IN THE

Supreme Court of Virginia

RECORD NO. 110349

ALISSA M. THORPE, BENEFICIARY OF
MATTHEW ALSON THORPE (DECEASED),

Appellant,

v.

JOHN CLARY, t/a JMC WELDING,
TED BOWLING CONSTRUCTION, and
VIRGINIA SURETY COMPANY,

Appellees.

OPENING BRIEF OF APPELLANT

Stephen T. Harper, Esq. (VSB No. 38466)
REINHARDT & HARPER, PLC
1809 Staples Mill Road, Suite 300
Richmond, Virginia 23230
(804) 355-7900
(804) 355-9297 (facsimile)
harper@vainjurylaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

OPENING BRIEF OF APPELLANT.....1

STATEMENT OF SIGNIFICANT PRECEDENTIAL VALUE.....2

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS.....3

ASSIGNMENT OF ERROR.....4

1. The Court of Appeals erred when it affirmed the Virginia Workers' Compensation Commission decision that the claimant's average weekly wage was only $48.08 per week. (JA Pg. 158, 167, 179, 204).

QUESTION PRESENTED.....4

1. Whether the Court of Appeals erred in holding that the claimant's average weekly wage was only $48.08 per week. (See assignment of error No. 1).

STATEMENT OF FACTS.....4

STANDARD OF REVIEW.....7

ARGUMENT.....10

CONCLUSION……20

CERTIFICATE OF
SERVICE……22

TABLE OF AUTHORITIES

CASES PAGE

Baggett Transp. Co. v. Dillion,
219 Va. 633, 637, 248 S.E.2d 819, 822 (1978).....10

Berglund Chevrolet, Inc. v. Landrum,
43 Va. App. 742, 749-50, 601 S.E.2d 693, 697 (2004).....9

Cinnamon v. International Bus. Mach Corp.,
238 Va. 471, 474, 384 S.E.2d 618, 619 (1989).....8

Clinchfield Coal Co. v. Reed,
40 Va. App. 69, 72, 577 S.E.2d 538, 540(2003).....8

Conyers v. Martial Arts World of Richmond, Inc.,
273 Va. 96, 104, 639 S.E.2d 174, 178 (2007).....9

Ellen Kaye, Inc. v. Wigglesworth,
34 Va. App. 390, 394, 542 S.E.2d 30, 32 (2001).....7

Hood v. Comm.,
269 Va. 176, 608 S.E.2d 913 (2005).....9

K & G Abatement Co. v. Keil,
38 Va. App. 744, 756, 568 S.E.2d 416, 422 (2002).....10

Meeks v. Commonwealth,
274 Va. 798, 802, 651 S.E.2d 637, 639 (2007).....9

Meredith Constr. Co. v. Holcombe,
21 Va. App. 537, 539, 466 S.E.2d 108, 109 (1996).....7

Oraee v. Breeding,
270 Va. 488, 498, 621 S.E.2d 48, 52-53 (2005).....9

Pilot Freight Carriers, Inc. v. Reeves,
1 Va. App. 435, 441, 339 S.E.2d 570, 573 (1986).....7

Spicer v. Va. Birth-Related Neurological Injury Comp. Program,
48 Va. App. 69, 72, 577 S.E.2d 538, 540 (2003).....8

Thorpe v. Clary, et al.
57 Va. App__1010102,__S.E.2d__(2011) 11, 13, 14, 15

Uninsured Employer Fund v. Thrush,
255 Va. 14, 496 S.E.2d 57
(1998).....7, 9, 10, 17, 18, 19, 20

STATUTES

Va. Code §17.1 - 410.....2

Va. Code §65.2- 101 ....7, 9, 11, 15, 17, 20

Va. Code §65.2-101(b) 12, 13

Va. Code §65.2 – 706(A).....9

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

ALISSA M. THORPE, BENEFICIARY OF MATTHEW ALSON THORPE, (Deceased), Appellant,	)
v.	)
JOHN CLARY, t/a JMC WELDING Employer,	)Record No.: 110349
And	)
TED BOWLING CONSTRUCTION, Employer,	)
VIRGINIA SURETY COMPANY, Insurer,	)
Appellee's.	)

