

1 The State ex rel. Nicholson, Appellant, v. Copperweld Steel Company; Industrial
2 Commission of Ohio, Appellee.

3 [Cite as *State ex rel. Nicholson v. Copperweld Steel Co.* (1996), ____ Ohio St.3d
4 ____.]

5 *Workers' compensation -- R.C. 4123.60 affords dependents, upon timely*
6 *application, the right to claim compensation for which a decedent*
7 *was eligible but was not paid before death -- Mandamus available to*
8 *enforce this right -- Industrial Commission's order denying*
9 *application for compensation an abuse of discretion when*
10 *requirements of Noll not met.*

11 (No. 94-2352 -- Submitted September 24, 1996 -- Decided December 18, 1996.)

12 APPEAL from the Court of Appeals for Franklin County, No. 93APD08-
13 1091.

14 Appellant, Marian Nicholson, seeks a writ of mandamus (1) to vacate
15 appellee Industrial Commission of Ohio's denial of her "Application for Payment
16 of Compensation Accrued at Time of Death," and (2) to award her the permanent
17 total disability compensation ("PTD") she claims her husband should have
18 received prior to his death.

19 Marian's husband, Charles Nicholson, was injured in 1973 and again in
20 1974 while working for Copperweld Steel Company. His workers' compensation

1 claims were recognized for “right foot” and “contusion and ecchymosis of left
2 buttock, strain of left sacroiliac, aggravation of pre-existing arthritis of the lumbar
3 spine, spondylolisthesis at L5/S1 and central bulging discs at L4/5, L5/S1.” In
4 July 1990, Charles applied for PTD. His physician, Dr. Martin J. Lohne, reported
5 that Charles was “100% disabled” due to his back injury. A commission
6 specialist, Dr. David M. Baroff, reported Charles had a twenty-five percent
7 permanent partial impairment based on the allowed back condition, but concurred
8 that Charles was unfit for sustained remunerative employment. Charles died on
9 February 18, 1992, before any disposition of his PTD application.

10 On April 13, 1992, Marian applied, as Charles’s dependent, for the
11 compensation Charles could have received prior to his death. The commission
12 denied her application in February 1993, finding that Charles had been
13 permanently and totally disabled when he died, but not due to either of his allowed
14 conditions. The commission explained:

15 “The reports of Doctors Lohne, Baroff and McCloud were reviewed and
16 evaluated. This order is based particularly upon the report of Doctor McCloud.

17 “The medical evidence found persuasive includes the report of Commission
18 orthopedist Dr. McCloud. The report, which consists of a review of both allowed

1 claim files subsequent to the claimant's death, finds a 30% permanent partial
2 impairment due to the claimant's allowed conditions and opines these conditions
3 did not render the claimant permanently totally impaired. It is noted that the
4 claimant's course of treatment for his allowed conditions was exclusively
5 conservative in nature. The report of Commission specialist Dr. Baroff, which
6 finds only a 25% permanent partial impairment but opines the claimant is
7 permanently disabled from any work, is found unpersuasive in that it is not
8 supported by objective medical evidence on file. Medical evidence on file
9 indicates at the time of his death the claimant suffered from a seizure disorder and
10 arthritis in both knees. The death certificate indicates the claimant's immediate
11 cause of death was cardiac arrest, with meningeal sarcoma and coronary
12 a[r]teriosclerotic heart disease listed as contributing causes. Therefore, while the
13 Commission finds the claimant to have been incapable of gainful employment at
14 his date of death, it is determined that the claimant's inability to work was not
15 causally related to the allowed conditions in the claim files. This finding is based
16 on a consideration of Dr. McCloud's report, the claimant's conservative course of
17 treatment, the claimant's advanced age of 68 at his date of death, and his serious
18 non-work related medical conditions. Accordingly, the IC-2 filed 7/17/90

1 [Charles's application] and the C-6 filed 4/13/92 [Marian's application] are
2 denied."

3 Marian then filed her complaint in mandamus in the Court of Appeals for
4 Franklin County. She argued that the allowed conditions and Charles's other
5 vocational characteristics had made him unfit for sustained remunerative
6 employment and, therefore, that the commission had abused its discretion by
7 denying her payment for the PTD Charles should have received prior to his death.
8 A referee recommended denial of the writ without reaching Charles's PTD
9 eligibility. The referee concluded that Charles's claim had abated upon his death
10 and that Marian had no legal right, under R.C. 4123.60, to pursue payment for his
11 PTD by an action in mandamus. The court of appeals agreed, adopted the
12 referee's reasoning, and denied the writ.

13 The cause is before this court upon an appeal as of right.

14 *Jurus Law Offices* and *Michael J. Muldoon*, for appellant.

