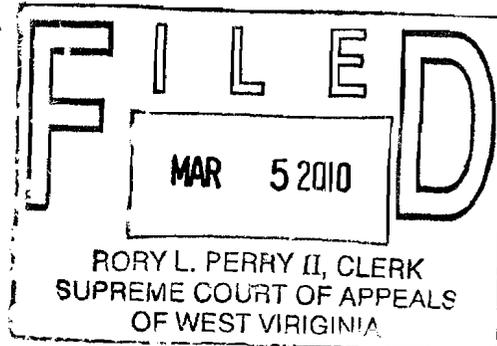


IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

\_\_\_\_\_  
At Charleston  
\_\_\_\_\_



**CHARLES L. JOHNSON,**

**Appellant,**

v.

**APPEAL NO. 2040452  
JCN/CLAIM NO. 840069749  
CA ORDER: 03/14/2006  
ALJ ORDER: 02/08/2008  
BOR ORDER: 09/17/08  
SC DOCKET NO. 35382**

**FOOTE MINERAL COMPANY,**

**Appellee.**

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**FROM THE WEST VIRGINIA WORKERS' COMPENSATION BOARD OF REVIEW**

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**TO THE HONORABLE JUDGES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

**RESPONSE ON BEHALF OF SELF-INSURED  
EMPLOYER-APPELLEE FOOTE MINERAL COMPANY**

**FOOTE MINERAL COMPANY  
By SPILMAN THOMAS & BATTLE, PLLC  
Karin L. Weingart (WV State Bar #8911)  
P. O. Box 273  
Charleston, WV 25321  
(304) 340-3851**

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FOOTE MINERAL COMPANY,

Appellee.

**MEMORANDUM OF PARTIES**

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Edwin H. Pancake, Esquire  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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FOOTE MINERAL COMPANY,

Appellee.

**RESPONSE ON BEHALF OF SELF-INSURED  
EMPLOYER-APPELLEE FOOTE MINERAL COMPANY**

**I. NATURE OF THE PROCEEDING AND RULING BELOW**

Charles L. Johnson (“Claimant” or “Appellant”) appeals the September 17, 2008 order of the Workers’ Compensation Board of Review (“Board”), which affirmed the April 24, 2007, decision of Deputy Chief Administrative Law Judge Henry Haslebacher (“Judge Haslebacher”), which affirmed the March 14, 2006, order entered by the Claims Administrator’s which ceased payment of dependent’s benefits. Appellant appeals this decision. Foote Mineral Company (“Employer” or “Foote Mineral”) submits this brief in response to claimant’s appeal and asserts that the Board’s decision is correct and supported by the reliable evidence of record.

## II. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Upon initiation in 2004 of self-administration of self-insured employer claims, the employer began the process of claims reviews to understand the status and history of its open claims that had previously been administered by the West Virginia Workers' Compensation Division. In reviewing its claims, the employer identified irregularities in the processing of the claim at bar. For ease of understanding the long factual and procedural history of this claim, the employer presents the following timeline with pertinent details:

| <b>DATE</b>    | <b>EVENT</b>  | <b>PERTINENT DETAILS</b>  |
|----------------|---|---|
| Dec. 13, 1989  | Employee, Louis Johnson, dies.  | Death due to cancer.  |
| July 11, 1990  | Widow Anna Johnson, files application for dependent's benefits.<br>(Appellee's Appendix No. 1.)       | Application for benefits indicates "none" with regard to identifying surviving dependent children. This is not simply left blank; "none" is handwritten in the appropriate space. |
| May 15, 1991   | Workers' Compensation Fund rejects application based on OPB findings.<br>(Appellee's Appendix No. 2.) | Widow protests and litigation follows.  |
| April 14, 2000 | Anna Johnson, dies.   | No suggestion of death or substitution of parties filed. No notice regarding Anna Johnson's death was provided to the employer, employer's counsel, or the Division.              |
| April 9, 2001  | Office of Judges affirms claim rejection.<br>(Appellee's Appendix No. 3.)                             | Anna Johnson's counsel appeals in her name without providing Suggestion of Death or requesting Substitution of Parties.   |

