[Cite as *State ex rel. Sziraki v. Indus. Comm.*, 2011-Ohio-1486.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Estate of Dean E. Sziraki,	:	
Relator,	:	
v.	:	No. 10AP-267
Administrator, Bureau of Workers' Compensation and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 29, 2011

Law Offices of Kurt M. Young LLC, and *Kurt M. Young*, for relator.

Michael DeWine, Attorney General, and *Elise Porter*, for respondents Ohio Bureau of Workers' Compensation Marsha Ryan, Administrator and Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, the Estate of Dean E. Sziraki ("Dean"), commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order that awarded scheduled loss of use benefits for the two years prior to Dean's death (104 weeks), rather than the full 850 weeks possible for Dean's loss of use of all four of his limbs. Relator also asserted that respondent, Ohio

Bureau of Workers' Compensation ("BWC"), abused its discretion by failing to award scheduled loss of use benefits during Dean's lifetime even though no application for those benefits was filed until approximately six months after Dean's death.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that: (1) the BWC did not abuse its discretion when it did not sua sponte award Dean scheduled loss benefits during his lifetime; (2) neither the BWC nor the commission abused its discretion when an award of scheduled loss benefits was not paid to Dean's estate as part of the death benefits award; (3) the commission did not abuse its discretion by imposing a formal application requirement; and (4) the commission properly limited the award to two years preceding Dean's death and by only paying the compensation that would have accrued in that two-year period. Accordingly, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision. In its first objection, relator contends that the magistrate erred when she found that the BWC did not abuse its discretion when it failed to award relator scheduled loss of use benefits during Dean's lifetime. We disagree.

{¶4} As noted by the magistrate, the policy relied upon by relator in support of its argument permits, but does not require, the BWC to award loss of use benefits without an application or other motion. Here, it is undisputed that no one submitted an application for scheduled loss of use benefits on Dean's behalf until six months after his death. We agree with the magistrate that relator has not demonstrated that the BWC had a clear

legal duty to make the scheduled loss of use award during Dean's lifetime in the absence of an application for such an award. Therefore, we overrule relator's first objection.

{¶5} In its second objection, relator asserts that the magistrate erred by finding that neither respondent abused its discretion by failing to award relator a death benefit in the full amount of the scheduled loss of use award (850 weeks). Under Ohio law, this argument is erroneous.

{¶6} A decedent's estate may be entitled to receive workers' compensation benefits that have accrued at the time of the decedent's death, but remained unpaid. Here, an award for the full 850 weeks of scheduled loss of use had not accrued because no application for such an award was submitted prior to Dean's death. Because this obligation never accrued, the commission did not abuse its discretion by failing to award relator a death benefit in an amount equaling 850 weeks for scheduled loss of use. *State ex rel. Estate of McKenney v. Indus. Comm.*, 110 Ohio St.3d 54, 2006-Ohio-3562, ¶22. Therefore, we overrule relator's second objection.

{¶7} Relator asserts in its third objection that the magistrate erred by finding that the commission did not abuse its discretion when it exceeded its rule-making authority and imposed a formal application requirement. Again, we disagree.

{¶8} R.C. 4123.57 states that an employee may file an application for permanent partial disability benefits, which includes the loss of use of a body part. Because Ohio law contemplates that an employee may file such an application, the commission did not abuse its discretion by requiring an application for these benefits. Accordingly, we overrule relator's third objection.

{¶9} In its fourth and final objection, relator contends that the magistrate erred by finding the request for concurrent scheduled loss awards was a request for a lump sum

payment. Relator argues that it was not seeking a lump sum payment. Instead, it was seeking a consecutive rather than a concurrent two-year award. Although the magistrate may have misunderstood relator's argument, relator's argument is nonetheless without merit.

{¶10} In *Swallow v. Indus. Comm.* (1988), 36 Ohio St.3d 55, 57, the Supreme Court considered and approved the commission's policy of awarding loss of use benefits consecutively rather than concurrently. See also *McKenney* at ¶20 (awarding loss of use benefits consecutively was not an abuse of discretion, even where an individual claimant might be disadvantaged by that policy). Thus, the commission did not abuse its discretion by awarding relator a scheduled loss of use benefits consecutively, as it does for all loss of use recipients. For these reasons, we overrule relator's fourth objection.

{¶11} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

TYACK and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Estate of Dean E. Sziraki,	:	
Relator,	:	
v.	:	No. 10AP-267
Administrator, Bureau of Workers' Compensation and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on November 30, 2010

Law Offices of Kurt M. Young LLC, and *Kurt M. Young*, for relator.

Richard Cordray, Attorney General, and *Elise Porter*, for respondents Ohio Bureau of Workers' Compensation Marsha Ryan, Administrator and Industrial Commission of Ohio.

IN MANDAMUS

{¶12} Relator, the Estate of Dean E. Sziraki, 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 which awarded scheduled loss of use benefits to Dean E. Sziraki ("Dean") for the two years prior to his death (104 weeks of

benefits) and asking the commission to award the full 850 weeks possible for Dean's loss of use of all four limbs. To the extent that respondent Ohio Bureau of Workers' Compensation ("BWC") is named a party to this action, relator asserts that the BWC abused its discretion by failing to sua sponte make an award of scheduled loss of use benefits during Dean's lifetime without requiring the filing of an application for those benefits.

Findings of Fact:

{¶13} 1. Dean was employed by his mother's paving business when he was involved in a single motor vehicle accident on May 14, 1991.

{¶14} 2. Dean's claim was ultimately allowed for the following conditions:

> Protein-calorie malnutrition, not otherwise specified; intracerebral hemorrhage; pneumonia, organism-not other–wise specified; post traumatic pulmonary insufficiency; post traumatic pulmonary insufficiency; respiratory failure; coma and stupor; dysphagia; respiratory arrest; fracture C2 vertebra-open; vertebral fracture, not otherwise specified-closed; closed cervical fracture with cord injury; bilateral fracture of rib-closed; cerebral laceration, not elsewhere classified; brain laceration, not elsewhere classified; brain laceration, not elsewhere classified-coma, not otherwise specified; brain laceration, not elsewhere classified-concussion; brain injury, not elsewhere classified; trauma pneumohemothorax-closed; lung contusion-closed; late effect of contusion; late effects of intracranial injury; late effect of internal injury chest; death.

{¶15} 3. Dean spent the next 16 years as a quadriplegic and in a nonverbal state, in various nursing facilities and hospitals. Dean died on January 8, 2007.

{¶16} 4. Dean's medical bills were paid for through his workers' compensation claim.

{¶17} 5. According to BWC notes, Dean's mother ("Marilyn") was informed in October 1997 that Dean "should be eligible for [permanent total disability] or [temporary

total disability]" compensation. Apparently, at that time, Marilyn indicated she did not have a power of attorney for Dean.

{¶18} 6. Another note, dated October 27, 1997, indicates that a licensed social worker was "trying to help with answering questions re: power of attorney for finances" with Marilyn.

{¶19} 7. On February 21, 1998, an application for permanent total disability ("PTD") compensation was filed.[1]

{¶20} 8. In a tentative order mailed April 22, 2002, statutory PTD compensation was awarded to Dean beginning March 20, 2002.[2]

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[1] The actual application is not in the record; however, it appears that Marilyn became the guardian of Dean's person for purposes of medical treatment and that she filed the application.

[2] Sometime after Dean died, Dean's estate (relator herein) requested that the commission exercise its continuing jurisdiction under R.C. 4123.52 and asked that the start date for Dean's award of PTD compensation be changed. In an order mailed November 7, 2007 the commission granted the motion and modified the start date of PTD compensation to February 24, 1996, two years prior to the filing date of the IC-2 application as follows:

> The Commission finds that the deceased Injured Worker was permanently and totally disabled pursuant to R.C. 4123.58(C) from 02/24/1996, two years prior to the filing date of the IC-2 Application. The Commission relies on the report of Dr. Thompson, dated 03/20/2002, the IC-2 Application, filed 02/24/1998, and the Staff Hearing Officer order issued 04/12/2002, wherein statutory permanent total disability was originally granted. Specifically, in his 03/20/2002 report, Dr. Thompson notes that he had been seeing the [I]njured [W]orker for eight (8) years, that the Injured Worker had permanent total loss of use of both arms and both legs as a result of the industrial injury, and that the Injured Worker "has basically been unchanged" since Dr. Thompson had been "taking care of him."
>
> Dr. Thompson's report indicated that the Injured Worker's loss of use existed at least as early as 1994, but R.C. 4123.52 limits the retroactive payment of permanent total disability compensation to a two-year period "prior to the date of filing application therefore." Therefore, the Commission orders the start date for the payment of permanent total disability compensation be reset to 02/24/1996, two years prior to the filing date of the IC-2. Accordingly, the Injured Worker's estate is entitled the payment of permanent total disability compensation from 02/24/1996 to 03/19/2002; which is to be paid pursuant to BWC rules and regulations.

{¶21} 9. Because Dean was unmarried, had no dependents, and had no guardian of his estate, the BWC was not able to pay the PTD benefits awarded to him.

{¶22} 10. In a letter dated June 7, 2002, the BWC notified Marilyn that her son (Dean) was eligible for benefits and asked her to call. Specifically, the letter provided:

> Dear Mrs[.] Sziraki,
>
> BWC has reviewed the file for your son Dean[.]
>
> He is eligible for a monetary award which will need to be received and managed by a guardian. At present we do not have a power of attorney or evidence of a court ordered guardian for your son.
>
> Please advise the BWC if a court has appointed a guardian and provided [sic] us with the appropriate documentation.
>
> Payment may be with held until a guardian is appointed.
>
> You may notify the BWC of your decision in writing to the above address or call * * *.

{¶23} 11. According to a letter mailed February 1, 2006 from Michael J. Sourek, Staff Attorney for BWC, to Marilyn and Brian D. Jones, Attorney at Law, the BWC again informed Marilyn and Mr. Jones that a guardian needed to be appointed for Dean's estate. Specifically, that letter informed Marilyn and Mr. Jones as follows:

> * * * I am not aware if Mr. Jones represents Ms. Sziraki, but he has made contacts with our agency in 2002 and 2004[.] * * * I have made several attempts to contact Mr. Jones without response in the past month or so.
>
> I have reviewed the above captioned claim, and it appears that the Industrial Commission of Ohio awarded Dean Sziraki benefits under Ohio Rev. Code §4123.58(C) on May 14, 2002[.] * * * These benefits will continue most likely for the rest of Mr. Sziraki's life. Mr. Sziraki may also be entitled to other benefits that are not addressed in this order.
>
> However, Mr. Sziraki's unfortunate medical state renders him incompetent under Ohio law. In fact, Ms. Sziraki, to the best of the Administrator's knowledge, has a valid guardianship of

> Mr. Sziraki's *person*, but not his *estate*. Consequently, pursuant to Ohio Admin[.] Code §4121-3-10(A)(3), the Administrator has withheld payment of this compensation until a guardian of Mr. Sziraki's *estate* has been appointed.
>
> To the best of the Administrator's knowledge at this time, no guardian of the estate has ever been appointed for Mr. Sziraki. Through some research, the following is stated in Ohio Rev. Code §2111.03[:]
>
> > The court, on its own motion, shall proceed…*upon suggestion by the bureau of workers' compensation that any person who has made application for or been awarded compensation or death benefits as an employee…is…incompetent.* In that case, no application need be filed and the bureau shall furnish the court with the name and residence of such person and the name, degree of kinship, age, and address of the father, mother, next of kin or such person insofar as known by the bureau.
>
> The Administrator would like to resolve payment of Mr. Sziraki's benefits. To the best of the agency's knowledge, Ms. Sziraki is Dean Sziraki's mother and next of kin. Ms. Sziraki would most likely be preferred for appointment of guardian of the estate because she already has guardianship of Mr. Sziraki's person. Unfortunately, it appears periodically through the past several years, there have been discussions with Ms. Sziraki by Claims Department personnel regarding Ms. Sziraki obtaining guardianship of Mr. Sziraki's estate; to the best of the Administrator's knowledge, no action has ever been taken by Ms. Sziraki to obtain this guardianship.
>
> At this time, the Administrator must formally request a written response within thirty (30) days of receipt of this letter. Failure to respond, or a written response indicating that Ms. Sziraki does not want to pursue guardianship of Mr. Sziraki's estate, will leave the Administrator no choice but to refer this matter to the Ohio Attorney General's Office for filing a suggestion of incompetency on Mr. Sziraki's behalf with the appropriate probate court. Should Ms. Sziraki notify the agency that she wishes to pursue Mr. Sziraki's guardianship of estate, the Administrator will cooperate fully with her efforts.
> I understand that this may be a difficult issue for Ms. Sziraki, but the Administrator must resolve this dilemma that has been going on for nearly the past four years. It is clearly not

> in the best interests of Mr. Sziraki to let this issue continue unresolved. If Mr. Jones represents Ms. Sziraki, I encourage her to discuss this matter with him as soon as possible. If she does not have representation, I encourage her to seek legal counsel for advice regarding her options. Should she have difficulty in obtaining an attorney, Ms. Sziraki can contact the Toledo Bar Association[.] * * *

(Emphases sic.)

{¶24} 12. There is no indication that either Marilyn or Mr. Jones responded and neither Marilyn nor anyone else applied for loss of use benefits on behalf of Dean until six months after his death.

{¶25} 13. On July 6, 2007, a C-86 motion was filed requesting scheduled loss of use of both arms and legs beginning February 10, 1997 and continuing.

{¶26} 14. The motion was heard before a district hearing officer ("DHO") on December 12, 2007. The DHO determined that Dean was entitled to a loss of use award for the loss of both arms and both legs; however, the DHO determined that the award was payable from January 8, 2005 through January 8, 2007 as follows:

> The decedent died on 01/08/2007. The Application for Scheduled Loss was filed 07/06/2007. Pursuant to the decision in State ex rel. Adams v. Aluchem, Inc. [104 Ohio St.3d 640, 2004-Ohio-6891,] the decedent would not have been able to receive more than an award beginning 01/08/2005, two years prior to his death, presuming he filed for a scheduled loss on the date of his death, due to the two year limit on retroactive payment. The estate can only claim, at most, an award that would not exceed the compensation which the decedent might have received but for his death, pursuant to the decision in [*State ex rel. Liposchak v. Indus. Comm.* (2000), 90 Ohio St.3d 276]. Pursuant to the provisions in [*State ex rel. Morehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364] and State ex rel. Estate of McK[e]nney v. Industrial Commission of Ohio [110 Ohio St.3d 54, 2006-Ohio-3562], the Scheduled Loss Award terminates on the date of death, as Injured Worker had no dependents.

> Therefore, the award is to be paid from 01/08/2005 through 01/08/2007, only.
>
> This order is based upon the reports of Dr. Forte, dated 10/29/2007, Dr. Thompson, dated 03/20/2002 and 10/29/2004.
>
> A [POWER OF ATTORNEY], FILED 07/06/2007, IS ON FILE FOR THE ABOVE LISTED INJURED WORKER.

(Emphases sic.)

{¶27} 15. Marilyn, as the administrator of Dean's estate, appealed the order of the DHO.

{¶28} 16. The matter was heard before a staff hearing officer ("SHO") on January 25, 2008. The SHO affirmed the prior DHO's order providing, in relevant part:

> The C-86 Motion, filed by the estate of the Injured Worker, on 07/06/2007, requests that:
>
> > "[One] The estate of the injured worker be paid a scheduled loss for the loss of use of both Right and Left arms, from February 10, 1997 and continuing;
> >
> > [Two] The estate of the injured worker be paid a scheduled loss for the loss of use of both Right and Left legs from February 10, 1997 and continuing;
> >
> > [Three] The attached POA (Power of Attorney) be honored" (emphasis added).
>
> The key word, which is repeated in the Motion, filed on 07/06/2007, is the word "estate" of the Injured Worker. There is no question that Ohio Revised Code Section 4123.57(B) provides for an award of compensation of two hundred and twenty five (225) weeks of compensation for the loss of an arm and two hundred (200) weeks of compensation for the loss of a leg.
>
> * * *
>
> Therefore, none of the parties, nor the parties' representatives, present at hearing on Friday, 01/25/2008, argued that the deceased-claimant, Dean E. Sziraki, would not have been entitled to the payment of the requested

awards for total loss of use of both right and left arms and total loss of use of both right and left legs, as a result of the recognized industrial injury of 05/14/1991. In fact, the Injured Worker was previously granted an award of Statutory Permanent Total Disability, based upon a specific finding that, "the injured worker has suffered the permanent and total loss of use of both arms and both legs, as a direct result of the allowed industrial injury", pursuant to the prior Industrial Commission Order of 04/08/2002, mailed 04/12/2002.

However, despite the aforesaid finding, the Injured Worker never filed a request for the payment of an award, pursuant to Ohio Revised Code Section 4123.57(B), during his lifetime. Said Application was filed by the estate of the deceased-claimant, on 07/06/2007, nearly six months after the Injured Worker's death, on 01/08/2007. However, Professor Larson, in his treatise, Workers' Compensation Law (2001) stated that an Injured Worker who receives a Scheduled Loss award that is paid in weekly installments payments, "does not ordinarily 'own' the unpaid balance of the award, so as to entitle his heirs, as such, to any interest in it." 1 Larson Section 1.03. Professor Larson's treatise goes on to state that, if such a scheduled loss award is paid for a fixed number of weeks, "most jurisdictions, in the absence of a special statute to the contrary, have held that the heirs have no claim upon the unaccrued payments, since the award is a personal one" (emphasis added). 4 Larson, Section 89.03.

The Ohio Supreme Court, in the case of State ex rel. Estate of McKenney v. Industrial Commission (2006) 110 Ohio St. 3d 54, held that the estate of a deceased worker's surviving spouse was not entitled to the payment of Permanent Partial Disability benefits that accrued after the death of the spouse, given that the right to compensation was a personal right of the Injured Worker. In that case, the Ohio Supreme Court also held that a dependent's estate can recover only Workers' Compensation benefits that had accrued to the dependent, before the dependent's death, but that had not been paid. In the McKenney case, as in the instant claim, the Injured Worker sustained the loss of use of all four limbs and, therefore, would have been entitled to 850 weeks of Scheduled Loss benefits under Ohio Revised Code Section 4123.57(B), if he had lived.

Furthermore, Ohio Revised Code Section 4123.57(B), itself, specifically provides that an award of unpaid installments

may only be awarded to the surviving spouse, or if there is no surviving spouse, to the dependent children of the Injured Worker and, if there are no such children, then to such dependents as the Administrator determines. In the instant claim, the Injured Worker had no surviving spouse, no dependent children and no other dependents, at the time of his death, on 01/08/2007.

Furthermore, the Motion, filed by the estate of the deceased-claimant requests that the award of accrued compensation, under Ohio Revised Code Section 4123.57(B) begin on 02/10/1997, more than ten years prior to the date of filing of said Motion, on 07/06/2007.

The Ohio Supreme Court addressed a similar situation, in the case of State ex rel. Adams v. Aluchem, Inc. (2004), 104 Ohio St. 3d 640, when it held that the Workers' Compensation Statute of Limitations, under Ohio Revised Code Section 4123.52, barred the retroactive payment of Statutory Permanent Total Disability Compensation for a period in excess of two years before claimant's Motion for compensation was filed. As previously indicated above, the Injured Worker had not filed an application for an award of loss of use of both arms and both legs, at the time of his death, on 01/08/2007. Therefore, the estate of the deceased-claimant can only claim, at most, an award that would not exceed the compensation which the decedent might have received for a period two years prior to the date of his death, on 01/08/2007, if the Injured Worker had filed an application on that date.

Therefore, it is the order of this Staff Hearing Officer that the estate of the deceased-claimant is hereby awarded 104 weeks of compensation, pursuant to Ohio Revised Code Section 4123.57(B) and Ohio Revised Code Section 4123.60, representing the accrued compensation which the decedent might have received, but for his death. The deceased-claimant would have been entitled to an award of compensation totaling 850 weeks (225 weeks for loss of use of the right arm, 225 weeks for loss of use of the left arm, 200 weeks for loss of use of the right leg and 200 weeks for loss of use of the left leg, totaling 850 weeks of compensation), pursuant to Ohio Revised Code Section 4123.57(B), to be paid consecutively (rather than two 200 week periods of payments for the loss of his legs and two 250 week periods of payments for the loss of his arms, concurrently). This award to the estate of the deceased-claimant is to begin with a start date of 01/08/2005 (two

> years prior to the date of the deceased-claimant's death, assuming that the Injured Worker had filed the application on the date of his death) through 01/08/2007, only.
>
> It is further order of this Staff Hearing Officer that the aforesaid award of compensation is limited to the 104 weeks of compensation which had already accrued, for the period from 01/08/2005 through 01/08/2007, and that the remaining 746 weeks of compensation, which were yet to accrue are to be considered unaccrued compensation which was personal to the deceased-claimant (since he had no surviving spouse, dependent children or other dependents) and, therefore, not payable to the estate of the deceased-claimant.

(Emphases sic.)

{¶29} 17. Further appeal was refused by an order mailed April 4, 2008.

{¶30} 18. The request for reconsideration was denied by an order mailed May 24, 2008.

{¶31} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶32} In this mandamus action, relator argues that both the BWC and the commission abused their discretion as follows: (1) the BWC abused its discretion when it failed to sua sponte award Dean scheduled loss benefits during his lifetime; (2) both the BWC and the commission abused their discretion by failing to award scheduled loss benefits to Dean's estate as part of the death benefits award; (3) the commission abused its discretion when it exceeded its rule making authority and imposed a formal application requirement as the threshold for considering a scheduled loss award; and (4) the commission abused its discretion by failing to make a lump sum award of the 850 weeks of compensation to which Dean was entitled.

{¶33} The magistrate finds that: (1) the BWC did not abuse its discretion when it did not sua sponte award Dean scheduled loss benefits during his lifetime; (2) neither the

BWC nor the commission abused their discretion when an award of scheduled loss benefits was not paid to Dean's estate as part of the death benefits award; (3) the commission did not abuse its discretion by imposing a formal application requirement; and (4) the commission properly limited the award to two years preceding Dean's death and by only paying the compensation that would have accrued in that two year period.

{¶34} 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.

Alleged failure to sua sponte make award

{¶35} R.C. 4123.57 provides for scheduled loss awards:

> (A) Partial disability compensation shall be paid as follows.
>
> * * * [T]he employee may file an application with the bureau of workers' compensation for the determination of the percentage of the employee's permanent partial disability resulting from an injury or occupational disease.
>
> * * * [T]he administrator of workers' compensation shall review the employee's claim file and make a tentative order as the evidence before the administrator at the time of the making of the order warrants. If the administrator determines that there is a conflict of evidence, the administrator shall send the application, along with the claimant's file, to the district hearing officer who shall set the application for a hearing.
> * * *
>
> (B) In cases included in the following schedule the compensation payable per week to the employee is the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code per week and shall continue during the periods provided in the following schedule:

> * * *
>
> For the loss of an arm, two hundred twenty-five weeks.
>
> * * *
>
> For the loss of a leg, two hundred weeks.
>
> * * *
>
> 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.

{¶36} As above indicated, awards for partial disability compensation begin with the filing of an application with the BWC. Thereafter, the administrator of the BWC is required to review the claim file and make a tentative order if warranted. However, if the administrator determines that there is a conflict of evidence, the matter shall be submitted to a DHO for a hearing. Pursuant to subsection (B), an injured worker is entitled to 225 weeks of compensation for the loss of an arm and 200 weeks for the loss of a leg. Further, whenever an award of permanent partial disability compensation under R.C. 4123.57 is made prior to the death of the injured worker, all unpaid installments accrued or to accrue shall be paid to the injured worker's surviving spouse, or if there is no surviving spouse, to the injured worker's dependent children, if there are no such children, to such dependents as the administrator determines.

{¶37} In the present case, it is agreed that Dean qualified for an award under the scheduled loss of use statute. It is equally apparent that neither Dean nor his mother, as next of kin, applied for a scheduled loss of use award during his lifetime. However, relator

argues that no application was necessary, and that the BWC abused its discretion when it failed to sua sponte make the award and pay the money to Dean during his lifetime.

{¶38} In support of relator's argument, relator quotes from the BWC's website and argues:

> * * * The Bureau of Workers' Compensation Administrator's INFO STATION explains policy and procedures to its own employees and other interested parties. Agency procedures clearly provide alternative means of bringing a scheduled loss award under consideration by way of *request* **or** *agency identification*. The Bureau of Workers' Compensation may allow and pay without application if medical evidence is provided that supports payment. Specifically, in regard to division B of Revised Code Section 4123.57, the Administrator's policy directs: (abbreviations as in original text):
>
> A scheduled loss award does not have to be requested on a Motion (C-86).
>
> A [scheduled loss] award can be requested on the First Report of Injury, or identified during the claim investigation. The [claims service specialist] may also allow and pay a [scheduled loss] award without application if medical evidence is provided that supports payment of the scheduled loss award. BWC will not usually schedule an Independent Medical Exam (IME) if there is appropriate medical evidence to support the loss. These should be staffed to determine the necessity…. [T]here is no two year statute of limitations in which a person must file a request for a permanent partial/scheduled loss. ORC 4123.57 does not contain any time limitations for filing a scheduled loss request. Scheduled loss awards are not tied to a specific time period.

(Relator's brief, at 14-15; emphases sic.)

{¶39} Relator argues that the above-quoted "policy" supports the argument that the BWC was required to sua sponte make the award during Dean's lifetime without requiring an application. Specifically, relator points out that the policy indicates that a scheduled loss award does not have to be requested with a motion, but may be requested on the first report of injury or identified during the claim investigation. Relator

points out that the claims service specialist may also allow and pay a scheduled loss award without requiring an application if medical evidence is provided supporting the payment of the award. Relator argues further:

> When the Bureau states an application is not required, and the claims specialist *should* pro-actively review, determine and pay, that agency is allowed alternative considerations for effecting payment. When the agency is fully aware that an application can not be made, due to incompetency, *should* means the Bureau *must* effect the alternative means of initiating and paying benefits.

Id. at 15. (Emphases sic.)

{¶40} Relator identifies the BWC's "policy" as an "administrative rule" issued pursuant to statutory authority and argues that it has the force of law.

{¶41} The problem with relator's argument is two-fold. First, the above "policy" is not an administrative rule and was not promulgated pursuant to either the BWC's or the commission's rule-making authority. As such, this policy does not have the same effect as law. Second, the "policy" specifically provides that the claims service specialist ***may*** allow and pay a scheduled loss award without an application. In *Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St.2d 102, paragraph one of the syllabus, the Supreme Court of Ohio held:

> In statutory construction, the word "may" shall be construed as permissive and the word "shall" shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.

