

[Cite as *State ex rel. Masterson v. Indus. Comm.*, 2019-Ohio-5217.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. James Masterson,	:	
[Decedent] c/o Elaine Masterson (Widow),	:	
	:	
Relator,	:	No. 18AP-83
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio et al.,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on December 10, 2019

On brief: *Heller, Maas, Moro & Magill Co., L.P.A.*, and *Robert J. Foley*, for relator.

On brief: *Dave Yost*, Attorney General, and *Eric J. Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶ 1} Relator, Elaine Masterson, the widow of James Masterson ("decedent"), has filed an original action requesting this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order which apportioned loss of use benefits between relator and Trevor Masterson, son of decedent, and issue an order finding she is entitled to the entire award.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate of this court who issued a decision,

including findings of fact and conclusions of law, which is appended hereto. The magistrate recommended this court deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed objections to the magistrate's decision arguing that dependent children are only eligible for scheduled loss benefits when there is no surviving spouse. Relator contends the commission erred in failing to follow the language of the scheduled loss statute, R.C. 4123.57(B), choosing instead to rely on R.C. 4123.60, pertaining to benefits available to dependents of deceased workers.

{¶ 4} Relator argues, in the alternative, that even if Trevor is entitled to a portion of the scheduled loss benefits, the commission abused its discretion in finding he was entitled to a percentage of the entire amount. Relator maintains that Trevor would only be entitled to the scheduled loss benefits during the period he was a dependent, and that any dependency ended when he reached the age of 25 (February 11, 2016).

{¶ 5} R.C. 4123.57(B) provides for compensation "payable to an employee when the employee suffers the loss of a body part that is listed on a schedule set forth in the statute." *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, ¶ 7. R.C. 4123.57(B) states in part:

When an award under this division has been made prior to the death of an employee all unpaid installments accrued or to accrue under the provisions of the award shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

When an employee has sustained the loss of a member by severance, but no award has been made on account thereof prior to the employee's death, the administrator shall make an award in accordance with this division for the loss which shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

{¶ 6} R.C. 4123.60 addresses eligibility of dependents to receive compensation for which a deceased worker was entitled to but did not receive prior to death. *See, e.g., State ex rel. Nyitray v. Indus. Comm.*, 2 Ohio St.3d 173, 174 (1983) (Pursuant to R.C. 4123.60,

"[d]ependents may be awarded the compensation the worker was entitled to receive prior to death."). R.C. 4123.60 states in part:

In all cases where an award had been made on account of temporary, or permanent partial, or total disability, in which there remains an unpaid balance, representing payments accrued and due to the decedent at the time of his death, the administrator may, after satisfactory proof has been made warranting such action, award or pay any unpaid balance of such award to such of the dependents of the decedent, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case. If the decedent would have been lawfully entitled to have applied for an award at the time of his death the administrator may, after satisfactory proof to warrant an award and payment, award and pay an amount, not exceeding the compensation which the decedent might have received, but for his death, for the period prior to the date of his death, to such of the dependents of the decedent, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case, but such payments may be made only in cases in which application for compensation was made in the manner required by this chapter, during the lifetime of such injured or disabled person, or within one year after the death of such injured or disabled person.

{¶ 7} Thus, R.C. 4123.60 "permits the deceased claimant's dependents to receive awards made on account of 'temporary, or permanent partial, or total disability,' when there remains an unpaid balance of accrued payments due to the claimant at the time of the claimant's death," and the statute "also permits the deceased claimant's dependents to receive an award up to the amount the decedent would have received if he had made application for an award of benefits to which he was lawfully entitled during his lifetime." Fulton, *Ohio Workers' Compensation Law*, Section 11.2, 618-19 (5th Ed.2018). Further, "the dependents are entitled to receive the award only if an application was filed during the deceased claimant's lifetime or within one year after his death." Fulton, *Ohio Workers' Compensation Law*, Section 11.2, 619 (5th Ed.2018). *See also State ex rel. Scott v. Ohio Bur. of Workers' Comp.*, 73 Ohio St.3d 202, 204 (1995) (applying one-year statute of limitations under R.C. 4123.60 to claim for scheduled-loss award under R.C. 4123.57).

