

1986

LDS Hospital v. Industrial Commission of Utah, Second Injury Fund and Anna Webster: Brief of Defendant Anna Webster

Utah Supreme Court

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86 0046

IN THE SUPREME COURT OF THE STATE OF UTAH

L.D.S. HOSPITAL,	:	
	:	
Plaintiff,	:	
	:	
-vs-	:	
	:	
THE INDUSTRIAL COMMISSION OF	:	
THE STATE OF UTAH, THE SECOND	:	
SECOND INJURY FUND OF THE	:	Case No. 860046
STATE OF UTAH, and ANNA F.	:	
WEBSTER,	:	
	:	
Defendants.	:	Priority No. 6

BRIEF OF DEFENDANT ANNA WEBSTER

ON WRIT OF REVIEW TO THE SUPREME COURT
OF THE STATE OF UTAH FROM THE INDUSTRIAL COMMISSION OF UTAH

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Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue presented for review is whether the Industrial Commission applied the proper standards and follow the proper guidelines in determining that Anna F. Webster was partially dependent at the time of the dependency review.

STATEMENT OF FACTS

The material facts in this case are not in dispute.

On July 20, 1979, Anna F. Webster's husband sustained multiple injuries to his head and body in a motorcycle accident which occurred while in the course of his employment. Tr. 78.

In August, 1979, Plaintiff began making temporary total disability benefits payments. These benefits were changed to permanent total disability benefits on February 23, 1981 based upon a report prepared by Dr. Robert Baer. Tr. 139.

On December 15, 1982, Anna F. Webster's husband died due to complications associated with the accident. On January 26, 1983, the Commission ordered Plaintiff to pay an additional 116 weeks of benefits of \$179.00 per week. These benefits, added to those previously paid, equalled 312 weeks of death benefits at the maximum rate of \$179.00 per week. Tr. 78 and 139.

Plaintiff continued to make the ordered payments until March, 1985. In February, 1985, Anna Webster wrote a letter to the Second Injury Fund inquiring about obtaining benefits beyond the initial 312 weeks. Tr. 78 and 139. The Second Injury Fund denied responsibility for additional benefits. Tr. 25-26 and 139-140. Anna Webster filed an Application for a Hearing requesting continued benefits. Tr. 30.

Following a hearing on June 26, 1985, the Administrative Law Judge concluded that Anna F. Webster was partially dependent but reduced her weekly benefits from \$179.50 to \$89.50 per week. Tr. 79-80.

The Administrative Law Judge considered numerous factors in determining that Anna F. Webster was entitled to continued but reduced benefits. Tr. 79-80.

The Commission affirmed the Administrative Law Judge's Order and denied Plaintiff's Motion for Review on January 9, 1986. Tr. 139-141.

SUMMARY OF ARGUMENT

The Industrial Commission followed the mandate of Utah Code Annotated §35-1-68 (1985) and extensively reviewed the issue of dependency. Before determining that Anna F. Webster was partially dependent and reducing her benefits from \$716.00 to \$358.00 per month, the Industrial Commission through the Administrative Law Judge carefully reviewed all relevant facts. The Industrial Commission examined Anna F. Webster's monthly income which was \$1,315.00, more than one-half of which was the dependency benefits. In addition, the Commission examined her monthly expenses which totaled approximately \$1,300.00.

In fashioning a fair and reasonable remedy, the Commission was fully aware of the fact that Anna F. Webster would no longer have a mortgage on her home as of September, 1985 and accordingly would no longer have that monthly expense. Additionally, the Commission also held that interest earned by Anna F. Webster's savings should be considered income. Nevertheless, the Indus-

trial Commission, after all of the evidence was considered, affirmed a finding of partial dependency but decreased the monthly amount by half.

This Court should apply two standards in reviewing the Commission's Order. First, in reviewing questions of law, it must apply the "correction of error" standard. It is submitted that the Commission committed no reversible error in the manner in which it applied the law.

Second, in reviewing the Commission's findings, it must apply an "arbitrary and capricious" standard. Again, it is submitted that the Commission committed no reversible error. The findings of the Commission are supported by competent evidence and are not arbitrary and capricious. The Commission considered all of the evidence at the time of the dependency review.

