OPINION ENTERED: December 8, 2011

CLAIM NO. 199452584

TINA HELENE DABNEY, WIDOW
(THEARN ALAN DABNEY, DECEASED) PETITIONER

VS. **APPEAL FROM HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE**

LANGLEY & MORGAN
DEBRA CAROL AMBURGEY
SPECIAL FUND
and HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, COWDEN and STIVERS, Members.

STIVERS, Member. Tina Helene Dabney ("Tina"), Widow of Thearn Alan Dabney, Deceased, ("Thearn") appeals from the August 26, 2011, opinion and order dismissing with prejudice her "Motion to Change Beneficiary." No petition for reconsideration was filed. Because of the issue on

appeal, a summary of the procedural background is necessary.

On December 28, 1994, Thearn filed a Form 101 alleging a July 26, 1994, injury while working for Langley & Morgan. Thearn also alleged the Special Fund was partially liable because pre-existing degenerative disc disease was aroused into disabling reality. In an October 31, 1996, opinion and award, ALJ Zaring P. Robertson determined Thearn was 35% occupationally disabled and awarded permanent partial disability ("PPD") benefits. On December 9, 2002, ALJ Lloyd R. Edens approved an "Agreement as to Compensation" in which the parties agreed Thearn was permanently and totally disabled. The settlement agreement indicated, in relevant part, as follows:

> Monetary terms of settlement: **$20,000.00 to be paid by the defendant/employer in a lump sum, followed by $600.00 per month for life (guaranteed for 30 years), beginning on January 5, 2003, to be paid by the Defendant/Employer by annuity; and concurrent/co-payments of $139.53 per week (600.00 ÷ 4.3) for Plaintiff's lifetime to be paid by the Special Fund beginning on January 5, 2003. It is agreed by and between the Parties that the Special Fund shall receive the benefit of the tier down on its weekly benefit payment pursuant to KRS 342.730(4) at the time of Plaintiff's 65th birthday.**

The parties indicated the total settlement amount was $596,000.00. The parties also agreed Thearn was not waiving his right to future medical benefits. The parties further agreed as follows:

FUTURE PERIODIC PAYMENTS:

> **In consideration of the agreement, the Defendant/Employer, by and through its Insurer and/or Reinsurer, agrees to make periodic payments, made according to the schedule as follows.**

(The "Periodic Payments") to be paid to Thearn Alan Dabney ("Payee")	**$600.00 per month to be paid by the Defendant/Employer, beginning January 5, 2003, for life, guaranteed for 30 years.**

RIGHT TO PAYMENTS:

> **Payee acknowledges that the Period Payments cannot be accelerated, deferred, increased or decreased by Payee; nor shall Payee have the power to sell, mortgage, encumber or anticipate the Periodic Payments, or any part thereof, by assignment or otherwise.**

BENEFICIARY:

> **Any payments to be made after the death of Payee pursuant to the terms of the Agreement shall be made to such person or entity as shall be designated in writing by Payee to Insurer and/or Reinsurer. Payee may change any designation at any time, subject to state law, by written notice which is delivered to, received and accepted by the Insurer and/or Reinsurer. The designation must be in a form acceptable to the Insurer and/or**

> **Reinsurer before such payments are made to the designated person(s) or entity.**
>
> **If Thearn Alan Dabney should die prior to the date of the last guaranteed Periodic Payment, the Periodic Payment(s) shall continue to be made to <u>DEBRA CAROL AMBURGEY</u> [hand-written].**

<u>CONSENT TO REINSURANCE</u>:

> **The Insurer will enter into a "Reinsurance Agreement" whereby the obligation to make periodic payments set forth above is transferred to CGU Life Insurance Company of America. Payee agrees to look to CGU Life Insurance Company of America for the payments set forth above. The Insurer shall not be released from its obligation to pay compensation pursuant to the Parties' agreement, but shall only be secondarily liable for same in the event that CGU Life Insurance Company of America fails to make the period payments called for above.**
>
> ***
>
> **The Parties agree that the plaintiff is permanently and totally disabled. The Parties agree that this settlement extinguishes all claims for temporary total disability, permanent partial disability, and permanent total disability. This settlement is inclusive of attorney fees, interest and vocational rehabilitation. The Parties further agree that the above settlement is in lieu of a permanent and total disability award.**

The document was signed by Thearn, his attorney, and the attorneys representing the employer and Special Fund.

