21, 2001, as part of the adoption process of the two minor dependents.

The Commission notes the following excerpts from the Final Adoptive Home Study dated December 21, 2001:

Patricia reports that she has family support from her parents and her youngest daughter, Jamie, regarding providing long-term care to Jazlyn and Jared. (The Commission notes absolutely no reference to the deceased employee concerning any family support).

Patricia reports that her parents have played an integral part in the raising of Jazlyn and Jared Sheeley, as they provided relative care to both children prior to their coming to live with Patricia (The Commission notes no reference whatsoever to the deceased employee providing any part in the raising of the two minor children).

Patricia also has a child, Kevin Politte, age 22 respectively, who was born prior to her first marriage. He is currently enlisted in the army, and is due home in February of 2002. Kevin is single and has no children. (The Commission notes no mention of the deceased employee, Kevin Politte, providing any financial or emotional support for the two minor children).

Kevin Politte is 22 years old. He is enlisted in the Army, and will return home in February of 2002. Kevin is single with no children. Patricia reports a close relationship with Kevin, and speaks to him every couple of days. Patricia adds that she has considered having Kevin become guardian to Jazlyn and Jared, if something were to happen to Patricia. (The Commission notes no reference concerning any financial or emotional support for the two minor children).

The Commission also has thoroughly reviewed the section of the Final Adoptive Home Study titled Employment, Income and Expenses, and there is no mention of any type of financial support to be provided Patricia Politte by the deceased employee concerning the upbringing of the two minor children. The report details the anticipated income, expenses and current assets and there is no reference to any support either financially or emotionally being provided in the future by the deceased employee for the care and maintenance of the two minor dependents.

The Judgment and Decree of Adoption ordered by Judge Bader as of January 11, 2002, specifically found and determined that Patricia Politte "has the ability to properly care for, support, maintain and educate the minor children".

#### IV. Conclusions of Law

Based on a complete review of the entire record, the Commission finds that the two minor dependents are not entitled to benefits as dependents of the deceased employee because the minor dependents did not establish that they were dependent upon the wages of the deceased employee for support.

The Commission concludes that Patricia Politte was able to financially support the two minor dependents; the credible and believable evidence does not support any finding that the deceased employee provided any type of support whatsoever to the two minor children, and certainly not on a regular basis, and the two minor children were not proven ever to be dependent upon him for support; the adoption decree executed by Circuit Judge Bader specifically finds that Patricia Politte has the ability to properly care for, support, maintain and educate the minor children; and there is no credible, believable or trustworthy evidence that either of the two minor dependents looked to and relied upon any contributions from the deceased employee in whole or in part, as a means of support and maintenance.

The testimony of witnesses Glennon Politte, Linda Dunn and Denise Gonzalez pertaining to statements made by the deceased employee were timely objected to as inadmissible hearsay. Pursuant to section 491.010 RSMo and *Harrison v. Harrison Turf Company*, 908 S.W.2d 159 (Mo.App.1995), the Commission has serious misgivings as to the admissibility of this testimony and giving this testimony legal consideration. This statute clearly requires that an adverse party must testify before relevant statements made by the deceased party may be admitted. The statute

does provide that certain evidence that would otherwise be excludable under the hearsay rule could be received, if the opposing party voluntarily testifies about dealings with the person who has died.

In the instant case, the adverse party, the employer, did not testify. Accordingly, none of the statements of the witnesses, Glennon Politte, Linda Dunn and Denise Gonzalez pertaining to statements allegedly made to them by the deceased employee should be or are admissible. In addition, even if the Commission were to consider the hearsay statements/hearsay testimony of these witnesses, the Commission would not afford such testimony any weight due to the absence of any supporting documentation or corroboration from any additional evidence, i.e., absolutely no corroborative evidence of any support on any type basis from the deceased employee to the two minor dependents. Self-serving hearsay which is unsubstantiated, unsupported and uncorroborated is inherently unreliable, and not trustworthy.

Likewise, the Commission does not find the testimony of Patricia Politte credible, trustworthy or believable to base a finding of actual dependency in favor of the two minor dependents. Patricia Politte testified that the deceased employee told her he was willing to co-parent the children; would share taking care of them; and would share in their upbringing both from a financial and emotional perspective. Based on a complete review of the entire record, the Commission does not find there was any such promise made by the deceased employee to Patricia Politte. The Final Adoptive Home Study is completely void of any reference that the deceased employee was going to provide financial and emotional support to the family unit. Patricia Politte provided no copies of cancelled checks, letters, statements or any credible documentary evidence to support her contention that any actual support was ever provided the two minor dependents by the deceased employee; or corroboration or substantiation that the deceased employee was ever going to provide any type of support, be it financial or emotional support, in the future. What Patricia Politte offered at trial was her unsupported testimony and self-serving statements of alleged support contributions, after the Decree of Adoption, after the death of the deceased employee and in apparent anticipation of the instant litigation. The Commission rejects the credibility or believability of this testimony as it is not reliable.