BRIEF OF APPELLANT

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINIA

COMES NOW ALISSA M. THORPE, APPELLANT, BENEFICARY OF MATTHEW ALSON THORPE (DECEASED), (hereinafter collectively referred to as "Thorpe"), by counsel, and submits this Brief of Appellant in

support of her appeal of the Court of Appeal's Opinion dated February 16, 2011, denying Thorpe's Petition for Rehearing. It is respectfully submitted that the Court of Appeals erred when it affirmed the decision of the Virginia Workers' Compensation Commission holding that the average weekly wage was $48.08 per week.

STATEMENT OF SIGNIFICANT PRECEDENTIAL VALUE

Pursuant to §17.1 – 410, Thorpe suggests that this case involves matters of significant precedential value that require review by the Supreme Court of Virginia because the Opinion of the Court of Appeals of Virginia is directly opposed to the Opinion of the Supreme Court of Virginia in Uninsured Employer Fund v. Thrush, 255 Va. 14, 496 S.E.2d 57 (1998). Under the rationale of Uninsured Employer Fund v. Thrush, 255 Va. 14, 496 S.E.2d 57 (1998), Thorpe contends that the Court of Appeals should have held that the average weekly wage was $2,500.00 per week. Accordingly, Thorpe respectfully request this Court reverse the Opinion of the Court of Appeals. We would request this Court allow Thorpe to present Oral Argument on this issue and enter an Order holding that the average weekly wage should be $2,500.00 per week.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This matter came before the Virginia Workers' Compensation Commission pursuant to the claim for benefits filed by the decedent's sole statutory beneficiary, Alissa M. Thorpe. Alissa M. Thorpe sought Death Benefits pursuant to the Virginia Workers' Compensation Act alleging that the claimant had been killed in course and scope of his employment with John Clary t/a JMC Welding, (hereafter referred to as "the employer"). The employer did not appear at the original hearing before Deputy Commissioner Tabb and the statutory employer, Ted Bowling Construction, (hereinafter referred to as "statutory employer"), appeared by and through their Counsel. The evidence at the hearing was the claimant was to receive $2,500 for a week's worth of work. After the hearing Deputy Commissioner Tabb ruled that Thorpe's death did occur within the course and scope of his employment and that the statutory beneficiary Alissa Thorpe was entitled to death benefits in the amount of 500 weeks. Deputy Commissioner Tabb ruled that the average weekly wage of Thorpe in his employment at the time of his death was $48.08 per week. Subsequently, an Appeal was noted to the Full Commission on the issue of the alleged improper determination of average weekly wage by Deputy Commissioner Tabb. After reviewing the

written Brief's, the Full Commission affirmed Deputy Commissioner Tabb's determination and affirmed on the basis that the average weekly wage determination of $48.08 per week was correct. Thorpe appealed to the Court of Appeals who affirmed the Virginia Workers' Compensation Commission on February 1, 2011. Thorpe filed a Petition for Rehearing En Banc with the Court of Appeals which was denied on February 16, 2011. Subsequently, Thorpe noted this appeal.

ASSIGNMENT OF ERROR

The Court of Appeals erred when it affirmed the Virginia Workers' Compensation Commission decision that the claimant's average weekly wage was only $48.08 per week. (JA. Pg 158, 167, 179, 204).

QUESTION PRESENTED

Whether the Court of Appeals erred when it affirmed the Virginia Workers' Compensation Commission in holding that the claimant's average weekly wage was only $48.08 per week. (See assignment of error No. 1).

