

OPINION NO. 75-051

Syllabus:

1. The provisions of R.C. 4123.59 as amended by Amended Substitute House Bill No. 417 apply to dependents, who otherwise qualify for benefits, of those individuals who died on or after November 16, 1973.

2. The rate of compensation for weekly death benefits under R.C. 4123.59 is sixty-six and two-thirds per cent of the decedent's average weekly wage as calculated under R.C. 4123.61. The maximum rate of compensation is sixty-six and two-thirds per cent of the "statewide average weekly wage", which is determined pursuant to R.C. 4123.62 as of April 1, 1972 for dependents, who otherwise qualify for benefits, of those individuals who died on or between November 16, 1973 and December 31, 1973.

3. The rate of compensation for death benefits under R.C. 4123.59 for weeks after January 1, 1974 remains unchanged once determined. However, the maximum rate of compensation for the weeks after January 1, 1974 will be based on the adjusted "statewide average weekly wage" as determined annually pursuant to R.C. 4123.62.

To: Gregory J. Stebbins, Chairman, Industrial Commission of Ohio, Columbus, Ohio
By: William J. Brown, Attorney General, July 17, 1975

I have before me your request for my opinion which reads in part as follows:

"1. Do the provisions of Section 4123.59, Ohio Revised Code as amended by Amended Substitute House Bill No. 417 apply to the dependents, who otherwise qualify for benefits, of individuals who died between November 16, and December 31, 1973, both dates inclusive?

"2. If your answer to the first question is in the affirmative:

"(a) What rate of compensation and what maximum rate of compensation, if any, apply to such benefits?

"(b) Is there a difference in such rate and

maximum rate for the weeks prior to January 1, 1974 and the weeks thereafter?"

Am. Sub. H.B. No. 417 was passed by the Legislature on July 27, 1973, signed by the Governor on August 17, 1973, and filed in the Secretary of State's office on the same date. The bill amended various sections of Chapter 4123 of the Revised Code relating to Workmen's Compensation. It was not passed as an emergency or other measure and did not become effective until 90 days after it was signed and filed. See Ohio Constitution, Article II, Section 1(c); *Heuck v. State, ex rel. Mack*, 127 Ohio St. 247 (1933); 1961 Op. Att'y. Gen. No. 2615, p. 648. While certain provisions of H.B. 417 specify effective dates, there was no effective date specified for R.C. 4123.59 and R.C. 4123.62, the sections with which you are concerned. Accordingly, R.C. 4123.59 and 4123.62 became effective on November 16, 1973.

R.C. 4123.59 provides for weekly payments to the wholly and partly dependent persons of an employee whose death was caused by an injury to or occupational disease contracted by the employee. Prior to the amendment to R.C. 4123.59 by H.B. 417, the maximum and minimum limitations on these weekly payment benefits were specified in dollar amounts. See H.B. 280, 134 Ohio Laws 1370, 1378-80. The amendment, however, changed the limitations so that they are now calculated as a percentage of a "statewide average weekly wage."

R.C. 4123.59 as amended reads in part:

"(B) If there are wholly dependent persons at the time of 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.

". . . .

"(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."
(Emphasis added.)

The new basis for calculation using the "statewide average weekly wage" is defined by amended R.C. 4123.62(C), which also provides the manner in which it is to be determined and annually adjusted. R.C. 4123.62(C) reads in pertinent part:

"(C) Effective January 1, 1974, and each first day of January thereafter, the current maximum weekly benefit amounts provided in sections 4123.56, 4123.58, and 4123.59, and division (A) of section 4123.57 of the Revised Code shall be adjusted based on the increase or decrease in the statewide average weekly wage.

"'Statewide average weekly wage' means the average weekly earnings of all workers in Ohio employment subject to sections 4141.01 to 4141.06 of the Revised Code as determined as of the first day of April for the preceding calendar year by the administrator of the bureau of employment services.