The Commission cannot find any competent and substantial evidence to base any legal conclusion that the two minor dependents were actually dependent upon the deceased employee's wages at the time of his death. There is no competent and substantial evidence that the alleged dependents relied on receiving any support from the deceased employee.

Accordingly, the portion of the award of the administrative law judge concluding that Jazlyn Sheeley and Jared Sheeley are partial dependents entitled to benefits pursuant to section 287.240 RSMo due to the death of the deceased employee is reversed. In lieu thereof the Commission determines that neither Jazlyn Sheeley nor Jared Sheeley are dependents as defined by section 287.240 RSMo, and consequently are not entitled to death benefits. The determination that Patricia Politte was not a dependent as defined by section 287.240 RSMo, and not entitled to death benefits is affirmed; and the awarding of the burial expense in the amount of \$3,818.54, payable to Vinyard Funeral Home, Inc., is also affirmed.

No attorney's fees are awarded concerning the obligation of the employer/insurer to pay the burial expense since that issue was not in dispute.

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of August 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

Injury No.: 02-046033

Employee: Kevin G. Politte (deceased)

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SEPARATE OPINION CONCURRING IN PART AND  
DISSENTING IN PART

I must respectfully disagree with the larger part of the opinion of the majority of the Commission. I would affirm the award of the administrative law judge and find the minor children to be partial dependents of the deceased. I would agree with the other members of the Commission that Patricia Politte has not established that she is a dependent of decedent under the law. Further, I would agree that employer/insurer are liable for the burial expenses as awarded.

Save for these points, I disagree with the majority.

The majority opinion has extensively set forth the statutory definitions of dependents and I will not reiterate them herein.

The administrative law judge identified the threshold question as whether the children can be considered actually dependent on the deceased based on unfulfilled promises. The administrative law judge found that they could. This finding was based, in part, on the testimony of a number of witnesses who testified to deceased's statements and averments of his intention to provide support for the children and assistance for his mother in seeing to their care. The majority has now resorted to legal technicalities to deny these children and to disregard the announced intention of the deceased.

This is especially true of the testimony of witness Gonzalez. Ms. Gonzalez stated that deceased told her "he was gonna help ... financially. And that they were gonna split all the bills down the middle and also help raise the children." No specific objection of any kind was made during the course of her testimony. The majority is using a "running objection" made during the testimony of an earlier witness to technically disqualify this witness.

I would find the testimony of witness Gonzalez to be competent and substantial testimony and a substantial support to the proposition that deceased promised to assume a financial responsibility for the children. *Eimer v. Board of Police Commissioners*, 895 S.W.2d 117, 120 (Mo.App. 1995).

The administrative law judge also relied upon the well-established case law in making his determination of dependency. The Cunningham and Henley cases cited by the administrative law judge mandate his decision. To hold that dependency cannot be based upon an unfulfilled promise requires that we ignore seventy years of case law and the statutory requirement of liberal construction of the law to achieve the public good. Section 287.240 (3) RSMo.

The majority notes the adoptive home study and comments that no reference is made to any support from deceased. It should be pointed out that the study reflects the family unit as it existed prior to the adoption of the children involved here and while deceased was in the service. No one would expect the study to reflect anyone who was in the service and not an active part of the studied household. Yet, when properly construed the study lends great weight to the position of the minor children. The study states, in part, "she has considered having Kevin (deceased) become guardian .. if something were to happen.." This statement speaks to conversation and agreement between the deceased and his mother as to his role and feelings for the children.

The great weight of Missouri jurisprudence in this field requires the upholding of the award of the administrative

law judge granting benefits and finding dependency.