STATEMENT OF FACTS

Death benefits were sought for sole statutory beneficiary Alissa Thorpe, the decedent's wife. The statutory employer, through counsel stipulated that Alissa Thorpe was the statutory beneficiary subject to other

defenses raised by the statutory employer at the hearing. At the hearing, evidence was presented that prior to the accident in question Thorpe had a residential ornamental iron railing business. (JA pg. 48). Eric McMahon was the sole witness that testified at the hearing. Eric McMahon worked with Thorpe in his ornamental iron business. (JA pg. 48). He had worked for Thorpe for approximately 8-9 months prior to the accident in question. (JA pg. 47). On May of 2006, the employer came to the claimant's storage facility with a proposition that he wanted to employ Thorpe and Eric McMahon to complete the roofing of an incomplete metal building he was constructing. (JA pg. 48). He offered them $5,000 to complete the metal building in one week and the money would be divided 50/50 amongst them. (JA pg. 50).

There was no available evidence of a comparable employee of the employer as the only other employee was a gentleman known as "Jesse." Jesse along with the employer had essentially disappeared and no one was able to locate them to be witnesses. (JA 71).

It was undisputed that the ornamental iron work was dissimilar employment to the construction of the metal building and therefore any wages by Thorpe earned in his dissimilar employment as an ornamental

iron railing maker cannot be considered in determining his average weekly wage for the job that he performed for the employer. The employer never appeared at the hearing or at a deposition so the only evidence for the Commission was the testimony of Eric McMahon that the job was to complete the building in one week for a total of $5,000 to be divided 50/50 between Thorpe and Eric McMahon. (JA pg. 50)

Deputy Commissioner Tabb asked if the parties wished to have an additional hearing for additional evidence on the issue of average weekly wage. Both sides declined the offer and did not submit additional evidence. Deputy Commissioner Tabb determined that the average weekly wage for Thorpe was $48.08 per week. (JA pg. 158). He simply took the $2,500 earnings and divided that by 52 weeks to come up with that number.

Thereafter Thorpe timely filed an Appeal to the Court of Appeals and the matter was heard by a panel. (JA 175). In Opinion dated February 1, 2011, the Court of Appeals affirmed the decision of Full Commission, but adopted an entirely new rationale, holding that Thorpe failed to prove by proponderance of the evidence that Thorpe's average weekly wage should have been higher than the $48.08 per week that the Full Commission determined. (JA 199). Thorpe challenged this new rational in her Petition

for a Rehearing En Banc which was denied. (JA 203, 213). This Court granted Thorpe's Petition for Appeal and Thorpe request this Court to reverse the below decision and hold that Thorpe's average weekly wage was $2,500 per week. (JA 222, 231, 251, 265).

STANDARD OF REVIEW

The issue before this Court concerns whether the Court of Appeals and Virginia Workers' Compensation Commission incorrectly applied the statute (§65.2 – 101) to the facts in determining average weekly wage. The decision below and underlying rationale cannot be reconciled with the decision and rationale of *Uninsured Employer Fund v. Thrush, 255 Va. 14, 496 S.E.2d 57(1998),* given the factual parallels of the two cases.

"The commission is guided by statute in determining average weekly wage." *Ellen Kaye, Inc. v. Wigglesworth*, 34 Va. App. 390, 394, 542 S.E.2d 30, 32 (2001). "By which the commission may base its finding of average weekly wage." *Meredith Constr. Co. v. Holcombe*, 21 Va. App. 537, 539, 466 S.E.2d 108, 109 (1996). Unless the commission misconstrues the statute, the determination of an employee's "average weekly wage" constitutes a "question of fact" deserving of deferential appellate review. *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435, 441, 339 S.E.2d 570, 573 (1986).

