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Eligibility to Receive Death Benefits Plus Accrued Compensation; State ex rel. Nyitray v. Industrial Commission

Mary Clare O'Connor

Eligibility to Receive Death Benefits Plus Accrued Compensation

State ex rel. Nyitray v. Industrial Commission,
2 Ohio St. 3d 173, 443 N.E.2d 962 (1983)

IN *STATE EX REL. NYITRAY V. INDUSTRIAL COMMISSION,*[1] the Ohio Supreme Court recently overruled *State ex rel. Spiker v. Industrial Commission,*[2] a forty-year-old case which had interpreted two important sections of the Ohio Workers' Compensation Act.[3] Under the new ruling, dependents of workers who die from work-related injuries or occupational diseases will be eligible to receive death benefits as well as compensation which had accrued to the worker up until the time of his death.[4]

The two relevant sections of the Workers' Compensation Act are Ohio Revised Code sections 4123.59[5] and 4123.60.[6] Section 4123.59 provides death benefits to dependents of workers who die from work-related injury or occupational disease.[7] Section 4123.60 determines if and when the worker's dependents are entitled to receive his[8] accrued compensation.[9]

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[1]2 Ohio St. 3d 173, 443 N.E.2d 962 (1983).

[2]141 Ohio St. 174, 47 N.E.2d 217 (1943).

[3]OHIO REV. CODE ANN. § 4123 (Page 1980). For other current rulings in the area of workers' compensation, see *Survey of Ohio Supreme Court Decisions 1981-1982,* 9 OHIO N.U.L. REV. 785 (1982).

[4]State ex rel. Nyitray v. Indus. Comm'n, 2 Ohio St. 3d 173, 443 N.E.2d 962 (1983).

[5]"In case an injury to or an occupational disease contracted by an employee causes his death, benefits shall be in the amount and to the persons following: . . . ." OHIO REV. CODE ANN. § 4123.59 (Page 1980).

[6]"In all cases of death from causes other than the injury or occupational disease for which award had theretofore been made . . . in which there remains an unpaid balance, representing payments accrued and due to the decedent at the time of his death, the commission may . . . award or pay any unpaid balance of such award to . . . the dependents of the decedent . . . ." OHIO REV. CODE ANN. § 4123.60 (Page 1980).

[7]For some purposes injury must be distinguished from occupational disease. *See* J. YOUNG, WORKMEN'S COMPENSATION LAW OF OHIO § 10.1-.17 (2d ed. 1971). *See generally* Editorial Note, *Rationale of the Law of Injury and Occupational Disease Under the Ohio Workmen's Compensation Act,* 34 U. CIN. L. REV. 145 (1965) (discussing the historical basis for the differential treatment). The distinction, however, is not within the scope of this article. The words "injury" and "disease" therefore, will hereafter be used interchangeably.

[8]For the sake of convenience, the male pronoun will be used throughout this article. It means, of course, to encompass both male and female workers and dependents.

[9]"Accrued" is a key word. It means compensation which is already owed to a worker for a past time period. It does not include any award which may have been granted him for the future. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 58.41, 58.42 (1983). For example, if a worker is awarded weekly disability checks for the next six months, and he dies after only two months, the accrued portion is the amount for the two months prior to his death. The unaccrued portion is that which would have been paid to him for the remaining four months had he lived.

The questionable portion of section 4123.60 is that which states:

> 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 . . . award or pay any unpaid balance of such award to . . . the dependents of the decedent . . . .[10]

The Ohio Supreme Court first had occasion to interpret these two provisions side by side in 1943. In *State ex rel. Spiker v. Industrial Commission* the court held section 4123.60 to mean that "[n]othing may be paid [to the worker's dependents] unless the workman died from a cause other than the compensable injury."[11] The *Spiker* court, in other words, interpreted sections 4123.59[12] and 4123.60 to be mutually exclusive.[13] If dependents filed under section 4123.59, they could not file under section 4123.60. Ohio lived with this interpretation until the same fact pattern[14] was scrutinized again in *State ex rel. Nyitray v. Industrial Commission.*

The *Nyitray* case arose under the following facts: In April, 1974 Paul Nyitray was exposed to carbon dioxide at the Liquid Carbonic Corporation where he worked.[15] He suffered a myocardial infarction as a result.[16] The Bureau of Workers' Compensation subsequently awarded him temporary total disability benefits[17] from April, 1974 to February, 1976.

