

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The State of Ohio ex rel. Howard Moore	:	
dec'd, Wilma Moore, spouse [and]	:	
Brenda Spears, daughter,	:	
	:	
Relators,	:	No. 11AP-256
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and	:	
Rollyson Aluminum Products, Inc.,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on April 19, 2012

The Bainbridge Firm, LLC, Christopher J. Yeager, and Andrew J. Bainbridge, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relators, Howard Moore ("decedent"), Wilma Moore, his spouse, and Brenda Spears, his daughter, filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its denial of the lump sum settlement ("LSS").

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found relators did not demonstrate the commission abused its discretion in determining that decedent's claim abated at the time of his death. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} No objections have been filed to the magistrate's findings of fact; however, relators have filed the following two objections to the magistrate's conclusions of law:

[1.] The Magistrate erred in finding the settlement had not reached the stage of approval prior to the injured worker's death.

[2.] The Magistrate failed to properly analyze the requirements of R.C. 4123.65(C), mandating a good cause showing for withdraw from a settlement agreement.

{¶ 4} In the first objection, relators contend Ohio Adm.Code 4123-5-21, which provides that a claimant's application is abated upon the claimant's death if the application is pending before the bureau or commission at the time of death, is not applicable here because settlement had reached the stage of being approved. Relators further contend the magistrate's reliance on *State ex rel. Carmickle v. Indus. Comm.*, 154 Ohio App.3d 74, 2003-Ohio-4574 (10th Dist.), to support the finding that settlement had not yet been approved is misplaced because *Carmickle* is distinguishable from the instant matter. We disagree with relators' position.

{¶ 5} The *Carmickle* decision reflects that on February 27, 2000, the claimant filed a settlement agreement and application for approval of settlement agreement with the Bureau of Worker's Compensation ("BWC"). The claimant made an offer to settle for \$95,000. On March 2, 2000, the BWC verbally advised the claimant that while it would not agree to the proposed \$95,000, it would approve a settlement in the amount of \$80,000. Four days later, on March 6, the claimant faxed an amended settlement agreement and release to the BWC indicating his willingness to settle his claim for \$80,000. Though the BWC sent claimant a letter approving the \$80,000 settlement on March 22, 2000, the claimant died on March 13, 2000. On April 1, 2000, the BWC

notified the relators in that case that the settlement application was denied due to abatement of the claim resulting from the claimant's death that occurred prior to the BWC's order approving the settlement application.

{¶ 6} In the mandamus action, this court framed the issue as whether an oral offer and acceptance of that offer constituted approval of the settlement by BWC's administrator so as to be subject to BWC's abatement policies. This court held that an oral offer to settle a claim does not constitute approval by the administrator because "[c]learly, Ohio Adm.Code 4123-3-34(F) and (G), requiring notice of approval to be sent to the claimant, employer, their representatives and the Industrial Commission, contemplate written, not oral, approval by the administrator." *Id.* at ¶ 11.

{¶ 7} Regardless of *Carmickle's* similarity to the instant case, relators contend it is distinguishable because in *Carmickle* the initial offer was made on March 2, and it was not until March 22 that the BWC issued an order approving the settlement, whereas in the case sub judice, the offer, acceptance, and issuance of an order approving the settlement occurred within two days. We do not agree that this factual distinction requires a conclusion contra to that reached by the magistrate in this case. *Carmickle* held that the Ohio Administrative Code rules clearly contemplate written, not oral, approval by the BWC's administrator. In accordance with *Carmickle's* holding, we must conclude that the settlement here had not reached the stage of approval prior to the claimant's death.

{¶ 8} For these and the reasons stated in the magistrate's decision, we overrule relators' first objection to the magistrate's decision.