{¶42} The quoted policy permits, but does not require, the BWC to award loss of use benefits without an application or other motion. However, because the policy uses the word may, the policy does not require that the BWC act. The concept that the BWC "could have" made the award is completely different from the concept that the BWC

"should have" made the award and relator's contention that this particular situation transformed the permissive instruction into a mandatory requirement is not supported by law. Further, as the record indicates, Marilyn did make an application for PTD compensation; may have been represented by counsel; and had been appointed guardian of Dean's person. Even after PTD compensation was awarded to Dean, the BWC was unable to pay that compensation because Dean was incompetent and no one had been appointed guardian of his estate. The BWC specifically contacted Marilyn in 2002 and again in 2006 informing her that she or someone else needed to be appointed guardian of Dean's estate so that the PTD compensation could be paid. However, Marilyn did not and no payments of PTD compensation were made until after Dean's death.

{¶43} Within the workers' compensation system, the law and rules are to be liberally construed in favor of claimants. Nevertheless, the burden of proof is, and always has been, on the claimant to submit evidence entitling them to benefits. Claimants are required to act diligently to protect their rights and secure compensation. See *State ex rel. Justice v. Dairy Mart, Inc.* (2002), 94 Ohio St.3d 34, wherein the court explained:

> "[A] claimant must act diligently to secure compensation by commission order. And R.C. 4123.52 explicitly states the penalty for a claimant's inaction—any award will be limited to the two years preceding his or her application for it." *Id.* at 180, 712 N.E.2d at 751.

Id. at 35, citing *State ex rel. Welsh v. Indus. Comm.* (1999), 86 Ohio St.3d 178.

{¶44} Because (1) the "policy" is neither a statute nor a rule, (2) the "policy" provides that the BWC ***may*** award scheduled loss compensation, but does not impose a requirement, and (3) because there is no evidence that Marilyn relied on this information, relator cannot demonstrate a clear legal right, nor can relator demonstrate that the BWC

had a clear legal duty to make the scheduled loss award in the absence of an application seeking the same.

Alleged failure to pay entire award as part of death benefits

{¶45} Relator next argues that the BWC and the commission abused their discretion when they failed to award scheduled loss benefits to Dean's estate as part of the death benefits award.

{¶46} R.C. 4123.59 pertains to benefits payable in case of death and provides, in pertinent part:

> In case an injury * * * causes * * * death, benefits shall be in the amount and to the persons following:
>
> (A) If there are no dependents, the disbursements from the state insurance fund is limited to the expenses provided for in section 4123.66 of the Revised Code.
>
> (B) 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, but not to exceed a maximum aggregate amount of weekly compensation which is equal to sixty-six and two-thirds percent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code[.] * * *
>
> (1) The payment as provided in this section shall continue from the date of death of an injured * * * employee until the death or remarriage of such dependent spouse. * * *
>
> (2) That portion of the payment provided in division (B) of this section applicable to wholly dependent persons other than a spouse shall continue from the date of death of an injured * * * employee to a dependent as of the date of death, other than a spouse, at the weekly amount determined to be applicable and being paid to such dependent other than a spouse, until he:
>
> (a) Reaches eighteen years of age;
>
> (b) If pursuing a full time educational program while enrolled in an accredited educational institution and program, reaches twenty-five years of age;

> (c) If mentally or physically incapacitated from having any earnings, is no longer so incapacitated.
>
> * * *
>
> (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[;] * * *
>
> (2) A child under the age of eighteen years, or twenty-five years if pursuing a full-time educational program while enrolled in an accredited educational institution and program, or over said age if physically or mentally incapacitated from earning[.] * * *
>
> It is presumed that there is sufficient dependency to entitle a surviving natural parent or surviving natural parents, share and share alike, with whom the decedent was living at the time of his death, to a total minimum award of three thousand dollars.
>
> The administrator may take into consideration any circumstances which, at the time of the death of the decedent, clearly indicate prospective dependency on the part of the claimant and potential support on the part of the decedent. * * *

{¶47} R.C. 4123.60 provides further:

> 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. * * *
>
> In all cases of death where the dependents are a surviving spouse and one or more children, it is sufficient for the surviving spouse to apply to the administrator on behalf of the spouse and minor children. In cases where all the dependents are minors, a guardian or next friend or such minor dependents shall apply.
>
> 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[.] * * * 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, * * * 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.

{¶48} It is undisputed that Marilyn was not Dean's spouse, nor was she his dependent child. Further, there is no evidence in the record that would indicate that Marilyn was residing with Dean at the time he was injured or otherwise. As such, Marilyn did not qualify as a dependent of Dean under either R.C. 4123.59 or 4123.60 and was not entitled to a death benefit.

{¶49} Admittedly, relator's argument here is not that Marilyn should have been paid a death benefit, but that the estate should have been paid death benefits, specifically, the full amount of the scheduled loss award at issue here. In support of this argument, relator again quotes from information derived from the internet, specifically:

> * * * Administrator's Info Station, Accrued Compensation:
>
> Dependents and estates are entitled to any compensation that had accrued up to and including the date of the employee's death. An application is not required to make an accrued compensation payment. The [C]ustomer Care Team (CCT) should proactively review the claim to determine if any accrued compensation exists, identify the appropriate dependent, or estate if no dependents, secure the necessary documentation and issue an order for payment.
>
> Under the section detailing 'Percentage of Permanent Partial and Permanent Partial Disability Not Yet Awarded' the Administrator continues:

> Payment of Scheduled Loss will be made to the dependent or estate, either on a bi-weekly schedule (the same as it would to the injured worker) or as a net present day valued (NPV) lump sum payment. The CSS will verify how the dependent or estate chooses to receive the award and document the decision in V3 notes.

(Relator's brief, at 18-19.)