{¶ 8} In the present case, the commission discussed the interplay, as well as the "conflicts," between R.C. 4123.57(B) and 4123.60. Specifically, the commission noted that "R.C. 4123.60 limits payment of accrued awards to the period prior to the decedent's death" while, by contrast, "R.C. 4123.57(B) provides no such limitation for payment of accrued awards." The commission further observed that "R.C. 4123.57(B) authorizes payment to dependent children if there is no surviving spouse, but R.C. 4123.60 authorizes payment to the dependents as determined by the Administrator." In addressing and seeking to resolve those conflicts, the commission concluded that "R.C. 4123.60 establishes the one-year statute of limitation as well as the beneficiaries for payment, while * * * R.C. 4123.57(B) controls the method, calculation, and amount of the payment of the accrued award." The commission deemed this interpretation "appropriate as Ohio's workers' compensation laws favor coverage for dependent children."

{¶ 9} The Supreme Court of Ohio has "consistently recognized and generally deferred to the commission's expertise in areas falling under the agency's jurisdiction." *State ex rel. FedEx Ground Package Sys., Inc. v. Indus. Comm.*, 126 Ohio St.3d 37, 2010-Ohio-2451, ¶ 27, citing *State ex rel. Hina v. Indus. Comm.*, 121 Ohio St.3d 4, 2009-Ohio-250, ¶ 19. Similarly, with respect to interpretation of statutes, courts "must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command." *State ex rel. McLean v. Indus. Comm.*, 25 Ohio St.3d 90, 92 (1986), citing *Jones Metal Prods. Co. v. Walker*, 29 Ohio St.2d 173, 181 (1972).

{¶ 10} In *Moorehead*, the Supreme Court, addressing a claim by a widow for scheduled loss benefits, noted in part that the commission's determination as to benefits "should be made in light of all relevant statutes," which included the court's consideration of both R.C. 4123.57(B) and 4123.60. *Id.* at ¶ 21. In the present case, the commission exercised its discretion in construing R.C. 4123.57(B) and 4123.60 to conclude that "R.C. 4123.60 establishes the one-year statute of limitation as well as the beneficiaries for payment, while * * * R.C. 4123.57(B) controls the method, calculation, and amount of the payment of the accrued award." Finding the commission's interpretation not

unreasonable, we afford deference to that interpretation and conclude the commission did not abuse its discretion in its apportionment of the scheduled loss benefits.

{¶ 11} As noted, relator argues, in the alternative, Trevor is not entitled to a full allocation of compensation for the scheduled loss and facial disfigurement because he was no longer a dependent upon reaching the age of 25 (February 11, 2016). In support, relator contends death benefits are essentially wage replacement benefits.

{¶ 12} This court has previously noted that the intent of R.C. 4123.59 (benefits in case of death) "is to compensate dependents for the 'loss of support' resulting from the employee's death." *State ex rel. PolyOne Corp. v. Indus. Comm.*, 10th Dist. No. 12AP-313, 2014-Ohio-1376, ¶ 9. However, "[b]y contrast, 'benefits for partial disability [under R.C. 4123.57(B)] are more akin to damages for work-related injuries.' " *Id.*, quoting *State ex rel. Gen. Motors Corp. v. Indus. Comm.*, 42 Ohio St.2d 278, 282 (1975). As noted by the commission, while R.C. 4123.59 provides for termination of death benefits at age 25, there is no such age limitation under either R.C. 4123.57(B) or 4123.60. We therefore find unpersuasive relator's contention that the commission abused its discretion in allocating to Trevor a portion of the entire amount of the scheduled loss benefits.

{¶ 13} Based on this court's independent review, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We therefore overrule relator's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

Objections overruled; writ of mandamus denied.

DORRIAN and McGRATH, JJ., concur.