Here, the evidence presented on the issue of the average weekly wage of Thorpe was undisputed and unrefuted. The Workers' Compensation Commission and the Court of Appeals misconstrued the statute in calculating the average weekly wage. Where the facts relevant to the resolution are not in dispute, this Court must determine whether the lower Courts correctly applied the law to the facts. *Cinnamon v. International Bus. Mach. Corp., 238 Va. 471, 474, 384 S.E.2d 618, 619 (1989).*

This court review questions of law *de novo* and independently determines the governing legal principles without deference to the decision under review. *Spicer v. Va. Birth-Related Neurological Injury Comp. Program*, 48 Va. App. 613, 618, 63 S.E.2d 732, 734 (2006) (reaffirming principle of de novo review of "pure questions of law"); *Clinchfield Coal Co. v. Reed*, 40 Va. App. 69, 72, 577 S.E.2d 538, 540 (2003) (stating we "do not consider ourselves 'bound by the legal determinations made by the commission.'"

Thorpe suggests that the evidence or average weekly wage was unrefuted. Both the Court of Appeals and the Workers' Compensation Commission improperly applied the facts to the law and misinterpreted the statute in question. As stated above, an issue of statutory interpretation is

a pure question of law which is reviewed *de novo*. Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007).

"The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." Meeks v. Commonwealth, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (citation and internal quotation marks omitted). The Court has a duty "whenever possible, to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal." Oraee v. Breeding, 270 Va. 488, 498, 621 S.E.2d 48, 52-53 (2005) (citations and internal quotation marks omitted). No proper interpretation of §65.2 – 101 and the definition of average weekly wage can result in an average weekly wage of $48.08 in light of the opinion in Thrush.

The Court of Appeals viewed this matter, improperly, as a question of fact. Questions of fact are reviewed under the highest level of appellate deference. A clearly erroneous standard of review is applied to a trial courts finding of fact, Hood v. Comm., 269 Va. 176, 608 S.E.2d 913 (2005). By statute, this court treats "the commission's fact-finding as conclusive and binding" if it rests on a sufficient threshold of evidence. Berglund Chevrolet, Inc. v. Landrum, 43 Va. App. 742, 749-50, 601 S.E.2d. 693, 697 (204) (quoting Code §65.2 – 706(A)). "This appellant deference

is not a mere legal custom, subject to a flexible application, but a statutory command," id. that binds the court so long as a "rational mind upon consideration of all the circumstances" could come to the conclusion the commission adopted, *K & G Abatement Co. v. Keil*, 38 Va. App. 744, 756, 568 S.E.2d 416, 422 (2002) (quoting *Baggett Transp. Co. v. Dillion*, 219 Va. 633, 637, 248 S.E.2d 819, 822 (1978)).

ARGUMENT

The Court of Appeals decision here makes the same mistake that the Full Commission made below, ignoring the facts and rationale of *Uninsured Employer Fund v. Thrush, 255 Va. 14, 496 S.E.2d 57 (1998).* Thrush involves a similar factual scenario, the difference in Thrush was the claimant there was hired for one day and was going to make $6 an hour for seven hours for a total $42 per week. In that situation the Supreme Court of Virginia determined that $42 was the correct average weekly wage. Here, Thorpe was hired to work a week, was going to make $2,500.00 and yet the decisions below result in a determination that the claimant's widow here receives only $48 per week, a mere $6 per week more than the claimant in Thrush. Clearly the decision here cannot be reconciled with the Opinion in Thrush. Therefore, this matter must be taken up by this Court to correct the injustice that has occurred to

Thorpe's family.

The Court of Appeals decision seems to be hanging on the fact that they viewed the $2,500 average weekly wage proffered by Thorpe as an "aberrational weekly wage figure," *Thorpe v. Clary, et al., 57 Va. App__1010102,__S.E.2d__(2011)*, an amount they viewed as an unfair and unjust approximation of future lost wages. The Court of Appeals interpreted Code §65.2 - 101 as a tiered formula for the determination of average weekly wage. A closer analysis of Code §65.2 – 101 needs to be undertaken because the Court of Appeals has reached a determination which is inconsistent with the purposes of the Act. Code §65.2 – 101 defines average weekly wage as

> "the earnings of the injured employee in the employment in which he was working at the time of injury during the period of 52 weeks immediately preceding the day of the injury...when the employment prior to the injury extended over a period less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed provided that results fair and just to both parties will be thereby obtained...when, by reason of shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly wage amount which during the 52 weeks previous

> to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community".