"The statewide average weekly wage to be used for the determination of compensation for any employee who sustains an injury, or death, or who contracts an occupational disease during the subsequent calendar year beginning with the first day of January, shall be the statewide average weekly wage so determined as of the prior first day of April adjusted to the next higher even multiple of one dollar."

(Emphasis added.)

Pursuant to conversations with your office after you requested this opinion, I understand that confusion has arisen with respect to the date which the amendments to R.C. 4123.59 and 4123.62 were effective. The confusion arises because of the introductory phrase to the first paragraph of amended R.C. 4123.62(C); "Effective January 1, 1974." The issue is whether that phrase precludes application of the "statewide average weekly wage" in cases where death occurred between November 16, 1973 (the effective date of the amendments) and January 1, 1974.

From a review of R.C. 4123.62, it is clear that the phrase "Effective January 1, 1974" only relates to the annual adjustments to the "statewide average weekly wage." The definition of this phrase as well as the method of calculation are provided for in separate paragraphs within R.C. 4123.62(C), with no indication that calculations using the newly defined phrase were to have been suspended until January 1, 1974. Accordingly, the new base for calculation (the "statewide average weekly wage") is to be applied where the death of an employee occurred on or after November 16, 1973 and his dependents otherwise qualify for weekly payment benefits under R.C. 4123.59.

You have further requested my opinion as to what specific rate of compensation and what specific maximum rate are to be applied to otherwise qualifying dependents of an individual whose death occurred after November 16, 1973 but before January 1, 1974.

As to the weekly benefit, it is clear that sixty-six and two-thirds per cent of the decedent's average weekly wage is to be paid. Computation of that average presents no problem because it is provided for in R.C. 4123.61, which reads in pertinent part:

"In death claims . . . the decedent's average weekly wage for the year preceding the injury or the date of the disability due to the occupational disease begins shall be the weekly wage upon which compensation shall be based."

R.C. 4123.59 limits the maximum weekly benefits to sixty-six and two-thirds per cent of the "statewide average weekly wage." This statewide average is, pursuant to R.C. 4123.62, determined as of the first day of April for the preceding calendar year. Accordingly, where death has occurred on or between November 16, 1973 and December 31, 1973, the date for determination of the "statewide average weekly wage" is April 1, 1972.

The next question is whether either the initially computed average weekly wage or the "statewide average weekly wage" changes when computing payments made subsequent to January 1, 1974.

As to the average weekly wage, there is no change. R.C. 4123.61 provides for a one time determination. Unless that determination is questioned, it remains as the basis for computing the weekly benefit and is not subject to periodic adjustment. The result is different, however, when one considers the "statewide average weekly wage" -- the basis for the maximum limitation on weekly benefits.

The amendment to R.C. 4123.62 clearly provides for an annual adjustment to the "statewide average weekly wage." Accordingly, where the death occurred on or between November 16 and December 31, 1973, an initial "statewide average weekly wage" is determined with reference to April 1, 1972. That average is then to be adjusted as of January 1, 1974, with reference for that adjustment being to April 1, 1973.

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

1. The provisions of R.C. 4123.59 as amended by Amended Substitute House Bill No. 417 apply to dependents, who otherwise qualify for benefits, of those individuals who died on or after November 16, 1973.

2. The rate of compensation for weekly death benefits under R.C. 4123.59 is sixty-six and two-thirds per cent of the decedent's average weekly wage as calculated under R.C. 4123.61. The maximum rate of compensation is sixty-six and two-thirds per cent of the "statewide average weekly wage," which is determined pursuant to R.C. 4123.62 as of April 1, 1972 for dependents, who otherwise qualify for benefits, of those individuals who died on or between November 16, 1973 and December 31, 1973.

3. The rate of compensation for death benefits under R.C. 4123.59 for weeks after January 1, 1974 remains unchanged once determined. However, the maximum rate of compensation for the weeks after January 1, 1974 will be based on the adjusted "statewide average weekly wage" as determined annually pursuant to R.C. 4123.62.