{¶50} Relator uses the above information to again maintain and argue that no application was necessary for Dean to have been awarded scheduled loss of use benefits and for his estate to have been paid that compensation after his death. However, the above-quoted provision specifically indicates that an application is not required to make an "accrued" compensation payment. Here, there was no accrued compensation because no application for a scheduled loss award had been made prior to Dean's death. Having already found that the BWC was not required to sua sponte make the scheduled loss award, Marilyn's failure to make the application on Dean's behalf is the reason that no award was ever made. Because no award was ever made, there was no accrued compensation to have been paid to a dependent or to Dean's estate.

{¶51} As the record indicates, as guardian of Dean's person, Marilyn made an application for PTD compensation. That award was granted; however, because there was no guardian of Dean's estate, none of that compensation was actually paid. Following Dean's death, Marilyn was appointed guardian of the estate and ultimately the accrued PTD compensation was paid into the estate.

{¶52} The Supreme Court of Ohio's decision in *State ex rel. Estate of McKenney v. Indus. Comm.*, 110 Ohio St.3d 54, 2006-Ohio-3562, is helpful to this analysis. In that case, Patrick McKenney's workers' compensation claim was allowed for quadriplegia. He

applied for and received PTD benefits and 850 weeks of scheduled loss benefits under R.C. 4123.57(B) for the loss of use of all four limbs.

{¶53} Six weeks after payments began, McKenney died on March 15, 2002. One month later, McKenney's surviving spouse and sole dependent, Nancy, sought a lump sum payment of the remaining 844 weeks of scheduled loss compensation. However, the next day she died and her estate was substituted as a party for the purposes of pursing her motion.

{¶54} The commission awarded the estate scheduled loss benefits only through April 27, 2002, the date of Nancy's death, reasoning as follows:

> "R.C. 4123.57(B) provides for an award of compensation for loss of use to the surviving spouse of the injured worker of such compensation accrued during the injured worker's lifetime and that which would have accrued had the *injured worker* survived. The statute makes no such award for compensation that will not accrue until after the death of the surviving spouse or any eligible dependent. Therefore, when Nancy McKenney died on 04/27/2002, the unaccrued loss of use benefits were no longer payable in the absence of an eligible dependent to whom a further award could be made. The plain language of R.C. 4123.57(B) makes it clear that the surviving spouse's entitlement to the loss of use benefits abates upon her death and no further benefits are payable. The Industrial Commission declines the invitation to rewrite the statute and pay compensation beyond what the legislature intended." (Emphasis sic.)

Id. at ¶5.

{¶55} The estate filed a mandamus action; however, this court affirmed the commission's reasoning and denied the writ.

{¶56} On appeal, the Supreme Court of Ohio noted that all parties agreed that the estate was entitled to some portion of the scheduled loss award; however, the issue was the amount to which the estate was entitled. The court noted that prior case law clearly established that:

> No one challenges the estate's entitlement to some portion of the scheduled loss award. At issue is the amount thereof, and, in this regard, prior case law is clear—a dependent's estate can recover only compensation that had accrued to the dependent before the dependent's death but that had not been paid. *Indus. Comm. v. Dell* (1922), 104 Ohio St. 389, 135 N.E. 669; *State ex rel. Hoper v. Indus. Comm*. (1934), 128 Ohio St. 105, 190 N.E. 222; *State ex rel. Nossal v. Terex Div. of I.B.H.* (1999), 86 Ohio St.3d 175, 712 N.E.2d 747.

Id. at ¶7.

{¶57} The estate argued that the entire amount of the scheduled loss award accrued to the surviving spouse at McKenney's (the claimant) death. However, the court determined that R.C. 4123.57(B) did not support that assertion, noting that R.C. 4123.57(B) provides, 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."

Id. at ¶10.

{¶58} The court rejected the estate's argument:

> The estate's reliance on the mandatory "shall" is misplaced, because the mandate presumes a living dependent, which is not the case here. Moreover, the statute specifically refers to installments "*accrued or to accrue*." (Emphasis added.) If the entire amount accrued immediately, as the estate claims, there would be no need for this language. The estate's interpretation of the statute is, therefore, rendered untenable by the statute's very language.
>
> * * *
>
> It therefore follows that the loss of earning capacity that scheduled loss compensation was intended to ameliorate ceases upon the death of the injured worker—just as it does with all other forms of disability compensation.

> * * *
>
> R.C. 4123.57(B) anticipates the payment of scheduled loss compensation in weekly installments. Commutation to a lump sum can occur, but only if the injured worker first applies for lump-sum payment, meets certain specified criteria designated in R.C. 4123.64, and receives approval from the bureau. The specificity of those criteria—and the fact that satisfaction still does not guarantee approval by the bureau—demonstrates that the method of payment is of substantive concern to the General Assembly and should not be summarily dismissed as irrelevant to our inquiry as the [*LaCavera v. Cleveland Elec. Illum. Co*. (1984), 14 Ohio App.3d 213, 217-18, 14 OBR 240, 470 N.E.2d 476 (Markus, J., concurring)] occurrence—and in turn, the estate—suggests.

Id. at ¶11, 16 and 19.

{¶59} Because scheduled loss compensation is intended to ameliorate the loss of earning capacity, scheduled loss compensation ceases upon the death of the injured worker in the same manner in which other forms of disability compensation cease. When Dean died, there was no longer loss of any earning capacity to ameliorate and, because no application had been made and no award had been made, there was no "accrued" compensation to be paid to the estate.

Allegation rule-making authority exceeded

{¶60} Relator next argues that the commission abused its discretion when it exceeded its rule-making authority and imposed the requirement that a formal application be made before the commission will consider whether a scheduled loss of use award should be made. In making this argument, relator points out that, while it is clear that a formal application is required before the commission will process an application for PTD compensation, it is equally clear that an application is not required before a claimant can be awarded scheduled loss of use benefits.