|               |  |   |
|---------------|--|---|
| June 18, 2002 | Appeal Board reverses and grants dependent's benefits to Anna Johnson.<br>(Appellee's Appendix No. 4.)   | Known counsel of record for the employer, Spilman Thomas & Battle, PLLC, has been active in the case, and Anna Johnson's counsel had copied employer's counsel on all legal documents, arguments, orders, and submissions to this date.   |
| July 15, 2002 | Employer files Petition for Review with the Supreme Court of Appeals.<br>(Appellee's Appendix No. 5.)  | Copy is sent to Thomas P. Maroney, counsel for Anna Johnson.  |
| July 17, 2002 | Workers' Compensation Division issues acknowledgement of Appeal Board order granting dependent's benefits to Anna Johnson.<br>(Appellee's Appendix No. 6.)                                 | Notice goes to employer's counsel, Anna Johnson, and Anna Johnson's counsel.  |
| July 22, 2002 | Wilbur Yahnke, Director of Compensation Services at Thomas P. Maroney, sends "Notification of Substitutional Party" to the Workers' Compensation Division.<br>(Appellee's Appendix No. 7.) | <p>Mr. Yahnke is not a licensed attorney and filed documents with legal import requesting legal action <b>without providing notice to the employer's known counsel of record</b>. This substitution of parties was NOT sent to the Supreme Court of Appeals where a Petition in Anna Johnson's name was pending.</p> <p>Included with this notice were two letters (dated 8/22/01 and 7/12/02) from physicians certifying appellant's (adult dependent son) need for guardianship as of the dates of the reports. There is no documentation included to establish dependency any earlier than 2001.</p> |

|                         |   |   |
|-------------------------|---|---|
| <p>October 30, 2002</p> | <p>Workers' Compensation Division issues standard pay order in accord with its earlier acknowledgement of the Appeal Board's granting of dependent's benefits.<br/>(Appellee's Appendix No. 8.)</p> | <p>This is not a protestable order. It simply provides the basis for the employer's payment. The order covers the period from 12/14/89 through 11/30/02 for a total of \$277,060.06. The amount from 12/14/89 through 4/14/00 reflects dependent's benefits <b>Anna Johnson</b> would have received had the award been granted while she was alive.</p> <p>Employer's counsel (as is customary) is not included on the pay order since this is merely a pay order effectuating the Appeal Board's ruling.</p> |
| <p>July 1, 2004</p>     | <p>Self Administration for Self-Insured Employers becomes effective.</p>  | <p>Until this time, the Workers' Compensation Division issued pay orders to simply direct 3<sup>rd</sup> Party Administrators to make payments of awards. (non-protestable)</p>   |
| <p>March 14, 2006</p>   | <p>Employer ceases paying Anna's dependent's benefits which were being paid to her son.<br/>(Appellee's Appendix No. 9.)</p>  | <p>The wrongfully paid benefits (she had died 6 years earlier) were discovered as part of a process of claims reviews being conducted to adjust to self-administration.<br/>(Petitioner's Index No. 7.)</p>   |

By decision dated February 8, 2008, Judge Haslebacher affirmed the claim administrator's March 14, 2006, order, finding that the only order regarding dependent's benefits was for Anna Johnson based on the application filed in 1990. (Petitioner's Index No. 6.) There was no other order related to dependent's benefits and, therefore, this is not a matter of a corrected order, rather a matter of the employer abiding by the terms of the original application and related court orders. Appellant appealed this decision.

On September 17, 2008, the Board of Review adopted Judge Haslebacher's findings and affirmed his decision. (Petitioner's Index No. 5.) Appellant filed a petition for appeal, which was granted by this Court on January 5, 2010. (Appellee's Appendix No. 10.)

### III. PROPOSITIONS WHICH REFUTE APPELLEE'S ALLEGED ERRORS

1. In case an occupational pneumoconiosis causes death, the benefits shall be paid to dependents for as long as their dependency continues in the same amount that was paid or would have been paid the deceased employee for total disability had he or she lived, and "dependents" includes a dependent widow or widower until death or remarriage of the widow or widower, and an invalid child, to continue as long as the child remains an invalid. Further, all such persons are jointly entitled to the amount of benefits payable as a result of employee's death. W. Va. Code § 23-4-10 (1989).

2. Applications for dependent's benefits must be filed within two years of the employee's death, and likewise, all proofs of dependency must be filed within two years of the employee's death. W. Va. Code § 23-4-15 (1989).

3. *Martin v. Workers Compensation Div.*, 557 S.E.2d 324, 210 W. Va. 270 (2001).

4. The Board of Review shall reverse, vacate or modify the order or decision of an administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are: (i) in violation of statutory provisions; or (ii) in excess of the statutory authority or jurisdiction of the administrative law judge; or (iii) made upon unlawful procedures; or

(iv) affected by other error of law; or (v) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (vi) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. W. Va. Code § 23-5-12(b).

