IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. Estate of Dean E. Sziraki Relator, vs. Administrator, Bureau of Workers' Compensation and Industrial Commission of Ohio, Respondents.	CASE NO. 11-0799 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case. No. 10AP-267

RELATOR ESTATE OF DEAN E. SZIRAKI'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Kurt M. Young (#0061917)
Law Offices of Kurt M. Young, LLC
The Park Lane
412 23rd Street, Suite 204
Toledo, OH 43604-6508
(419) 244-7885
(419) 244-7886 - fax
kmy@kmylaw.com

COUNSEL FOR RELATOR, ESTATE OF DEAN E. SZIRAKI

Elise M. Porter (0055548)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
614-466-6730
614-728-9535 fax

COUNSEL FOR RESPONDENTS,
ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, AND
INDUSTRIAL COMMISSION OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: *Page*

STATUTES:

ADMINISTRATIVE RULES:

POLICIES AND PROCEDURES:

COUNTERSTATEMENT TO THE APPELLEE'S STATEMENT OF THE CASE AND FACTS

The Relator, Dean Sziraki's Estate, would like to begin by correcting the misstatements put forth by the Appellee for the Bureau of Workers' Compensation (Bureau) and the Industrial Commission (Commission).

First, in the Appellee's Introduction, the Appellee sets forth misleading facts about Marilyn Sziraki, when it states, "Marilyn—who was represented by counsel—got appointed guardian of his person, obtained medical benefits, and applied for permanent total disability ("PTD") benefits on Dean's behalf." (Appellee's Brief at 1). This is misleading because Marilyn Sziraki was not represented by counsel for all these events. There is nothing in the record to suggest that before 2002 that Marilyn Sziraki was represented by counsel because it was at that point when she employed attorney Brian Jones to become guardian over Dean Sziraki's person. (R. at 99). The PTD benefits and other medical benefits occurred before any representation.

Further, the Appellee incorrectly states "during the 16 years of his incapacity, Marilyn and her attorney" because this implies Marilyn Sziraki had representation during all of Dean Sziraki's incapacity. (Appellee's Brief at 1). As has been pointed out, Marilyn Sziraki did not have any form of counsel until 2002, nor did she ever have any counsel that had a representative identification number to appear before the Bureau or the Commission until after Dean Sziraki's death.

It is interesting that the Appellee states unequivocally that Marilyn Sziraki had representation throughout Dean Sziraki's incapacity in their Introduction because in the Appellee's Argument, they contradict this stance, by being unsure of it when they state that

Marilyn Sziraki "appeared" or "apparently" represented by counsel. (Appellee's Brief at 1, 8). The point is that the Appellee cannot have it both ways. The Appellee should not be allowed to change the basis for their arguments based on which basis fits their argument better.

Second, the Appellee misleads the court by stating that the Bureau Staff Attorney "tried repeatedly" to contact Marilyn Sziraki and attorney Jones. (Appellee's Brief at 3). First off, Relator objects to the Appellee calling attorney Jones Dean Sziraki's putative attorney because he was only Marilyn Sziraki's attorney and nothing in the record states that attorney Jones was accepted as Dean Sziraki's attorney. Next, the Appellee claims there were repeated attempts by the Bureau Staff Attorney, Michael Sourek, but their citation for this statement includes only one letter sent by Mr. Sourek on Feb. 1, 2006, which is the only letter from Mr. Sourek in the entire record. (R. at 73-74). The other citations to the Appellee's supplements, which are not part of the Record pursuant to this Court's denial of the Appellee's Motion to Supplement the Record, contain no reference of Mr. Sourek contacting Marilyn Sziraki. Thus, the Appellee's assertion "tried repeatedly" is misleading and false.

The Appellee's third misleading statement occurs when the Appellee states, "Marilyn was aware of the policy [guardianship], as it was attached to one of the letters sent to her by the Bureau in 2002. TS. At 105-106." (Appellee's Brief at 8). The citation for this statement, from the Appellee's Stricken Third Supplement (which is not part of the Record), consists of a letter from Sydney Simpson, which is in the stipulated record at page 98 and a printout from the Bureau's InfoStation website concerning guardianship. The problem is that these two documents were not sent together as the Appellee asserts because the Bureau's date stamps do not correspond. The letter's date and Bureau date stamp is for June 7, 2002, while the Bureau's date stamp for the guardianship document is April 23, 2003, over 10 months after the letter was sent.

(Appellee's Stricken Third Supplement at 105-106). Further, the guardianship document shows it was originally printed on April 17, 2003. (Appellee's Stricken Third Supplement at 106). While Bureau notes state that the guardianship document was sent with the June 7, 2002 letter, the document submitted in their Stricken Third Supplement is not that document. (Appellee's Stricken Third Supplement at 127). The guardianship document from their Stricken Third Supplement seems to reference a possible letter sent on April 23, 2003 from the Bureau, but that letter is not in the record or any of the Bureau's supplements. (Appellee's Stricken Third Supplement at 126). Therefore, the Appellee has misled the court by asserting that the guardianship document was sent with the 2002 letter.

Finally, the Relator objects to the Appellee trying to raise the abuse of discretion standard set forth in mandamus cases. *See State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76, 78-79, 497 N.E.2d 70 (1986) citing *State ex rel. Hutton v. Indus. Comm.*, 29 Ohio St.2d 9, 13, 278 N.E.2d 34 (1972). The proper standard to be entitled to a writ of mandamus is that the Relator must show (1) a clear legal right to the relief requested; (2) respondent is under a clear legal duty to perform the act sought; and (3) Relator has no plain and adequate remedy at law. *State ex rel. Fain v. Summit Cty. Adult Probation Dept.*, 71 Ohio St.3d 658, 658, 646 N.E.2d 1113 (1995), citing *State ex. rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994); *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631(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, 78-79, 497 N.E.2d 70 (1986). An abuse of discretion connotes more than an error of judgment; it implies a decision that is without a reasonable basis. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140

(1983), citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). 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, 57-58, 505 N.E.2d 962 (1987).

The Appellee asserts in their Argument section and their Proposition of Law No. 1 that the standard is "gross abuse of discretion." (Appellee's Brief at 4, 5, 10). Nowhere in the cases cited by the Appellee does it state that the standard is "gross abuse of discretion", rather the cases state the standard as abuse of discretion. *See State ex rel. Athey v. Indus. Comm.*, 89 Ohio St. 3d 473, 733 N.E.2d 589 (2000); *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St. 3d 373, 658 N.E.2d 1055 (1996); *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165, 429 N.E.2d 433 (1981); *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St. 3d 414, 662 N.E.2d 364 (1996). In the rest of the Appellee's brief, the Appellee cites the proper standard as abuse of discretion. Therefore, the Relator believes this court should disregard the Appellee's attempt to raise the standard on the Relator's burden.

ARGUMENT

Proposition of Law No. I: *The Bureau erred to the prejudice of Relator as a matter of law when it failed to pay the scheduled loss benefits to Dean Sziraki during his lifetime.*

A. Dean Sziraki had a clear legal right to scheduled loss benefits requested because neither R.C. 4123.57 nor the Bureau's policy manual requires an application for scheduled loss benefits.

In this case, Dean Sziraki, the injured worker, was rendered incompetent due to his accident, and the Appellee does not dispute this. (Appellee's Brief at 9). The record contains an abundance of information that Dean Sziraki had loss of use of all four limbs. (R. at 33-34, 47,

50, 55, 56-58, 59, 63, 65, 69, 70). The Appellee does not dispute that Dean Sziraki had lost the use of all four limbs. Thus, Dean Sziraki was entitled to scheduled loss benefits for all four limbs.

The Appellee makes much of the fact that R.C. 4123.57 makes use of the word "application" and states that it is a requirement. (Appellee's Brief at 6). However, in Appellee's first indented quote of R.C. 4123.57, the statute specifically states that "the employee *may* file an application . . . for a determination." (Emphasis added) R.C. 4123.57. By the using the word 'may', the statute contemplates that there is another possible way to receive this benefit. While R.C. 4123.57(A) specifically mentions the use of an application for permanent partial disability and the Bureau has created a form to handle this, which is a C-92 form, there is, in fact, no application that exists within the Bureau where one could apply for scheduled loss benefits. However, under 4123.57(B), there is absolutely no mention of an application to award a scheduled loss benefit, and the Bureau has not created an application for scheduled loss. Because an application is not mandated by R.C. 4123.57 and there is no Ohio Administrative Rule that covered scheduled loss when this case started, one must look to the Bureau's policy manual. The Bureau's policy manual sets out the methods to award scheduled loss benefits, which is either by the injured worker's request or by the Bureau through its claims investigation. Ohio Bureau of Worker's Compensation, Permanent Partial (PP)/Scheduled Loss Compensation, http://www.ohiobwc.com/basics/InfoStation/InfoStationContent.asp?Item=1.2.3.11 (last visited Mar. 1, 2012). Thus, the Appellee incorrectly asserts that an application is a requirement, when the statute clearly states that application is not a requirement when it uses the word "*may*" and the Bureau's policy shows that the application is not required. Therefore, when the option for the injured worker to make a request is unavailable based on being incompetent from a work-

related injury, the other method is then required to be exercised, which means it becomes the Bureau's duty.

In addition, the Appellee misleads this Court by stating that "[t]he statutes and case law *generally place* the onus of the claimant" to obtain compensation benefits. (Emphasis added) (Appellee's Brief at 6). The use of "generally place" has the effect to make the onus be one that does not always require the claimant or injured worker to be the one to obtain claimant's benefits. In fact, the Appellee latter in their brief changed this assertion and stated that it does "*indeed* place the onus on the claimant." (Emphasis added) (*Id.* at 16). The Appellee cited the same case for these inconsistent statements, which is *State ex rel. Justice v. Dairy Mart, Inc.* In that case, this Court affirmed that "'a claimant must act diligently to secure compensation by commission order.'" *State ex rel. Justice v. Dairy Mart, Inc.*, 94 Ohio St.3d 34, 35, 759 N.E.2d 1252 (2002), citing *State ex rel. Welsh v. Indus. Comm.*, 86 Ohio St.3d 178, 180, 712 N.E.2d 749 (1999). This means that there is a duty that requires the claimant, injured worker, to diligently secure compensation.

The Appellee is trying to use the same case to support two contrary points of view. The first is that the *generally* onus view suggests that there is not always a duty on the claimant to secure compensation. The second view, which *indeed* place's the onus on the claimant, means that entire duty is on the claimant to secure compensation and no one else. Therefore, the Appellee misleads this Court by using the same case law to support its two contrary arguments.

The Relator asserts that second view, which the duty is on the claimant to secure compensation, is the proper interpretation of the *Justice* case. *Justice* at 35. In this case, Dean Sziraki had no ability to act diligently to secure his compensation. In Appellant's merit brief, we have fully explained how Dean Sziraki had no representation through a guardianship or any other

method where a person would have standing on Dean Sziraki's behalf to make a claim for compensation. Thus, there was no way for Dean Sziraki to have diligently secured compensation.

The Appellee also asserts the *Moorehead* quote is taken out of context. *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203. While, the Appellee correctly asserts that *Moorehead* held that the injured worker's conscious awareness is not to be determinative to whether one is entitled to the benefit, rather it is that the loss has been sustained. (Appellee's Brief at 7); *see Moorehead* at ¶18. Relator asserts that Dean Sziraki's situation is a logical extension of the *Moorehead* decision because while Dean Sziraki may have had the ability to open eyes, there is no documentation to prove Dean Sziraki was consciously aware of the loss based on his quadriplegia. This Court correctly determined that where the loss is sustained the statute directs the compensation to be paid. *Moorehead* at ¶ 18. Thus, when Dean Sziraki sustained the loss of use of his arms and legs from his work-related injury on May 14, 1991, he had a clear legal right to scheduled loss compensation under R.C. 4123.57(B).

B. The Bureau had a clear legal duty to pay the scheduled loss benefits requested.

The Appellee's argument is that the failures of Marilyn Sziraki and attorney Brian Jones, of which neither is the claimant in this case, is why Bureau had no clear legal duty. The Appellee's argument here also relays heavily on its Stricken Third Supplement, which has been denied by this Court. As pointed out above, the Appellee used improper suggestions, such as Marilyn Sziraki appeared or apparently represented by counsel, and incorrect facts, claiming attachments to a letter where the time stamps do not match, to base its arguments on. (Appellee's Brief at 8).

Here, the Appellee's argument is that because Marilyn Sziraki, Dean Sziraki's mother, or her 'apparent' attorney, Brian Jones, failed to apply for scheduled loss benefits; then the Bureau had no duty to pay. This argument is in complete contradiction to the case law from *Justice*, which stated the duty is on the claimant, injured worker, to diligently secure compensation. *Justice* at 35. Thus, the Appellee is shifting the burden to people that had not been authorized or appointed by Dean Sziraki to act for him.

Further, the Appellee makes much of the 2006 letter from the Bureau's attorney, Michael J. Sourek, to Marilyn Sziraki. (R. at 73-74). The letter basically states Dean Sziraki could get other benefits, he was incompetent, that no compensation can be paid until there is a guardian of Dean Sziraki's estate, and finally, a warning that if the guardianship over the estate is not taken care of within 30 days the Bureau will file the suggestion of incompetency with the probate court to have a guardian of the estate appointed (this is what the Relator termed the guardianship bypass). (*Id.*); *see* R.C. 2111.03. This guardianship bypass is a method that the Bureau can use to have a guardian of the estate appointed in situations of incompetency. However, the Appellee states that the reason the Bureau never did it is because Marilyn Sziraki "never exercised it." (Appellee's Brief at 9). Thus, again the Appellee places the responsibility on Marilyn Sziraki and states it is her failure to do something she is not allowed to do because only the Bureau can ask the probate court to appoint a guardian, under the guardianship bypass in R.C. 2111.03.

In that 2006 letter, the Bureau assumed the duty of having a guardian of the estate appointed for Dean Sziraki when it leveled the ultimatum—that if there was a failure to respond within 30 days in writing the Bureau would take action. (R. at 74). Nothing in the record ever shows that Marilyn Sziraki responded to this letter. Thus, the Bureau abused its discretion in not filing for guardianship for Dean Sziraki.

In addition, the Appellee admits that if there was a guardianship of Dean Sziraki's estate, the Bureau may have "even awarded them without application." (Appellee's Brief at 9). This begs the question, if an injured worker is *entitled* to benefits, how does not having a mechanism to receive the benefits prevent other benefits from being awarded. Thus, the Appellee is yet again arguing Marilyn Sziraki's failure is the reason why the Bureau did not abuse its discretion.

Therefore, the Bureau had a clear legal duty and did abuse its discretion in failing to pay the scheduled loss benefits. Neither, the Appellee's misleading and misstatement of facts nor placing the burden on others besides that of claimant, Dean Sziraki, changed the fact that the Bureau had a clear legal duty to pay Dean Sziraki's scheduled loss benefits.

Proposition of Law No. II: *The Bureau and Industrial Commission of Ohio erred to the prejudice of Relator as a matter of law when they failed to pay the scheduled loss benefits to Dean Sziraki's estate as part of Dean Sziraki's Death Benefits.*

A. The scheduled loss benefits began to accrue at the moment of Dean Sziraki's injury.

The *McKenney* Court did not specifically disavow the quoted passage from the concurrence in *LaCavera*. *State ex rel. Estate of McKenney v. Indus. Comm.*, 110 Ohio St.3d 54, 2006-Ohio-3562, 850 N.E.2d 694, at ¶ 14, quoting *LaCavera v. Cleveland Elec. Illum. Co.*, 14 Ohio App.3d 213, 217-218, 470 N.E.2d 476 (1984) (Markus, J., concurring). Rather, the *McKenney* Court disavowed the proposition that McKenney's estate was using it for, which was having the entire scheduled loss benefits accrue immediately on the death of the injured worker's spouse. *McKenney* at ¶ 9, 11, 15. In addition, the *McKenney* Court was concerned with the purpose of what scheduled loss was meant to ameliorate, which was the loss of earning capacity based on the scheduled loss. *Id.* at ¶15-16.

The Relator does not argue for this Court to alter the holding that scheduled loss benefits end at death of either the injured worker or the injured worker's dependents. Rather, the Relator asserts the injured worker's loss of use is fully determined the moment it occurs, and this is the point when the scheduled loss benefits, under R.C. 4123.57(B), begin to accrue. *See LaCavera* at 217-218 (Markus, J., concurring). In fact, the *Moorehead* decision agrees with this position when it stated, "where the requisite physical loss has been sustained, the statute directs that scheduled loss compensation shall be paid." *Moorehead* at ¶ 18. Because it is at the moment the loss is sustained that directs when the scheduled loss compensation is to be paid. According to the case law, Dean Sziraki's scheduled loss benefits began to accrue when he sustained the loss of use of both arms and both legs on May 14, 1991, which means Dean Sziraki accrued 816 weeks of scheduled loss benefits before his death. Thus, this analysis fits perfectly within the previously laid out case law because Dean Sziraki's 816 weeks of accrued compensation would have ameliorated his earning capacity during that time.

B. An application requirement for an incompetent injured worker's scheduled loss benefits cannot be constrained by the statute of limitations because no one had the standing to make the application until after Dean Sziraki's death.

The Appellee has incorrectly tied scheduled loss benefits to an application, which is not required by R.C. 4123.57 or Bureau's policy manual. The Appellee uses R.C. 4123.60, which covers death benefits, to state that if no award was made during the lifetime then there could be no accrual of benefits. (Appellee's Brief at 14). This reasoning is counter to the case law stated above because it makes the application the sole reason to ameliorate the loss of earning capacity, not whether or when the injured worker has sustained the loss.

In fact, scheduled loss benefits are not tied to any timeframe based on the Bureau's own policy. The Bureau's policy states:

> The two year statute of limitations in which an injured worker must file a request does not apply to permanent partial/scheduled loss awards. RC 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 as long as the clam is open.

Ohio Bureau of Worker's Compensation, Permanent Partial (PP)/Scheduled Loss Compensation, http://www.ohiobwc.com/basics/InfoStation/InfoStationContent.asp?Item=1.2.3.11 (last visited Mar. 1, 2012). Thus, the Bureau policy states that scheduled loss is not tied to any statute of limitations because it is the loss of use that causes when the earning capacity needs to be ameliorated not the application.

The Bureau is to be given great authority and deference to run the complex workers' compensation system that creates rules and policies; thus, why would it choose to promulgate rules and policies that run counter to the statutes. The Bureau has chosen to promulgate rules and policies that state no application is required, and in fact, the Bureau has never created an application for scheduled loss but has for all other monetary benefits. The Appellee states that an application is required, but there has never been a form created that the Bureau could hand to an injured worker to apply. A C-92 application cannot be used for scheduled loss because it only applies to permanent partial disability under R.C. 4123.57(A). Relator does note that Bureau policy states a C-86 Motion can be used to request scheduled loss benefits. Ohio Bureau of Worker's Compensation, Permanent Partial (PP)/Scheduled Loss Compensation, http://www.ohiobwc.com/basics/InfoStation/InfoStationContent.asp?Item=1.2.3.11 (last visited Mar. 1, 2012). However, this form leaves the injured worker to their own devices to figure out how to make the request and provides no guidance to what is needed for the scheduled loss

benefit. Thus, when the statute does not require an application and the Bureau' policy does not require nor provide an application for scheduled loss benefits, then there is no way any injured worker, let alone an incompetent, quadriplegic injured worker, could have filed one.

Standing is the proper argument and does have merit. This Court has stated that the duty is on the *claimant* to diligently secure compensation, not any other party including the employer. *Justice* at 35. The Relator asserts then that the proper parties that could diligently secure compensation for the claimant are claimant, the claimant's guardian of the estate (or power of attorney) through an authorized representative, or the claimant's authorized representative. Furthermore, if the claimant is not acting on their own behalf, then the claimant or the claimant's guardian of the estate must have "authorized a representative to act on their behalf in all BWC matters," which is done on R-2 form. Ohio Bureau of Worker's Compensation, Authorization of Representative of Injured Worker (R-2), https://www.ohiobwc.com/worker/forms/r2/default.asp (last visited Mar. 1, 2012); *see* Ohio Adm. Code 4123-3-22.

Here, Dean Sziraki never had the ability to represent himself before the Bureau because his injury left him an incompetent quadriplegic. (R. at 2, 33-34, 47, 50, 55, 56-58, 59, 63, 65, 69, 70). Dean Sziraki never signed nor had a guardian of his estate sign a form to have an authorized representative during his lifetime. Therefore, because Dean Sziraki was incompetent based on his work-related injury and no one was ever authorized to represent him before the Bureau during his lifetime, neither he nor anyone else had the standing to represent him before the Bureau.

The Appellee argues that standing is not relevant in workers' compensation law and, in fact, argues that "anyone, even a complete stranger, can apply for benefits on behalf of a claimant if they have relevant information." (Appellee's Brief at 15-16). The Appellee quotes

R.C. 4123.511(A) to back up this assertion. While the Appellee's assertion is correct on one level, it is not valid for the case before this Court. Revised Code 4123.511 applies to a first report "indicating that an injury or occupational disease has occurred or been contracted which may be compensable." R.C. 4123.511(A). The reason for this statute is so that when a worker is injured there is little barrier to gaining access to the workers compensation system. Thus, this statute allows anyone to report only when the first injury or occupational disease has affected a worker, not for subsequent compensation.

To find that even a complete stranger can file for someone else's compensation in the Bureau, the Appellee would be asking this Court to overturn the rule that the *claimant* must diligently secure compensation. *See Justice* at 35. In fact, the Commission even has policy against the Appellee's proposition. In its Hearing Officer Manual, the Commission states that only a party in interest, which "is expressly limited to the claimant, his/her representative, the employer, the employer's representative, and the Administrator," can sign a motion, application, or appeal. Hearing Officer Manual, Memo S6, dated May 7, 2001. If the party in interest has not signed the motion, application, or appeal, it shall be dismissed. *Id.* Thus, not only does the case law and the Commission's Hearing Officer Manual, but even the statute quoted by the Appellee *do not support* the Appellee's proposition that even a complete stranger could have filed for Dean Sziraki's scheduled loss compensation.

Let's take, arguendo, the Appellee's proposition that if "the Bureau receives information . . . from anyone, the written verification of that information 'shall be considered an application for compensation.'" (Appellee's Brief at 16), quoting R.C. 4123.511(A). This would mean that any one of the reports from the doctors, nurses, or anyone for that fact that noted Dean Sziraki's quadriplegia, which is located in Bureau's file for Dean Sziraki, shall have been considered an

application for scheduled loss compensation. Thus, if the Appellee's proposition is correct, then any one of the reports in Dean Sziraki's claim file should be considered an application for scheduled loss benefits.

Another problem with the Appellee's proposition is that if anyone, even a complete stranger, with verified information can file for an injured worker's compensation, then why has the Appellee placed all the blame on Marilyn Sziraki and the attorney, Brian Jones. The Appellee stated that "she and the attorney sat on Dean's potential rights for years." (Appellee's Brief at 15). Why is it that only these two are to blame for Dean Sziraki's not receiving scheduled loss benefits? Because, under the Appellee's proposition, everyone that had information about the Dean Sziraki's quadriplegia sat on his rights, which is anyone who treated Dean Sziraki and all those (including the Bureau's attorneys) who reviewed Dean Sziraki's file when it was considered catastrophic. (R. at 22-24). Thus, with all the people, medical personal and Bureau's personal, involved in Dean Sziraki's claim, any of the indicia in the record should have been considered an application for scheduled loss benefits for Dean Sziraki. Therefore, under the Appellee's proposition, the Bureau definitely abused its discretion when it failed to consider all the indicia in the record as application for scheduled loss benefits.

Finally, if nothing precluded Marilyn Sziraki from applying for scheduled loss benefits for Dean Sziraki as asserted by the Appellee, then why was the Bureau so adamant about her becoming guardian over Dean Sziraki's estate before proceeding with any other matters. (Appellee's Brief at 16); (R. at 26, 27, 70, 73-74, 98). According to Ohio law, the Bureau is charged with assisting and aiding the claimant in filing claims and notifying the claimant of their rights under the law. R.C. 4123.511(A). In fact, the Bureau had a process to have a guardian appointed to assist the claimant, which the Bureau's attorney even threatened to use but never

followed though with. R.C. 2111.03; (R. at 73-74). Thus, the Bureau not only failed in its duty to assist Dean Sziraki in filing claims, but it failed to provide him the means to file those claims for compensation.

Therefore, based on case law, Dean Sziraki sustained his loss of use at the moment of his work-related injury, and the statute, R.C. 4123.57(B), directed that he be paid his scheduled loss benefits. From the moment of Dean Sziraki's injury, no one had the ability before the Bureau to diligently secure compensation for him. As stated above, R.C. 4123.57(B), and the Bureau's policy do not require an application but the Bureau's policy does state that the Bureau can pay without a request. The Relator asserts that if the claimant has no ability to diligently secure his compensation and no one else has standing, then the Bureau inherits the duty to award scheduled loss compensation, especially when it fails to assist the claimant through its guardian bypass mechanism to get representation for an incompetent, injured worker. Thus, the Bureau abused its discretion where it failed to pay the scheduled loss benefits to Dean Sziraki's estate as part of Dean Sziraki's Death Benefits.

Proposition of Law No. III: *The Industrial Commission of Ohio erred to the prejudice of Relator as a matter of law when it exceeded its rule making authority and imposed a formal application requirement as a threshold for agency consideration of the scheduled loss benefits.*

The Appellee again incorrectly asserts that R.C. 4123.57 mandates an application. The statute states "the employee *may* file an application with the bureau of workers' compensation." (Emphasis added) R.C. 4123.57. While an application may be contemplated, it does not make it a requirement as asserted by the Appellee. In addition, R.C. 4123.57(A) states:

> The district hearing officer, upon the application, shall determine the percentage of the employee's permanent disability, *except as is subject to division (B) of this section*, based upon that condition of the employee resulting from the injury or occupational disease and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable.

(Emphasis added) R.C. 4123.57(A). This exception for R.C. 4123.57(B), the scheduled loss section, exempts scheduled loss from a determination by the district hearing officer, which is based on an application. In fact, when determinations are made under R.C. 4123.57(B), they are to be made by the administrator. R.C. 4123.57.

Here, when the District Hearing Officer (DHO) required that Dean Sziraki's estate file an application for scheduled loss benefits, the officer mandated a rule not required by R.C. 4123.57, nor the Ohio Administrative Code (which, at the time of the case, was silent about scheduled loss benefits procedure) or the Bureau's policy in handling the scheduled loss benefits. (R. at 80). Thus, the DHO abused his discretion, and the Commission exceeded its rule making authority by imposing on Dean Sziraki's estate a rule mandating that the estate had to make an application for the scheduled loss benefits.

Furthermore, the Relator would like to point out that it knows all references to the 2010 Ohio Administrative Code 4123-3-15 are not binding on this case, but believes they are persuasive and that it was the Relator's duty to include them for the Court to make a well reasoned decision.

Therefore, the Commission abused its discretion and exceeded its rule making authority by mandating an application for the scheduled loss benefits.

Proposition of Law No. IV: *The Industrial Commission of Ohio erred to the prejudice of Relator as a matter of law when it granted scheduled loss benefits as a consecutive payment instead of separate concurrent payments.*

The Relator does not only rely on rules promulgated after Dean Sziraki's death; rather the newer rules were included for full disclosure of the current law and for their persuasive potential. Relator notes that this Court has held that the Commission has the discretion to determine if the injured worker is better off with consecutive over concurrent payments. *McKenney* at ¶ 20. However, R.C. 4123.57 states that Bureau administrator is to make the scheduled loss determination. R.C. 4123.57. Thus, the *McKenney* holding gives no deference to the Bureau to determine and pay the scheduled loss benefits as required by the statute.

Here, the Bureau referred Dean Sziraki's estate's motion to the Commission without a determination. But the Bureau recommended that the "requested awards be paid concurrently vs. consecutively." The Bureau clearly demonstrated that it preferred for the payment of the concurrent awards. In the DHO's order on this issue, the order was silent with regard to whether the award was the consecutive or concurrent. (R. at 85-86). On appeal, the Staff Hearing Officer in a mere parenthetical limited the scheduled loss benefits to being a consecutive award rather than a concurrent award without any support for the change. (R. at 89). Thus, the Commission summarily gave no deference to the Bureau's determination that it wanted concurrent awards for Dean Sziraki's scheduled loss compensation, and never supported its decision with any reasoning for the change.

Therefore, the Commission abused its discretion when it limited the scheduled loss benefits of Dean Sziraki's estate to a consecutive award by giving no deference to the Bureau's

request for a concurrent award rather than a consecutive award. In addition, the Commission abused its discretion by never giving any stated reasons for this change.

CONCLUSION

For the foregoing reasons, Dean Sziraki had a clear legal right to the scheduled loss benefits based on his quadriplegia resulting from the injuries he suffered in his 1991 accident. The Bureau had a clear legal duty to identify and pay the scheduled loss benefits, and it abused its discretion when it knew that Dean Sziraki was incompetent and was impossible for him to effect a request for his scheduled loss benefits. Therefore, the Relator requests that this Court grant this writ of mandamus and order the Bureau to pay the full 850 weeks that would have been paid if the Bureau had done its duty, or, in the alternative, the 816 weeks that he valiantly lived since his accident because the Relator has no plain and adequate remedy at law.

Respectfully submitted,

Kurt M. Young
Counsel for Relator,
Estate of Dean E. Sziraki

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was sent by ordinary U. S. mail to Elise M. Porter, Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130, counsel for Respondents Administrator, Bureau of Workers' Compensation and Industrial Commission of Ohio, 30 West Spring Street, Columbus, Ohio 43266 on March 27, 2012.

Kurt M. Young (0061917)
Counsel for Relator,
Estate of Dean E. Sziraki