In August, 1977 Nyitray applied for an extension of those benefits for the period between February, 1976 and August, 1977.[18] In January, 1978 his application was approved, and a warrant for disability compensation from

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[10]OHIO REV. CODE ANN. § 4123.60 (Page 1980).

[11]141 Ohio St. at 177, 47 N.E.2d at 219.

[12]*See supra* note 5.
The burden of proof rests upon the dependent claimant to show that the injury was the proximate cause of death. Johnson v. Indus. Comm'n, 164 Ohio St. 297, 130 N.E.2d 807 (1955); Weaver v. Indus. Comm'n, 125 Ohio St. 465, 181 N.E. 894 (1932).

[13]141 Ohio St. 174, 47 N.E.2d 217.

[14]The substantive fact patterns in *Spiker* and *Nyitray* were identical, but there was a procedural difference. In *Spiker,* suit was brought by the administratix of the deceased worker's dependent. 141 Ohio St. at 175, 47 N.E.2d at 217. In *Nyitray* it was the worker's widow herself who sued the Industrial Commission. 2 Ohio St. 3d at 173, 443 N.E.2d at 963.

[15]2 Ohio St. 3d at 173, 443 N.E.2d at 962.

[16]Proving work-related causation in cardiac cases is sometimes difficult, although such proof was not an issue in *Nyitray. See* Note, *Heart Injuries Under Workers' Compensation: Medical and Legal Considerations,* 14 SUFFOLK U.L. REV. 1365 (1980) (illustrating that medical uncertainty about causes of heart disease makes it especially difficult to establish a relationship between heart attacks and employment). *See generally* Comment, *Problems of Proving Causation in Cardiac Cases Under the Ohio Workmen's Compensation Act,* 1 U. TOL. L. REV. 165 (1969).

[17]OHIO REV. CODE ANN. § 4123.56 (Page 1980) prescribes the amount and duration of temporary disability awards.

[18]Nyitray also applied for reimbursement for previously paid medical bills. This was also approved. 2 Ohio St. 3d at 173, 443 N.E.2d at 963.

February, 1976 through August, 1977 was issued and mailed to him.[19]

On January 29, 1978, before receiving the warrant, Nyitray died from the heart disease he had contracted at work. The Bureau of Workers' Compensation then cancelled his award, and his dependent widow filed for the accrued compensation which Nyitray would have received but for his death. When she also filed for death benefits pursuant to section 4123.59,[20] the Industrial Commission[21] granted this request, but denied her application to receive the disability compensation which had accrued to her husband prior to death.[22]

Mrs. Nyitray appealed the Commission's decision to the Franklin County Court of Appeals,[23] which reluctantly[24] affirmed the Commission. The case then came before the Ohio Supreme Court,[25] which reversed. This time the court looked beyond the face of the words themselves,[26] concluding that the legislature had never intended sections 4123.59 and 4123.60 to be mutually exclusive,[27] and that the Spiker court's construction of these statutes was contrary to the purpose behind the Workers' Compensation Act.[28]

The court also held that section 4123.60, as interpreted by the *Spiker* court, violates the equal protection clause of the fourteenth amendment to the United States Constitution,[29] because it discriminates between two classes of workers' dependents — those dependents whose worker died from the work-related injury and those whose worker died from other injuries or illness. The *Spiker* interpretation would not allow Nyitray's dependents to keep his accrued compensation check, because he had died from the heart disease he had contracted at work. Yet if Nyitray had, for example, been struck by lightning instead, his dependents might have been able to keep his check.