The Commission utilized the proper standards and guidelines to promote the purpose of the Utah Workers' Compensation Act and to comply with the applicable general rules of law. By applying these standards and guidelines the Commission properly concluded that Anna F. Webster need not use her savings (principal) to relieve Plaintiff of its statutory obligation to pay her as the widow of a deceased former employee.

Anna F. Webster has demonstrated her dependency by competent evidence and therefore is entitled to have the Order awarding her partial dependency benefits affirmed.

ARGUMENT

I

THE INDUSTRIAL COMMISSION DID NOT ERR IN
FINDING THAT ANNA F. WEBSTER IS PARTIALLY DEPENDENT

This Court has established certain standards when reviewing orders of the Industrial Commission. If this Court is reviewing the Commission's interpretation of general questions of law, it applies a "correction-of-error" standard, with no deference given to the Commission's interpretation. Dean Evans Chrysler Plymouth v. Morse, Utah, 692 P.2d 779, 782 (1984). This standard requires this Court to determine whether the Commission has complied with the guidelines of the law. Utah Department of Administrative Services v. Public Service Commission, Utah, 658 P.2d 601, 608 (1983).

If this Court is reviewing the Commission's Findings of Fact, it applies an "arbitrary and capricious" standard. Blaine v. Industrial Commission of Utah, Utah, 700 P.2d 1084, 1086 (1985). This standard requires that the Commission's findings are not to be displaced in the absence of a showing that they are arbitrary and capricious. Id.

The issue of dependency must be determined based upon the facts and circumstances at the time of review as provided in Utah Code Annotated, §35-1-68(2)(b)(iii) (1985). That section provides as follows:

The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or nondependent person and shall be paid such benefits as the commission may determine pursuant to Subsection (2)(c)(ii).

Section 35-1-68(2)(c)(ii) also provides that the issue of partial dependency "shall be determined by the Commission in keeping with the circumstances and conditions of dependence existing at the time of the dependency review."

Plaintiff unconvincingly argues that the Commission did not follow the statutory guidelines "of taking into consideration all facts and circumstances" at the time of the dependency review. Plaintiff's brief, p. 10. To support this argument, Plaintiff cites a statement made by the Administrative Law Judge. The weakness of this argument is exposed by even a cursory examination of the Findings of Fact and Conclusions of Law entered on July 2, 1985. The Administrative Law Judge took into consideration Anna F. Webster's current income, including interest earned by her savings [Tr. 79]. The Administrative Law Judge also considered Anna Webster's current monthly expenses [Tr. 79 and 140]. And, the Administrative Law Judge further noted that such expenses included the mortgage payments on her home which would terminate in September, 1985 and, accordingly, would no longer be a monthly expense. Tr. 79.

Based upon the specific facts which the Administrative Law Judge considered at the time of the dependency review, it is submitted that the Administrative Law Judge complied with the mandates of the statute. It is further submitted that the findings of the Administrative Law Judge were neither arbitrary nor capricious because there is unquestionably a reasonable basis to support such findings.

II

ANNA F. WEBSTER WAS DEPENDENT UPON THE
CONTINUED PAYMENT OF WORKERS' COMPENSATION
BENEFITS AT THE TIME OF THE DEPENDENCY REVIEW

At the time of the dependency review, Anna F. Webster was receiving \$716.00 in Workers' Compensation benefits. These benefits constituted over one-half of her monthly income [Tr. 79]. Mrs. Webster's dependency upon such benefits is convincingly demonstrated by the fact that she was forced to invade her life savings when Plaintiff terminated her benefits [Tr. 79].

The standard to establish dependency under the Utah Workers' Compensation Act, which Appellant broadly paraphrases in its brief at page 10, was set forth by this Court in Farnsworth v. Industrial Commission, Utah, 534 P.2d 897 (1975). This Court stated:

[T]hat dependency within the terms of the statute does not mean absolute dependency for the necessities of life, but rather that the applicant looked to and relied on the contributions of the workman, in whole or in part, as a means of supporting and maintaining himself in accordance with his social position and accustomed mode of life. Id. at 899.