Under this method you take the $2,500 earned by Thorpe during the week before the accident and divide it by 1 week and you come up with an average weekly wage of $2,500 per week.

Here is where the Full Commission and the Court of Appeals make their mistake. Part A provides that the $2,500 can be divided by a week to determine average weekly wage. This method "shall be followed". The only qualification is the result must be "fair and just to both parties". There was no evidence or argument by the employer, or the statutory employer, before the Deputy Commissioner or the Full Commission that the method suggested by the claimant was unfair or unjust to the employer/statutory employer. Yet the Court of Appeals skips over this mandate of Part A and skips to Part B. §65.2–101(b), that section provides that

> "when for exceptional reason the foregoing would be unfair to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount in which the injured employee would be earning if not for the injury".

To state that Thorpe would have been earning $48 per week, were it not

for the injury, is an absurdity. The evidence was that he had a successful business he was running on his own. However because it was dissimilar employment, it could not be considered in his average weekly wage. *Thorpe v. Clary, et al., 57 Va. App__1010102,__S.E.2d__(2011).*

Code §65.2 – 101(b) states specifically that "such other method must be used which will approximate the amount that the employee would be earning if not for the injury". There is no rational basis for the Full Commission or the Court of Appeals to state that $48 a week is what Thorpe would be earning but for the injury. The only evidence before the Commission and the Court of Appeals was that Thorpe was undertaking a job where he was to earn $2,500 per week. The Court of Appeals states that "the evidence thus falls short of satisfying the first tier Code §65.2 – 101, which takes the employee's earnings over the previous year and divides it by 52 weeks". *Thorpe v. Clary, et al. 57 Va. App__1010102,__S.E.2d__(2011).* Again, this is incorrect, this is exactly what Thorpe established. He established the earnings he had in the 52 weeks before the accident with this defendant employer. When the Court of Appeals reached this conclusion, they provided no support for it.

The Court of Appeals then concludes that "the claimant also failed to show the aberrational weekly wage figure would be a fair and just

approximation of future loss". *Thorpe v. Clary, et al. 57 Va. App__1010102,__S.E.2d__(2011).* On what basis did the Court of Appeals decide that this was an "aberrational weekly wage figure"? No evidence on wages was provided by the employer or the statutory employer. With no evidence that this figure was "aberrational", the Court of Appeals has no basis for this conclusion. In fact, the Court of Appeals could easily speculate that this figure was too low. Thorpe's regular business could have provided him with $10,000 of income per week, we don't know because his regular business was dissimilar employment and therefore irrelevant. The statutory employer had the opportunity to present evidence of comparable employee's in the community or evidence to show the result sought by Thorpe was unjust and unfair. They choose/failed to present any such evidence.

In addition the Court of Appeals seems to forget the fact that even a determination of an average weekly wage of $2,500 per week does not result in a death benefit of $2,500 per week to Thorpe's beneficiaries. In fact, it does not even result in two-thirds of that as a death benefit, because there is a statutory cap on the maximum amount of benefits. The weekly maximum benefit was $773 per week at the time of the accident,

meaning even a determination of a $2,500 per week average weekly wage would only result in a death benefit of $773 per week. The Court of Appeals appears to skip over at this point. The Court of Appeals seems hung up on the fact that the claimant didn't present evidence of the average weekly wage during the 52 weeks prior to the injury being earned by "person of the same grade and character employed in the same class of employment in the same locality or community". *Thorpe v. Clary, et al. 57 Va. App__1010102,__S.E.2d__ (2011).* Before such evidence is relevant the Respondent must show the $2,500.00 a week would be unfair and unjust. Without such a showing, Code §65.2 – 101 mandates the calculation suggested by this claimant "shall be followed". Thorpe would suggest such evidence, if relevant, could/should have been presented by the employer/statutory employer to show the wage proffered by Thorpe was unjust. For whatever reason, they never presented such evidence and never argued the average weekly wage of $2,500 would have been unjust.

