

[Cite as *State ex rel. Puckett v. Indus. Comm.*, 2004-Ohio-2817.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Donald D. Puckett,
Deceased, Marilyn Puckett, Parent,

Relator,

v.

The Industrial Commission of Ohio,
James Conrad, Administrator Bureau
of Workers' Compensation and
Phinney Industrial Roofing, Inc.,

Respondents.

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:
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:
:
:
:

No. 03AP-640

(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 1, 2004

Livorno and Arnett Co., LPA, and Charles W. Kranstuber, for relator.

Jim Petro, Attorney General, and William J. McDonald, for respondent Industrial Commission of Ohio.

Kegler, Brown, Hill & Ritter, David M. McCarty, Patsy A. Thomas and Timothy T. Tullis, for respondent Phinney Industrial Roofing.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Marilyn Puckett, mother of the deceased Donald D. Puckett, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order calculating the amount of death benefits payable to relator following the death of her son.

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) In her decision the magistrate concluded that: (1) the Industrial Commission had jurisdiction to consider relator's application for death benefits, and (2) the commission abused its discretion in limiting relator's award of prospective death benefits to two years. Accordingly, the magistrate determined a writ should issue.

{¶3} Relator has filed objections to the magistrate's conclusions of law concerning the jurisdiction of the Industrial Commission to determine relator's request for death benefits. Respondents have filed objections to the magistrate's determination regarding the award of death benefits.

{¶4} Relator sought death benefits under R.C. 4123.59(C), which provides for a weekly payment of 66 and two-thirds percent of the employee's average weekly wage, not to exceed 66 and two-thirds percent of the statewide average weekly wage as defined in division (C) of R.C. 4123.62. R.C. 4123.59(C) also prescribes that the weekly payment "shall continue for such time as the administrator in each case determines." Pursuant to R.C. 4123.59(E), "[a]n order issued by the administrator under this section is appealable pursuant to sections 4123.511 to 4123.512 of the Revised Code."

{¶5} Generally, a request for death benefits begins in the Bureau of Workers' Compensation ("BWC") with the administrator. The stipulated record here begins with the matter before a district hearing officer of the Industrial Commission, who rested jurisdiction on R.C. 4123.511. The jurisdictional notation suggests the matter indeed began before the BWC and was appealed to the commission pursuant to R.C. 4123.511.

{¶6} The district hearing officer determined relator was partially dependent on the decedent pursuant to R.C. 4123.59(C). The district hearing officer further determined the total award to which relator was entitled: twice the statutory minimum.

{¶7} On appeal, the staff hearing officer modified the district hearing officer's order. The staff hearing officer found a preponderance of evidence to support a finding that relator was partially dependent on the decedent. The staff hearing officer, however, did not purport to award an amount of death benefits, but forwarded the matter to the BWC pursuant to R.C. 4123.59(C) to calculate the average weekly wage and death benefits.

{¶8} Although the matter was returned to the BWC, the BWC failed to take action on the matter. Due to the BWC's inaction, relator filed a motion requesting that the BWC comply with the staff hearing officer's order and make the necessary determinations under R.C. 4123.59(C).

{¶9} While the BWC, in response, determined that decedent's average weekly wage would be \$226.94, the BWC noted it was not separately calculating an award because it had adopted the findings in the district hearing officer's September 13, 2001 order. The BWC instead referred the matter back to the commission, which ultimately issued the order subject of this mandamus action.

{¶10} Pursuant to R.C. 4123.59(C), the BWC, not the commission, is charged with determining in the first instance the average weekly wage and the length of time weekly payments will continue. The record does not disclose what the BWC did in terms of complying with that statutory directive when the matter initially was filed. Once the matter was appealed, however, the commission gained jurisdiction of it and could correct any errors or deficiencies in the BWC's action on the application. Even though the staff hearing officer returned the matter to the BWC for calculations, pursuant to the order of November 1, 2002, the commission retained jurisdiction. Thus, even if the BWC administrator did not fully comply with the staff hearing officer's directive when the matter was returned to the BWC, any deficiency does not prejudice relator, as the commission's review on appeal is de novo. Relator's objections are overruled.