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[19]Two hearings were held, on September 8, 1977 and Janury 17, 1978, before the warrant was issued. *Id.* at 173, 443 N.E.2d at 963.

[20]OHIO REV. CODE ANN. § 4123.59 (Page 1980).

[21]One of the Industrial Commission's functions is to investigate and handle all disputed workers' compensation claims. OHIO REV. CODE ANN. § 4123.51.6 (Page 1980).

[22]Nyitray had also been awarded compensation for a work-related back injury. Since this injury had not caused his death, the hearing officer did approve Mrs. Nyitray's application for this portion of his accrued compensation. 2 Ohio St. 3d at 173, 443 N.E.2d at 963.

[23]The appeals process is quite intricate in workers' compensation cases. For two excellent overviews of this subject see Kendis, *Appellate Procedures in Workmen's Compensation Cases,* 22 CLEVE. ST. L. REV. 244 (1973); Young, *Processing a Workmen's Compensation Case in Ohio,* 17 CLEV. MAR. L. REV. 103 (1968).

[24]2 Ohio St. 3d at 176, 443 N.E.2d at 965 (quoting the Franklin County Court of Appeals decision, which stated that "[w]e are not free to overrule a decision of the Supreme Court even if it involves an unconstitutional result.").

[25]2 Ohio St. 3d 173, 443 N.E.2d 962.

[26]The *Spiker* court went no further than to take a cursory glance at § 4123.60. Nowhere in the opinion is there any indication that the majority attempted to examine the Workers' Compensation Act as a whole. The result was a very literal interpretation. 141 Ohio St. at 177, 47 N.E.2d at 219.

[27]2 Ohio St. 3d at 177, 443 N.E.2d at 965.

[28]*Id.*

[29]"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The *Nyitray* opinion presented an interesting hypothetical example of the "absurd results"[30] which could obtain under the *Spiker* mutual exclusivity interpretation of these two statutes:

> For example, the facts may be identical in two situations: two workers were injured to the same extent, in the same accident, and have the same number of dependents, and both workers applied for and had been granted compensation. However, the checks were mailed at different times due to administrative management of the claims. As a result, one worker received and cashed the check before dying while the other, Nyitray here, died before receiving payment. Clearly, both workers are entitled to compensation for their work-related injuries, and we can see no rational basis for denying Nyitray's dependents the compensation which he had been granted.[31]

In her dissenting opining in *Nyitray,* Justice Krupansky indicated that she would uphold the *Spiker* interpretation despite these "absurd results."[32] She reasoned that the purpose of the Workers' Compensation Act is not thwarted by denying dependents recovery under section 4123.60, because they can claim "potentially greater" death benefits under section 4123.59.[33]

Justice Krupansky also noted that disability compensation is exempt from garnishment by creditors,[34] and that this fact evidences the "personal" nature of a compensation award and precludes dependents from having any claim upon the worker's checks until he dies.[35] Theoretically, Nyitray, had he lived to cash his check, could have gambled it all away at the race track; in this sense his dependents were not legally entitled to any part of his "personal" award while he lived. Thus, they are not entitled to it upon his death either.

The recent trend, however, has been for courts to distinguish between ordinary creditors[36] and dependents whom the employee has a common law duty to support.[37] Garnishment is being permitted now in the areas of alimony and child support.[38] As early as 1944 a Summit County Common Please Court held that while workers' compensation is exempt from creditors, it nonetheless

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[30]2 Ohio St. 3d at 177, 443 N.E.2d at 965.

[31]*Id.*

[32]*Id.* at 178, 443 N.E.2d at 967 (Krupansky, J., dissenting) (Justice Krupansky's was the only dissenting vote in *Nyitray*).

[33]*Id.* at 180, 443 N.E.2d at 968.

