

OPINION NO. 74-018

Syllabus:

1. An order of a deputy administrator of the Bureau of Workmen's Compensation is, in the absence of regulations to the contrary, a final order after the deadline for filing an application for reconsideration has passed.

2. An order of a deputy administrator of the Bureau of Workmen's Compensation remains subject to the continuing jurisdiction of the Industrial Commission within the time limitations set out in R.C. 4123.52, but may be modified or revoked only if there is evidence of such new or changed conditions, arising subsequent to the order, as would justify a change in the order under the provisions of Chapters 4121 and 4123 of the Revised Code.

3. R.C. 4123.59 and 4123.60 are mutually exclusive statutes, and when a person receives an award under each statute, the proper compensation is the amount of the latter award. Hence, the amount of the first award must be deducted from the payment of the second.

To: Gregory J. Stebbins, Chairman, Industrial Commission of Ohio, Columbus, Ohio

By: William J. Brown, Attorney General, March 1, 1974

I have your predecessor's request for my opinion, which reads as follows:

"That portion of Section 4123.60 R.C. in paragraph three, relating to conditions under which compensation for injury may be awarded after death of the injured employee, is in need of a legal opinion to clarify the intention of the Legislature.

"We had a decedent who was entitled to have made an application for benefits for permanent total disability, and said benefits were awarded and the check was mailed to his residence. After transmittal and just prior to his receipt of the warrant, he died, and the widow returned the check. Thereupon she filed an application to receive the benefits as the dependent on the basis that the claimant's death was not due to the injury. The Deputy Administrator entered an order finding that she was entitled to the benefits and further found that the death was not the result of the injury allowed during the decedent's lifetime.

"Subsequent to this action, and after receipt of the payment, the widow-claimant, who also used the advice of legal counsel previously, now on the advice of the same attorney filed an application for the death award on the basis that the death resulted from the injury.

"The Commission requests it be given an opinion based on the following:

"(A) Was the action of the Deputy Administrator finding that the death was not the result of the injury, from which order no appeal was taken, a final order to the extent that the subject matter was res adjudicata when the claim for death benefits was subsequently filed?

"(B) If your answer to the above question is in the negative, should the award which she received under Section 4123.60, be deducted from the regular death award which she received under Section 4123.59?"

Your request concerns the relationship of R.C. 4123.60 and R.C. 4123.59 in determining the proper death benefit to be paid to the dependents of an injured employee upon his death. R.C. 4123.60 provides for death benefits when an employee's death is not caused by the injury which he sustained and reads, in part, as follows:

"In all cases of death from causes other than the injury or occupational disease for which award had theretofore 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 commission 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, or for services rendered on account of the last illness or death of such decedent, as the commission determines in accordance with the circumstances in each such case. If the decedent would have been lawfully entitled to have made application for an award at the time of his death the commission 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, or for services rendered on account of the last illness or death of such decedent, as the commission determines in accordance with the circumstances in each such case, but such payments may be made only in cases in which application for compensation was made in the manner required by sections 4123.01 to 4123.94, inclusive, of the Revised Code, during the lifetime of such injured or disabled person, or within one year after the death of such injured or disabled person."

R.C. 4123.59 provides for death benefits when the death of an employee is caused by an injury to or an occupational disease contracted by him and reads, in part, as follows:

"In case an injury to or an occupational disease contracted by an employee causes his death, and if (1) his death ensues, within a period of three years after the injury or the beginning of disability due to the occupational disease, or (2) compensation for total disability, or partial disability as provided in division (A) of section 4123.57 of the Revised Code, on account of the injury or occupational disease which caused his death has been paid for any portion of the year next preceding the date of the death of such employee, or (3) the administrator or industrial commission finds that a decedent, who applied for compensation as described in division (2) of this paragraph, and who was examined by a licensed physician, would have been entitled to an award of compensation had not death ensued; provided denial by the industrial commission of any death claim based upon division (3) of this paragraph shall not be appealable under section 4123.519 of the Revised Code; * * *."

(Emphasis added.)

In the instant situation the dependent filed an application for death benefits pursuant to R.C. 4123.60, stating that the employee's death was not due to the injury. An order was then entered by a deputy administrator authorizing the payment of death benefits and finding that the death was not the result of the injury. A deputy administrator is given the power to conduct hearings by R.C. 4123.08, which reads as follows:

"Each member of the industrial commission, and its deputies, referees, supervisors, directors, secretaries, auditors, actuaries, inspectors, investigators, and examiners appointed by the commission, may for the purposes contemplated by sections 4123.01 to 4123.94, inclusive, of the Revised Code, administer oaths, certify to official acts, take testimony or depositions, conduct hearings, inquiries, and investigations, issue subpoenas, and compel the attendance of witnesses and the production of books, accounts, papers, records, documents, evidence, and testimony."