McGrath, J., retired, formerly of the Tenth Appellate District,
Assigned to active duty under authority of the Ohio
Constitution, Article IV, Section 6(C).

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State ex rel. James Masterson, [Decedent] c/o. Elaine Masterson (Widow),	:	
Relator,	:	
v.	:	No. 18AP-83
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on November 20, 2018

Heller, Maas, Moro & Magill Co., L.P.A., and Robert J. Foley, for relator.

Michael DeWine, Attorney General, and Eric J. Tarbox, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 14} Relator, Elaine Masterson, as the widow of James Masterson ("decedent" or "Masterson"), has filed this original action requesting this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which apportioned loss of use benefits between her and Trevor Masterson ("Trevor"), son of decedent, and ordering the commission to find that she is entitled to the entire award.

Findings of Fact:

{¶ 15} 1. The decedent was fatally injured when the tractor trailer he was driving rolled over on April 23, 2013.

{¶ 16} 2. Relator, as the surviving spouse, filed a workers' compensation claim for death benefits which was allowed by the Ohio Bureau of Workers' Compensation ("BWC") in an order mailed June 3, 2013. The BWC awarded relator benefits of \$418.50 per week.

{¶ 17} 3. In an order mailed August 7, 2013, the BWC determined that Trevor, decedent's son, was a dependent child because he was attending college full time. As a result, the BWC reapportioned the death benefits between relator and Trevor as follows:

Dependent child, Trevor Masterson will be attending College full time, his Fall Classes begin on 8/26/2013.

The benefits will be reapportioned as follows:

Elaine Masterson, date of birth 02/18/1963, is awarded \$313.88 per week as the surviving spouse to begin 08/26/2013. Payment is to continue unless future facts and circumstances warrant stopping payment in accordance with the statute. In the event of remarriage, the surviving spouse is hereby ordered to immediately notify BWC. At that time, a new order will be issued for payment of a lump-sum award to the surviving spouse as provided by statute.

Trevor Masterson, date of birth 02/11/1991, is awarded \$104.62 per week as a dependent child to begin 08/26/2013. Payment will continue upon submission of proof of ongoing full-time enrollment from an accredited educational institution, until the enrollment is discontinued or until 02/11/2016, the date when the child will reach the age of 25. The child is hereby ordered to immediately notify BWC of changes in enrollment status.

{¶ 18} 4. On April 21, 2014, relator filed a motion seeking a scheduled loss of use award for decedent's loss of use of bilateral legs and bilateral arms as well as an additional award for facial disfigurement.

{¶ 19} 5. The matter was heard before a district hearing officer ("DHO") on October 24, 2014. Finding the decedent lived at least 15 minutes subsequent to the industrial accident which was the basis of the death claim, the DHO relied on the medical evidence in the record, and granted relator's total loss of use award as requested as well as \$7,500 in connection with the facial disfigurement sustained by decedent as a consequence of the accident.

{¶ 20} 6. Because Trevor did not receive notice of the original hearing, he too filed a motion for loss of use as well as facial disfigurement.

{¶ 21} 7. Ultimately, following a hearing on January 26, 2017 before the commission, the prior order granting relator the entire award for total loss of use of bilateral extremities and facial disfigurement was vacated. The commission applied both R.C. 4123.57 and 4123.60 and determined the award should be apportioned between relator and Trevor, 75 percent to relator and 25 percent to Trevor. That order provides as follows:

03/14/2017 – After further review and discussion, it is the order of the Commission the Appeals, filed 12/13/2016 and 12/16/2016, by the Surviving Spouse and the Administrator respectively, are granted, and the order of the Staff Hearing Officer, issued 12/03/2016, is vacated. Notwithstanding the decision to grant the Appeals, it is the order of the Commission the loss of use and facial disfigurement awards, previously authorized by District Hearing Officer order, issued 10/30/2014, be allocated between the Surviving Spouse and the Dependent Child as specified below.