[34]OHIO REV. CODE ANN. § 4123.67 (Page 1980).

[35]2 Ohio St. 3d at 182, 443 N.E.2d at 970.

[36]For recent sweeping changes in the area of creditors' rights in Ohio, *see* Student Project, *Creditor's Rights in Ohio: An Extensive Revision,* 16 AKRON L. REV. 487 (1983).

[37]2 A. LARSON, *supra* note 9, at § 58.47.

[38]Bugh v. Bugh, 125 Ariz. 190, 608 P.2d 329 (Ariz. App. 1980); In re Marriage of Thomas, 89 Ill. App. 3d 81, 411 N.E.2d 552 (1980); Hughes v. Hughes, 132 N.J. Super. 559, 334 A.2d 379 (1975); Steller v. Steller, 97 N.J. Super. 493, 235 A.2d 476 (1967). *See also,* Annot., 31 A.L.R.3d 532 (1970 & Supp. 1983).

is subject to alimony payments.[39] The opinion stated: "[A]limony is not a debt but an obligation imposed by law because of public policy."[40]

Justice Krupansky also attacked the majority's ruling that the *Spiker* result is unconstitutional. She stated that traditionally the Ohio Supreme Court will not examine the constitutionality of a statute if there exists a way to dispose of the issue on other grounds.[41]

Although the majority chose not to use it, such a way did exist.[42] One need merely look at the thought-provoking dissenting opinion[43] in the very case which *Nyitray* overruled: *Spiker*. In that case, Justice Williams stated that a dependent's right to compensation which the worker could have received had he lived should not be affected because the dependent is also eligible for death benefits. "In a proper case the dependent is entitled to both."[44] Justice Williams reasoned that the purpose of the workers' compensation fund is to benefit the worker while he lives and his dependents after his death.[45] Thus, in his view previous case law had settled the issue of whether accrued compensation becomes part of a worker's estate.[46] It does not.

Justice Williams then pointed to the amended portion of General Code § 1465-83[47] (now Ohio Revised Code § 4123.60), noting that "[i]f the decedent would have been entitled to have made application for an award at the time of his death the commission may . . . award and pay an amount, not exceeding the compensation which the decedent might have received, but for his death, to . . . the dependents of the decedent . . . ."[48]

This part of the statute, Justice Williams noted, makes no reference to the cause of death at all. "It could hardly have been the legislative intent that a dependent could receive such compensation if the deceased workman 'would have been lawfully entitled to have made application for an award,' but would not be entitled thereto if an award had actually been made to him."[49]

A basic understanding of the history of workers' compensation is an essential prerequisite to any analysis of the *Nyitray* decision. The concept of workers'

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[39]Chapman v. Chapman, 29 Ohio Op. 273, 15 Ohio Supp. 9 (C.P. Summit County 1944).

[40]*Id.* at 274, 15 Ohio Supp. at 9.

[41]2 Ohio St. 3d at 179, 443 N.E.2d at 967.

[42]The majority might have successfully skirted the constitutional issue altogether simply by re-evaluating the interpretation of the statute.

[43]141 Ohio St. at 180, 47 N.E.2d at 220 (Williams, J., dissenting).

[44]*Id.* at 183, 47 N.E.2d at 221.

[45]*Id.* at 181, 47 N.E.2d at 220.

[46]*Id.* at 180, 47 N.E.2d at 220 (citing State ex rel. Petroff v. Indus. Comm'n, 127 Ohio St. 65, 186 N.E. 721 (1933); State ex rel. Rowland v. Indus. Comm'n, 126 Ohio St. 23, 183 N.E. 787 (1932); Bozzelli v. Indus. Comm'n, 122 Ohio St. 201, 171 N.E. 108 (1930)).

[47]114 Ohio Laws 26, 37 (amended July 9, 1931).

[48]OHIO GENERAL CODE § 1465-83 (now OHIO REV. CODE ANN. § 4123.60).