This standard has been utilized by this Court in numerous decisions. Park Utah Consolidated Mines Co. v. Industrial Commission, Utah, 36 P.2d 979 (1934). Star v. Industrial Commission, Utah, 615 P.2d 436 (1980).

Plaintiff attempts to cloud this issue by demonstrating its prowess at arithmetic. Plaintiff's brief, p. 5. Nonetheless, the undisputable fact is that, at the time of the dependency

review, the compensation benefits constituted more than one-half of her montly income [Tr. 79]. Despite this fact, Plaintiff suggests that Mrs. Webster is not dependent upon such benefits to maintain herself in accordance with her social position and accustomed mode of life.

It is respectfully suggested that the Commission is not obligated to consider an alternative social position and mode of life for Mrs. Webster. The fundamental goal of Workers' Compensation is to compensate widows for the income lost when their spouses are killed at work so that they can maintain the social position she and her husband had acquired at the time of his death.

Accordingly, it is submitted that Mrs. Webster demonstrated her continued but partial dependency and that the Commission fashioned a fair and reasonable remedy to further the purpose of the Workers' Compensation Act. Hence, this Court should affirm the final and administrative decision of the Commission.

III

THE INDUSTRIAL COMMISSION APPLIED THE
PROPER STANDARDS AND FOLLOWED PROPER
GUIDELINES IN DETERMINING THAT ANNA F.
WEBSTER WAS PARTIALLY DEPENDENT

Utah Code Annotated, §35-1-68(2)(b)(iii) (1985) empowers the Industrial Commission to review the issue of dependency. The Commission is required by that section to consider facts and circumstances existing at the time of review to determine whether an applicant is a "wholly dependent person". If not, the applicant may be considered partially dependent and shall be paid such

benefits as the Commission may determine pursuant to §35-1-68(2)(c)(ii) (1985).

Such payment shall be based upon the circumstances and conditions at the time of the dependency review and will be paid in a weekly amount not exceeding the maximum weekly rate that a partially dependent would receive if wholly dependent. Utah Code Annotated, §35-1-68(2)(c)(ii) (1985).

Applying the foregoing statutory guidelines to the instant case, it becomes evident that the Commission did apply the proper standards and guidelines.

The findings adopted by the Commission refer to Anna F. Webster's monthly income and expenses at the time of the dependency review. In addition, the findings acknowledge the fact that her mortgage payment would end in September, 1985. Based upon the facts and upon all other evidence, the Administrative Law Judge concluded that she was partially dependent.

Section 35-1-68(2)(b)(iii) (1985) accords the Commission the discretion to determine that an applicant may be partially dependent. Section 35-1-68(2)(c)(ii) (1985) then empowers the Commission to award benefits, the amount of which shall not exceed a stated limit.

Accordingly, this Court must conclude that the Commission acted arbitrarily and capriciously before the Commissioners' Order can be reversed. There is, however, no evidence that the Commission acted in such a manner. In fact, the Commissioners' and the Administrative Law Judge's Order contradict such a conclusion. The Administrative Law Judge considered all relevant

facts and circumstances and the Commission found that the Administrative Law Judge fashioned a fair remedy considering not only Anna Webster's interest but also Plaintiff's interest. Such a decision cannot be considered arbitrary or capricious. Therefore, the Commisioners' Order should be affirmed.

IV

THE INDUSTRIAL COMMISSION DID NOT
ERR WHEN IT REFUSED TO REQUIRE ANNA F.
WEBSTER TO USE HER SAVINGS

Professor Larson has stated the general rule in cases involving the issue of partial dependency and a claimant who has other sources of support:

Partial dependency may be found when, although the claimant may have other substantial sources of support from his own work, from property, or from other persons on whom claimant is also dependent, the contributions made by the decedent were looked to by the claimant for the maintenance of his accustomed standard of living. 2 Larson, Workmen's Compensation Law, §63.12(a) (1983).

Plaintiff in its argument has failed to grasp the fundamental purpose of the Utah Workers' Compensation Act. Plaintiff assumes that since Mrs. Webster has managed to save some money she is not entitled to any benefits. This assumption, however, is in conflict with the general rule espoused by Professor Larson and with the purpose inherent in the Utah Workers' Compensation Act.