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John J. Hickey, Member

## AWARD

Employee: Kevin G. Politte (deceased) Injury No. 02-046033

Dependents: Patricia Politte (alleged)

Jazlyn Sheeley (Jazlyn Carol Politte)

Jared Sheeley (Jared Glennon Politte)

Before the

DIVISION OF  
WORKERS'

COMPENSATION

Employer: Arrowhead Contractors

Department of Labor and  
Industrial Relations of  
Missouri

Insurer: American Family Mutual Insurance Company

Jefferson City, Missouri

Hearing Date: 7/19/04; finally submitted 8/23/04

Checked by: KD:bb (by df)

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 14, 2002
5. State location where accident occurred or occupational disease was contracted: Jefferson County, MO

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee suffered fatal injury by motor vehicle accident.
12. Did accident or occupational disease cause death? Yes Date of death? 5/14/02
13. Part(s) of body injured by accident or occupational disease: Body as a whole
14. Nature and extent of any permanent disability: n/a
15. Compensation paid to-date for temporary disability: n/a
16. Value necessary medical aid paid to date by employer/insurer? n/a
17. Value necessary medical aid not furnished by employer/insurer? n/a
18. Employee's average weekly wages: \$465.88
19. Weekly compensation rate: \$310.60
20. Method wages computation: By agreement of the parties

## COMPENSATION PAYABLE

### 21. Amount of compensation payable:

Claim of Patricia Politte as a dependent is denied. See Award.

Jazlyn Sheeley (Jazlyn Carol Politte) and Jared Sheeley (Jared Glennon Politte) are partial dependents under the Act. The death benefit is \$77.92 per week, each partial dependent entitled to one-half of the death benefit, or \$38.96 per week. Death benefit to be paid to Patricia Politte per Section 287.240(5). The total amount due from 5/14/02 to 7/19/04, the date of hearing, is for 114 weeks, or a total of \$8,882.88. Employer to pay \$77.92 in death benefits per week thereafter from 7/19/04 for so long as the condition of dependency continues to subsist. See Award as to calculation of the benefit.

Employer and insurer liable for burial expense in the amount of \$3,818.54, payable to Vinyard Funeral Home, Inc.

### 23. Future requirements awarded: n/a

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Mark Helfers

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kevin G. Politte (deceased)

Injury No: 02-046033

Before the

DIVISION OF WORKERS'

COMPENSATION

Department of Labor and Industrial Relations of Missouri

Jefferson City, Missouri

Dependents: Patricia Politte (alleged)

Jazlyn Sheeley (Jazlyn Carol Politte)

Jared Sheeley (Jared Glennon Politte)

Employer: Arrowhead Contractors

Insurer: American Family Mutual Insurance Company

Checked by: KD:bb (by df)

At issue in this matter is the liability of the employer, Arrowhead Contractors, for death benefits following a compensable fatal injury by accident arising out of and in the course of employment. The involved work injury resulted in the death of the employee, Mr. Kevin Politte. Patricia Politte, Jazlyn Sheeley (Jazlyn Carol Politte), and Jared Sheeley (Jared Glennon Politte) are seeking benefits as dependents of the employee under the workers' compensation act. The parties appeared at hearing by and through their counsel and entered into certain stipulations and agreements as to the issues and evidence to be presented. Attorney Mark Helfers represented all three claimants at hearing. Attorney Todd D. Hilliker represented Arrowhead Contractors and its insurer, American Family Mutual Insurance Company. The parties stipulated that the employer and insurer were liable for burial expense in the amount of \$3,818.54, payable to Vinyard

Funeral Home, Inc.

Patricia Politte appeared at hearing and testified on behalf of the claimants. The claimants further elicited the testimony of the following: Mr. Glennon P. Politte Sr.; Ms. Linda Dunn; and Ms. Denice E. Gonzalez. The employer and insurer declined to call any witnesses on its behalf.

## EXHIBITS

The following exhibits are in evidence:

### Claimants' Exhibits

- A. Judgement and Decree of Adoption
- B. Certification of Death
- C. Driver Application For Employment

### I. Employer and Insurer's Exhibits

- 1. Final Adoptive Home Study

## FINDINGS OF FACT AND RULINGS OF LAW

Mr. Kevin Politte suffered a fatal injury as a result of a motor vehicle accident arising out of and in the course of his employment with Arrowhead Contractors. The birth date showing on the certification of death indicates that Mr. Politte was 21 years old as of the date of the accident. Mr. Politte had never married prior to his fatal accident, and is not known to have fathered any children. Prior to his service in the military, Mr. Politte lived with his mother, Patricia Politte, at the house that has been her home since 1996. Mr. Politte served for four years in the military, and moved back home with his mother immediately thereafter in March of 2002 and began looking for employment. Ms. Politte made accommodations in the living arrangements in her home to allow for the return home of her son. Ms. Politte testified that her son received maybe one or two paychecks prior to his death on May 14, 2002.