5. If the decision of the Board represents an affirmation of a prior ruling by both the Commission and the Office of Judges that was entered on the same issue in the same claim, the decision of the Board may be reversed or modified by the West Virginia Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo reweighing of the evidentiary record. W. Va. Code § 23-5-15(c).

6. The West Virginia Supreme Court of Appeals will not reverse a finding of fact made by the Workers' Compensation Board of Review unless it appears from the proof upon which the Board acted that the finding is plainly wrong. *Conley v. Workers' Compensation Division*, Syll. Pt. 1, 199 W. Va. 196, 483 S.E.2d 542 (1997).

7. If the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact. *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402, 412 (1994).

#### **IV. POINTS AND AUTHORITIES RELIED UPON**

*Board of Education of the County of Mercer v. Wirt*,  
192 W. Va. 568, 453 S.E.2d 402, 412 (1994)

*Conley v. Workers' Compensation Division*, Syll. Pt. 1,  
199 W. Va. 196, 483 S.E.2d 542, 549 (1997)

*Martin v. Workers Compensation Div.*,  
557 S.E.2d 324, 210 W.Va. 270 (2001)

W. Va. Code § 23-4-10

W. Va. Code § 23-4-15

W. Va. Code § 23-5-12(b)

W. Va. Code § 23-5-15(c)

## V. ARGUMENT

This appeal should be denied because appellant introduced insufficient evidence and unsustainable argument to support his protest to the Claims Administrator's order which ceased payment of dependent's benefits upon discovery that the dependent for whom the benefits were awarded had passed away, and the Division had illegally shifted payments to the appellant. The record fully supports a finding that Judge Haslebacher properly affirmed the Claims Administrator's order. Appellant fails to show that the Board of Review made a material misstatement or mischaracterization of particular components of the evidentiary record. Appellant did not show that the Board of Review's Order is in clear violation of constitutional or statutory provisions or is clearly the result of erroneous conclusions of law. For these reasons, the Appellee requests that this appeal be denied.

If the decision of the Board represents an affirmation of a prior ruling by both the Commission and the Office of Judges that was entered on the same issue in the same claim, the decision of the Board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory

provisions, is clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. W. Va. Code § 23-5-15(c). Appellee has not accurately or credibly identified any constitutional or statutory violation or erroneous conclusion of law. Likewise, the Appellant has failed to demonstrate a "material misstatement or mischaracterization of particular components of the evidentiary record."

In this case, the Board reviewed the Administrative Law Judge's Decision under the standards set forth at W. Va. Code § 23-5-12(b), which provides, in pertinent part, that the Board may reverse the decision of the administrative law judge only "if the substantial rights of [a party] have been prejudiced" because the administrative law judge's decision was unlawfully made, the decision exceeded the jurisdiction of the administrative law judge or the decision was "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record." In applying the "clearly wrong" standard, this Court has said, "if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact." *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402, 412 (1994). This Court has also emphasized that "[t]he Legislature has determined by its enactment of W. Va. Code § 23-5-12(b) that the Board of Review, in essence, must accord deference to decisions by the [Office of Judges]." *Conley v. Workers' Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542, 549 (1997). Thus, this Court and the

Legislature have both made it clear that the decision of the administrative law judge must be “clearly wrong” before the Board of Review can reverse its decision.

The employer’s self-administering Third Party Administrator instituted termination of Anna Johnson’s dependent’s benefits upon discovering that Anna Johnson had died and her dependent’s benefits had been paid to appellant without a proper claim for dependent’s benefits having been made by or on behalf of appellant. The employer will concede that the benefits which had accrued and were owed to Anna Johnson for the period of December 14, 1989 (the day after Louis Johnson’s death) through and including April 14, 2000 (the date of Anna’s death), may rightfully have gone to appellant (the adult dependent son) as a type of derivative benefit addressed by *Martin v. Workers Compensation Div.*, 2001, 557 S.E.2d 324, 210 W.Va. 270 (Although this case and its progeny dealt with post mortem disability benefits, there is an arguable logical basis for applying those principles to the benefits Anna was ultimately ruled to be entitled to.).