[49]141 Ohio St. at 183, N.E.2d at 221.

compensation grew out of recognition of the need to prevent financial disaster both to employer and employee.[50] With the spread of the industrial revolution in this country, workers were exposed to an ever-increasing number of hazards. Under common law tort theory the injured worker could sue the employer for damages.[51] If the worker's own negligence contributed to his injury, he took nothing.[52] If the employer was totally at fault, on the other hand, the potential for financial ruin existed.[53] Thus, the alternative plan for a no-fault insurance policy was born.[54]

Under a workers' compensation plan negligence and fault are largely immaterial.[55] The one criterion entitling the employee to benefits is that the injury be "received in the course of, and arising out of . . . employment."[56] The net result is that the employee is guaranteed assured, if modest, benefits, while the employer need not fear the potentially huge judgments that might be levied against him under a common law right to recovery.[57] Because the employer purchases insurance[58] against work-related injuries, the cost of those injuries is ultimately placed on the consumer as part of production costs.[59]

The primary purpose of any workers' compensation plan is to compensate loss of earning power by providing a schedule of benefits to the injured

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[50]Bureau of Workers' Compensation, Pamphlet No. 490, History of the Workers' Compensation Program (n.d.).

[51]1 A. LARSON, *supra* note 9, at § 4.30.

[52]*See* 1 A. LARSON, *supra* note 9, at § 4.30 on the various defenses available to employers under common law.

[53]*But see* 1 A. LARSON, *supra* note 9, at § 4.30, graphically illustrating the erosion of employees' ability to recover anything, due to the variety of defenses available to employers.

[54]*See* 1 A. LARSON, *supra* note 9, at § 4.30, citing German statistics from the year 1907, which classified 42.05% of all work-related accidents as being inevitable, and attributable to no one's fault. At § 4.50 he notes that studies done by the Minnesota and Wisconsin Labor Departments confirmed the German study.

[55]1 A. LARSON, *supra* note 9, at § 1.10.

[56]OHIO REV. CODE ANN. § 4123.01(C) (Page 1980).

Interpreting whether an employee's injury occurs within the "course of employment" is, of course, a subject in itself. The modern trend seems to be to favor a broad definition. *See* Note, *Worker's Compensation: A New Standard for Work Connectedness,* 32 U. FLA. L. REV. 828 (1980) (Cafeteria cashier had occasionally banked the day's receipts on her way home. She was assaulted and robbed at her home by a restaurant loiterer who apparently thought she had cafeteria money at her home. Held: After-hours robbery occurred within the course of employment. Strother v. Morrison Cafeteria, 383 So. 2d 623 (Fla. 1980)).

[57]Modern courts, however, have carved out some notable exceptions to the general rule that workers' compensation is the exclusive remedy for workers injured on the job. An employer's intentional tort may expose him to common law liability. The leading Ohio Case is Blankenship v. Cincinnati Milacron Chemicals, 69 Ohio St. 2d 608, 433 N.E.2d 573 (1982). *See* 51 U. CIN. L. REV. 682 (1982) (analyzing *Blankenship*). *See generally,* Annot., 9 A.L.R. 4th 778 (1981 & Supp. 1983) (citing *Blankenship,* and discussing employer's tort liability to worker for concealing workplace hazard).

The dual capacity doctrine is another major exception to the exclusivity rule. *See* 48 U. CIN. L. REV. 187 (1979) (discussing Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978), which held that an employer-hospital is not immune to suit by an employee-patient when its negligence arises from a breach of duty imposed because of its dual capacity as an administering hospital).

[58]Ohio has an exclusive state insurance fund. Private insurance carriers are not permitted to underwrite policies for any employer. J. YOUNG, *supra* note 7, at § 1.13.

[59]1 A. LARSON, *supra* note 9, at § 1.00.

worker and his dependents.[60] Since it is a scheme for preventing need during disability,[61] the worker-recipient does not "own" the award in the sense that he would a tort recovery.[62] He cannot assign it;[63] it cannot be attached by creditors;[64] and his heirs cannot normally inherit any remaining unpaid balance of his disability award.[65]

Here "heirs" must be distinguished from "dependents," however. In many states dependents have been allowed to continue to receive the disability compensation as yet unaccrued to the worker when he died.[66] For example, if the worker were awarded 300 weeks worth of compensation, but died after only fifty weeks, the unaccrued portion (250 weeks) would not become an asset of the estate, but would go to his dependents, if any.[67]

Accrued compensation is a different matter.[68] Larson, the leading authority on the subject, states: "Accrued but unpaid installments are, of course, an asset of the estate, like any other debt."[69] He then cites authority from seventeen states. Ohio is not one of them.[70] One wonders, therefore, whether the legislative intent behind section 4123.60 is simply to ensure that accrued but unpaid compensation does not go to the estate, but to the worker's dependents.

Thus, the troublesome "cause of death other than . . ." wording in section 4123.60 need not have been intended to exclude dependents from receiving accrued but unpaid compensation unless the worker died from a cause unrelated to the work injury. Rather its purpose could have been to ensure that if those dependents were not entitled to death benefits under section 4123.59 (because the injury had not caused the death), they would at least be able to claim the amount accrued to the worker between the time of injury and the time of death.

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[60] *Id.* at § 1.10; J. YOUNG, *supra* note 7, at § 1.14.

[61] For an excellent apology on the social morality of workers' compensation, see 1 A. LARSON, *supra* note 9, at § 2.20.

[62] *Id.* at § 2.60.

[63] OHIO REV. CODE ANN. § 4123.67 (Page 1980); 3 Op. Att'y Gen. 2104 (1915).

[64] "'Compensation before payment shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to the employees or their dependents." OHIO REV. CODE ANN. § 4123.67 (Page 1980).

[65] 2 A. LARSON, *supra* note 9, at § 58.40; J. YOUNG, *supra* note 7, at § 8.11.

[66] Jones v. New Jersey Mfgs. Casualty Ins. Co., 77 N.J. Super. 147, 185 A.2d 678 (1962), *aff'd* 39 N.J. 555, 189 A.2d 711 (1963); MASS. GEN. LAWS ANN. ch. 152, § 36A (West 1965); N.C. GEN. STAT. § 97-37 (1965); N.Y. WORK. COMP. LAWS § 15(4) (Consol. 1965), OKLA. STAT. ANN. title 85, § 48 (West 1952); W. VA. CODE § 23-4-6(e) (1955).

[67] 2 A. LARSON, *supra* note 9, at § 58.42.

[68] *See supra* note 9.

[69] 2 A. LARSON, *supra* note 9, at § 58.41.

[70] *Id.* The states are Arizona, Arkansas, California, Connecticut, Georgia, Kansas, Louisiana, Massachusetts, Michigan, Montana, New Jersey, North Carolina, Oregon, Tennessee, Texas, Utah, and Washington.

If any doubt still exists, one can turn to Ohio Revised Code section 4123.95[71] which states that the Ohio Workers' Compensation Act "shall be liberally construed in favor of employees and the dependents of deceased employees."

In a conversation with this author, Mr. L. Paul Amonett, staff attorney for the Ohio Industrial Commission, stated that the *Nyitray* decision will have minimal effect upon the state insurance fund.[72] Most accrued compensation awards are very small,[73] since the Industrial Commission reviews disability claims every six to eight weeks.[74] Death claims are expensive but few,[75] and *Nyitray* has no effect until there is both an allowable death claim and accrued compensation.[76]

Is *Nyitray* a just result? "Definitely," stated Mr. Amonett. "It's been a long time coming in Ohio. Conserving funds is not the business of workers' compensation. Our job is to pay and pay promptly when a rightful claim arises. Squandering the fund is one thing, but if it's owed, pay it."[77]