Kevin Politte was the first-born child of Patricia Politte. Ms. Politte had her first child while living in the home of her father, Glennon P. Politte Sr. Patricia Politte subsequently married and divorced Wesley Sheeley, and had two children from that marriage, daughters Jennifer Sheeley and Jamie Sheeley. Jennifer Sheeley then gave birth to Jazlyn Sheeley on 4/21/99, and to Jared Sheeley on 5/6/2000 (The Judgement and Decree of Adoption, Claimants' Exhibit A, indicates that the legal names of the children were subsequently changed to Jazlyn Carol Politte and Jared Glennon Politte). Jazlyn and Jared are niece and nephew to the deceased, Mr. Kevin Politte. Patricia Politte is the maternal grandmother of Jazlyn and Jared.

Glennon P. Politte Sr. and his wife, as the great grandparents of Jazlyn and Jared, were given foster parent custody of the two children for approximately one year. The two children were eventually placed in a pre-adoptive placement with their grandmother, Patricia Politte, in June of 2001. The parental rights of Jennifer Sheeley, and of the natural and putative fathers of Jazlyn and Jared respectively were subsequently terminated by Order of the Court dated 1/11/02, and by that same order Patricia Politte became the adoptive parent of Jazlyn and Jared.

Patricia Politte is currently single, having married and divorced three times. Ms. Politte is employed as a custodian for the Dunklin R-5 School District, and currently earns a monthly income of \$1,120 from that employment. Ms. Politte also receives from the state an allowance of \$225 per month for each of her adopted grandchildren. Ms. Politte acknowledged that she no longer receives the maintenance check in the amount of \$800.00 as listed as income in the Final Home Adoptive Study (Employer and Insurer's Exhibit No. 1), inasmuch as the obligation of her former spouse to make such a payment expired in April of 2002.

While serving in the military, Kevin Politte would send money home to his mother from time to time. There was no particular pattern to those payments, often being made when Ms. Politte would find herself in need of meeting certain expenses. The best estimate Ms. Politte was able to provide, in the absence of any documentation of such payments, suggests that during his four years in the military Mr. Politte sent home a total in the neighborhood of \$2000 to \$3000 dollars.

Mr. Politte was serving in the military at the time of Jazlyn and Jared's birth, and throughout the period of time that the Politte family was choosing and implementing a course of action as to the care of the two children. Mr. Politte was in the military for the duration of time in which foster care of the children was established; a home

study was completed; and the Court approved the adoption of the children by Patricia Politte. Ms. Politte was not willing to undertake the adoption of the two children without an understanding with her father, brother, and son that she would require both emotional and financial support to succeed as the legal parent of the two children. The testimony of Glennon P. Politte Sr. and of Patricia Politte persuades that the two were very close to Kevin Politte, with whom they talked often, and with whom several discussions were had as to the future of the care and support of the two children, Jazlyn and Jared.

In the absence of the \$800 per month provided by her former spouse, it is painfully obvious that Ms. Politte was going to be in a tenuous state of existence as it relates to the relationship of her income versus her expenses as shown on the final adoptive home study. In the absence of other sources of income, the situation can only become more tenuous with the adoption of two children, the monthly state allowance of \$225 per child notwithstanding. It is also apparent that Ms. Politte made the decision to keep what is admittedly a larger home than what her own needs would justify, and the burden of the mortgage, in order to accommodate both the permanent addition of the two children, and Kevin's return home from his service in the Army.

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DEPENDENCY/DEATH BENEFITS

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Section 287.240 RSMo provides for the payment of death benefits to total or partial dependents of the deceased employee. Paragraph (4) of Section 287.240 provides that certain spouses and children of the deceased shall be conclusively presumed to be totally dependent for support upon the deceased employee, and a death benefit is to be payable to such total dependents to the exclusion of other dependents. To the extent that the deceased in this matter was never married and had no children prior to his death, the door is open for other alleged dependents, in this case a mother, niece, and nephew, to make the claim that death benefits are payable to them.

Inasmuch as the claimants in this matter are not alleging to be entitled to benefits as the surviving spouse, they need not show, as a prerequisite to a finding of dependency, that the deceased employee had any legal obligation or legal liability to render support. Elihinger v. Wolf House Furnishing Co., 85 S.W.2d 11 (Mo. 1935). Section 287.240(4) defines "dependent" as "a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury." The statute sets up a two-part test to show dependency; relationship to the deceased employee by blood or marriage, and actual dependency in whole or in part upon the wages of the deceased. Phillips v. Air Reduction Salesco, 85 S.W. 2d 551, 555-556 (Mo. 1935), decided concurrently with Elihinger.