Professor Larson concludes that the Court must look at whether the decedent's contributions to Anna F. Webster were used to maintain her accustomed standard of living. The evidence establishes at the time of the dependency review that the bene-

fits received by Anna F. Webster constituted more than one-half of her monthly income. This clearly establishes that Anna F. Webster looked to contributions made by her deceased husband for the maintenance of her accustomed standard of living.

The purpose of the Utah Workers' Compensation Act has been defined by this Court as follows:

[The purpose] is to provide compensation for the probable financial loss suffered by dependents on account of the death of the decedent. Farnsworth, supra, 534 P.2d at 900; Star, supra, 615 P.2d at 439.

In an effort to escape the above quoted general rule and the stated purpose of the Utah Workers' Compensation Act, Plaintiff cites two clearly distinguishable cases from other jurisdictions. The first is Akin v. Akin Distributors, Inc., Okla., 386 P.2d 769 (1963). In that case, the claimant failed to produce sufficient evidence that she was dependent upon her son within the meaning of the Oklahoma Workers' Compensation Act. The evidence in that case did establish that claimant earned a substantial income, in addition to owning valuable stock. Her deceased son merely contributed \$50.00 per month. Under that set of facts, the Court was required to affirm the conclusion that the claimant was not dependent. The Court refused to disturb a finding which was supported by competent evidence. Id. at 772.

In the present case, the Commissioners' Order finding Anna F. Webster partially dependent and, accordingly, reducing her monthly benefits from \$716.00 per month to \$358.00 per month is also supported by competent evidence. That Order was based

after all material facts and circumstances were carefully, and fairly, considered by the Commission.

The second case cited by Plaintiff is Terrinoni v. Westward Ho!, Fla., 418 So.2d 1143 (1982). In that case the Florida Court was struggling with a Florida statute which is substantially different from the Utah Workers' Compensation Act. Claimant had received a substantial sum of benefits from a combination of sources. The Florida Court held that the Florida statute and Florida case law supported the conclusion that there comes a time when dependency benefits may be terminated.

Utah statute also provides for a termination of such benefits. §35-1-68(2)(b)(iii) mandates that the issue of dependency shall be reviewed after the initial six-year period and annually thereafter. Therefore, if the Commission finds, based upon the facts and circumstances at the time of such review, that a claimant is no longer dependent, then benefits can be terminated.

In the instant case, however, the Commission concluded that Mrs. Webster is no longer wholly dependent but is partially dependent. Therefore, it reduced her dependency benefits by fifty percent (50%) from \$716.00 to \$358.00 per month. It has not been demonstrated that the Commission's Order is not supported by competent evidence; therefore, it should be affirmed.

V

THE INDUSTRIAL COMMISSION DID NOT ERR BY FAILING
TO HOLD OR TAKE JUDICIAL NOTICE OF THE FACT THAT
ANNA F. WEBSTER'S CLOTHING EXPENSE WAS EXCESSIVE

As has been amply demonstrated herein, the purpose of dependency benefits is to afford the claimant the ability to maintain her standard of living. The Administrative Law Judge and the Industrial Commission carefully reviewed all the evidence which was submitted, including Mrs. Webster's clothing expense. Obviously the Commission's collective conscience was not shocked by that expense. It is submitted that Plaintiff's conscience is insufficient reason to reverse a proper Order.

VI

ANNA F. WEBSTER IS ENTITLED TO RECEIVE THE
ADDITIONAL BENEFITS AS AWARDED BY THE
INDUSTRIAL COMMISSION REGARDLESS OF WHO
THIS COURT FEELS SHOULD PAY SUCH BENEFITS

Plaintiff has raised an argument that pursuant to Utah Code Annotated §35-1-70 (1953), it should not be required to pay extended dependency benefits to Mrs. Webster. It is Plaintiff's position that the payment of such benefits are the responsibility of the Second Injury Fund.