{¶11} Respondents object to the magistrate's determination that the commission abused its discretion in limiting the award of death benefits to two years. Respondents' objections are well-taken. The staff hearing officer's October 17, 2002 order states it is "[b]ased on the findings of fact set forth in the 09/13/2001 District Hearing Officer order (and noting that the 11/01/2001 Staff Hearing Officer order did not vacate the 09/13/2001 order but only modified it as to the method of payment of benefits), along with consideration of the affidavits on file regarding the degree of support provided by the deceased claimant to his mother and its prospects for continuing, as well as the *testimony and arguments at hearing*, the Staff Hearing Officer affirms the award of 104 weeks of partial death benefits to Marilyn Puckett, beginning on 09/07/2000 and totaling \$15,578.16." (Emphasis added.) (Staff Hearing Officer October 17, 2002 Order, 1-2.)

{¶12} The stipulated evidence does not include a transcript of the testimony taken in the hearing and referred to in the staff hearing officer's order. Accordingly, we cannot determine that the factual conclusions in the staff hearing officer's order are not supported by the requisite some evidence. The magistrate improperly attempted to review the staff hearing officer's conclusions without all of the evidence the staff hearing officer had before him. Respondents' objections are sustained.

{¶13} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts. Accordingly, we adopt those as our own. For the reasons set forth in the discussion of relator's objections to the jurisdictional aspects of this mandamus action, we conclude the commission had the necessary jurisdiction to determine relator's request for death benefits. For the reasons set forth in the discussion of respondents' objections, we conclude the stipulated evidence fails to present a basis to determine that the staff hearing officer's factual determinations are not supported by some evidence.

{¶14} In accordance with the foregoing, we deny the requested writ of mandamus.

*Relator's objections overruled;
respondents' objections sustained;
writ of mandamus denied.*

LAZARUS, P.J., and SADLER, J., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Donald D. Puckett,	:	
Deceased, Marilyn Puckett, Parent,	:	
	:	
Relator,	:	
	:	
v.	:	No. 03AP-640
	:	
The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
James Conrad, Administrator BWC	:	
of Workers' Compensation and	:	
Phinney Industrial Roofing, Inc.,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on December 12, 2003

Livorno and Arnett Co., LPA, and Charles W. Kranstuber, for relator.

Jim Petro, Attorney General, and William J. McDonald, for respondent Industrial Commission of Ohio.

Kegler, Brown, Hill & Ritter, David M. McCarty, Patsy A. Thomas and Timothy T. Tullis, for respondent Phinney Industrial Roofing.

IN MANDAMUS

{¶15} Relator, Marilyn Puckett, mother of deceased Donald D. Puckett, has filed this original action requesting that this court issue a writ of mandamus ordering

respondent Industrial Commission of Ohio ("commission") to vacate its order wherein the commission calculated the amount of death benefits payable to relator following the death of her son, decedent.

Findings of Fact:

{¶16} 1. On September 6, 2000, decedent was employed by respondent Phinney Industrial Roofing ("employer"). On that date, decedent fell off a roof and subsequently died as a result of the injuries he sustained.

{¶17} 2. At the time of his death, decedent was 21 years of age. Decedent was survived by his mother, relator herein, and two sisters. Decedent's father had died years earlier.

{¶18} 3. Relator applied for death benefits as a result of decedent's death indicating that both she and decedent's sister, Angela, had been dependent upon decedent for support.