{¶ 9} In the second objection, relators contend that since the settlement had reached the stage of approval, the magistrate was required to consider R.C. 4123.65(C) and determine whether the BWC had good cause to withdraw from the settlement. Given our disposition of relators' first objection to the magistrate's decision and our conclusion that the settlement had not reached the stage of approval, we do not find relators' second objection to be well-taken. Accordingly, we overrule relators' second objection to the magistrate's decision.

{¶ 10} To summarize, we conclude relators' objections fail to raise any new issues and instead reargue the contentions that were presented to and sufficiently addressed by the magistrate. Upon review of the magistrate's decision, an independent review of the

record, and due consideration of relators' objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶ 11} Accordingly, for the reasons set forth herein and in the magistrate's decision, relators' objections to the magistrate's decision are overruled, and the requested writ of mandamus is hereby denied.

*Objections overruled;
writ of mandamus denied.*

TYACK and CONNOR, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

<p>The State of Ohio ex rel. Howard Moore dec'd, Wilma Moore, spouse [and] Brenda Spears, daughter,</p> <p style="padding-left: 40px;">Relators,</p>	<p>: : : : : : :</p>	<p>No. 11AP-256</p> <p>(REGULAR CALENDAR)</p>
<p>v.</p> <p>Industrial Commission of Ohio and Rollyson Aluminum Products, Inc.,</p> <p style="padding-left: 40px;">Respondents.</p>	<p>: : : : : : :</p>	

MAGISTRATE'S DECISION

Rendered on November 21, 2011

The Bainbridge Firm, LLC, Christopher J. Yeager, and Andrew J. Bainbridge, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} Relators, Howard Moore ("decedent"), Wilma Moore his spouse, and Brenda Spears, decedent's daughter, filed this original action requesting that this court

issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its denial of the lump sum settlement ("LSS").

Findings of Fact:

{¶ 13} 1. On December 6, 1979, decedent sustained an injury while in the course of his employment with respondent Rollyson Aluminum Products, Inc. ("Rollyson").

{¶ 14} 2. Decedent began receiving permanent total disability ("PTD") compensation.

{¶ 15} 3. On January 25, 2010, relator, Ms. Spears as power of attorney, executed a Settlement Agreement and Application for Approval of Settlement Agreement (C-240) for LSS on behalf of decedent, who was 85 years old at the time. At that time, decedent's physical abilities had improved; he was walking with the aid of a walker instead of using a wheelchair as he had been for the previous year.

{¶ 16} 4. The Ohio Bureau of Workers' Compensation ("BWC") requested an Acknowledgement and Waiver form (BWC-9920) be completed. It is dated January 25, 2010, but the BWC contends they received it on March 10, 2010 and the fax date on the bottom of the exhibit is marked "RCVD AT 3/10/2010."

{¶ 17} 5. One month later, in April, the application went to the BWC "Round Table" for discussion.

{¶ 18} 6. On April 13, 2010, the BWC requested further medical evidence regarding non-work-related health problems to evaluate the value of the claim. The medical documents were filed by decedent on May 11, 2010.

{¶ 19} 7. Another round table review of the settlement application was scheduled for May 18, 2010.

{¶ 20} 8. On May 16, 2010, decedent was hospitalized at Kings Daughter Medical Center. The BWC was not aware of his hospitalization.

{¶ 21} 9. On May 25, 2010, the BWC and decedent's attorney reached a verbal agreement, settling the claim for \$53,000, which included \$7,900 for prescription drugs, \$1,100 for medical, and \$44,000 indemnity.

{¶ 22} 10. That evening, May 25, 2010, at approximately 10:15 p.m., decedent passed away.

{¶ 23} 11. On May 26, 2010, decedent's attorney executed and sent an Amended Settlement Agreement and Release ("C-241") to the BWC. That same day, the BWC mailed an approval order.

{¶ 24} 12. On May 27, 2010, the BWC withdrew the LSS approval based upon decedent's death, because the settlement had abated.