On November 20, 2007, ALJ Sheila Lowther approved a subsequent settlement agreement in which Thearn waived his statutory rights to reopen, future medical benefits, additional total temporary disability ("TTD") benefits or income benefits, and vocational rehabilitation for a lump sum payment of $50,000.00. The agreement indicated there were no past medical bills due, with $20,000.00 paid for a buy-out of future medical benefits, $2,000.00 paid for the waiver of vocational rehabilitation, $2,500.00 paid for a waiver of the right to reopen, and $5,500.00 paid for a waiver of the statutory right to additional TTD benefits. The agreement specifically provided the following language:

> This is a settlement of medical benefits, and any remaining issues from a previously settled claim. An [sic] settlement agreement was approved by then ALJ Lloyd Edens on November 22, 2002 approving an annuity settlement. That settlement, and the proceeds which plaintiff continues to receive from that settlement are not affected by this agreement.

On June 18, 2009, Thearn married Tina. Thearn died on September 4, 2010. On October 20, 2010, Tina filed a Verified Form 111 – Motion to Substitute Party and Continue Benefits. Tina indicated Thearn's cause of death was cardiac arrhythmia and attached a copy of Thearn's death certificate, their marriage certificate, Tina's birth

certificate, the settlement agreement approved by ALJ Edens on December 9, 2002, and the settlement agreement approved by ALJ Sheila Lowther on November 20, 2007. Langley & Morgan filed an objection to Tina's motion.

On November 1, 2010, J. Landon Overfield, Chief Administrative Law Judge ("CALJ Overfield") entered an order substituting Tina as the plaintiff in lieu of the deceased and giving the defendants twenty days in which to show cause "why benefits should not be continued to Tina Dabney." Langley & Morgan filed another response asserting Tina was not entitled to the annuity benefits. Langley & Morgan asserted the benefits due after Thearn's death do not pass pursuant to the Kentucky Workers' Compensation Act but rather by contract. It asserted KRS 342.160, relied upon by Tina, is not applicable, and Thearn had the option of changing his beneficiary before or after his marriage and prior to his death and did not. The Special Fund filed a Stipulation of Entitlement to Continuation of Benefits acknowledging pursuant to KRS 342.730(3), Tina was entitled to $66.75, one half of the "original benefit payment" agreed to be paid by the Special Fund pursuant to the 2002 settlement agreement subject to the provisions of KRS 342.730(4). Based on the Special Fund's stipulation, on January 19, 2011, CALJ Overfield entered an order that Tina

shall receive the benefits to be paid by the Special Fund "payable at the rate of $69.77 per week" from and after September 4, 2010, subject to the provisions of KRS 342.730(4). On January 25, 2011, CALJ Overfield entered an order reopening the claim for "resolution of the issue as to the proper recipient of the remainder of [Thearn's] benefits under the annuity." The order indicated by separate order the matter would be assigned to an ALJ. Thereafter, in an April 19, 2011, order, ALJ Smith, on his own motion, joined Debra Carol Amburgey as a "necessary party in interest."

The June 21, 2011, deposition of Tina and the June 21, 2011, deposition of Thearn's sister, Debra Carol Amburgey ("Debra"), are the only testimony in the record.

Tina testified the parties were married on June 15, 2009, the day before she was to go to prison.[1] Tina acknowledged after she got out of prison in June of 2010, she and Thearn stayed with Debra until he died. She acknowledged Thearn had lived with Debra while she was in prison. Tina introduced the first page of a November 7, 2009, letter she stated was written to her by Thearn. That letter references Thearn's "money thats [sic] left," but

[1] The marriage certificate reflects Tina and Thearn were married on June 18, 2009.

does not mention the benefits due Thearn pursuant to the 2002 settlement agreement. Tina testified Thearn thought Tina, as his wife, would be the beneficiary. Tina stated Thearn wanted to make sure "I'd be took [sic] care of." Tina also stated approximately a week before Thearn died Debra said she "would be took [sic] care of." She stated about a week before Thearn died he called about a change of beneficiary and was told "something about a handwritten thing." Tina assumed the November 7, 2009, letter, introduced as Exhibit 1 to her deposition, was all that was needed. She acknowledged Thearn never requested a change of beneficiary form.