Jazlyn, Jared, and Patricia are all blood relations of the deceased, and meet the first part of the test to qualify as dependents. The claimants must further show that they are "actually dependent" in whole or in part on the wages of Kevin Politte. In cases involving claimants such as these who are not presumed to be totally dependent, Section 287.240 (4)(b) provides, in part, "In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such cases if there is more than one person wholly dependent the death benefit shall be divided equally among them."

The word 'dependent' in many of the cases has been defined as provided in Kennedy v. Keller, 37 S.W.2d 452, 453 (Mo. App. 1931), as follows:

The word "dependent" ordinarily means the need of aid or support; not self-sustaining. A dependent person is one who has not the means of his own to support himself. A total dependent is one who has no means whatever to support himself. A partial dependent is one who

has some means, but not sufficient for his support.

The claimant Patricia Politte has failed to make the case that she was a partial dependent of the deceased as of the date of his injury. All of the testimony submitted by Ms. Politte and her father supported the proposition that the intention of the deceased was to provide and to be responsible for the support of Jared and Jazlyn. Ms. Politte testified that claimant offered to help with expenses so that Ms. Politte could "stay in the bigger house with the children". Ms. Politte offered no testimony to support the conclusion that she was incapable of supporting herself; rather, she testified that she was willing to petition for the adoption of Jared and Jazlyn so long as she received support from the family. As a consequence, the petition for adoption was granted, with a finding that Ms. Politte "had the ability to properly care for, support, maintain, and educate the minor children" (Claimants' Exhibit A, page 2). While it may be true that Ms. Politte received between \$2,000 to \$3,000 from the deceased over the course of the four years he was in the military, there was nothing by way of testimony to suggest whether and to what extent that money was used to support Ms. Politte. In fact, the only example given by Ms. Politte as to the use of the money was to suggest or suppose that she may have needed money on one occasion to cover attorney's fees in pursuing the adoption of the children.

The testimony of Ms. Politte nonetheless persuades that she would not have considered adopting Jazlyn and Jared and would not necessarily have remained in a house that was larger than her needs alone required if it were not for the commitment of Kevin Politte to help share in the household expenses. It is readily apparent from the listing of her income and expenses that the claimant would be unable to adopt the children and meet all of her expenses, including her home mortgage, once the support obligation of her former spouse terminated in 2002. "Dependence within the meaning of the Workmens' Compensation Law does not mean absolute dependency for the necessities of life, but rather that the claimed dependent looked to and relied upon the contributions of the employee, in whole or in part, as a means of supporting and maintaining himself" Craig v. Calvert, 572 S.W.2d 235, 237 (Mo. App. 1978)(quoting Dykes v. Thornton, 282 S.W.2d 451, 454 (Mo. 1955).

Query whether Jazlyn and Jared can be considered to be "actually dependent" on their uncle, Kevin Politte, for support based on a promise to share in expenses that went unfulfilled as of the time of his death? Early decisions noted a split in jurisdictions as to whether there can be a right to compensation in those cases where there is a promise to contribute, but due to circumstances and an untimely death, the employee never made any substantial contributions in support of the claimant.

Lack of actual and substantial support was not a bar to a finding of dependency in Cunningham v. Management & Engineering Corp., 45 S.W.2d 899 (Mo.App. 1932). In that matter, the surviving parents were found to be partially dependent on a minor son, where there was evidence of the intent to send wages to the parents, but the son suffered a fatal work injury before drawing his first pay check. In opting for the more encompassing view of dependency, the court noted a liberal interpretation was required by statute. More recently, in Henley v Tan Co., Inc., 140 S.W.3d 195, 199 (Mo. App. S.D. 2004), the court acknowledged that the law was to be liberally construed in favor of the employee, where it states:

The purpose of the Workers' Compensation Act is to provide a method of compensation for injuries sustained by employees through accidents arising out of and in the course of employment, and to place the burden of such losses on the industry rather than the injured employee and their family. Farmer-Cummings v. Future Foam, Inc., 44 S.W.3d 830, 835 (Mo.App. W.D.2001). Although a claimant bears the burden of proving the elements of his claim to a "reasonable probability," it is well-settled that "[t]he Workers' Compensation Law should be interpreted in a liberal manner in favor of the employee. Questions regarding the right of the employee to benefits must be resolved in the injured employee's favor." Avery v. City of Columbia, 966 S.W.2d 315, 320 (Mo.App. W.D.1998).