The Court of Appeals also ignores the fact that even the Commission conceded it was "one week's high pay with the unusual hiring circumstances surrounding it. *Thorpe v. Clary, et al. 57 Va. App__1010102,__S.E.2d__(2011).* The employer had a deadline to meet, the job was dangerous and the wage reflected both of those factors. The

Court of Appeals seems hung up on the fact that they felt Thorpe needed to present more evidence of average weekly wage. Thorpe would suggest that evidence of people employed in the same grade and character in the same class of employment in the same locality was presented in the form of the wages Eric McMahon earned. It was a dangerous form of work, as evidenced by the fact that Thorpe was killed during this matter. In addition, there was a quick deadline so the pay was higher. For the Court of Appeals to suggest that it was possible to find person's of the same grade and character in the same class of employment in the same locality and community, is purely speculative. This was a very unusual and dangerous job. The only evidence of what people made in the same class of employment was presented by the testimony of Eric McMahon regarding what he and Thorpe were to be paid. If the employer wanted to dispute that this evidence of $2,500 per week was not a fair and accurate presentation of what was made in this type of work, they could have tried to present "person's of the same grade and character in the same class of employment, in the same locality and community". They did not do that. The Court of Appeals goes out on its own to extrapolate that this is an aberrational weekly wage, a <u>speculative conclusion</u> with <u>no evidence</u> to support it. For direction on how to handle these facts the Virginia Workers'

Compensation Commission, the Court of Appeals, and this Court simply need to look at Thrush. The Commission simply took the $2,500 figure and divided by 52 weeks. However, we know that is improper under the Thrush decision. By ignoring the Supreme Court decision in Thrush, the Full Commission and the Court of Appeals have disregarded the purpose of the Workers' Compensation Act, have disregarded the proper analysis under Code §65.2 – 101, and have failed to calculate an average weekly wage that is not unfair to the employee.

In Thrush, the employer hired the decedent to perform painting work for a total of 7 hours on December 8, 1991, for $6 per hour. While performing the painting work, the claimant fell from a scaffold and died a short while later. His widow later filed a claim for death benefits and the Commission ultimately entered an award for such benefits based upon an average weekly wage of $240 per week. This calculation was based upon a 40-hour work week at $6 per hour, the hourly wage which the claimant was to earn on December 8, the one day he was to work for the employer. The Supreme Court of Virginia reversed the lower decision and held that as the employee was only employed for one day, rather than for a 40-hour week, the Commission's calculation, based upon a 40-hour week, was in error. In addition, the Court specifically held that the claimant's earnings at

his regular job as a pipe layer could not be combined with his earnings as a painter, noting that the statute specifically provided that the earnings must be from the employment in which the employee was working at the time of injury. The Court concluded that, while the Act permitted several permissible methods of computing the average weekly wage, none supported the Commission's calculation since the only evidence of earnings was the $42 to be paid on the day of injury. The Court accordingly found that $42 was the proper average weekly wage." (JA pg. 161).

Clearly, Uninsured Employer's Fund v. Thrush parallels many of the facts found in this matter. In Thrush, he was employed for a specific limited time period and was to be paid a specific limited amount for that time period (to wit he was to work for one day for seven hours at $6 per hour earning a total of $42.) The Supreme Court reversed the Commission's decision holding that you could not extrapolate that day's worth of work to a 40 hour work week. Instead, since the only evidence of his earnings was the $42 be paid on that day, the Court found that $42 was the proper average weekly wage. What is important to know about the Thrush decision, is the Court did not take the $42 earnings in that one week of work and divide it by 52 to determine the average weekly wage of

Thrush. Yet, that is exactly what the Deputy Commissioner, the Full Commission and the Court of Appeals did here.