The Decedent died on 04/23/2013, at which time the Surviving Spouse was the sole dependent. Death benefits were awarded to her by Bureau of Workers' Compensation (BWC) order, issued 06/03/2013. Death benefits were reallocated by the BWC order, issued 08/07/2013, with the finding Trevor Masterson became a dependent child upon his full-time enrollment with an accredited educational institution on 08/26/2013. Death benefits were reallocated again, by the BWC order, issued 02/17/2016, when the Dependent Child reached the age of 25 on 02/11/2016.

As noted above, the District Hearing Officer order, issued 10/30/2014, awarded accrued compensation to the Surviving Spouse for the loss of use of the Decedent's extremities and facial disfigurement. The Commission order, issued 09/22/2016, enumerated the parties' acquiescence to the Dependent Child's C-86 Motion, Request for Relief, filed 02/04/2016, and referred for further hearing the remaining contested issue, being the allocation of the loss of use and facial disfigurement awards between the Surviving Spouse and the Dependent Child.

R.C. 4123.57(B) states in relevant part:

When an award under this division has been made prior to the death of an employee all unpaid installments accrued or to accrue under the provisions of the award shall be payable to the surviving spouse, or if there is no surviving spouse, to

the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

When an employee has sustained the loss of a member by severance, but no award has been made on account thereof prior to the employee's death, the administrator shall make an award in accordance with this division for the loss which shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

The Surviving Spouse argues R.C. 4123.57(B) precludes payment of loss of use awards to dependents when the spouse survives.

R.C. 4123.60 states in relevant part:

In all cases where an award had been made on account of temporary, or permanent partial, or total disability, in which there remains an unpaid balance, representing payments accrued and due to the decedent at the time of his death, the administrator may, after satisfactory proof has been made warranting such action, award or pay any unpaid balance of such award to such of the dependents of the decedent, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case. If the decedent would have been lawfully entitled to have applied for an award at the time of his death the administrator may, after satisfactory proof to warrant an award and payment, award and pay an amount, not exceeding the compensation which the decedent might have received, but for his death, for the period prior to the date of his death, to such of the dependents of the decedent, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case, but such payments may be made only in cases in which application for compensation was made in the manner required by this chapter, during the lifetime of such injured or disabled person, or within one year after the death of such injured or disabled person.

The Dependent Child argues R.C. 4123.60 authorizes allocation of the loss of use and facial disfigurement awards between the Surviving Spouse and the Dependent Child.

The Commission acknowledges the conflicts between R.C. 4123.57(B) and R.C. 4123.60. R.C. 4123.60 limits payment of accrued awards to the period prior to the decedent's death while R.C. 4123.57(B) provides no such limitation for payment of accrued awards. R.C. 4123.57(B) authorizes payment to dependent children if there is no surviving spouse, but R.C. 4123.60 authorizes payment to the dependents as determined by the Administrator.

As previously determined by the Commission in claim number 97-547614, the conflict of whether payment of loss of use awards is limited to the period prior to the decedent's death may be reconciled by applying the one-year statute of limitation from R.C. 4123.60, while the method, calculation, and amount of the payment of the accrued award is controlled by R.C. 4123.57(B). The Commission finds the conflict regarding payment of accrued awards to a surviving spouse and dependent children at issue in the current claim is similarly reconciled. Thus, R.C. 4123.60 establishes the one-year statute of limitation as well as the beneficiaries for payment, while, once again, R.C. 4123.57(B) controls the method, calculation, and amount of the payment of the accrued award. The Commission finds this interpretation appropriate as Ohio's workers' compensation laws favor coverage for dependent children.

Accordingly, the loss of use and facial disfigurement awards authorized by the District Hearing Officer order, issued 10/30/2014, are reallocated as follows: 25% of the awards to Trevor Masterson, Dependent Child, beginning 08/26/2013.