Similarly, the fact that the deceased was making no contributions at the time of his death was not a bar to a finding of dependency in Shaffer v. Williams Bros., Inc., 44 S.W.2d 185 (Mo App. 1931). In Shaffer, the deceased son had been sending wages home to his mother and father as recently as eleven months prior to his death. The deceased then left that employment; returned to work on the family farm without receiving any wages;

contributed some \$10 to his father during that summer that he made while baling hay; but did not make any other contributions to the date of his death. Claimant subsequently suffered a work related death within five days of his employment with Williams Brothers.

Following Cunningham and Shaffer, and supposing that Jazlyn and Jared are dependents under the act notwithstanding the lack of any actual contributions by the deceased as of the date of his death, the burden is on the claimants to show the amount of contributions their Uncle Kevin would have made for their support had he lived. Shaffer, at page 186.

Further, in order to calculate the benefit to a partial dependent, Section 287.240(3) provides as follows:

If there are partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employee at the time of the injury, shall be paid by the employer to each of the dependents proportionately;

Partial dependents under the statute are to share a death benefit that is a percentage of the total death benefit in the same proportion that the contribution for support made by the decedent bears to the decedent's total wages. Tracey v. Acme Distributing Co., 160 S.W.2d 469 Mo. App. 1942); Faccione v. Busy Bee Candy Co., 216 S.W.2d 112 (Mo. App. 1949); Elihinger, supra, 85 S.W.2d 11,16.

The proof as to contribution made by the claimants consists in large part of hearsay declarations as to what the decedent, just prior to his fatal injury, had said he would contribute. In Shaffer, the court reversed and remanded on the issue as to proof of contribution, and in so doing seemed to suggest that in that particular case proof of contribution required a finding as to the expenses of the decedent and as to his spending habits.

In Shaffer, the court determined that there was not enough known as to the decedent's living expenses away from home to support the finding as to contribution of support to the parents. Shaffer is distinguishable because a determination of all decedent's living expenses was critical in that case, inasmuch as it was found that all of decedent's wages, less expenses, were to be contributed to the parents.

As for Kevin Politte, decedent was living at home with his mother and with Jazlyn and Jared, among others, and was to share living expenses. To the extent that the Polittes were to share living expenses, the benefit to Jazlyn and Jared can be calculated in terms of a reasonable expectation that the decedent would contribute at least his fair share of the basic necessities of providing shelter for his niece, nephew, and for himself.

The following monthly living expenses are known, based on the listing as contained within the Home Study, Employer and Insurer's Exhibit No. 1:

Mortgage	\$750
Electric	\$150
Water	\$ 25
Trash	\$ 5
Sewer	\$ 5
Total	\$ 935

One-half of these living expenses on a monthly basis would equal a payment of \$467.50 per month, or \$116.88 per week. By application of the relevant case law, the partial dependents would be entitled to a benefit calculated in the same proportion as the weekly contribution (\$116.88) bears to the total weekly wage of decedent (\$465.88). The applicable proportion is 116.88 over 465.88, or .25088. Multiplying the applicable death benefit (\$310.60) by this fraction yields a total death benefit of \$77.92.

Jazlyn and Jared, as partial dependents of the decedent, Kevin Politte, are each entitled to one-half of the death benefit of \$77.92 per week, or a total of \$38.96 per week.

Section 287.240(5) provides as follows:

The division or the commission may, in its discretion, order or award the share of compensation of any such child to be paid to the parent, grandparent, or other adult next of kin or conservator of the child for the latter's support, maintenance and education, which order or award upon notice to the parties may be modified from time to time by the commission in its discretion with respect to the person to whom shall be paid the amount of the order or award remaining unpaid at the time of the modification;

Pursuant to Section 287.240(5), the death benefit is to be paid to Ms. Patricia Politte, the adoptive parent and maternal grandparent of the partial dependents, for the support, maintenance and education of Jazlyn and Jared.

This award is subject to a lien in favor of Mark Helfers, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: \_\_\_\_\_  
\_\_\_\_\_

Made by:

KEVIN DINWIDDIE

*Administrative Law Judge*

*Division of Workers' Compensation*

A true copy: Attest:

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Gary Estenson

*Director*

*Division of Workers' Compensation*