{¶ 25} 13. On July 15, 2010, decedent's counsel filed a C-86 motion requesting "that the settlement proceeds arising from the agreed terms of the Amended Settlement Agreement (C-241) be paid to the surviving dependent spouse, pursuant to Ohio Revised Code Section 4123.60." In the memorandum in support, counsel argued that the settlement had reached the stage of being approved, was not subject to the abatement provisions in Ohio Adm.Code 4123-5-21, and that the BWC took an unreasonable amount of time processing the LSS application.

{¶ 26} 14. Following a hearing on August 26, 2010, a district hearing officer ("DHO") denied the C-86 motion finding that decedent's widow, relator Wilma Moore, failed to meet her burden of proof.

{¶ 27} 15. The DHO's decision was appealed and after a hearing on October 29, 2010, a staff hearing officer ("SHO") denied the C-86 motion.

{¶ 28} 16. The SHO's order was appealed and the commission refused the appeal in an order mailed December 21, 2010.

{¶ 29} 17. On March 16, 2011, relators filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 30} Relators assert that the commission abused its discretion in denying the LSS compensation arguing that the settlement was not subject to claim abatement provisions.

{¶ 31} Because the settlement had reached the stage of being approved by the administrator of the BWC, relator contends that the BWC lacked a good cause to withdraw from the settlement.

{¶ 32} 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* (1983), 6 Ohio St.3d 28. 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 to the 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.

{¶ 33} For the reasons that follow, it is this magistrate's decision that this court should deny relators' request for a writ of mandamus.

{¶ 34} R.C. 4123.65 provides, as follows:

(A) A state fund employer or the employee of such an employer may file an application with the administrator of workers' compensation for approval of a final settlement of a claim under this chapter. The application shall include the settlement agreement, and except as otherwise specified in this division, be signed by the claimant and employer, and clearly set forth the circumstances by reason of which the proposed settlement is deemed desirable and that the parties agree to the terms of the settlement agreement. * * *

* * *

(C) No settlement agreed to under division (A) of this section or agreed to by a self-insuring employer and the self-insuring employer's employee shall take effect until thirty days after the administrator approves the settlement for state fund employees * * *. During the thirty-day period, the employer, employee, or administrator, for state fund settlements, * * * may withdraw consent to the settlement[.] * * *

{¶ 35} Ohio Adm.Code 4123-5-21 provides, as follows:

(A) When a claimant dies, action on any application filed by the claimant, and pending before the bureau or the industrial

commission at the time of his death, is abated by claimant's death.

{¶ 36} Ohio Adm.Code 4123-3-34(F) and (G) provide, as follows:

* * * When a settlement agreement has been approved by the administrator, a notice of approval shall be sent to the claimant, the employer, and their representatives, informing them of their rights to withdraw consent to the settlement agreement within thirty days. * * *

The administrator shall also send the notice of approval to the industrial commission within five days from the date of the bureau order of approval. * * *

{¶ 37} The issue is whether the oral offer of a \$53,000 settlement and decedent's counsel's oral acceptance of that offer constituted a settlement and an approval of the settlement by the administrator of the BWC. The magistrate finds that the commission did not abuse its discretion by finding that it did not. Had the BWC known that decedent's health had taken a turn for the worse, the BWC likely would have re-evaluated its decision to award \$44,000 for future PTD compensation.

{¶ 38} Initially, a mistake was made concerning the estimated future value of decedent's claim because the BWC had no knowledge of the current status of his illness. Because the BWC representatives did not know that decedent was in the hospital or the intensive care unit, and because neither party knew that decedent would pass away the evening of May 25, 2010 after the settlement was negotiated that afternoon, the calculations based on the life expectancy of decedent were inaccurate and erroneous.