{¶19} 4. On September 13, 2001, a district hearing officer ("DHO") issued an order regarding the apportionment of death benefits/dependency. Ultimately, the DHO concluded that relator was partly dependent upon decedent to the extent that she was entitled to a total award of \$6,000, representing twice the statutory minimum. The DHO further found that decedent's sister, Angela, was not dependent upon him at the time of his death. (Relator does not challenge the determination that Angela was not dependent upon decedent and that she herself was only partly dependent.) Thereafter, the DHO addressed the question of relator's prospective dependency. In that regard, the DHO made the following determination:

The next question is how likely is it that Marilyn would have remained 5% dependent upon claimant had he lived. Contrary to petitioner's argument that [a] DHO is forbidden to take this into account, O.R.C. 4123.59 (D)(2) explicitly states that in determining the extent of partial dependence the decision-maker "may take into consideration any circumstances which, at the time of the death of the decedent, clearly indicate prospective dependency on the part of the claimant and potential support on the part of the decedent."

Claimant had just turned 21 five months prior to his tragic death. In the normal course of events, most children leave their parent's home at some point after they reach the age of majority. Marilyn testified as to her belief that claimant would have continued to give her money even if he moved out. This may well be true. However, as claimant's own expenses would in that event necessarily have increased due to establishing a new home (and perhaps a new family of his own), the amount he could afford to give to his mother would most likely decrease over time.

Thus, DHO finds Marilyn was dependent upon claimant to the extent of 5% of her personal support and that this dependency was likely to decrease over time.

DHO next turns to the question of how to translate this finding into a dollar figure. At first blush one is tempted to find a diminishing 5% dependency to be a "minimal" amount and therefore to merit only the minimum award specified by statute; \$3,000. However, under O.R.C. 4123.59 (D)(2), Marilyn would be entitled to \$3,000 if claimant had never given her any money at all. To give her that same amount when claimant actually did provide her with support would appear manifestly unjust.

Double the minimum statutory award for a parent who lived with a deceased claimant would equal \$6,000. This figure is only slightly greater than what one would arrive at if one takes claimant's total monthly take-home pay at time of death (\$1,139.49 as calculated on proceeding pages), multiplied by two years in the future (the statutory length of time used when a deceased claimant's spouse remarries), divided by 5 so as to represent that Marilyn was only one of 5 members in the household. DHO concedes that the apparent precision of this formula is illusory. Projecting only two years into the future is

perhaps an underestimation, just as assuming claimant would have turned over every single cent he earned to his mother is most definitely an overestimation. However, the fact that these two different methods produce figures in the same "ball park" reflects that some amount approximating these would be appropriate.

Therefore, DHO finds that Marilyn Puckett, deceased claimant's mother, was partly dependent upon claimant at the time of his death to the extent that she is entitled to a total award of \$6,000 (twice the statutory minimum).

(Emphasis sic.)

{¶20} 5. Both relator and the employer appealed this order and the matter was heard before a staff hearing officer ("SHO") on November 1, 2002. The SHO modified the prior DHO order to the following extent:

The preponderance of the evidence supports a finding of partial dependency.

The file is ordered to be forwarded to the BWC of Workers' Compensation pursuant to R.C. 4123.59(C) to calculate an average weekly wage and death benefits.

As indicated, the file was referred to the Ohio BWC of Workers' Compensation ("BWC") for a determination pursuant to R.C. 4123.59(C).

{¶21} 6. The BWC failed to make the requisite determinations mandated by R.C. 4123.59(C). As such, relator filed a motion requesting that the BWC abide by the November 1, 2002 SHO order and make the necessary determinations set out in R.C. 4123.59(C).

{¶22} 7. By order dated April 23, 2002, the BWC determined that decedent's average weekly wage would be set at \$226.94.

{¶23} 8. On May 8, 2002, a BWC employee noted that the BWC was not separately calculating an award because it had adopted the DHO findings in the order of September 13, 2001. Thereafter, on May 31, 2002, the BWC referred the matter to the commission for clarification of the amount of death benefits to be paid.

{¶24} 9. The matter was heard before a DHO on August 6, 2002, and resulted in an order providing as follows:

The District Hearing Officer first finds that the Average Weekly Wage in this claim has previously been set at \$226.94 per week. The District Hearing Officer further finds that the rate at which the decedent's mother is to be paid death benefits is \$149.79 per week. Said calculation is reached by dividing the above Average Weekly Wage by 66 2/3 percent.