It is the position of Anna F. Webster that she has clearly demonstrated her entitlement to additional dependency benefits. Her entitlement is not affected by this argument. Therefore, Mrs. Webster respectfully requests that this Court decide who should pay her the benefits.

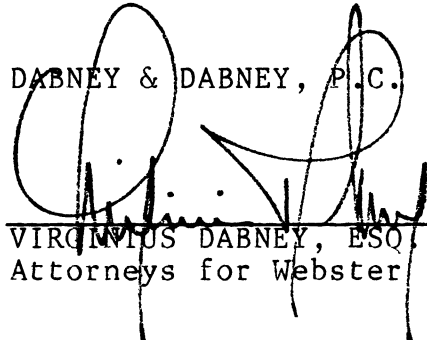
CONCLUSION

Anna F. Webster has produced competent evidence to support her claim for additional dependency benefits. The Industrial Commission considered not only that evidence, but all evidence as well as the interests of the parties. The Commission's final

administrative decision is fair and reasonable under the circumstances. In light of the foregoing, Anna F. Webster respectfully requests that this Court affirm the Commission's Order.

DATED this 20th day of June, 1986.

DABNEY & DABNEY, P.C.


VIRGILIUS DABNEY, ESQ.
Attorneys for Webster

CERTIFICATE OF SERVICE

I hereby certify that I mailed four (4) true and correct copies, postage pre-paid, of the foregoing document on this the 30th day of June, 1986, to the following:

David L. Wilkinson, Esq.
ATTORNEY GENERAL OF THE STATE OF UTAH
Attorneys for Industrial Commission
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Salt Lake City, Utah 84111

DABNEY & DABNEY, P.C.


VIRGILIUS DABNEY, ESQ.
Attorneys for Webster

ADDENDUM

INDUSTRIAL COMMISSION OF UTAH

CASE No.85000250

ANNA WEBSTER, Widow of
GENE WEBSTER, deceased,

Applicant,

vs.

L.D.S. HOSPITAL
(SELF-INSURED),

Defendant

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

* * * * *

HEARING: Hearing Room 334, Industrial Commission of Utah, 160
East Broadway, Salt Lake City, Utah, on June 26, 1985,
at 8:30 a.m.; same being pursuant to Order and Notice
of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: The Applicant was present and represented by Virginus
Dabney, Attorney at Law.

The Defendant was present and represented by Larry
White, Attorney at Law.

At the conclusion of the evidentiary hearing, the parties requested
that the Administrative Law Judge take the matter under advisement until June
28, at noon, to allow them an opportunity to reach a settlement of the case.
No settlement having been received by noon on June 28, 1985, the
Administrative Law Judge is prepared to enter the follow.

FINDINGS OF FACT:

The Applicant herein, Anna Webster, is the widow of Gene Webster, who
sustained a fatal industrial injury on July 20, 1979, while in the course or
scope of his employment with the defendant, L.D.S. Hospital. The injured
worker eventually died from his injuries on December 15, 1982. On January 26,
1983, the Industrial Commission entered an Order providing for the payment of
death benefits to the surviving spouse of the deceased, Anna Webster, the
Applicant herein. As the result of that Order, the Applicant was paid death
benefits at the rate of \$179.00 per week through March 20, 1985, by the
Defendant.

On or about March 15, 1985, the Applicant filed an application for
continuing death benefits from the Defendant, pursuant to Section 35-1-68,
Utah Code Annotated.

ANNA WEBSTER, Widow
GENE WEBSTER, Deceased
FINDING OF FACT
PAGE TWO

Section 35-1-68 (b)(iv) provides that "...In determining the then existing annual income of the surviving spouse, the Commission shall exclude 50% of any Social Security Death Benefits received by that surviving spouse." The Applicant's present income consists of the \$479.00 per month she receives from Social Security for a disability award due to her rheumatoid arthritis, and \$120.00 per month which she receives from the L.D.S. Hospital retirement plan. Prior to the termination of the benefits by the Defendant, she was also receiving \$716.00 in compensation benefits, for a total monthly income of \$1,315.00. The Applicant's expenses are approximately \$1,300.00. As the result of the death of her husband, the Applicant collected \$36,000.00 in life insurance proceeds, and as the result of the death of her mother, she received \$9,000.00. The Applicant testified that she has \$85,000.00 in money market certificates. As the result of those certificates, the Applicant earned approximately \$8,000.00 last year in interest income. However, she did not invade any of her savings until the Defendant terminated her benefits, whereupon she spent \$2,600.00 of her savings. It was also revealed that the Applicant would be paying off her mortgage in September of 1985, and accordingly would no longer have that monthly expense.

Without considering the interest income, it would appear at first blush that the Applicant would be wholly dependant on the benefits provided by the Defendant, since they constitute over one half of her monthly income. The Defendant, by and through counsel, has taken the position that the Applicant should place her \$85,000.00 in high yielding annuities, and that by doing so, she would realize a higher income than she receives from her money market certificates. However, the Administrative Law Judge feels that the Defendant, is missing the point. The point being, that it is not the Applicant's responsibility to find the highest yielding investment so that the insurance carrier may be benefited. However, the Administrative Law Judge does feel that the interest income should be considered in determining the Applicant's disposable income. In other words, the Administrative Law Judge finds that the interest earned by a surviving spouse should be included as income, however the Applicant should not be forced to invade the principal or corpus, in order to meet the everyday necessities of life. After considering all of the evidence on the file, the Administrative Law Judge feels that the fairest finding in this case, would be a finding of partial dependency. Further, the Administrative Law Judge finds that the Defendant should pay the Applicant \$89.50 per week or \$358.00 every four weeks which sum represents one half of the allowance for full dependency.

With respect to the annual dependency review called for in Section 68 of the Act, the Defendant shall send an Affidavit of Dependency form, which will be promulgated by the Commission in the near future, to the Applicant. The form should be sent at least sixty (60) days prior to the one (1) year anniversary of the date of this Order. The form will be sent to the defendant and the Industrial Commission by Mrs. Webster. The Defendant shall not suspend or terminate benefits to Mrs. Webster after the anniversary date of this order, unless the Affidavit of Dependency indicates a significant change in her income level, either by increasing or decreasing.

ANNA WEBSTER, Widow
GENE WEBSTER, Deceased
FINDING OF FACTS
PAGE THREE

CONCLUSIONS OF LAW:

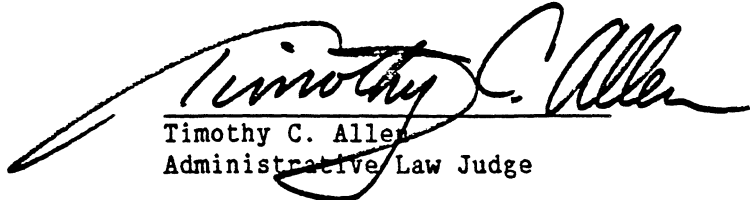
Anna Webster is now partially dependent for support purposes.

ORDER:

IT IS THEREFORE ORDERED that Defendant, L.D.S. Hospital (Self-Insured) pay Anna Webster, compensation at the rate of \$89.50 per week commencing effective March 21, 1985, and continuing until further order of the Commission.

IT IS FURTHER ORDERED that Defendant, L.D.S. Hospital (Self-Insured), shall send a Dependency Affidavit form to Anna Webster no later than sixty (60) days from the anniversary date of this Order. In the event there has been a substantial increase in Mrs. Webster's income, then the defendant may terminate benefits after the anniversary date of this Order, and the Applicant shall be entitled to a hearing before the Industrial Commission.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof specifying in detail the particular errors and objections, and unless so filed this Order shall be final and not subject to review or appeal.


Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
2 day of July, 1985

ATTEST:

/s/ Linda J. Strasburg

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on July 2, 1985 a copy of the attached Findings of Fact, Conclusions of Law and Order was mailed to the following persons at the following addresses, postage paid:

Anna Webster, 3864 South 850 West, Bountiful, Utah 84010

Virginus Dabney, Attorney, 412 Kearns Building, Salt Lake City, Utah 84101

Scott Wetzel Services, 833 East 400 South Suite 104, Salt Lake City, Utah 84102

Larry White, Attorney, 330 South 300 East, Salt Lake City, Utah 84111

INDUSTRIAL COMMISSION OF UTAH

By Barbara

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 85000250

ANNA WEBSTER, Widow of
GENE WEBSTER, Deceased,

Applicant,

vs.

L.D.S. HOSPITAL (Self-insured),

Defendant.

ORDER DENYING

MOTION FOR REVIEW

On July 2, 1985, an Administrative Law Judge of the Commission issued an Order requiring the Defendant in the above-captioned case to pay continued dependency death benefits to the widow/claimant, Anna Webster. The Defendant filed two separate Motions for Review asserting two different defenses. The first Motion for Review, filed August 28, 1985, argues that the widow/claimant is not a dependent because of the other financial resources available to her. The second Motion for Review, filed October 8, 1985, argues that if the Commission should find that the claimant was a dependent of the deceased, that the additional dependency death benefits should be paid out of the Second Injury Fund, and not by the Defendant Self-insured Employer. The Commission is of the opinion that both Motions for Review should be denied. A review of the file follows.

On July 20, 1979, the now-deceased husband of the claimant sustained multiple injuries to the head and body in a motorcycle accident which occurred while he was making a delivery for the Defendant while in the course of his employment. The Defendant Self-insured Employer began the payment of temporary total disability benefits in August of 1979. On February 23, 1981, these benefits were changed to permanent total disability benefits because of a physician report prepared by Dr. Robert Baer which indicated that the condition of the claimant's husband continued to deteriorate. On December 15, 1982, the claimant's husband died due to complications associated with the accident-caused arteriosclerotic cerebrovascular disease. On January 10, 1983, the claimant filed an application for death benefits. On January 26, 1983, the Commission issued an Order requiring the Defendant to pay an additional 116 weeks of benefits at \$179.00 per week. These ordered benefits, added to the already-paid 196 weeks of benefits, amounted to 312 weeks of death benefits at the maximum rate of \$179.00 per week.

Based on the January 16, 1983, Order, the Defendant continued to pay benefits to the claimant through March of 1985. In February of 1985, the claimant wrote a letter to the Second Injury Fund seeking information regarding continued benefits after the initial 312 weeks paid by the Defendant. The Second Injury Fund responded to her, in a letter dated March 4, 1985, that

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due to the May 1979 amendment to U.C.A. 35-1-68, the employer/carrier, and not the Second Injury Fund, was liable for any additional dependency benefits beyond the initial 312 weeks. Consequently, on March 15, 1985, the claimant filed an Application for Hearing to have the matter regarding continued benefits determined by an Administrative Law Judge. The Defendant answered the Application stating that the Defendant had already paid the 312 weeks of benefits specified in U.C.A. 35-1-68, and therefore, should not be liable for any additional benefits.

On June 26, 1985, the hearing was held. On July 2, 1985, the Administrative Law Judge issued his Findings of Fact, Conclusions of Law and Order awarding the claimant continued dependency benefits to be paid by the Defendant Self-insured Employer. The benefits were computed to be \$89.50 per week, which amounted to one half the maximum rate of \$179.00 per week which the Defendant paid to the claimant during the initial 312 weeks. In determining the amount of benefits to be paid by the Defendant, the Administrative Law Judge took into consideration income the claimant was receiving from other sources as compared against her regular living expenses. Other income included Social Security benefits she received for her own rheumatoid arthritis, retirement benefits due her deceased husband from the Defendant, and interest she earned on a money market account with a corpus of \$85,000.00. The Administrative Law Judge found that the claimant should not be required to invade the corpus of the money market account in order to meet her living expenses, and also ordered the continued benefits to be paid until a substantial change in the claimant's dependency status occurred.

On August 28, 1985, the Defendant filed the first Motion for Review. That Motion for Review objects to the Administrative Law Judge's finding that the claimant should not be required to invade the corpus of her money market account. The Motion argues that, at the time of the hearing, the claimant should not have been considered a dependent, as she had sufficient resources to provide for her necessities without the benefit of continued workers' compensation death benefits. The Defendant further argues that the Administrative Law Judge failed to take into consideration the reduction of her expenses which would occur in October 1985 due to her completing the payments for the mortgage on her home. The Defendant points out that once the mortgage was paid off, the claimant could pay all her listed expenses without the continued benefits, and without ever invading the corpus of her savings. The Defendant argues that based on these considerations, the Administrative Law Judge should have denied the claimant continued death benefits as she was not dependent on outside income.

On October 8, 1985, the Defendant wrote a letter to the Second Injury Fund requesting the Second Injury Fund to agree to pay the continued death benefits ordered by the Administrative Law Judge in the July 2, 1985, Order. This request was denied by the Second Injury Fund on October 3, 1985. Once again the Second Injury Fund pointed out that the May 1979 amendment to U.C.A. 35-1-68 relieved the Second Injury Fund for the previously specified liability for continued death benefits beyond the initial 312 weeks. On October 18,

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1985, the Defendant presented the Commission with a request to overrule the Administrative Law Judge, and order the continued benefits to be paid out of the Second Injury Fund.

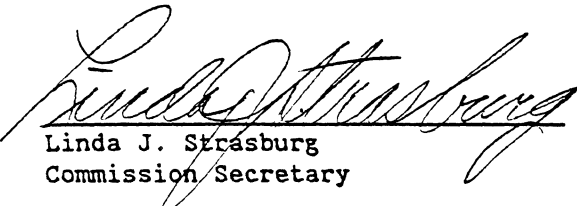
Regarding the Defendant's first Motion for Review, the Commission notes that the issue arises due to the lack of a concrete definition of dependency as specified in the Workers' Compensation Act. In this case, the issue is narrowed to whether or not a claimant need exhaust all financial resources before a finding of dependency is appropriate. As there are no legislative guidelines in this area, the Commission feels that in this particular case, the Administrative Law Judge fairly fashioned the award of continued benefits by taking into account the interest income the claimant received from her savings and excluding the corpus. The Commission finds this to be an equitable compromise between the interests of the two parties, and therefore, must deny the Defendant's first Motion for Review.

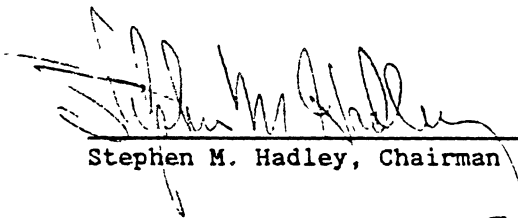
The Defendant's second Motion for Review must also be denied. The Commission is satisfied that the intent of the legislature's May 1979 amendment to U.C.A. 35-1-68 was to relieve the increasing financial burden placed on the Second Injury Fund. The legislature provided this relief by deleting the language in U.C.A. 35-1-68 specifying that the Second Injury Fund would be liable for continued dependency benefits. The code section which the Defendant feels contradicts this interpretation (U.C.A. 35-1-70) by specifying a 312-week limitation on benefits from the carrier is not applicable to continued dependency death benefits. That section applies to "special cases" which are not specifically provided for by other code sections. As the Commission finds no clear contradiction in the reading of U.C.A. 35-1-68, and U.C.A. 35-1-70, the Defendant's second Motion for Review is also denied.

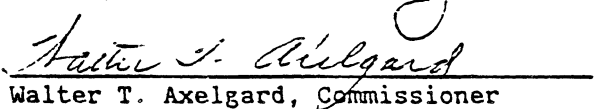
IT IS THEREFORE ORDERED that the Defendant's Motions for Review submitted on August 28, 1985, and October 8, 1985, are denied and the Administrative Law Judge's Order dated July 2, 1985, is hereby affirmed.


Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
9th day of January, 1986.

ATTEST:


Linda J. Strasburg
Commission Secretary


Stephen M. Hadley, Chairman


Walter T. Axelgard, Commissioner


Lenice L. Nielsen, Commissioner

CERTIFICATE OF MAILING

I certify that on January 16, 1986, a copy of the attached Order Denying Motion for Review in the case of Anna Webster issued January 9, 1986, was mailed to the following persons at the following addresses, postage paid:

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THE INDUSTRIAL COMMISSION OF UTAH

By DeAnn Seely
DeAnn Seely