{¶ 39} The C-241, executed and filed on May 26, 2010 by decedent's attorney, indicates that claim No. 79-50780 will settle for \$53,000, with a \$44,000 allocation to

future PTD compensation, \$7,900 to future prescriptions, and \$1,100 to future medical treatment. However, by the time the C-241 was filed, decedent had already passed away. Ohio Adm.Code 4123-3-34(H) provides that "[t]he effective date of the settlement is the date the notice of approval of settlement agreement is mailed." The order was mailed on May 26, 2010. Thus, on May 26, the BWC was unaware of decedent's death and the parties were mistaken about the estimated future value of the claim.

{¶ 40} Furthermore, both parties were mistaken as to the status of decedent's health. The only medical information the BWC had was provided, throughout the negotiation process, by his widow and daughter who indicated that his "health was excellent."

{¶ 41} Finally, R.C. 4123.65(C) provides that an administrative settlement does not "take effect until thirty days after the administrator approves the settlement for state fund employees[.] * * * During the thirty-day period, the employer, employee, or administrator, for state fund settlements, * * * may withdraw consent to the settlement." If an employee dies within the 30-day period, the settlement can be voided by any party for good cause. Here, the 30-day period had not started because decedent passed away on May 25, 2010, and the settlement agreement was filed one day later, on May 26. The BWC did not need good cause to withdraw because the 30-day period had not yet started.

{¶ 42} This case is similar to *State ex rel. Carmickle v. Indus. Comm.*, 154 Ohio App.3d 74, 2003-Ohio-4574. In *Carmickle*, the claimant filed an application for approval to settle a claim for \$95,000 in February 2000. On March 2, 2000, the claimant was orally advised that the BWC would approve the settlement for \$80,000. On March 6,

2000, the claimant faxed his agreement to settle for that amount and the fax shows his signature and his attorney's signature. The claimant died on March 13, 2000. On March 22, 2000, the BWC issued a letter approving the settlement in the amount of \$80,000. On April 1, 2000, the BWC notified the claimant's attorney that the settlement application was denied as no settlement had been reached and it was withdrawing its consent, pursuant to R.C. 4123.65(C), as the claim abated with the claimant's death.

{¶ 43} This court addressed the issue of whether the oral offer and the acceptance of that offer constituted approval of the settlement by the administrator of the BWC so that BWC policy, which exempts settlements that have been approved by the administrator of the BWC from the abatement provisions of R.C. 4123.65, would override the abatement provisions. This court found that an oral offer to settle a claim did not constitute approval by the administrator. "Clearly, Ohio Adm.Code 4123-3-34(F) and (G), requiring that notice of approval be sent to the claimant, employer, their representatives, and the Industrial Commission, contemplate written, not oral, approval by the administrator." *Carmickle* at ¶11. Thus, here, pursuant to *Carmickle*, decedent died before the BWC approved the settlement application and the claim abated upon his death. The 30-day cooling off period did not apply because the settlement was never approved by the administrator.¹

{¶ 44} Relators contend this case is similar to *Johns v. Bur. of Workers' Comp.*, Ct.Cl. No. 2000-01155, 2002-Ohio-425. In *Johns*, the court found that the abatement provisions of Ohio Adm.Code 4123-5-21 were inapplicable because the settlement

¹ At the hearing, relators argued that the BWC unreasonably delayed processing the LSS application. However, they have not raised that argument in their mandamus action.

agreement was reached before the injured worker died. This court noted that two of the three committee members had signed the settlement agreement before the injured worker died, and the BWC had not withdrawn its consent within the 30 days.

{¶ 45} However, this case is distinguishable from *Johns*. In this case, the settlement agreement was merely an oral agreement and no signatures had been obtained. The BWC had not executed the settlement agreement. Also, the BWC withdrew its consent within the 30-day period, even though, as discussed above, that was not necessary here because the 30-day period did not apply since the settlement was never approved by the administrator.

{¶ 46} Based on the foregoing, it is this magistrate's decision that relators have not demonstrated that the commission abused its discretion in determining that decedent's claim abated at the time of his death, and relators' request for a writ of mandamus should be denied.

/s/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
MAGISTRATE

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).