{¶61} Essentially, relator argues that, since neither the statute nor the rule specifically state that an application is required, the fact that no application was ever made is immaterial. Relator contends that it is incumbent upon both the BWC and the commission to monitor claims so that claimants are paid the compensation for which they qualify. According to relator, this is the only way in which the workers' compensation fund can be properly administered.

{¶62} Relator also cites *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, in support by arguing that the claimant there did not file an application and yet he received a scheduled loss award. This magistrate disagrees with relator's reasoning.

{¶63} William Moorehead fell approximately 15 to 20 feet head first onto a concrete floor. He suffered severe spinal cord injuries and died 90 minutes later. His widow applied for both death benefits and scheduled loss compensation. The commission denied the award finding that Moorehead did not experience a physical and sustained loss of his extremities because he was comatose.

{¶64} Because there is no language in R.C. 4123.57(B) requiring that an injured worker be consciously aware of his paralysis in order to qualify for scheduled loss benefits, the Supreme Court of Ohio granted a writ of mandamus and remanded the case to the commission to determine the amount of benefits due.

{¶65} Contrary to relator's assertions, an application was filed in *Moorehead* by his surviving spouse. Here, an application was eventually filed after Dean's death. In *Moorehead*, Justice Stratton wrote a concurrence in which she indicated that Moorehead's spouse should only receive one week of scheduled loss benefits since the presumed loss of earning capacity ceased upon his death. Here, the commission has

awarded relator compensation for the full two years preceding Dean's death. Nothing in *Moorehead* warrants a different conclusion. Further, the evidence demonstrates that the BWC did "monitor" the claim and informed Marilyn that Dean might be entitled to other compensation and suggesting that someone be "appointed" guardian of Dean's estate.

{¶66} After finding that neither the BWC nor the commission promulgated a rule requiring the sua sponte consideration and award of scheduled loss benefits, there can be no authority which either the BWC or the commission presumably exceeded.

Alleged failure to make lump sum payment

{¶67} Lastly, relator argues that the commission abused its discretion when, after determining that Dean was entitled to a scheduled loss of use award, the commission limited the payment to two years prior to his death and treated the award as one award and not four separate awards. Relator contends that if the commission limited the award to the two years preceding Dean's death, relator should receive four separate awards of 104 weeks each (one for each arm and leg).

{¶68} Pursuant to R.C. 4123.52, "[t]he jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified." In *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542, the court examined the judicially-carved circumstances under which continuing jurisdiction may be exercised, and stated as follows:

> R.C. 4123.52 contains a broad grant of authority. However, we are aware that the commission's continuing jurisdiction is not unlimited. See, *e.g., State ex rel. Gatlin v. Yellow Freight System, Inc.* (1985), 18 Ohio St.3d 246, 18 OBR 302, 480 N.E.2d 487 (commission has inherent power to reconsider its order for a reasonable period of time absent statutory or

> administrative restrictions); *State ex rel. Cuyahoga Hts. Bd. of Edn. v. Johnston* (1979), 58 Ohio St.2d 132, 12 O.O.3d 128, 388 N.E.2d 1383 (just cause for modification of a prior order includes new and changed conditions); *State ex rel. Weimer v. Indus. Comm.* (1980), 62 Ohio St.2d 159, 16 O.O.3d 174, 404 N.E.2d 149 (continuing jurisdiction exists when prior order is clearly a mistake of fact); *State ex rel. Kilgore v. Indus. Comm.* (1930), 123 Ohio St. 164, 9 Ohio Law Abs. 62, 174 N.E. 345 (commission has continuing jurisdiction in cases involving fraud); *State ex rel. Manns v. Indus. Comm.* (1988), 39 Ohio St.3d 188, 529 N.E.2d 1379 (an error by an inferior tribunal is a sufficient reason to invoke continuing jurisdiction); and *State ex rel. Saunders v. Metal Container Corp.* (1990), 52 Ohio St.3d 85, 86, 556 N.E.2d 168, 170 (mistake must be "sufficient to invoke the continuing jurisdiction provisions of R.C. 4123.52"). Today, we expand the list set forth above and hold that the Industrial Commission has the authority pursuant to R.C. 4123.52 to modify a prior order that is clearly a mistake of law. * * *

{¶69} The SHO specifically noted that no application for a scheduled loss of use award was made prior to Dean's death. The SHO determined that the estate could only claim, at most, an award that would not exceed the compensation to which Dean might have received if he had filed the application for scheduled loss award on the date of his death, January 8, 2007. As such, the SHO awarded the estate 104 weeks of compensation representing the accrued compensation which Dean might have received, but for his death.

{¶70} R.C. 4123.52 is clear: the commission shall not make any modifications, change, finding, or ***award*** which awards compensation for a back period in excess of two years prior to the date of the filing for the application seeking that compensation. In spite of the fact that no application had been filed by Dean or on Dean's behalf prior to his death, the commission considered the issue of scheduled loss benefits as if Dean had filed that application on the date of his death. Pursuant to R.C. 4123.52, the commission could not have awarded compensation in excess of two years from the "filing" of the

application as determined by the commission. Further, to the extent that relator argues that the commission should have made a lump sum award of 850 weeks of scheduled loss compensation, the commission followed the law from *McKenney* as previously discussed on pages 19-22. Relator has not demonstrated that the commission abused its discretion by limiting the award of scheduled loss of use compensation to two years prior to the death of Dean, representing the entire award to which Dean would have been entitled if Dean had filed the application on the date of his death, and denying the request for a lump sum payment.

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

s/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).