According to W. Va. Code § 23-4-10 (1989), in case an occupational pneumoconiosis causes death, the benefits shall be paid to dependents for as long as their dependency continues in the same amount that was paid or would have been paid the deceased employee for total disability had he or she lived, and “dependents” includes a dependent widow or widower until death or remarriage of the widow or widower, and an invalid child, to continue as long as the child remains an invalid. Further, all such persons are jointly entitled to the amount of benefits payable as a result of employee's death. Also relevant is W. Va. Code § 23-4-15 (1989) which states

that applications for dependent's benefits must be filed within two years<sup>1</sup> of the employee's death, and likewise, that **all proofs of dependency must be filed within two years of the employee's death.**

Appellant never applied for and was never granted dependent's benefits in this matter. In July of 1990 when Anna Johnson applied for dependent's benefits, she completed the application, and indicated that there were no dependent children to be included in this claim. This was not simply an oversight: she did not leave that space blank; she actually wrote in the word "None" in response to the inquiry about dependent children. Appellant, in fact, never filed an application for dependent's benefits. A non-lawyer, Mr. Wilbur Yahnke, simply mailed a letter to the Workers' Compensation Division requesting that appellant be substituted for Anna once the Appeal Board reversed the claim denial in 2002 – almost twelve years after the death of Louis Johnson. The "notice of substitution" did not go to known counsel of record for the employer, and, therefore, did not provide for an opportunity at that time to assess the legal appropriateness of such an action.

Appellant's counsel argues that appellant had been receiving dependent's benefits since 2002 by virtue of the fact that he is an invalid and was dependent upon his father, Louis (the employee) at the time of the employee's death. This is not a true statement. Appellant began receiving dependent's benefits by virtue of the fact that counsel's office sent a substitution of parties to the Workers' Compensation Division instructing them to issue Anna's benefits – without notice to known counsel of record

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<sup>1</sup> The employer's March 14, 2006 order cites the current law which now has a six month statute of limitations; however, given the failure to provide "notice" of dependency for at least 12 years, the difference has no impact on the employer's position or legal arguments.

and without advising this Court or the Board of Review of the death of Anna despite the pendency of an appeal in her name. Amazingly, the documentation used to support this “substitution of parties” demonstrated only that appellant was incapacitated as of August 22, 2001, at the earliest – more than a year **after** Anna’s death and more than eleven years after the employee’s death. Technically, this did not even support a finding of dependency on Anna and was most likely generated to allow his sister to take over his affairs. However, this was sent to the Division without providing copies to known counsel of record for the employer, and as a result, the Division issued a pay order for appellant. These pay “orders” are administrative devices to prompt payments from employers or their administrators. The employer was expecting that such a pay order would be issued because of the Appeal Board decision granting **Anna** dependent’s benefits. Before self-administration was effected, this was the norm. A pay order is not protestable, nor would the employer have had any reason to question the order in light of the Appeal Board’s ruling and Division’s acknowledgement thereof.

Appellant’s counsel further argues that all parties were notified by the July 22, 2002, correspondence [the “Notification of Substitutional Parties”] that appellant was a surviving dependent child. The problem with this assertion is two-fold: (1) the letter only indicates that Foote Mineral was copied on the letter, **not known counsel of record** – recall that known counsel of record filed a Petition for Review just a week earlier, and until the July 22<sup>nd</sup> letter went out, all pleadings, evidence, and other filings made by appellant’s lawyer had been copied to employer’s counsel – this “substitution” was not; and (2) none of the supporting documents with the “notification” actually proved that appellant was a dependent of either Anna or the employee. Additionally,

when Anna's counsel filed an appeal of the ALJ decision *one year after she had died*, a notice of death and substitution of parties should have been filed with the Board of Review. Even if counsel was not aware of Anna's death at that time<sup>2</sup>, counsel was aware of her death at the time of the employer's Petition before the Supreme Court of Appeals and should have filed the notice with the Court and employer's counsel. Appellant appears to blame the employer for continuing to pay Anna's dependent's benefits to appellant "without objection" but fails to note that the employer was effectively deprived of the opportunity to object: (1) the "substitution" was effected without notice to the employer's counsel; and (2) pay orders are simply administrative means of prompting an employer to pay where an issue has already been protested and litigated to a final decision – they are not protestable decisions. The mere concept of such a protest would effectively create a perpetual litigation cycle.

