

OPINION NO. 74-019

Syllabus:

(1) The Industrial Commission may reapportion the sixty-six and two-thirds per cent of the decedent's average weekly wage, awarded to his dependents pursuant to R.C. 4123.59(B), as the needs of the dependents change, so long as the time limitations set forth in R.C. 4123.52 have not expired.

(2) When the rights of certain dependents to a portion of the award ceases under R.C. 4123.59(B) (1) and (2), the industrial Commission should reapportion the award among other eligible dependents.

(3) When a widow remarries and receives a lump sum equal to the amount she would receive for the next two years, the Commission should reapportion the award among other eligible dependents two years after the date of the remarriage.

(4) When a child, who was wholly dependent on the decedent, reaches the age of eighteen, and is neither a full-time student nor incapacitated, his portion ceases and the Commission should reapportion the award; but if he thereafter becomes a full-time student the Commission should again reapportion the award and assign to such dependent such portion as it deems equitable.

(5) The Industrial Commission has no authority to make an award pursuant to R.C. 4123.59 which has a time limitation other than provided by statute or which is contingent upon the occurrence or non-occurrence of certain events, although the commission may reapportion benefits within the time limitations provided in R.C. 4123.52.

To: Anthony R. Stringer, Administrator, Bureau of Workmen's Compensation,
Columbus, Ohio

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

I have before me your request for my opinion, which poses the following questions:

(1) If an apportionment of compensation is made to several dependents without limitation by the Industrial Commission pursuant to R.C. 4123.59(B)

can any reapportionment be made when the needs of the dependents change?

(2) May an award which has ceased pursuant to R.C. 4123.59(B)(1) or 4123.59(B)(2) be reapportioned among other dependents?

(3) If question two is answered in the affirmative, when should that part of an award reapportioned because of the remarriage of a widow be started?

(4) If question two is answered in the affirmative, would it be proper to reapportion any living child's award before he becomes twenty-five years of age?

(5) May an award which has a time limitation other than provided by statute or which is contingent upon the occurrence or non-occurrence of certain events be made to a wholly dependent person?

(6) If question five is answered in the affirmative, may such award upon termination be reapportioned to other dependents?

R.C. 4123.59, which was recently amended by Amended Substitute House Bill No. 417, reads 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 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; benefits shall be in the amount and to the persons following:

(A) If there are no dependents, the disbursements from the state insurance fund shall be 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 shall be 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 per cent of the statewide average weekly wage as defined in division (C) of

section 4123.62 of the Revised Code, and not in any event less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, regardless of the average weekly wage. Where there is more than one person who is wholly dependent at the time of the death of the employee, the Industrial Commission shall promptly apportion the weekly amount of compensation payable under this section among the dependent persons as provided in division (D) of this section.

(1) The payment as provided in this section shall continue from the date of death of an injured or disabled employee until the death or remarriage of such dependent spouse. If the dependent spouse remarries, an amount equal to two years of compensation benefits at the weekly amount determined to be applicable to and being paid to the dependent spouse shall be paid in a lump sum to such spouse and no further compensation shall be paid to such 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 or disabled 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.

(C) If there are partly dependent persons at the time of the death, the weekly payment shall be sixty-six and two-thirds per cent of the employee's average weekly wage, not to exceed sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and shall continue for such time as the industrial commission in each case determines.

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

(1) A wife upon a husband with whom she lives at the time of his death, or a wife who is not residing with her husband because of the aggression of the husband;

(2) A child under the age 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, upon only the one parent who is contributing more than one-half of the support for such child and with whom he is living at the time of the death of such parent, or for whose maintenance such parent was legally liable at the time of his death.

"It shall be 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 commission 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. 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 relation of husband or widow, lineal descendant, ancestor, or brother or sister. 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 three thousand dollars to be apportioned among them as the commission may order.

"In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as dependent unless such person is a member of the family of the deceased employee, or bears to him the relation of husband or widow, lineal descendant, ancestor, or brother or sister. The commission has final discretion to award death benefits solely to those who are wholly dependent or to apportion such benefits among wholly dependent persons and other dependent persons as the commission deems equitable in the circumstances of each particular case."

(Emphasis added.)

Before answering your questions specifically, I note that the introductory paragraph of R.C. 4123.59, and paragraphs (B) and (C) thereof, prescribe that death benefits to dependents shall be in the weekly amount of sixty-six and two-thirds per cent of the decedent's weekly compensation, but within a certain fixed maximum and minimum. Furthermore, paragraph (B) and the last sentence of the Section provide that this weekly amount shall be apportioned among the dependents by the Industrial Commission in such manner as it deems equitable. See also R.C. 4123.60. Finally it should also be noted that R.C. 4123.95 provides:

"Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees. (Emphasis added.)"

(1) You first ask whether a reapportionment of compensation can be made when the needs of the dependents change after an original apportionment has been made to several dependents. Although, as has just been pointed out, the Industrial Commission is required, under R.C. 4123.59 and 4123.60, to apportion the original award of sixty-six and two-thirds of the decedent's average weekly wage among his dependents, those sections of the Revised Code make no specific provision for a reapportionment. However, R.C. 4123.52, which provides that the Industrial Commission has continuing jurisdiction over each case for at least six years, and in some cases ten years, 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, 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." (Emphasis added.)

Since R.C. 4123.52, 4123.59, and 4123.60 are closely related, they must be read in pari materia. Having so read these statutes, I must conclude that the Industrial Commission may reapportion benefits granted pursuant to R.C. 4123.59(B) as the needs of the dependents change, so long as the time limitations set forth in R.C. 4123.52 have not expired. Cf. Industrial Commission v. Dell, 104 Ohio St. 389 (1922). However, there must be a distinct change in the needs of the dependents after the original order to invoke the continuing jurisdiction of the Industrial Commission, because a change or modification of an order must be predicated upon evidence of new or changed conditions occurring subsequent to the original decision. State v. Ohio Stove Co., 154 Ohio St. 27 (1950); State, ex rel. Oberlin v. Industrial Commission, 114 Ohio App. 135 (1961).