CONCLUSION

The Ohio Constitution was amended in 1923 to provide a plan "[f]or the purpose of providing compensation to workmen and their dependents, for death, injuries, or occupational disease occasioned in the course of such workmen's employment . . . ."[78] The General Assembly contemplated paving a two-way street for employers and employees. The plan compelled employers to contribute to the state insurance fund;[79] in return, the employee relinquished his common law right of action against his employer.[80]

Paul Nyitray was a worker who became temporarily totally disabled from

[71]OHIO REV. CODE ANN. § 4123.95 (Page 1980). This section was not added to the Ohio Workers' Compensation Act until 1959. Justice Clifford Brown, in one opinion, stated that "[t]he enactment of this statute most probably resulted, in part, from the prior judicial use of procedural niceties to cause unjust results . . . ." Wires v. Doehler-Jarvis Div. of NL Industries, Inc., 46 Ohio App. 2d 40, 45, 345 N.E.2d 629, 632 (1974).

[72]Interview with Landon Paul Amonett, Staff Attorney for Ohio Industrial Commission, in Akron, Ohio (June 30, 1983).

[73]Over the last six years, Mr. Amonett has not seen one accrued compensation claim in an amount over $1,000.

[74]Telephone interview with Robert C. Fuller, Director of Research and Statistics of the Bureau of Workers' Compensation, Columbus, Ohio (July 7, 1983).

[75]Ohio averages between 300 and 350 death claims annually. The average amount runs between $150,000 to $200,000, depending upon the age of the surviving spouse, who receives a pension for life or until remarriage. Telephone Interview, *supra* note 74.

[76]The Ohio Bureau of Workers' Compensation's Research and Statistics Department has no record of the frequency with which this combination occurs.

[77]This author's personal thanks goes to Mr. Amonett, who graciously gave of his valuable time to help alleviate the confusion of this complex area of the law.

[78]OHIO CONST. art. II, § 35.

[79]"[L]aws may be passed establishing a state fund to be created by compulsory contribution thereto by employers . . . ." OHIO CONST. art. II, § 35.

[80]"Such compensation shall be in lieu of all other rights to compensation, or damages, . . . and any employer who pays the premium or compensation provided by law . . . shall not be liable to respond in damages at common law or by statute . . . ." OHIO CONST. art. II, § 35. *But see supra* note 57.

a disease contracted in the course of his employment. This disease killed him before his approved disability award reached him. It is incongruous that administrative delays should prevent his dependent widow from receiving this award for him posthumously merely because she is also lawfully entitled to death benefits.[81]

The *Spiker* decision[82] was rendered long before section 4123.95 was added to the Workers' Compensation Act.[83] Since this amendment specifically orders a liberal construction of the Act in favor of employees and their dependents,[84] the *Nyitray* ruling merely righted a wrong which had plagued the Paul Hyitrays of this state for forty years.

MARY CLARE O'CONNOR

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[81] *Cf.* OHIO REV. CODE ANN. § 4123.57(B) (Page 1980) (scheduling lump sum awards for permanent partial disability).

"When an award under this division has been made prior to the death of an employee, all unpaid installments accrued or to accrue . . . are payable to the surviving spouse . . . ."

This section makes no reference to the cause of death. Had Nyitray been awarded disability compensation under § 4123.57(B), then his dependent widow could have been able to collect: 1) The accrued portion of the award; plus 2) The unaccrued portion; plus 3) Death benefits under § 4123.59. Nyitray was totally, not just partially, disabled. *A fortiori,* one would think that the legislative intent was to permit his dependent to recover at least the accrued portion of his award, regardless of whether that dependent was also entitled to death benefits.

[82] 141 Ohio St. 174, 47 N.E.2d 217.

[83] *See supra* note 71.

[84] "'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.'' OHIO REV. CODE ANN. § 4123.95 (Page 1980) (effective November 2, 1959).