15 *Betty D. Montgomery*, Attorney General, and *Charles Zamora*, Assistant

16 Attorney General, for appellee.

17 *Per Curiam*. Two questions are presented for our review: (1) Is mandamus
18 available to compel payment, pursuant to R.C. 4123.60, to a decedent's spouse of

1 the PTD the decedent could have received prior to his death? and (2) Did the
2 commission abuse its discretion in finding that Charles was not entitled to PTD
3 and denying Marian the payments available under R.C. 4123.60? For the reasons
4 that follow, we hold that R.C. 4123.60 affords dependents, upon timely
5 application, the right to claim compensation for which a decedent was eligible but
6 was not paid before death and that mandamus is available to enforce this right.
7 We further hold that the commission's order is not sufficiently specific under *State*
8 *ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 567 N.E.2d 245, and,
9 therefore, constitutes an abuse of discretion. Accordingly, we reverse and return
10 this cause to the commission for further consideration and an amended order.

11 R.C. 4123.60

12 Marian applied for payment of compensation for which Charles qualified
13 before he died pursuant to R.C. 4123.60, which provided, in part:

14 "In all cases of death from causes other than the injury or occupational
15 disease for which award had theretofore been made on account of temporary, or
16 permanent partial, or total disability, in which there remains an unpaid balance,
17 representing payments accrued and due to the decedent at the time of his death, the
18 commission may, after satisfactory proof has been made warranting such action,

1 award or pay any unpaid balance of such award to such of the dependents of the
2 decedent, or for services rendered on account of the last illness or death of such
3 decedent, as the commission determines in accordance with the circumstances in
4 each such case. *If the decedent would have been lawfully entitled to have made*
5 *application for an award at the time of his death the commission may, after*
6 *satisfactory proof to warrant an award and payment, award and pay an amount,*
7 *not exceeding the compensation which the decedent might have received, but for*
8 *his death, for the period prior to the date of his death, to such of the dependents of*
9 *the decedent, or for services rendered on account of the last illness or death of*
10 *such decedent, as the commission determines in accordance with the*
11 *circumstances of each case, but such payments may be made only in cases in*
12 *which application for compensation was made in the manner required by sections*
13 *4123.01 to 4123.94 of the Revised Code, during the lifetime of such injured or*
14 *disabled person, or within one year after the death of such injured or disabled*
15 *person.”* (Emphasis added.) (136 Ohio Laws, Part I, 1075, 1169-1170.)

16 The court of appeals concluded that Charles’s PTD claim abated upon his
17 death, which is true under *State ex rel. Hamlin v. Indus. Comm.* (1993), 68 Ohio
18 St.3d 21, 22, 623 N.E.2d 35, 36. The court further held that his surviving spouse

1 had no right under R.C. 4123.60 to “step into * * * [his] shoes” for the purpose of
2 pursuing his claim, and this is also true. *State ex rel. Manns v. Indus. Comm.*
3 (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379, paragraph three of the syllabus
4 (where deceased claimant was paid lump-sum advance for anticipated future
5 compensation, advance was not “accrued compensation” to which dependents may
6 be entitled under R.C. 4123.60, and a surviving spouse cannot pursue the
7 decedent’s claim for the advance). The commission urges us to affirm for the
8 same reasons.

9 We, however, read the emphasized language of R.C. 4123.60 to expressly
10 authorize a deceased worker’s dependents’ receipt of compensation for which the
11 worker qualified and should have received before death. Indeed, we have already
12 said that where a deceased worker’s dependents’ claims accrued compensation
13 under R.C. 4123.60, “[t]he award is not personal to the worker because R.C.
14 4123.60 specifically provides that dependents may recover the compensation the
15 deceased worker was entitled to receive.” *State ex rel. Nyitray v. Indus. Comm.*
16 (1983), 2 Ohio St.3d 173, 177, 2 OBR 715, 719, 443 N.E.2d 962, 966, fn. 5. For
17 this reason, an R.C. 4123.60 award is similar to a death benefit award under R.C.
18 4123.59 -- both exist separate and apart from the rights of the injured worker.

1 *Nyitray* at 174, 2 OBR at 716, 443 N.E.2d at 963; *Manns*, 39 Ohio St.3d at 190,
2 529 N.E.2d at 1381.

3 Thus, contrary to the court of appeals' decision, Marian is not attempting to
4 pursue Charles's PTD claim, which he filed pursuant to R.C. 4123.58, on his
5 behalf. Rather, when Marian filed her application for accrued compensation, she
6 instituted her own claim for compensation Charles could have received, a claim
7 that is expressly sanctioned by R.C. 4123.60. As a result, Marian's claim was not
8 abated by Charles's death -- her interests actually arose at that time and, under
9 R.C. 4123.60, they became independently actionable. *Nyitray* at 174, 2 OBR at
10 716, 443 N.E.2d at 963.

11 The court of appeals also concluded that R.C. 4123.60 requires the
12 commission to decide a dependent's application for accrued compensation, but
13 stops short of authorizing a dependent's suit in mandamus if the application is
14 denied. The court came to this conclusion because R.C. 4123.60 does not identify
15 mandamus as an avenue for challenging the commission's denial of compensation
16 and because the statute states that the commission "may" compensate dependents
17 of deceased workers, connoting a discretionary decision. Neither consideration,

1 however, justifies the appellate court’s refusal to recognize Marian’s claim as
2 actionable in mandamus.

3 The court of appeals cited *State ex rel. Yurcsisin v. Indus. Comm.* (1944),
4 142 Ohio St. 479, 27 O.O. 408, 52 N.E.2d 991, which noted the discretionary
5 language of the predecessor to R.C. 4123.60, but did not deny mandamus on that
6 basis alone. The *Yurcsisin* court instead held that a widow had failed to prove
7 claimed compensation was “accrued and due” under the first sentence of the
8 statute. This holding does not bar mandamus where such proof exists.

9 Furthermore, in *Nyitray* we granted mandamus to remedy the denial of equal
10 protection represented by former R.C. 4123.60. At that time, R.C. 4123.60 denied
11 accrued compensation to dependents of workers who died of industrial injury or
12 occupational disease, but allowed compensation for qualifying dependents of
13 workers who died of other causes. We held that no rational basis justified a
14 distinction based on cause of death and granted the writ. By affording this relief,
15 we effectively ordered the commission to award any compensation for which the
16 surviving spouse in that case qualified. Thus, R.C. 4123.60 is enforceable through
17 mandamus.

18 PTD Denial

1 In reviewing the PTD application of a claimant who is only permanently
2 partially impaired due to industrial injury, the commission must consider the
3 claimant’s age, work experience, education, or other relevant nonmedical or
4 vocational characteristics, as required by *State ex rel. Stephenson v. Indus. Comm.*
5 (1987), 31 Ohio St.3d 167, 31 OBR 369, 509 N.E.2d 946, and determine whether
6 the claimant is nevertheless foreclosed from sustained remunerative employment.
7 *State, ex rel. Hopkins v. Indus. Comm.* (1994), 70 Ohio St.3d 36, 38,635 N.E.2d
8 1257, 1259; *State ex rel. Lawrence v. Am. Lubricants Co* (1988), 40 Ohio St.3d
9 321, 322, 533 N.E.2d 344, 345-346; *State ex rel. Hartung v. Columbus* (1990), 53
10 Ohio St.3d 257, 258, 560 N.E.2d 196, 198. And, for all its determinations, *Noll*,
11 *supra*, requires the commission “to prepare orders that ‘are fact-specific and which
12 contain reasons explaining its decisions. * * * Such order[s] must specifically state
13 what evidence has been relied upon to reach its conclusion and, most important,
14 briefly explain the basis of its decision.’” *State ex rel. Pass v. C.S.T. Extraction*
15 *Co.* (1996), 74 Ohio St.3d 373, 375, 658 N.E.2d 1055, 1057, quoting *Noll*, 57
16 Ohio St.3d at 206, 567 N.E.2d at 249. The commission’s failure to specify and
17 explain the impact of the *Stephenson* factors, in accordance with *Noll*, is an abuse

1 of discretion for which mandamus is the remedy. *State ex rel. Ranomer v. Indus.*
2 *Comm.* (1994), 71 Ohio St.3d 134, 137, 642 N.E.2d 373, 376.

3 Marian argues that the commission did not sufficiently account for the
4 *Stephenson* factors when it denied her application for compensation that had
5 accrued to Charles before he died. We agree.

6 Charles was approximately seventy-years old and a nursing-home resident
7 when he died. He had a seventh-grade education and had been employed as a
8 railroad brakeman and steel mill laborer. He had not worked since his injury in
9 1974, and he appeared to have no rehabilitation potential.

10 The commission noted Charles's age in its order but no other nonmedical
11 characteristics. It instead relied completely on Dr. McCloud's October 1992
12 report, which, except for one or two conclusions, reads as if he were determining
13 Charles's cause of death for a death-benefit claim, rather than Charles's fitness for
14 sustained remunerative employment on his application for PTD. The report stated:

15 "HISTORY

16 "Injured 4-30-74

17 "1) 562043-22 is allowed for right foot # 2) 73-41359 is allowed for

18 contusions and ecchymosis of left buttock, strain of left sacroiliac, aggravation of

1 pre-existing arthritis of lumbar spine and spondylolisthesis at L5-S1 with disc
2 bulging at L4-5 and L5-S1. He was a general laborer for the Copperweld Steel
3 Company.

4 "I was asked to review the industrial records to help determine if there was
5 medical evidence consistent with considering this claimant unable to perform any
6 sustained work activity. It is important to note that at the time of his death his
7 back injury was some 19 years old and his foot injury was some 18 years old. His
8 treatment in regard to each of these problems was conservative in nature and I did
9 review a variety of clinical notes from Dr. Burrows [*sic*, Baroff]. The charts are
10 quite thick but there is nothing in the chart that would indicate any specific or
11 radical changes that occurred through his clinical course as the conservative
12 treatment and various conservative modalities were continued throughout his
13 clinical history in regard to these claims. The claimant did die on February 18,
14 1992 and I did review the death certificate as prepared by the coroner. The
15 primary cause of death was listed as a cardiac arrest with a contributing factor of
16 meningeal sarcoma. Further, the claimant was felt to have arterial sclerotic heart
17 disease as a contributing factor as well.

1 “In summary, this individual died as a result of cardiac arrest and the
2 precipitating factor as well as the contributing factors [was] described on the death
3 certificate by the coroner. Neither the primary factor in relation to his death nor
4 the contributing factors in any fashion can be related to the conditions permitted to
5 be a portion of either of these two claims. Therefore, review of the medical
6 information in the record would indicate that this claimant cannot be considered
7 permanently and totally impaired based upon the conditions permitted to be a
8 portion of either claim.

9 “* * *

10 “562043-22 = 0% [Percentage of impairment]

11 “73-41359 = 30% [Percentage of impairment].”

12 To receive PTD, Marian must demonstrate not only Charles’s inability to
13 perform sustained remunerative employment, but also that the inability is causally
14 related to the allowed conditions. *State ex rel. LTV Steel Co. v. Indus. Comm.*
15 (1992), 65 Ohio St.3d 22, 23, 599 N.E.2d 265, 267. “Permanent total disability
16 cannot be based, wholly or partially, on nonallowed medical conditions.” *State ex*
17 *rel. Erico Products, Inc. v. Indus Comm.* (1994), 70 Ohio St.3d 661, 663, 640
18 N.E.2d 824, 826, citing *State ex rel. Fields v. Indus. Comm.* (1993), 66 Ohio St.3d

1 437, 613 N.E.2d 230. However, “[t]he presence of debilitating nonallowed
2 conditions * * * does not preclude permanent total disability compensation so long
3 as the allowed conditions * * * independently [or together with nonmedical
4 disability factors, *LTV Steel* at 24, 599 N.E.2d at 267] prevent sustained
5 remunerative employment.” *Erico* at 663, 640 N.E.2d at 826, citing *State ex rel.*
6 *Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452, 619 N.E.2d 1018.

7 Only the total absence of impairment attributable to allowed conditions
8 eliminates the commission’s obligation to consider nonmedical factors recognized
9 in *Stephenson*. In that situation, “there is no allowable impairment with which the
10 nonmedical factors could conceivably combine to produce [a finding that the
11 claimant was unfit for sustained remunerative employment].” *Erico* at 663, 640
12 N.E.2d at 826. Here, the commission was persuaded that Charles was thirty-
13 percent impaired due to his allowed back condition, but did not finish the PTD
14 analysis. It overlooked that the combination of the thirty percent impairment and
15 Charles’s education, age, and work history might have precluded his return to
16 work independently of his otherwise failing health.

17 The commission argues, however, that Dr. McCloud’s report was “some
18 evidence” upon which it could conclude that Charles’s permanent and total

1 disability was exclusively due to nonallowed conditions. The commission cites
2 *LTV Steel*, in which we declared it “pointless” to order an explanation of how
3 nonmedical factors justified a PTD award. *LTV Steel* at 25, 599 N.E.2d at 267.
4 There, medical evidence attributed permanent and total disability exclusively to
5 nonallowed conditions and, thus, necessarily established that the claimant’s
6 inability to work was not due to the allowed conditions.

7 *LTV Steel* sanctions the commission’s noncompliance with *Noll* where it
8 legitimately denies PTD on evidence that exclusively attributes disability to
9 nonallowed conditions. *LTV Steel*, 65 Ohio St.3d at 24-25, 599 N.E.2d at 267.

10 *LTV Steel*, however, was distinguished on this basis in *Waddle*, and the distinction
11 applies here for the reasons just discussed:

12 “*LTV* held that the presence of a totally disabling nonindustrial condition
13 negated the need for further *Noll* consideration. Unlike this case, however, the
14 claimant in *LTV* suffered no underlying impairment whatsoever from the allowed
15 condition. There was thus no allowed condition/impairment with which the
16 *Stephenson* factors could conceivably combine to produce permanent total
17 disability. The present claimant clearly has a work-related physical impairment
18 with which the *Stephenson* factors could combine.