(2) You next ask whether an award which has ceased pursuant to R.C. 4123.59(B)(1) or (2) may be reapportioned among other dependents. Prior to its 1973 amendment by A.S. H.B. No. 417, R.C. 4123.59 provided for a dollar limit on the total amount of the award to dependents. The amendment did away with that limit, and, in my opinion, the present award of sixty-six and two-thirds per cent of the deceased's average weekly wage never ceases as long as there remains any dependent who is entitled to it. The General Assembly clearly provided in R.C. 4123.59 that the benefits awarded to the deceased's dependents shall be in the amount of sixty-six and two-thirds per cent of his average weekly wage. The statute also provides that the Industrial Commission shall apportion that amount among the dependents in such manner as it deems equitable. The amount of the award is statutory. The manner in which it is apportioned rests within the discretion of the Commission. The payment apportioned to the spouse of the deceased will cease upon death or remarriage. R.C. 4123.59(B)(1). The payment apportioned to any other wholly dependent person will cease when he becomes eighteen, or when he becomes twenty-five if a full-time student, or when he recovers if mentally or physically incapacitated. R.C. 4123.59(B)(2). Payment apportioned to a partly dependent person will, of course, continue only so long as the Commission determines. R.C. 4123.59(C). But, under the present language of the Section, the award itself never ceases as long as there are dependents, or a dependent, who is entitled to it. The Industrial Commission must, therefore, within the time limits of R.C. 4123.52, reapportion the award whenever one of the decedent's dependents is no longer entitled to a share in it.

(3) Although, under R.C. 4123.59(B)(1), a dependent spouse's portion of the award ceases upon death or remarriage, the statute also provides that, upon remarriage, she shall be paid a lump sum "equal to two years of compensation benefits at the weekly amount * * * being paid to the dependent spouse * * *." You ask when the Commission should reapportion that part of the sixty-six and two-thirds per cent formerly paid to the widow.

Since the statutory award is fixed at sixty-six and two-thirds of the decedent's average weekly wage, the effect of this part of the amendment is to continue the widow's share for two years after her remarriage but to pay the full amount in one lump sum. The reapportioned payments should, therefore, be started two years after the date of the remarriage.

(4) The recent amendment also provides, in subsection (B)(2)(a) and (b), that that portion of the award, received by a person, other than a spouse, who was wholly dependent on the deceased at the time of death, shall continue until such dependent reaches the age of eighteen, or until he reaches the age of twenty-five if he is a full-time student in an accredited educational program. You ask whether it is ever proper to reapportion the award before such dependent becomes twenty-five.

It is clear that the dependent is no longer entitled to a portion of the award when he reaches the age of eighteen and is neither a full-time student nor physically or mentally incapacitated. R.C. 4123.59(B)(2). On the other hand, it is also clear that the General Assembly intended the dependent to share in the award up to the age of twenty-five if he is still a full-time student. As has already been pointed out, the Com-

mission has the authority to apportion the award upon such terms as it deems equitable; the Commission has, within the statutory limits, the authority to modify its prior orders in such manner as it thinks proper; and the Commission is obliged to construe the statute liberally in favor of dependents. I conclude, therefore, that when a wholly dependent person reaches the age of eighteen, and is neither a full-time student nor incapacitated, the Commission should reapportion the award. If, thereafter, the dependent becomes a full-time student, within the meaning of the statute, the Commission should again reapportion the sixty-six and two-thirds per cent award and assign to the dependent student such portion as seems equitable.

(5) Your fifth question concerns the authority of the Industrial Commission to make an award which contains a time limitation or other contingency not provided by statute. A thorough reading of R.C. 4123.59 and related statutes in the area of workmen's compensation reveals no authority for the Industrial Commission to place a time limitation upon an award based on a contingency or on the occurrence or non-occurrence of certain events. Since the Commission has only such powers as are expressly or impliedly conferred upon it by statute, I must conclude that such authority does not exist. However, as discussed previously, the Industrial Commission has continuing jurisdiction and may modify its award at a later time (within the time limits provided by R.C. 4123.52), if changed circumstances justify such modification.

Since the answer to question five is in the negative, it is unnecessary to answer question six.

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

(1) The Industrial Commission may reapportion the sixty-six and two-thirds per cent of the decedent's average weekly wage, awarded to his dependents pursuant to R.C. 4123.59(B), as the needs of the dependents change, so long as the time limitations set forth in R.C. 4123.52 have not expired.

(2) When the rights of certain dependents to a portion of the award cease under R.C. 4123.59(B) (1) and (2), the Industrial Commission should reapportion the award among other eligible dependents.

(3) When a widow remarries and receives a lump sum equal to the amount she would receive for the next two years, the Commission should reapportion the award among other eligible dependents two years after the date of the remarriage.

(4) When a child, who was wholly dependent on the decedent, reaches the age of eighteen, and is neither a full-time student nor incapacitated, his portion ceases and the Commission should reapportion the award; but if he thereafter becomes a full-time student the Commission should again reapportion the award and assign to such dependent such portion as it deems equitable.

(5) The Industrial Commission has no authority to make an award pursuant to R.C. 4123.59 which has a time limitation other than provided by statute or which is contingent upon the occurrence or non-occurrence of certain events, although the commission may reapportion benefits within the time limitations provided in R.C. 4123.52.