Debra testified she found out she had been named the beneficiary sometime after Thearn named her as beneficiary of the annuity. Debra testified Thearn told her she had always been there for him and helped him and it was the least he could do. Thearn lived with Debra off and on for approximately ten years. Thearn was not married when he named Debra as the beneficiary. Debra stated she told Thearn if he wanted Tina to get the money he needed to change the beneficiary, and Thearn responded he would never change the beneficiary because he knew what Tina would do with the money. Debra denied ever talking to Tina about the money Debra was to receive.

At the June 27, 2011, hearing, the parties' stipulated additional testimony was not necessary since the depositions of Tina and Debra were already in the record. Accordingly, the ALJ took the matter under submission. In the opinion and order, the ALJ first determined "all the purported statements of the decedent are not admissible pursuant to KRE 803." Regarding Tina's entitlement to the remaining benefits to be paid by Langley & Morgan pursuant to the 2002 settlement agreement, after setting forth verbatim KRS 342.160(1) and KRS 342.075, the ALJ concluded as follows:

> The respondent argues that pursuant to KRS 342.075 she is contractually entitled to receive the annuity, and that the dependency issues are not relevant, because the respondent's death did not result from his work. She is the third-party beneficiary of a contract between the decedent and the defendant carrier.
>
> KRS 342.160(1) states that the benefits in case of death shall be paid to one (1) or more dependents of the deceased employee for the benefit of all dependents entitled thereto, as determined by the ALJ. The respondent employer points out that this statute contemplates death benefits, not survivor benefits, and therefore does not apply to this claim. KRS 342.090 also contemplates death benefits, not survivor benefits. The death certificate indicates causes of death unrelated to the work injury.

KRS 342.075(1)(a) states that a surviving spouse shall be presumed wholly dependent upon a decedent if the spouse has not been abandoned by the decedent "at the time of the accident" (Emphasis ours). Para. 3 goes on to say, "No person shall be considered a dependent in any degree unless he is living in the household of the employee at the time of the accident (emphasis ours), or unless such person bears to the employee the relation of…wife…or sister". KRS 342.075(3). This statute, while contemplating dependency, still focuses on determining at the time of the work accident.

The settlement herein established a contract between the decedent and the respondent carrier. The decedent would receive $20,000 followed by $600.00 per month for life, guaranteed for 30 years, to be paid as an annuity, with a tier-down when the decedent reached age 65. Each party has offered hearsay testimony as to what the decedent believed or understood the settlement agreement to say. As stated above, however, the hearsay statements are inadmissible.

The ALJ has only the decedent's actions from which to judge. Plain on the face of the agreement is the procedure for changing beneficiaries. The payee may change beneficiaries at any time, subject to state law, by written notice delivered to, received, and accepted by the carrier. The petitioner testified that the decedent made a phone call. The respondent sister testified that the decedent never requested a change of beneficiary form. No evidence indicates that the [sic] communicated with the carrier in writing.

> During the several years the decedent and petitioner dated prior to marriage, the decedent returned to court and obtained an additional lump sum which did not affect the previous settlement. He interacted with his attorney at that time, but the evidence does not indicate that he made any effort to change the annuity. At the time he married the petitioner, the decedent had been receiving monthly benefits for several years. Still, he executed nothing in writing informing the carrier that he wanted to change beneficiaries.
>
> In construing statutes, generally "presumptions will be indulged in favor of those for whose protection the enactment was made." *Vance v. Kentucky Unemployment Insurance Commission*, 814 S.W.2d 284 (Ky. App. 1991). It has long been held that one of the primary purposes of the Workers' Compensation Act is to compensate injured employees for their loss of earning capacity, not just a present loss of income. See *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968).
>
> In the present case the decedent received all the benefit he was due – the lump sum, monthly payments, and continued payments to his contractual designee – his sister. He had the opportunity to change beneficiaries, but he did not exercise his right to do so. Therefore, the motion must be and is hereby DISMISSED WITH PREJUDICE.

Accordingly, the ALJ dismissed with prejudice Tina's "Motion to Change Beneficiary."

On appeal, Tina argues the ALJ erred in determining she was not entitled to the remaining benefits

payable pursuant to the annuity. She cites to Thearn's belief upon his death, Tina as his wife, would receive his benefits. She maintains Thearn attempted to change the beneficiary, but was told "he would have to do it in writing." Tina asserts, pursuant to KRS 342.075, she is clearly a dependent. Tina also argues KRS 342.160 mandates as Thearn's only dependent, she is entitled to his remaining benefits. Tina asserts KRS 342.160 states "shall," and thus, she is entitled to the annuity proceeds. Tina asserts KRS 392.080 and KRS 392.020 do not permit a spouse to be disinherited. To hold otherwise, Tina argues, would allow an injured worker to avoid his legal obligation. Tina posits the Board should remand this case with directions to the ALJ to find she is the appropriate beneficiary. We disagree and affirm.

As an appellate tribunal, on questions of law, or mixed questions of law and fact such as in the case *sub judice*, this Board's standard of review is *de novo*. See Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). "When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value." Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991). In

this case, based on the facts, which are not in dispute we conclude the issue on appeal is solely a question of law and, thus, our review in the case *sub judice* is *de novo*.

Contrary to Tina's contention, we believe KRS 342.075 and KRS 342.160 are not applicable to the case *sub judice*. In Brusman v. Newport Steel Corp., 17 S.W.3d 514, 518 (Ky. 2000), the Supreme Court held as follows:

> However, *White* is inconsistent with our later opinion in *Palmore v. Jones*, Ky., 774 S.W.2d 434 (1989), which held that the dependency determinations in KRS 342.075 had no application to a non-dependent widow's claim for benefits under KRS 342.730(3). The language of KRS 342.075(1) does not purport to apply only to survivors of a worker whose death was caused by the compensable injury or disease; thus, the statute would apply as well (if at all) to survivors of a worker whose death resulted from another cause. If *Palmore v. Jones* applies to death benefits payable under KRS 342.730(3), then it applies as well to death benefits payable under the virtually identical language of KRS 342.750.

Based on the Supreme Court's holding in Brusman v. Newport Steel Corp., supra, we believe the same logic applies to KRS 342.160 since it is a statute which deals with the payment of benefits to dependents and does not set forth the "classes of persons entitled to a continuation of benefits." Palmore v. Jones, 774 S.W.2d 434, 435 (Ky. 1989. Thus, generally, in situations where the injured

employee's death is not attributable to the work-related injury, entitlement to future benefits is governed by KRS 342.730(3).

That said, we conclude, in the case *sub judice*, KRS 342.730(3) does not control entitlement to the remaining monthly benefits to be paid by Langley & Morgan after Thearn's death. The settlement agreement reached between the parties in 2002 and approved by ALJ Edens provides the mechanism for determining the recipient of any remaining monthly benefits to be paid by Langley & Morgan after Thearn's death.

In Whittaker v. Smith, 998 S.W.2d 476, 478 (Ky. 1999) the Court of Appeals instructed as follows:

> A final award of workers' compensation benefits is the equivalent of a judgment. It has the same legal effect as a judgment, and it may be enforced as such, KRS 342.305. Unlike a pending action, a judgment survives the death of a judgment creditor.

This principle was reinforced in Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 384 (Ky. App. 2002) wherein the Court of Appeal stated:

> An agreement to settle legal claims is essentially a contract subject to the rules of contract interpretation. It is valid if it satisfies the requirements associated with contracts generally, i.e., offer and acceptance, full and complete terms, and

> consideration. [Citations omitted] The primary object in constructing a contract or compromise settlement agreement is to effectuate the intentions of the parties.

The Court of Appeals went on to state as follows:

> Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. [Citation omitted]

Id. at 385.

In the case *sub judice*, upon Thearn's death, the 2002 settlement agreement approved by ALJ Edens became enforceable by Debra since Thearn named her as the beneficiary of any income benefits to be paid by Langley & Morgan after his death. Since there was not an executed change of designation of beneficiary prior to Thearn's death, Debra, as the designated beneficiary in the 2002 settlement agreement, can enforce the terms of that agreement in the appropriate circuit court. The agreement clearly states how to change the beneficiary of the benefits due from Langley & Morgan after Thearn's death. After Thearn married Tina on June 18, 2009, for the remaining year and three months of his life, he chose not to change the beneficiary.

There is no prohibition against Thearn assigning a portion of his benefits to whomever he chooses. In

Newberg v. Sarcione, 865 S.W.2d 317, 320 (Ky. 1993) the Supreme Court held:

> Accordingly, in certain instances, the assignment of some of the benefits paid subsequent to the litigation of a compensation claim has been permitted.