As a practical matter, a deputy administrator enters orders and makes findings on behalf of the Industrial Commission, as explained below.

The court in State ex rel. Moore v. Keller, 120 Ohio App. 454 (1964), discussed the power of a deputy administrator and stated at 461 as follows:

"Furthermore, the administrator has complete authority to prescribe regulations that orders of subordinates shall not be final, but shall be subject to review by the administrator. Having apparently clothed a deputy with ostensible authority to issue findings and make orders in the name and style of the administrator, such action by a deputy becomes final in the absence of an application for reconsideration made by the employer or the claimant."

Thus it appears that, in the absence of regulations to the contrary, an order of a deputy administrator becomes final after the time in which to file an application for reconsideration has elapsed. See R.C. 4123.515.

However, R.C. 4123.52 provides that the Industrial Commission shall have continuing jurisdiction over each case. That Section reads, in part, as follows:

"The jurisdiction of the industrial commission over each case shall be 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. No such modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after six years from the date of injury in the absence of the payment of compensation for total disability under section 4123.56 of the Revised Code, except in cases where compensation has been paid under section 4123.56, 4123.57, or 4123.58 of the Revised Code, then ten years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code, and the commission shall not make any such modification, change, finding, or award which shall award compensation for a back period in excess of two years

prior to the date of filing application therefor. This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided such application is filed within the applicable time limit as provided in this section."

The courts have been called upon many times to interpret this Section, and they have held that the continuing jurisdiction of the Industrial Commission to modify or revoke its orders extends to a review of an order, after it has become final, only where there is evidence of new or changed conditions, arising subsequent to the order, and which would justify a change in the order under the provisions of Chapters 4121 and 4123 of the Revised Code. Kittle v. Keller, 9 Ohio St. 2d 177, 180-182 (1967); State ex rel. Kresge v. Industrial Commission, 157 Ohio St. 62 (1952); State v. Ohio Stove Co., 154 Ohio St. 27 (1950); State, ex rel. Griffey v. Industrial Commission, 125 Ohio St. 27 (1932); State, ex rel. Oberlin v. Industrial Commission, 114 Ohio App. 135 (1961). The court in State v. Ohio Stove Co. supra, stated at page 38 as follows:

"While the continuing jurisdiction of the Industrial Commission, as above set forth, applies to additional awards as well as the original awards of compensation for injuries sustained, an unlimited authority is not conferred upon the commission and it may not arbitrarily set aside or modify findings and orders as to such additional awards. Such changes or modifications must be predicated upon evidence of new and changed conditions occurring subsequent to the original decision."

Thus I must conclude that an order of a deputy administrator of the Bureau of Workmen's Compensation remains subject to the continuing jurisdiction of the Industrial Commission within the time limitations set out in R.C. 4123.52, but may be modified or revoked only if there is evidence of new or changed conditions arising subsequent to the order.

Your second question concerns the method of payment of a death award under R.C. 4123.59 when a death award has previously been paid under R.C. 4123.60. R.C. 4123.59 and 4123.60 are obviously mutually exclusive since a death can either be caused by, or not caused by, a certain injury. Thus an award under either Section would revoke a prior award made under the other Section. Thus revocation would necessitate the deduction of the prior award from the latter award in order to properly compensate the dependent in accordance with the decision as to the cause of death.

In specific answer to your questions, it is my opinion and you are so advised that:

1. An order of a deputy administrator of the Bureau of Workmen's Compensation is, in the absence of regulations to the contrary, final order after the deadline for filing an application for consideration has passed.
2. An order of a deputy administrator of the Bureau of Workmen's Compensation remains subject to the continuing jurisdiction of the Industrial Commission within the time limitations set out in R. C. 4123.52, but may be modified or revoked only if there is evidence of such new or changed conditions, arising

subsequent to the order, as would justify a change in the order under the provisions of Chapter 4121 and 4123 of the Revised Code.

3. R.C. 4123.59 and 4123.60 are mutually exclusive statutes, and when a person receives an award under each statute, the proper compensation is the amount of the latter award. Hence, the amount of the first award must be deducted from the payment of the second.