

TENTH APPELLATE DISTRICT

In re State ex rel. George W. Fisher,	:	
Decedent, Lois Fisher, widow-claimant,	:	
	:	
Relator,	:	
	:	
v.	:	No. 12AP-6
	:	
Spartan Stores Associates, LLC and	:	(REGULAR CALENDAR)
The Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on November 29, 2012

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*Scott I. Levey*, for relator.

*Ogne, Alberts, & Stuart, P.C., John M. Conway,*  
and *Michael A. Ross*, for respondent Spartan Stores  
Associates, LLC.

*Michael DeWine*, Attorney General, and *Rema A. Ina*, for  
respondent The Industrial Commission of Ohio.

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IN MANDAMUS

TYACK, J.

{¶ 1} The widow of George W. Fisher filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant her death benefits as a result of the death of George W. Fisher. The commission found Lois Fisher, the widow, had not proved that she was wholly or partially dependent on George W. Fisher for her support at the time of his death.

{¶ 2} In accord with Loc.R. 13(M), the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed

briefs. The magistrate then issued the appended magistrate's decision which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we not grant a writ.

{¶ 3} No party has filed objections to the magistrate's decision. The case is now before the court for review.

{¶ 4} George W. Fisher was rendered a quadriplegic as a result of his injuries in 1998. He died as a result of the injuries in 2010. Lois Fisher had moved out of the marital residence years before, first living with a friend and then living in her own apartment. Lois had her own sources of income and could show no financial support attributable to her husband. She went through a personal bankruptcy, during the course of which she was removed as a joint tenant of the marital residence and was removed from all the joint credit cards.

{¶ 5} The commission found a failure of proof of dependency, but found Lois Fisher had demonstrated prospective dependency because she was still married to George when he died. As a result, she received an award of \$3,000.

{¶ 6} The magistrate's decision has no error of law or fact on the face of the decision. We therefore adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

*Writ of mandamus denied.*

BRYANT and BROWN, JJ., concur.

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**APPENDIX**

**IN THE COURT OF APPEALS OF OHIO**

**TENTH APPELLATE DISTRICT**

In re State ex rel. George W. Fisher,  
Decedent, Lois Fisher, widow-claimant,

Relator,

v.

Spartan Stores Associates, LLC and  
The Industrial Commission of Ohio

Respondents.

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No. 12AP-6

(REGULAR CALENDAR)

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**MAGISTRATE'S DECISION**

Rendered on August 10, 2012

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*Scott I. Levey*, for relator.

*Ogne, Alberts, & Stuart, P.C., John M. Conway, and Michael A. Ross*, for respondent Spartan Stores Associates, LLC.

*Michael DeWine*, Attorney General, and *Rema A. Ina*, for respondent The Industrial Commission of Ohio.

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**IN MANDAMUS**

{¶ 7} Relator, Lois Fisher, as the widow-claimant of George W. Fisher ("decedent") has filed this original action requesting that this court issue a writ of mandamus ordering respondent, The Industrial Commission of Ohio ("commission") to vacate its order which denied relator's application for death benefits after finding that she had not met her burden of proving that she was wholly or partially dependent upon the

decedent at the time of his death and ordering the commission to find that she is entitled to those benefits.

**Findings of Fact:**

{¶ 8} 1. The decedent sustained a work-related injury on April 10, 1998 and his workers' compensation claim was allowed for the following conditions:

Spinal cord injury, C4-C6; laminectomy; deviated nasal septum with rhinosinusitis; neurogenic bladder.

{¶ 9} 2. Decedent's injuries rendered him a quadriplegic.

{¶ 10} 3. The decedent died on October 20, 2010 and it is undisputed that his death was proximately caused by his work-related injury.

{¶ 11} 4. On December 22, 2010, relator filed an application for death benefits.

{¶ 12} 5. The district hearing officer ("DHO") denied relator's application for death benefits. First, the DHO found that relator was not wholly dependent on the decedent because she was not living with the decedent at the time of his death. Specifically, the DHO noted that relator signed a lease for subsidized housing with the Department of Housing Urban Development ("HUD") on March 26, 2010. Relator's ability to procure subsidized housing was obtained based solely on her own income and was not based on the decedent's income.

{¶ 13} 6. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on April 8, 2011. The SHO also denied relator's application for death benefits. First, the SHO set forth the criteria for determining whether a person is presumed to be wholly dependent as follows:

Ohio Revised Code Section 4123.59 (D) (1) provides, in pertinent part, that, "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" (emphasis added) is a person who is, "presumed to be wholly dependent, for their support, upon a deceased employee."

{¶ 14} 7. Thereafter, the SHO determined that relator had not demonstrated that she was presumed to be wholly dependent on the decedent at the time of his death. Specifically, the SHO relied on the following findings:

The persuasive evidence presented in this claim indicates that the deceased claimant's surviving spouse, Lois Mae Fisher, was not living with the deceased claimant at the time of his death. Quite the contrary, the evidence indicates that the widow-claimant, Lois Mae Fisher, moved out of the marital home in December of 2009, allegedly because she was having back surgery. Subsequent to the surgery, the widow-claimant did not return home, but, instead, moved to a "friend's house."

Furthermore, the evidence presented indicates that, after recovering from her surgery, Lois Mae Fisher moved out of her "friend's house" and rented an apartment, commencing 03/26/2010.

Furthermore, the evidence presented indicated that the widow-claimant, Lois Mae Fisher, continued to reside out of the marital home, from 03/26/2010 through the date of the deceased-claimant's death, on 10/20/2010.

Therefore, it is the finding of this Staff Hearing Officer that the surviving spouse was not living with the deceased claimant at the time of his death on 10/20/2010.

Furthermore, the widow-claimant, Lois Mae Fisher, failed to prove that she was, "separated from the employee, at the time of death, because of the aggression of the employee."

Therefore, it is the finding of this Staff Hearing Officer that the surviving spouse, Lois Mae Fisher, was not living with the deceased-claimant at the time of his death. It is the further finding of this Staff Hearing Officer that the surviving spouse, Lois Mae Fisher, was not separated from the deceased-claimant, at the time of his death, because of the aggression of the deceased-claimant. Therefore, it is the further finding of this Staff Hearing Officer that the widow-claimant, Lois Mae Fisher, is not "presumed" to have been wholly dependent for support upon the deceased-claimant, George W. Fisher, at the time of his death on 10/20/2010.

(Emphasis sic.)

{¶ 15} 8. Thereafter, the SHO set out to determine whether or not relator was either wholly or partially dependent on the decedent at the time of his death. The SHO determined that relator failed to meet her burden of proving that she was either wholly or

partially dependent on the decedent at the time of his death. Specifically, the SHO made the following findings:

The widow-claimant, Lois Mae Fisher, had been separated from the deceased-claimant for approximately ten months at the time of his death on 10/20/2010. Furthermore, the widow-claimant had her own income, from both her employer pension and her social security disability benefits. The widow-claimant maintained her own apartment, separate from the family home, through her own sources of income.

Furthermore, the widow-claimant had previously filed for bankruptcy and had herself removed from joint tendency ownership of the marital home, where the deceased-claimant resided. In the bankruptcy proceeding, she also had herself removed from the credit cards that were previously jointly held as husband and wife.

Therefore, it is the finding of this Staff Hearing Officer that the widow-claimant, Lois Mae Fisher, was not wholly nor partly dependent upon the deceased-claimant, George W. Fisher, at the time of his death on 10/20/2010.

(Emphasis sic.)

{¶ 16} 9. Having found that relator had not demonstrated that she was either wholly or partially dependent on the decedent at the time of his death, the SHO considered whether or not relator had demonstrated prospective dependency. The SHO answered that question in the affirmative stating:

The sole remaining form of dependency is that of "prospective dependency" on the part of the widow-claimant. Under the Ohio Workers' Compensation Act, dependency is based upon the right to support, rather than upon the actual fact of support.

It is the further finding of this Staff Hearing Officer that Ohio Revised Code Section 4123.59 (D) (2), at the third subparagraph, provides that, "The Administrator may take into consideration any circumstances, which, at the time of the death of the decedent, clearly indicates prospective

dependency on the part of the claimant and potential support on the part of the decedent. No person shall be considered a prospective dependent unless such person is a member of the family of the deceased employee and bears to him the relationship of surviving spouse, legal decedent, ancestor, or brother or sister" (emphasis added).

Therefore, it is the finding of this Staff Hearing Officer that the widow-claimant, Lois Mae Fisher, was prospectively dependent upon her estranged spouse, George W. Fisher, at the time of his death on 10/20/2010. This finding is based upon the fact that, since she was still legally married to him at the time of his death, she still had the "prospective" right to receive support from George W. Fisher, at some point in time the future, despite the fact that she was not actually receiving support from George W. Fisher, at the time of his death on 10/20/2010.

Furthermore, Ohio Revised Code Section 4123.59 (D) (2) at the third subparagraph, provides the restriction that, "The total award for any or all prospective dependency, to all such claimants, except to a natural parent or natural parents of the deceased, shall not exceed \$3000.00 to be apportioned among them as the Administrator orders."

Since there are no other prospective dependents, it is the order of this Staff Hearing Officer that the total award of \$3000.00, for a prospective dependency, is hereby awarded to the widow-[claimant], Lois Mae Fisher.

(Emphasis sic.)

{¶ 17} 10. According to the brief of respondent-employer Spartan Stores Associates, LLC, both parties appealed the SHO's order; however, the commission denied both appeals.

{¶ 18} 11. Thereafter, relator filed the instant mandamus action in this court.

{¶ 19} 12. In this mandamus action, relator has included a copy of a deposition taken November 2, 2011 to support her arguments. <sup>1</sup>

Conclusions of Law:

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<sup>1</sup> The hearing before the DHO occurred on February 22, 2011 and the hearing before the SHO occurred on April 8, 2011. Therefore, the copy of the deposition testimony submitted by relator in support of this mandamus action was not presented at the commission level.

{¶ 20} 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).

{¶ 21} In order to prevail, relator must demonstrate that the commission abused its discretion by finding that she had failed to meet her burden of proving that she was either wholly or partially dependent on the decedent at the time of his death. For the reasons that follow, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion.

{¶ 22} Death benefits are payable to a dependent of an injured employee pursuant to R.C. 4123.59. In order to be eligible for death benefits, the applicant must demonstrate a certain level of dependency. Pursuant to R.C. 4123.59(D), certain persons are presumed to be wholly dependent for their support upon a deceased employee. 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 is presumed to be wholly dependent. *See* R.C. 4123.59(D)(1).

{¶ 23} In the present case, relator does not challenge the commission's finding that she was not living with the decedent at the time he died. Further, relator does not challenge the commission's finding that her absence from the home of the decedent was not due to the aggression on the part of the decedent. As such, relator does not challenge the commission's determination that she was not presumed to be wholly dependent on the decedent.

{¶ 24} What relator does challenge is the commission's finding that she did not meet her burden of proving that she was either wholly dependent or at least partially dependent on the decedent at the time of his death. In making this argument, relator directs this court's attention to her deposition testimony taken seven months after the hearing before the SHO. In her deposition testimony, relator explains that she initially moved out of the couple's bedroom because of his injuries. Relator also explains that, following her back surgery in 2005, she moved in with a friend because the decedent was unable to help her care for herself. Relator contends that she visited the decedent on a regular basis and that she bought him groceries and paid bills from their joint checking account. Relator also asserts that the decedent began making financial changes in order to insulate her from inheriting his debt in the event that he died. The decedent declared bankruptcy and, two years later, relator also declared bankruptcy. According to relator, the decedent removed her name from the home mortgage and credit cards in effort to protect her. Because of decedent's continuing, deteriorating health, the couple decided that relator should get her own apartment. Relator selected an apartment which was close to their home. According to relator, she paid for her both rent and bills from her own checking account as well as from their joint checking account.

{¶ 25} As noted previously, the above statements were made in a deposition taken months after the hearing before the SHO. While relator did attend the hearing before the SHO and presumably testified, there is no copy of the transcript from the SHO hearing. As such, none of this "evidence" was ever before the SHO for consideration.

{¶ 26} Considering the evidence which was actually before the commission at the time of the hearing before the SHO, the magistrate finds that the commission did not abuse its discretion in finding that relator failed to meet her burden of proving that she was either wholly or partially dependent upon the decedent at the time of his death. As the SHO noted, relator had been separated from the decedent for approximately ten months, had her own income, both from an employer pension and Social Security disability benefits, and relator maintained her apartment through her own sources of income. Further, relator had previously filed for bankruptcy and had herself removed from joint tenancy ownership of the marital home and had herself removed from the credit cards which were previously jointly held as husband and wife. Further, to the

extent that relator's deposition testimony provides an explanation for why the parties were living separately, the magistrate notes that, according to the deposition testimony, the decedent had filed for divorce from relator on at least two occasions. This "evidence" contradicts her other testimony indicating that the decedent had been attempting to protect relator. Lastly, although relator did submit copies of checks signed by her from a checking account in both her name and the decedent's name, it is not clear that those checks were written to pay for her bills and not the decedent's bills.

{¶ 27} Questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. In the present case, relator failed to establish that she was either wholly or partially dependent upon the decedent at the time he died. Upon review of the stipulation of evidence, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in finding that she failed to meet her burden of proof and this court should deny relator's request for a writ of mandamus.

/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).