Appellant's actions, through non-lawyer representatives, effectively deprived the employer of its due process and the employer never had a meaningful opportunity to object to the substitution. For appellant to have been entitled to dependent's benefits in his own right, he, or someone on his behalf, had to file for dependent's benefits with proof of dependency within two years of the employee's death. The employee died in 1989 and the application with proof of dependency had to be filed by 1991. This was never done. Appellant's counsel suggests that the employer is relying on a mere technicality to terminate benefits, but this is not true. If appellant had missed the two year statute by a matter of mere days, weeks, or even months that may be true, but in the case at bar, the first indication of any dependency came twelve

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<sup>2</sup> Though it would be safe to assume that counsel would have contacted his client (Anna) to advise of the ALJ decision and obtain permission to file an appeal.

years later, and the proof only demonstrated dependency as of 2001 – a year after Anna's death and eleven years after his father's death. Even more important is that fact that the question about dependent children on Anna's application was not simply overlooked – it was responded to, indicating "none."

In fact, the evidence developed during Appellant's protest of the order terminating benefits suggests that not listing appellant as a dependent on the application for benefits was not a mere oversight on Anna's part but a conscious decision to maximize family benefits.

Appellant's sister (Lois) testified in this claim, and stated that Appellant started receiving Social Security Disability benefits in 1979. (Tr. p. 7). (Appellee's Appendix No. 11.) She also indicated that after her father died, they (she and her mother) went to the Social Security Administration to arrange for appellant to receive survivor's benefits as well. (Tr. pp. 7-8). Additionally, the employer submitted a record from February 1, 1990 (about six weeks after Louis' death) where the Social Security Administration acknowledged the request and indicated that appellant's benefits would be raised as the result of his father's death – the application filed by Anna on appellant's behalf was dated December 18, 1989: four days after Louis' death. (Appellee's Appendix No. 12.) The employer only notes this information to indicate that Anna and Louis were very meticulous in their attention to appellant's welfare. This is also demonstrated in the careful crafting of their wills – which appellant submitted in support of the substitution of parties. The wills were re-drafted about a month after Louis' cancer had recurred, and were drafted to assure that appellant would be taken care of in the event of Anna's and Louis' passing.

Appellant's sister testified that she thought Anna did not list appellant as a dependent on the application for benefits because "she was in a state of mind when [her] father passed" and she probably didn't understand the question. (Tr. p. 12). That assertion is not consistent with the careful planning at the time of Louis' illness and the careful attention to securing Social Security benefits just four days after Louis' death. Anna did not complete the application for workers' compensation benefits until July 1990 – after she had already taken care of the Social Security benefits. Even further, Lois testified that Anna had legal counsel with whom she consulted regarding the dependent's benefits. (Tr. p. 23). Finally, in Louis' own application for Social Security disability benefits, appellant was listed as a dependent. (Appellee's Appendix No. 13.)

There is a logical, rational, and valid explanation for not including appellant as a dependent on the state workers' compensation application for dependent's benefits: to maximize benefits to both Anna and appellant. W. Va. Code § 23-4-10(b)(1) (1989) states that the widow and dependent children will be jointly entitled to the amount of benefits payable. If appellant had been identified as a dependent under the statute, he would be credited with a share of the state workers' compensation benefits, and his federal Social Security benefits could be offset. Anna would always take care of her son, so allowing her to claim sole entitlement to the workers' compensation dependent's benefits eliminated the risk of a reduction in the federal benefits with no risk that appellant would be neglected. She had legal counsel throughout this process – counsel with experience in workers' compensation and social security – and therefore, with knowledge of maximizing benefits. The careful and thorough planning from the time of Louis' death is testament to this. So, to characterize

all of this as a technicality or an oversight is simply not consistent with or supported by the complete record and evidence of such careful planning.

To suggest, as appellant's counsel does in closing, that the administrator's action was improper is absurd under the circumstances – particularly in light of the fact that for some reason, the “Notification of Substitution of Parties” was the *only* submission which was not copied to employer's counsel of record. There is absolutely no statutory authority for the actions of appellant's counsel or the actions of the Division in 2002 – in fact, the Division's act (issuing pay orders for payment to a payee who was never granted an award) was ultra vires<sup>3</sup>, and immediately upon discovery of these irregularities, the claims administrator took steps to rectify.