The District Hearing Officer further finds that said death benefits are to be paid for a period of 104 weeks (two years) beginning on the date following decedent's death, which is 09/07/2000. As such, the total award is determined to be \$15,578.16, payable to the decedent's mother.

The District Hearing Officer notes the previous Staff Hearing Officer order dated 11/01/2001, as well as the underlying District Hearing Officer order, which is dated 09/13/2001.

{¶25} 10. Both relator and the employer filed an appeal and the matter was heard before an SHO on October 17, 2002. Relator submitted evidence in the form of affidavits from several people who knew decedent. These people averred that decedent had turned down opportunities to move in with friends and had stated his intent to provide for his mother and sisters as needed in the future. The SHO modified the prior DHO order and stated as follows:

The Staff Hearing Officer finds at the outset that there is jurisdiction to address the issue of payment of death benefits to Marilyn Puckett, the deceased claimant's mother and his partial dependent. The basis for this finding is the fact that the

BWC previously awarded death benefits to Marilyn Puckett in compliance with the District Hearing Officer order of 09/13/2001 and then referred the issue of the C-86 Motion filed 04/16/2002 by Marilyn Puckett to the Industrial Commission for adjudication. The Staff Hearing Officer also relies on the BWC Progress Note dated 05/08/2002 in this regard.

The Staff Hearing Officer affirms the finding that the Average Weekly Wage in this claim has previously been set at \$226.94 by BWC order dated 04/23/2002. The Staff Hearing Officer further affirms the finding that the rate for payment of death benefits is \$149.79, a figure representing two-thirds of the Average Weekly Wage.

The orders of 09/13/2001 and 11/01/2001 established the status of Marilyn Puckett as a partial dependent of the deceased claimant. Based on the findings of fact set forth in the 09/13/2001 District Hearing Officer order (and noting that the 11/01/2001 Staff Hearing Officer order did not vacate the 09/13/2001 order but only modified it as to the method of payment of benefits), along with consideration of the affidavits on file regarding the degree of support provided by the deceased claimant to his mother and its prospects for continuing, as well as the testimony and arguments at hearing, the Staff Hearing Officer affirms the award of 104 weeks of partial death benefits to Marilyn Puckett, beginning on 09/07/2000 and totaling \$15,578.16.

{¶26} 11. Relator's further appeal was refused by order of the commission mailed January 18, 2003.

{¶27} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶28} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show that she has a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of

mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶29} Relator raises two issues in this mandamus action: (1) the commission lacked jurisdiction to make the determination concerning the duration of relator's death benefits; and (2) the commission abused its discretion in limiting the award of prospective death benefits to two years.

{¶30} R.C. 4123.59 provides for benefits in case of death and determinations of dependency. Specifically, R.C. 4123.59 provides, in pertinent part, as follows:

In case an injury to or an occupational disease contracted by an employee causes his death, benefits shall be in the amount and to the persons following:

* * *

(C) If there are partly dependent persons at the time of the death the weekly payment is sixty-six and two-thirds per cent of the employee's average weekly wage, not to exceed sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and shall continue for such time as the administrator in each case determines.

* * *

[(D)(2)] It is presumed that there is sufficient dependency to entitle a surviving natural parent or surviving natural parents, share and share alike, with whom the decedent was living at the time of his death, to a total minimum award of three thousand dollars.

The administrator may take into consideration any circumstances which, at the time of the death of the decedent, clearly indicate prospective dependency on the part of the claimant and potential support on the part of the decedent. No person shall be considered a prospective dependent unless such person is a member of the family of the deceased employee and bears to him the relation of surviving spouse, lineal descendant, ancestor, or brother or sister. The total award for any or all prospective dependency to all such claimants, except to a natural parent or natural parents of the deceased, shall not exceed three thousand dollars to be apportioned among them as the administrator orders.