{¶ 22} 8. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 23} Relator argues the commission was required to award her the entire amount of the award for loss of use and facial disfigurement, pursuant to R.C. 4123.57(B), and that the commission abused its discretion by also applying R.C. 4123.60, and apportioning the award between her and Trevor. The magistrate finds the issue in this case is, as follows: does the commission have discretion where, as here, the surviving spouse is not the biological mother of a dependent child of a decedent to apportion the award for total loss of use of bilateral extremities and facial disfigurement which occurred from an industrial accident which resulted in the death of the husband of the surviving spouse and the father of that dependent child? The magistrate answers that question in the affirmative.

{¶ 24} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 25} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 26} R.C. 4123.60 specifically provides:

Benefits in case of death shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents as the administrator of workers' compensation determines. The administrator may apportion the benefits among the dependents in such manner as he deems just and equitable.

* * *

If the decedent would have been lawfully entitled to have applied for an award at the time of his death the *administrator may, after satisfactory proof to warrant an award and payment, award and pay an amount*, not exceeding the compensation which the decedent might have received, but for his death, for the period prior to the date of his death, *to such of the dependents of the decedent*, or for services rendered on account of the last illness or death of such decedent, *as the administrator determines in accordance with the circumstances in each such case*, but such payments may be made only in cases in which application for compensation was made in the manner

required by this chapter, during the lifetime of such injured or disabled person, or within one year after the death of such injured or disabled person.

(Emphasis added.)

{¶ 27} Relator quotes the following from R.C. 4123.57(B):

When an award under this division has been made prior to the death of an employee all unpaid installments accrued or to accrue under the provisions of the award shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

When an employee has sustained the loss of a member by severance, but no award has been made on account thereof prior to the employee's death, the administrator shall make an award in accordance with this division for the loss which shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

{¶ 28} The parties agree that it is undisputed that a surviving spouse or other dependent of a claimant who dies as a result of a work-related injury may apply for any compensation for which the claimant could have applied had the claimant lived. Relator, as the surviving spouse of the decedent, filed an application for death benefits as well as a motion for scheduled loss of use of bilateral extremities and facial disfigurement—awards for which decedent could have applied had he lived. Relator did not include Trevor in that motion nor did she provide him notice that she had filed the motion. Relator is not the biological mother of Trevor. As soon as Trevor was aware, he too filed for those benefits. Relator does not challenge the commission's determination that, as a full-time college student, Trevor is a dependent under the statute. Instead, relator argues that R.C. 4123.57(B) provides that where there is a surviving spouse, that surviving spouse receives the entire amount of any award made for total loss of use and facial disfigurement, and the commission abused its discretion when it determined otherwise.

{¶ 29} Relator asserts that R.C. 4123.57 clearly establishes the requirement on the BWC to pay loss of use awards exclusively to the surviving spouse if one exists.

{¶ 30} In its orders, the commission recognized the apparent conflict between R.C. 4123.60 and 4123.57(B). R.C. 4123.60 provides the statute of limitation, identifies beneficiaries, and limits payment of accrued awards to the period prior to the decedent's death while R.C. 4123.57(B) provides the method, calculation, and amount of the payment without limiting the award to the period prior to the decedent's death. Furthermore, R.C. 4123.60 specifically vests the administrator with discretion to pay benefits to "one or more of the dependents of the decedent, for the benefit of all the dependents as the administrator of workers compensation determines. The administrator may apportion the benefits among the dependents in such manner as he deems just and equitable." That is precisely what was done here.

{¶ 31} This statute has been in effect more or less unchanged for decades. When it was originally drafted, a surviving spouse would ordinarily be the biological parent of any dependent children. Any award made to a surviving spouse would logically benefit any dependent children. Today, that fact pattern is not necessarily guaranteed. Here, because relator is not the biological mother of any of decedent's children, she did not include them in her motions, and she did not provide them with notice. One of decedent's sons, Trevor, although an adult, became a full-time college student. As such, he qualifies as a dependent. As a dependent, just like relator, he is one of a class of people to whom the administrator may make an award. Given the facts of this case, the magistrate cannot say the commission abused its discretion when it apportioned the award 75 percent to relator and 25 percent to Trevor.

{¶ 32} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion, and this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).