Mr. Yahnke's substitution of parties sent to the Division without copying known counsel of record was an effective means to side step the two-year statute of limitations and prevented the employer's counsel from protecting the employer's interests. Appellant never filed an application for benefits, at all, let alone within the two year limit. The employer could have even made a claim that the benefits paid to appellant for the period from December 14, 1989, through April 14, 2000, were inappropriate since *Martin v. Workers Compensation Div.*, 210 W.Va. 270 (2001) (as cited by Mr. Yahnke in his Notice of Substitution of Parties) is not applicable in this claim: *Martin* involved a dependent's derivative right to disability benefits accrued and owing to an employee at the time of death, even where the employee dies before a reversal of an unfavorable decision. The employer is willing to concede that a colorable

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<sup>3</sup> Claims for dependency and proofs of dependency were already ruled upon and determined with finality without appeal; the statute of limitations on the issue had passed twelve years earlier, and the Division was without authority or jurisdiction to act.

argument by analogy could be made for appellant's entitlement to those benefits. There is no argument, though, for entitlement to the benefits paid from April 14, 2000 (the day of Anna's death), until the benefits were terminated in 2006, but the employer, out of a sense of fundamental fairness, has opted not to pursue repayment of those benefits.

Finally, appellant's counsel argues that the employer failed to properly pursue a request for modification under W. Va. Code §23-5-4. In these circumstances, that provision is inapplicable – the employer ceased paying dependents benefits awarded to Anna Johnson because she had died. As Judge Haslebacher noted, the issue of dependency had been determined, and Anna was the only dependent who had applied for benefits. It was determined with finality that Anna was the only dependent. The employer was not seeking a modification of that order. Its obligations under that determination had ceased when Anna died. The termination was effected because Anna Johnson, the dependent for whom benefits were granted, died in 2000. That information was withheld from counsel of record for the employer and the employer wrongfully paid dependent's benefits to a recipient who never applied for such benefits. Rather, those payments were obtained when a non-lawyer filed legal papers to cause an administrative agency to perform an ultra vires act.

Appellant's appeal should be denied because there is insufficient evidence and unsustainable argument to support his protest to the Claims Administrator's Order which ceased payment of dependent's benefits. The record and the law fully support that decision and, thus, Judge Haslebacher properly affirmed the Claims Administrator's order. Appellant fails to show in his brief that the Board of Review made a material misstatement or mischaracterization of particular components of the evidentiary record.

Appellant did not show that the Board of Review's Order is in clear violation of constitutional or statutory provisions or is clearly the result of erroneous conclusions of law. For these reasons, the Board of Review's Order affirming Judge Haslebacher's Decision is correct and should be affirmed.

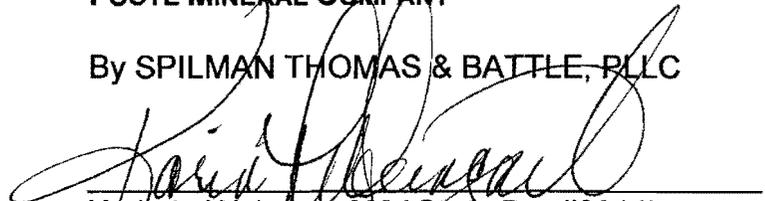
**VI. CONCLUSION**

The Board of Review properly determined that Judge Haslebacher's April 24, 2007, Decision should not be disturbed on appeal. For the foregoing reasons, the Employer urges this Court to affirm the Board of Review's Order dated September 17, 2008.

Respectfully submitted,

**FOOTE MINERAL COMPANY**

By SPILMAN THOMAS & BATTLE, PLLC

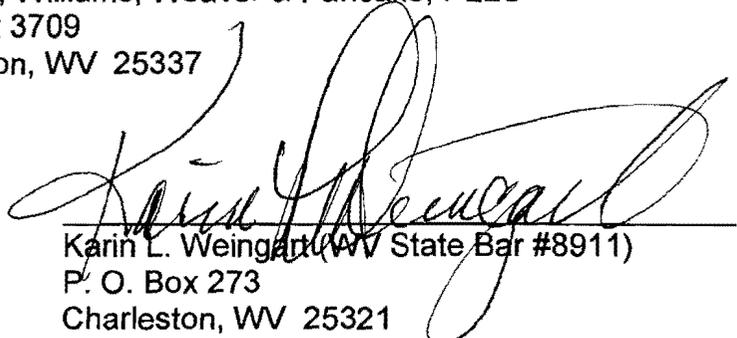


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**CERTIFICATE OF SERVICE**

I, Karin L. Weingart, counsel for Foote Mineral Company, do hereby certify that I have served a true copy of the foregoing "**BRIEF ON BEHALF OF EMPLOYER-APPELLEE FOOTE MINERAL COMPANY**" and "**APPENDIX**" upon the following, by placing the same in the United States mail, first class, postage prepaid, and addressed as follows on March 5, 2010:

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