{¶31} Pursuant to R.C. 4123.59(C), the administrator of the BWC is to make the initial determination. In the present case, contrary to relator's assertions, the administrator did make a determination in its April 23, 2002 order setting the average weekly wage at \$226.94. Thereafter, a BWC employee noted that the BWC was not separately calculating the award because it had adopted the DHO findings in the order of September 13, 2001. Because there was a procedural issue as to how to proceed, the BWC referred the matter to the commission for clarification of the amount of death benefits to be paid.

{¶32} In *State ex rel. Crabtree v. Ohio Bur. of Workers' Comp.* (1994), 71 Ohio St.3d 504, 507, the court addressed the powers and authority of the BWC and noted the following:

R.C. 4121.39 sets forth the powers and duties of the BWC:

"The administrator of workers' compensation shall do all of the following:

"(A) Review and process all applications for claims;

"(B) Award compensation and make payment on all noncontested claims;

"(C) Make payment on orders of the industrial commission and district and staff hearing officers as provided in section 4123.511 of the Revised Code * * *."

The limited power R.C. 4121.39 accords the BWC is consistently reflected in the remainder of the statutory framework of Ohio's workers' compensation system. The BWC's role is ministerial, not deliberative. The BWC gives way to the commission when a party contests an award necessitating a weighing of evidence and a judgment. The BWC then makes the payments based upon the commission's judgments.

{¶33} Because there was a question regarding whether benefits were being paid out properly or not, the BWC referred this matter for a hearing. Pursuant to R.C. 4123.39, the BWC took appropriate action and relator's assertion that the commission did not have authority to hold a hearing and make a determination is without merit.

{¶34} Relator also contends that the commission abused its discretion by limiting her award of death benefits to two years. For the reasons that follow, this magistrate agrees.

{¶35} In reviewing the DHO order of September 13, 2001 (upon which the commission ultimately relied in granting death benefits for two years), this magistrate is cognizant of the fact that the DHO determined that relator's claims that she was wholly dependent upon decedent when he died were not supported by the record and that the DHO found a great deal of relator's testimony to not be credible. However, relator was the only person who testified regarding whether she was wholly or partially dependent upon decedent. When the issue of prospective dependency came before the SHO, the

record contained not only relator's testimony and affidavit, but also affidavits from Shane Wolfe, Lance Stemen, Jerry L. Schreck, and Jennifer Carter, all of whom indicated that they had known decedent for a considerable amount of time and that decedent had taken it upon himself to help provide for his family since his father's death in 1992. Lance Stemen and Jennifer Carter both attested to the fact that they had asked decedent if he wanted to room with them and that decedent had always said that he could not because his family needed him at home.

{¶36} In reaching the determination that decedent would not have provided for relator in the future, the DHO had based the conclusion on the following:

Claimant had just turned 21 five months prior to his tragic death. In the normal course of events, most children leave their parent's home at some point after they reach the age of majority. Marilyn testified as to her belief that claimant would have continued to give her money even if he moved out. This may well be true. However, as claimant's own expenses would in that event necessarily have increased due to establishing a new home (and perhaps a new family of his own), the amount he could afford to give to his mother would most likely decrease over time.

(Emphasis sic.)

{¶37} It is apparent to this magistrate that the DHO made conclusions regarding 21 year old males in general which conclusions were not based upon the evidence that had been presented concerning decedent. The SHO then relied upon the prior findings of the DHO, which were mere generalizations, and determined that benefits should be paid for only two years. Although the commission is the evaluator of the evidence, this magistrate finds an abuse of discretion here because the commission does not refer to any evidence upon which the determination was made. As such, this magistrate finds

that the commission's order limiting the payment of benefits to two years is not supported by some evidence as it is merely supported by conclusory generalizations. As such, this magistrate finds that the commission did abuse its discretion in limiting her award to two years.

{¶38} Based on the foregoing, it is this magistrate's decision that relator has demonstrated that the commission abused its discretion in limiting her award of prospective death benefits to two years. Accordingly, this court should issue a writ of mandamus ordering the Industrial Commission of Ohio to vacate its order and conduct a new hearing to determine the length of prospective benefits which should be payable to relator.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE