

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Peter Maglis (deceased) :
[and] Irene Maglis (surviving spouse), :
Relator, :
v. : No. 15AP-648
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Athos Contracting, :
Respondents. :

D E C I S I O N

Rendered on June 28, 2016

On brief: *Schiavoni, Schiavoni, Bush & Muldowney, and Shawn R. Muldowney*, for relator.

On brief: *Michael DeWine*, Attorney General, and *John Smart*, for respondent Industrial Commission of Ohio.

On brief: *Levey/Gray, LLC, David E. Gray II, and Scott I. Levey*, for respondent Athos Contracting.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

LUPER SCHUSTER, J.

{¶ 1} Relator, Irene Maglis, as the surviving spouse of Peter Maglis ("decendent"), initiated this action requesting this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order finding that she was partly dependent on decedent at the time of his death and ordering the commission to issue an order finding that she was wholly dependent on decedent at the time of his death.

{¶ 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 who issued the appended decision, which includes findings of fact and conclusions of law. The magistrate concluded that the commission did not abuse its discretion when it found relator was only partly dependent on decedent at the time of his death and limited her death benefits to a period of ten weeks. Thus, the magistrate recommends this court deny relator's request for a writ of mandamus.

{¶ 3} Relator has filed the following objections to the magistrate's decision:

[1.] The Magistrate erred by finding that the Relator was not entitled to the statutory presumption that she was wholly dependent.

[2.] The Magistrate erred by finding that the Ohio Industrial Commission did not abuse [its] discretion in finding that Relator Surviving Spouse was only partially dependent.

[3.] The Magistrate erred by finding that the [*State ex rel. Indus. Comm. v. Dell*, 104 Ohio St. 389 (1922)] facts apply to the instant case.

[4.] The Magistrate erred by finding that Ohio Revised Code 4123.59(C) provides for the Ohio Industrial Commission to arbitrarily award ten weeks of death benefits without adequately explaining how they came to that amount.

{¶ 4} Because they are interrelated, we address together relator's first and second objections. In the first two objections, relator asserts the magistrate erred in finding no abuse of discretion when the commission concluded relator was only partly dependent on decedent at the time of his death. Relator argues the commission should have found her wholly dependent on decedent at the time of his death. This argument is unpersuasive.

{¶ 5} R.C. 4123.59 governed the commission's determination of relator's entitlement to death benefits. R.C. 4123.59(B) provides for death benefits payable to "wholly dependent persons at the time of the death," and R.C. 4123.59(C) provides for death benefits payable to "partly dependent persons at the time of the death." R.C. 4123.59(D)(1) identifies a person "presumed to be wholly dependent for [his or her]

support upon a deceased employee," to include a "surviving spouse who was living with the employee at the time of death."

{¶ 6} Relator argues she was living with decedent at the time of his death, and therefore she was presumptively wholly dependent on him at that time. However, the commission found that at the time of decedent's death, decedent lived in Campbell, Ohio, and relator lived in Greece. Evidence in the record supports the commission's finding. The evidence demonstrates that relator and decedent married in Greece in 1973. Two years later, decedent arrived in the United States on a work visa, and he eventually became a United States resident alien, but relator remained a resident of Greece. According to relator, each year, decedent would work in the United States from April until October, and then he would travel to Greece to live with relator. Decedent died in September 2012 while working in the United States. At the time of decedent's death, relator was living in Greece. Based on these facts, we agree with the magistrate that the evidence supported the commission's finding that relator did not live with decedent at the time of his death, and, therefore, the wholly dependent presumption did not apply.

{¶ 7} Without the presumption of dependency, the commission was required to determine "the question of dependency, in whole or in part, * * * in accordance with the facts [of the] case existing at the time of the injury resulting in the death" of decedent. R.C. 4123.59(D)(2). Based on its review of the evidence, the commission was not persuaded that relator was wholly dependent on decedent at the time of his death. Relator challenges this factual finding.

{¶ 8} According to relator, a probate court entry approving a wrongful death settlement payment to her and Social Security Administration documentation indicating her entitlement to monthly widow's benefits supported her position that she was wholly dependent on decedent. However, relator concedes that the commission was not bound by any determination of a probate court or the Social Security Administration as it relates to the level of her dependency. Additionally, while relator submitted an affidavit stating that she was wholly dependent on decedent and that he sent a majority of his earnings to her in Greece, she submitted little documentary evidence to corroborate this assertion. While relator submitted copies of a few MoneyGram receipts, they were all sent in 2011, relator was identified as the recipient on only one of the wire transfers, and decedent was

not identified as the transferor on any of the receipts. Considering the absence of corroborative evidence showing that decedent consistently wired a significant portion of his earnings to relator, the commission reasonably found relator's averment to lack credibility. *See, e.g., State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981) (credibility and weight to be given evidence are clearly within the discretion of the commission as factfinder). Therefore, the magistrate correctly determined that the commission did not abuse its discretion in finding that relator was only partly dependent on decedent at the time of his death. Accordingly, we overrule relator's first and second objections to the magistrate's decision.

{¶ 9} In her third objection, relator argues the magistrate erroneously found *Dell* to be applicable here. This argument is unconvincing. According to relator, the facts in this case are distinguishable from the facts in *Dell*. As the magistrate explained, relator is correct that many of the facts in *Dell* were different than those presented in this case. However, that case involved similar issues. The *Dell* court concluded that spousal dependency is an obligation that exists regardless of whether that obligation is being discharged. The *Dell* court's reasoning is applicable here because this case also involves questions regarding the dependency of a spouse not residing with the decedent. The magistrate correctly found no error in the commission applying the reasoning of *Dell* to the facts of this case. Therefore, we overrule relator's third objection to the magistrate's decision.

{¶ 10} In her fourth objection, relator argues that the magistrate erred by finding that the commission did not abuse its discretion when it arbitrarily awarded 10 weeks of death benefits. Specifically, relator argues the commission did not adequately explain why relator was only entitled to 10 weeks, versus 11, 20, or 50 weeks. However, in her arguments before the magistrate, relator argued the commission abused its discretion in not awarding the death benefits at a reduced weekly amount on an ongoing basis. Relator did not argue before the magistrate that 10 weeks of death benefits was arbitrary or that the commission failed to provide an adequate explanation. Consequently, this argument is waived. *See, e.g., State ex rel. German v. Provider Servs. Holdings, LLC*, 10th Dist. No. 13AP-149, 2014-Ohio-3336, ¶ 18 ("Because relator failed to raise this issue before the

magistrate, relator has waived this argument."). Accordingly, we overrule relator's fourth objection to the magistrate's decision.

{¶ 11} Following our independent review of the record pursuant to Civ.R. 53, we find the magistrate correctly determined relator is not entitled to the requested writ of mandamus. The magistrate properly applied the pertinent law to the salient facts. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. We, therefore, overrule relator's objections to the magistrate's decision and deny her request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

BROWN and BRUNNER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Peter Maglis (deceased) :
[and] Irene Maglis (surviving spouse)

Relator,

v.

Industrial Commission of Ohio and
Athos Contracting,

Respondents.

:
:
:
:
:

No. 15AP-648

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on February 25, 2016

Schiavoni, Schiavoni, Bush & Muldowney, and Shawn Muldowney, for relator.

Michael DeWine, Attorney General, and John Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 12} Relator, Irene Maglis, as the surviving spouse of Peter Maglis ("decedent"), 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 finding that she was partially dependent on the decedent at the time of his death, and ordering the commission to issue an order finding that she was wholly dependent on decedent at the time of his death.

Findings of Fact:

{¶ 13} 1. On September 12, 2012, the decedent was fatally injured in the course and scope of his employment as a bridge painter while working for Athos Contracting.

{¶ 14} 2. Relator, who was living in Greece while the decedent was working here in Ohio, filed a claim for death benefits. Apparently, relator never lived with the decedent here in Ohio; however, in her affidavit, she averred that relator "would live with me in Greece from October of each year until April of the following year. He would then go to the State of Ohio from April through October to work. During this period of time when my husband was in Ohio he would send all of the monies that he made directly to me."

{¶ 15} 3. In her affidavit, relator also averred that she was unemployed and wholly dependent on the decedent for financial support. In support, relator attached copies of a few MoneyGrams sent from a person named Larry S. Frangos. One of the MoneyGrams, in the amount of \$2,000 was specifically sent to relator. However, the other MoneyGrams were sent from Larry S. Frangos to other individuals in Greece and all were sent in the latter part of 2011.

{¶ 16} 4. Although relator asserted that decedent regularly traveled back and forth from the United States to Greece, relator did not submit any evidence (such as a copy of the decedent's passport or copies of airline tickets, or an affidavit from anyone else) to substantiate her claim. Her only evidence was her affidavit.

{¶ 17} 5. After her death claim was initially denied following hearings before a district hearing officer ("DHO") and staff hearing officer ("SHO"), and her appeal was refused, the commission agreed to hear her request for reconsideration.

{¶ 18} 6. The hearing before the commission occurred on November 18, 2014. First, the commission considered whether or not relator had met her burden of proving that she was wholly dependent on the decedent at the time of his death. Concluding that she was not, the commission stated as follows:

The Commission denies the Surviving Spouse's request she be declared a wholly dependent person of the Decedent and be found entitled to a weekly death benefit award pursuant to R.C. 4123.59(B). The Commission finds the Surviving Spouse does not qualify for the statutory presumption of whole dependency, as set forth in R.C. 4123.59(D)(1), for the reason she was not living with the Decedent at the time of his

death. At the time of his death, the Commission finds the Decedent was living in Campbell, Ohio, and the Surviving Spouse was residing in Greece, as she does currently. The Commission further finds no evidence the Decedent and the Surviving Spouse, as of the date of his death on 09/12/2012, were not living together due to the aggression of the Decedent, as also set forth in R.C. 4123.59(D)(1). In addition, the commission finds unpersuasive the Surviving Spouse's contention evidence on file, in the form of bank statements and copies of MoneyGram transmissions, demonstrates the Decedent consistently provided financial support to her. The Commission finds the evidence irrelevant to the issue of whole dependency, for which the Surviving Spouse cannot qualify as she did not reside with the Decedent at the time of his death.

{¶ 19} Thereafter, the commission considered whether or not relator had met her burden of proving that she was partially dependent on the decedent at the time of his death. Concluding that she was, the commission stated:

R.C. 4123.59(C) provides in pertinent part:

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 * * * and shall continue for such time as the administrator in each case determines.

Consistent with the holding in [*State ex rel. Indus. Comm. v. Dell*, 104 Ohio St. 389 (1922)], the Commission finds the Surviving Spouse was partially dependent upon the decedent at the time of his death. In Dell, the estate of the decedent's first wife, whom he had abandoned and for whom he stopped providing any financial support after a time prior to marrying a second wife, sought death benefits upon the death of the decedent. Similar to the provisions of R.C. 4123.59, the statutory language applicable to death claims at the time Dell was announced provided a presumption of whole dependency to a spouse living with a decedent at the time of his death. The Court in Dell found the first wife could not be classified as a wholly dependent person consistent with the statutory presumption, because she was not living with her husband at the time of his death; in addition, the court found she had received no support from him for some time. However, the Dell Court held, "Dependency rests upon an **obligation** of support, and not upon the question as to

whether that obligation is being discharged." *Id.* at 675 (emphasis added). The court further explained, "the marriage contract, supplemented by statutory enactments, clearly created the duty, and [the decedent] cannot relieve himself therefrom by his own acts * * *. He can only be relieved by the decree of some court of competent jurisdiction after process duly served upon the other party to the contract." *Id.*

Accordingly, Dell found the first wife was properly classified as a partial dependent, entitled to have the issue of the value of her death benefit determined in accordance with the facts of the case existing at the time of the decedent's death, as also set forth in the statutory provisions applicable at the time. The Commission finds the provisions of R.C. 4123.59 also call for a fact-based determination regarding the extent of an award of death benefits to a partially dependent person.

In the instant claim, the Commission finds the Surviving Spouse, was a partial dependent of the Decedent at the time of his death, as they remained married at the time of the Decedent's death, and there was accordingly a right to support from the Decedent, regardless of whether that obligation was being discharged. The Commission further finds the Surviving Spouse is entitled to ten weeks of death benefits, a closed period commencing on 09/13/2012, the day after the date of the Decedent's death.

The Commission refers the claim to a District Hearing Officer docket for a hearing on the issues of setting the average weekly wage and determining the weekly rate of death benefits payable as a result of this order.

(Emphasis sic.)

{¶ 20} 7. Thereafter, relator filed this mandamus action in this court.

Conclusions of Law:

{¶ 21} 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).

{¶ 22} 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).

{¶ 23} Under R.C. 4123.59, where a work-related injury results in the employee's death, benefits are payable to the employee's dependents pursuant to R.C. 4123.59, which provides in pertinent part:

If there are wholly dependent persons at the time of the death, the weekly payment is sixty-six and two-thirds per cent of the average weekly wage * * * [w]here there is more than one person who is wholly dependent at the time of the death of the employee, the administrator of workers' compensation shall promptly apportion the weekly amount of compensation payable under this section among the dependent persons as provided in division (D) of this section.

(1) The payment as provided in this section shall continue from the date of death of an injured or disabled employee until the death or remarriage of such dependent spouse. * * *

(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 * * * and shall continue for such time as the administrator in each case determines.

(D) The following persons are presumed to be wholly dependent for their support upon a deceased employee:

(1) A surviving spouse who was living with the employee at the time of death or a surviving spouse who was separated from the employee at the time of death because of the aggression of the employee.

{¶ 24} Under R.C. 4123.59(D)(1), there is a presumption that a surviving spouse living with the employee at the time of death or separated from the employee at the time of death because of the aggression of the employee is wholly dependent for their support upon a deceased employee.

{¶ 25} Relator argues that the evidence presented clearly establishes that she was wholly dependent upon decedent at the time of his death. As part of her argument, relator averred decedent was a seasonal worker who returned home for six months every year. Relator submitted not only the copies of the MoneyGrams, but also an entry from the probate court of Cuyahoga County, Ohio, approving a proffered settlement of \$500,000 to relator in her wrongful death action and documentation from the Social Security Administration notifying her that she is entitled to monthly widow benefits beginning November 2012 and payable as follows:

You will receive \$16,810.20 around June 20, 2014.

This is the money you are due for November 2012 through May 2014.

Your next payment of \$894.70, which is for June 2014, will be received on or about the third of July 2014.

After that you will receive \$894.70 on or about the third of each month.

{¶ 26} The record is clear that relator received significant financial benefits following decedent's death. However, different standards are applied by different agencies to determine the payment of benefits and a determination from either a probate court or the Social Security Administration is not binding on the commission.

{¶ 27} The fact that she successfully pursued a wrongful death action in a probate court is immaterial. R.C. 2125.02, a civil action for wrongful death, is for the exclusive benefit of a "surviving spouse, the children, and the parents of the deceased, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death."

There was no trial by jury and it cannot be determined if anyone contested the rebuttable presumption that relator actually suffered any damages as a result of decedent's death. Further, the receipt of survivor benefits under Social Security is immaterial. Decedent worked long enough and contributed to Social Security and, had he lived, he would have been entitled to retirement benefits. Because he died, his surviving spouse is automatically entitled to benefits. Further, even if they would have been divorced, because the marriage lasted ten years or more, relator still would have been entitled to benefits under Social Security. These determinations do not apply the same standards and are not binding on the commission here. The magistrate cannot say that the commission abused its discretion in reaching the decision it did.

{¶ 28} Relator's entitlement to death benefits was determined in accordance with R.C. 4123.59 and consideration of all applicable facts. The commission first determined that relator was not entitled to the presumption that she was wholly dependent on the decedent because she was not living with the decedent at the time of his death and the two were not separated due to the aggression of the decedent. Thereafter, the commission considered relator's evidence that she was still entitled to death benefits. The commission was not required to find relator's evidence that she was wholly dependent on the decedent persuasive. In arguing that the commission abused its discretion by finding only partial dependency, relator argues that it was improper for the commission to focus exclusively on the fact that relator was not physically living with decedent at the time of his death. The magistrate disagrees with relator's assertion.

The commission did find that relator and the decedent were not living together at the time of his death. Further, although relator asserted that the decedent lived in Greece with her six months out of the year and wired her the majority of his paycheck every month, relator submitted very little evidence. There were a few MoneyGrams sent to Greece by someone other than the decedent and only one was sent to relator. Further, aside from her self-serving statements, there was no evidence that decedent lived in Greece six months out of the year.

{¶ 29} Credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *Teece*. It is immaterial whether other

evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996).

{¶ 30} In *State ex rel. Indus. Comm. v. Dell*, 104 Ohio St. 389 (1922), cited by the commission, the court held that the issue of dependency rests upon the obligation of support and not whether that obligation is being discharged. Based upon the holding in *Dell*, the commission concluded that relator was partially dependent on decedent at the time of his death. In making this finding, the commission did not have to find relator's evidence persuasive. Instead, the mere fact that relator and the decedent were married at the time of his death created an obligation on the part of decedent to support relator. Based on that obligation, the commission found that relator was partially dependent. Because there is some evidence in the record to support this determination, the magistrate finds that relator did not demonstrate that the commission abused its discretion.

{¶ 31} Relator objects to the commission's citation to *Dell*, asserting that the facts are very different. In *Dell*, although still legally married to his first wife Sarah, Hiram moved out and married Maggie after telling her his first wife was dead. Hiram did not provide for Sarah after he left. After his death, the commission awarded death benefits to Maggie finding her, as Hiram's wife, wholly dependent. When Sarah learned of Hiram's death, she applied for benefits. The commission revoked Maggie's benefits finding she and Hiram were not legally married and denied Sarah benefits because she and Hiram were not living together and he had not provided her financial support.

{¶ 32} On appeal, benefits were denied to Maggie because she and Hiram were not legally married. The court further found that Sarah was not wholly dependent on Hiram because they were not living together. However, because the "marriage contract, supplemented by statutory enactments, clearly created the duty" of support, regardless of the fact that Hiram had not provided that support, the court found that Sarah was partially dependent.

{¶ 33} Arguing that there is a clear factual distinction between decedent's actions here and Hiram's actions, relator argues the *Dell* decision does not apply. The magistrate disagrees. The *Dell* court's finding was not based on Hiram's actions—the finding of partial dependency was based entirely on the fact that Hiram and Sarah were legally

married and, although living apart, Hiram still had a legal obligation of support even though he had not been fulfilling that obligation. The court's holding in *Dell* and the premise upon which it stands does apply here and the magistrate rejects relator's argument to the contrary.

{¶ 34} Relator's final argument challenges the amount and the method whereby the commission set out the payment she was to receive based upon the finding that she was partially dependent on decedent.

{¶ 35} R.C. 4123.59(C) provides that if the commission determines that there are partly dependent persons at the time of the death of the decedent, that person or persons will receive sixty six and two-thirds percent of the employee's average weekly wage "for such time as the administrator in each case determines." The statute clearly sets forth that the commission has discretion to determine the period of time that the compensation will be received. In the absence of any corroborating evidence, the commission did not find relator's self-serving statements that relator sent her the majority of his earnings persuasive. In the present case, based on the facts as determined by the commission, the magistrate cannot say that the commission abused its discretion by limiting the payment of death benefits to relator for a period of ten weeks.

{¶ 36} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion when it found that she was only partly dependent upon the decedent at the time of his death and limiting her death benefits to a period of ten weeks, 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).