Just as in Thrush, the claimant here was hired to work a limited time period (one week). Here, Thorpe was to be paid $2,500 for that one short time period of work. In Thrush, he was to be paid $42 during that one short time period at work. Again, in Thrush the Supreme Court did not divide the $42 by 52 weeks to determine the average weekly wage. Here the lower Court divides the $2,500 by 52 weeks to determine the average weekly wage. The end result clearly reflects the error of the Virginia Workers' Compensation Commission's and the Court of Appeals rational here.

In Thrush, where he was only supposed to earn $42 for one day worth of work, he ends up with an average weekly wage of $42 per week. Here, Thorpe was to earn $2,500 in that one weeks of work and the Commission gives him an average weekly wage of $48 per week. The end result is Thorpe's average weekly wage is only $6 dollars more than the average weekly wage of Thrush. Clearly, the decision by the Virginia Workers' Compensation Commission and the Court of Appeals here is not consistent with the decision in Thrush. Thorpe would remind this Court that the employer was a dead beat who failed to carry workers'

compensation insurance and was too big of a coward to ever appear for any deposition or hearing on this matter. He left Thorpe's wife and her daughter without a provider to care for them. Despite these facts, the Court of Appeals seeks to ensure no injustice occurs to the employer, and strains logic to reach an unfair and unjust decision. The result is Thorpe's beneficiary, his wife, receives $48 per week while the beneficiary in the Thrush case received $42 per week. These are two cases whose facts and evidence all parallel each other (in Thrush no evidence was presented of comparable employees in the community), therefore the two cannot be reconciled when the results and facts are looked at carefully. This Court must reverse the Opinion of the Full Commission and the Court of Appeals and hold that the average weekly wage here is $2,500 per week. The decision to divide the $2,500.00 by 52 weeks to reach an average weekly wage of $48.08, completely ignores the mandate of Code §65.2 – 101 and the evidence.

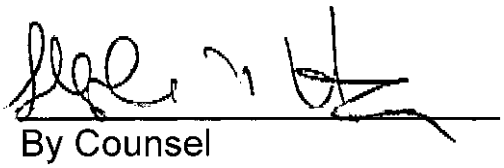
CONCLUSION

This Court is respectively requested to reverse the decisions below and find that the lower tribunals erred and hold that the average weekly wage here was $2,500. In the alternative, this court should reverse and enter a finding of average weekly wage higher than the $48 number

decided below. Thorpe requests an opportunity to appear in person to orally present this case to this Court and ultimately requests a reversal of the findings of the Court of Appeals and the Virginia Workers' Compensation Commission on the average weekly wage issue.

Respectfully submitted,

ALISSA M.THORPE, BENEFICIARY OF
MATTHEW ALSON THORPE,
(Deceased)



By Counsel

Stephen T. Harper, Esquire (VSB No. 38466)
Reinhardt & Harper, PLC
1809 Staples Mill Road
Suite 300
Richmond, VA 23230
(804) 355-7900 Phone
(804) 355-9297 Fax
harper@vainjurylaw.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that this Opening Brief of Appellant consist of an exact word count of 4,451, which is below the 8,750 word count limitation;

I hereby certify that 5:26(e) of the Rules of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Opening Brief of Appellant, and one electronic copy (via email or CD) have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy, have been mailed postage prepaid to counsel for the statutory employer and insurer, Lynn McHale Fitzpatrick, Franklin & Prokopik, 2325 Dulles Corner Boulevard, Suite 1150, Herndon, VA 20171 and John Clary, JMC Welding, 18246 White Pine Drive, Milford, Virginia 22514, phone number unknown and who is unrepresented.

Stephen T. Harper, Esquire