The Supreme Court went on to state:

> We believe that, in the instant case, the reimbursement provision, which operated as an assignment of a portion of the benefits received pursuant to the worker's subsequent compensation award against the Special Fund, does not violate either the purpose or the language of KRS 342.180 and is in accord with the purposes of the Workers' Compensation Act. KRS 342.180 prohibits the assignment of a workers' compensation claim. The agreement herein did not contemplate an assignment of the worker's claim against the Special Fund to the employer, but rather an assignment of whatever portion of the worker's recovery had been paid by the employer but was determined by the ALJ to be the responsibility of the Special Fund. The reimbursement to the employer relates to compensation benefits for the present injury and not to satisfaction of a debt which predated the injury.

Id.

The right of an injured worker to assign the proceeds due from his or her workers' compensation claim was reaffirmed by the Court of Appeals in Kentucky Employers' Mut. Ins. v. Novation Capital, LLC, 2008-CA-

000449-MR, rendered February 25, 2011, Designated Not To Be Published. In Kentucky Employers' Mut. Ins. v. Novation Capital, LLC, supra, the Court of Appeals stated:

> The purpose of KRS 342.180 and its prohibition against assignment of workers' compensation claims is 'to protect the injured worker and to promote the purpose of the Workers' Compensation Act by insuring that compensation benefits are available to meet the present and future requirements for food, clothing, and shelter of the worker and his dependents….'' Newberg v. Sarcione, 865 S.W.2d 317, 319 (Ky. 1993). However, an assignment of benefits paid is not inconsistent with the purpose of the statute or its language.

Slip op. at 2.

> . . .
>
> As in *Newberg*, the agreement between Taylor and Novation Capital is not an assignment of a claim but is a transfer of the compensation received under the compensation agreement. Moreover, the purpose of KRS 342.180 is not frustrated by approval of the petition.

Slip op. at 3.

Since Thearn was permitted to assign his benefits, the only method for Thearn to change that assignment was pursuant to the terms of the 2002 settlement agreement.

We believe the issue on appeal is controlled by the Supreme Court's holding in Hart v. Hart, 201 S.W.3d 457

(Ky. 2006). In Hart v. Hart, supra, Duane Hart ("Duane") had purchased an "annuity investment product" from Hartford Life Insurance Company. In the same year he purchased the annuity, Duane contacted his insurance agent and requested the appropriate change of beneficiary forms. His agent sent the forms along with a note affixed to the form directing Duane to fill in the correct information, sign, and return the forms. A self-addressed, stamped envelope was included so that the forms could be easily returned to the insurance agent. The insurance agent never received any change of beneficiary forms or any type of written notice from Duane indicating he wanted to change his beneficiary. As in the case *sub judice*, Duane's contract contained a provision any change of beneficiary must be in writing. The provision read as follows:

> The Designated Beneficiary will remain in effect until changed by the Contract Owner. Changes in the Designated Beneficiary may be made during the lifetime of the Annuitant by written notice to the Administrative Office of the Company….Upon receipt of such notice … at the Administrative Office of the Company, the new designation will take effect as of the date the notice is signed, whether or not the Annuitant or Contract Owner is alive at the time of receipt of such notice.

Id. at 458.

Four years later, Duane transferred management of his Hartford annuity account to his son Christopher, an Edward D. Jones investment broker. Christopher acknowledged his father "gave him no indication that he had intended any change to the designation of his wife Barbara as sole beneficiary on the annuity." Id.

Duane was shot and killed approximately nine months after Christopher began managing the account. Sometime after Duane's death, his son Christopher, discovered an "unmailed beneficiary and annuity change forms" in his father's business office. The forms which changed the beneficiary on the annuity from Duane's wife to his son and daughter appeared to have been signed by Duane and were dated July 7, 1997. Christopher took the forms to the lawyer for his father's estate who, in turn, mailed the forms to Hartford. Hartford acknowledged receiving the forms but assumed no position as to the proper beneficiary on the account. The lower court granted summary judgment in favor of Duane's children and the Court of Appeals affirmed. The Supreme Court reversed holding as follows:

> Here the change request forms were stored in Duane's office desk and remained undelivered in the nearly three years between his signing the forms and his death. In both cases, there is an absence of any proof that the insured intended his written notice

> of a change in beneficiary to be delivered to the company.
>
> In any case, *Hill* ends the inquiry. Substantial compliance has been deemed sufficient 'when the insured had done all he could do under the circumstances; all he believed necessary to effect the change or what the ordinary layman would believe was all that was necessary to accomplish the change.' *Id*. at 808-09 (internal quotation marks omitted). Duane's actions in this case far fall below that standard. Moreover, there is simply no way to characterize Duane's actions to effect the change as being 'out of the hands of the insured and directed to the insurance company.' *Id*. at 809. Thus, we cannot conclude that he substantially complied with the terms of the contract.

Id. at 460.

The Supreme Court held:

> The holding of the Court of Appeals that Duane **Hart** had substantially complied with the terms of his insurance contract and thereby designated Appellees as the beneficiaries on his annuity is in error.

Id. at 461.

In the case *sub judice*, the 2002 settlement agreement which designated Debra as the recipient of any benefits remaining to be paid by Langley & Morgan after Thearn's death is an enforceable contest. The fact Thearn married almost seven years after he executed the 2002

settlement agreement does not affect Debra's right to receive the balance of the income benefits due after Thearn's death. Therefore, pursuant to that contract, only a change of beneficiary form executed by Thearn, could affect Debra's right to receive the balance of the income benefits due from Langley & Morgan after Thearn's death. Since Thearn declined to change the beneficiary, the 2002 settlement agreement is binding and must be enforced. The ALJ correctly noted there was no change of beneficiary as required by the 2002 settlement agreement and Tina was not entitled to the annuity benefits.

Finally, although not addressed by the ALJ or either party, assuming *arguendo*, Tina was entitled to the benefits in question pursuant to KRS 342.730(3), since Thearn had no children, Tina would only be entitled to one half of the $600.00 monthly benefit. We conclude the 2002 settlement agreement reflects an express intent by the parties to avoid the applicability of KRS 342.730(3) which would have reduced the monthly benefit by fifty percent. Further, by avoiding the effects of KRS 342.730(3), the parties also avoided the effects of KRS 342.730(4) since the right to receive income benefits pursuant to KRS 342.730(3) is also "subject to the limitations contained in subsection 4." The 2002 settlement agreement specifically

states the $600.00 monthly payment cannot be increased or decreased which clearly evidences an intent by the parties to avoid the provisions of KRS 342.730(3) & (4). Thearn entered into a contract with his employer, Langley & Morgan, which required Langley & Morgan to pay $600.00 per month for the guaranteed period of thirty years. The express intent of the parties would clearly be eviscerated were we to hold KRS 342.730(3) is applicable. In addition, Langley & Morgan would receive an undeserved windfall.

We point out Tina is entitled to receive the remaining benefits to be paid by the Special Fund since the 2002 settlement agreement clearly was not designed to designate the recipient of the benefits to be paid by the Special Fund after Thearn's death. In the 2002 settlement agreement the parties stated the Special Fund was entitled to the statutory tier-down pursuant to KRS 342.730(4) at the time of Thearn's sixty-fifth birthday. That clearly evidences Thearn's intent that the individual entitled to the benefits due from the Special Fund after his death would be determined by the applicable statute.

Accordingly, the August 26, 2011, opinion and order dismissing Tina's motion as it relates to the benefits payable after Thearn's death by Langley & Morgan is **AFFIRMED**.

ALVEY, CHAIRMAN, NOT SITTING.

COWDEN, MEMBER, CONCURS.

COUNSEL FOR PETITIONER:

HON JOHNNIE L TURNER
P O BOX 351
HARLAN KY 40831

COUNSEL FOR RESPONDENT:

HON J LOGAN GRIFFITH
P O DRAWER 1767
PAINTSVILLE KY 41240

COUNSEL FOR RESPONDENT:

HON MARK L FORD
105 EAST CENTRAL STREET
HARLAN KY 40831

COUNSEL FOR RESPONDENT:

HON MARK BIZZELL
1047 US HIGHWAY 127 SOUTH STE 4
FRANKFORT KY 40601

ADMINISTRATIVE LAW JUDGE:

HON LAWRENCE F SMITH
916 N MULBERRY STE 100
ELIZABETHTOWN KY 42701