

SUPREME COURT OF OHIO

State ex rel. Hubbard v. Industrial Commission

96 Ohio St. 3d 336 (Ohio 2002) · Decided September 25, 2002

SUMMARY

The Ohio Supreme Court granted a writ of mandamus requiring the Industrial Commission to vacate its abatement order and reactivate a deceased worker’s claim for workers’ compensation benefits. The court held that the commission’s medical-examination resolution concerning certain occupational diseases did not apply to the decedent’s asbestos-induced mesothelioma. It further held that the widow could pursue benefits under Ohio Revised Code section 4123.60 for the period during which the claim was pending before the decedent’s death.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Moyer, C.J.; Douglas, J.; Resnick, J.; F.E. Sweeney, J.; Pfeifer, J.; Cook, J.; Lundberg Stratton, J.
JURISDICTION	Ohio
DECIDED	September 25, 2002
DISPOSITION	writ_granted
PROCEDURAL POSTURE	Original action in mandamus brought by the decedent's widow to compel the Industrial Commission to vacate its abatement order and reactivate a workers' compensation claim.
STANDARD OF REVIEW	Mandamus; the court determined whether the Industrial Commission abused its discretion or acted contrary to law in abating the claim and requiring the commission examination.
PRECEDENTIAL VALUE	Published Ohio Supreme Court opinion; precedential.
PARTIES	Mary C. Hubbard, widow-claimant and relator v. Industrial Commission of Ohio

TOPICS

- workers compensation
- administrative law
- exhaustion of remedies
- judicial review of agency action
- statutory interpretation

PRACTICE AREAS

workers compensation

administrative law

employment law

remedies

QUESTIONS PRESENTED

1. Whether the Industrial Commission improperly required a commission medical examination under provisions governing asbestosis and other occupational respiratory diseases caused by dust when the claim involved asbestos-induced mesothelioma.
2. Whether the widow's claim for compensation was barred by the general rule that unaccrued workers' compensation benefits abate upon the claimant's death.
3. Whether the widow was required to exhaust an administrative remedy under R.C. 4123.60 before seeking mandamus.

HOLDINGS

1. The Industrial Commission erred by treating mesothelioma and asbestosis as interchangeable and by relying on the examination requirement applicable to asbestosis or other occupational respiratory diseases resulting from injurious exposure to dust. Mesothelioma is distinct from asbestosis, and asbestos is a fiber rather than dust for purposes of the provision relied upon.
2. The widow was entitled to have the workers' compensation claim reactivated and to pursue benefits that Hubbard would have received during his lifetime but for administrative delay.
3. The widow was not required to make a separate application under R.C. 4123.60 before seeking mandamus because that statute empowered the commission to award benefits and the commission had already abated the claim.

KEY QUOTATIONS

“Regardless of the status of the claim at the time of death, the claimant’s estate may recover the compensation that the claimant would have received, but for administrative delays, during his or her lifetime.” (96 Ohio St. 3d at 337-338)

*“The two are distinct. Asbestosis is a pneumoconiosis, an “[inflammation commonly leading to fibrosis of the lungs.” Stedman’s Medical Dictionary (26th Ed.1995) 153 and 1391. Mesothelioma, on the other hand, is a cancer, “[a] rare neoplasm derived from the lining cells of the pleura and peritoneum which grows as a thick sheet covering the viscera * * *.”* (96 Ohio St. 3d at 338)

“The commission mistakenly emphasizes the word “any” when the operative word is “dust.” Decedent’s mesothelioma was caused by exposure to asbestos, and asbestos is a fiber, not a dust.” (96 Ohio St. 3d at 339)

FACTUAL BACKGROUND

Thomas H. Hubbard applied for workers' compensation benefits on April 23, 1999, alleging that workplace asbestos exposure caused malignant mesothelioma. He presented unrebutted medical evidence supporting the claim, but the Industrial Commission ordered a medical examination under Resolution No. R96-1-01. Hubbard,

who was unable to walk or stand and was transported on a stretcher, was diagnosed with industrial mesothelioma and died one week later. The commission abated the application after his death.

PROCEDURAL HISTORY

Thomas H. Hubbard filed a workers' compensation application for industrially caused mesothelioma and submitted un rebutted medical evidence. The Industrial Commission required a medical examination, and Hubbard died shortly thereafter. The commission then abated all action on the application, prompting his widow to commence an original mandamus action in the Supreme Court of Ohio.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The Industrial Commission was ordered to vacate its order of abatement and reactivate the claim for further proceedings to determine the amount of benefits owed to the widow for the period from April 23, 1999, through January 14, 2000.

CASES CITED

- State ex rel. Johnston v. Ohio Bureau of Workers' Compensation, 92 Ohio St. 3d 463, 751 N.E.2d 974 (2001)

OPINION

State ex rel. Hubbard v. Industrial Commission 96 Ohio St. 3d 336

PER CURIAM.

Per Curiam. {¶ 1} On April 23, 1999, decedent Thomas H. Hubbard filed a workers' compensation application, asserting that he had contracted malignant mesothelioma from years of heavy exposure to asbestos in the workplace. At his September 23, 1999 hearing, he submitted medical evidence corroborating his allegation. No contrary evidence was presented. {¶ 2} Despite the absence of rebuttal, a hearing officer for respondent Industrial Commission of Ohio referred decedent for a commission exam, citing commission resolution No. R96-1-01. On January 7, 2000, decedent was transported from his home to an examination in another county. He was presented for evaluation on a stretcher, unable to walk or stand. Examining physician Dr. Marc J. Dinga confirmed the diagnosis of industrial mesothelioma and sadly noted that decedent was literally "wasting away." One week later, Hubbard died. {¶ 3} As a result of decedent's death, the commission ordered that all action on the application be abated. Relator, widow-claimant Mary C. Hubbard, has now commenced an original action in mandamus before this court. {¶ 4} The parties agree and the evidence confirms that decedent expired from industrially induced mesothelioma. All agree that decedent timely sought workers' compensation benefits. They disagree on the widow-claimant's retention of them. {¶ 5} Widow-claimant does not dispute that unaccrued

benefits generally abate when a claimant dies. *State ex rel. Johnston v. Ohio Bur. of Workers' Comp.* (2001), 92 Ohio St.3d 463, 751 N.E.2d 974. She relies, however, on an exception to the rule carved by *Johnston*. {¶ 6} *Johnston* involved an application for a sizeable lump sum settlement in an allowed claim that the bureau did not process for eight months.. The claimant died in the interim from a nonwork-related cause, prompting the bureau to assert abatement. The widow countered with the accusation that the delay was unreasonable and proposed that an exception to the general abatement principles be made. {¶ 7} We agreed. Reviewing prior cases on the inheritability of workers' compensation benefits, we concluded that "the provision of prompt and certain compensation to deserving claimants [is] no less fundamental to Ohio workers' compensation law than the principle that workers' compensation benefits are generally uninheritable." *Id.* at 473, 751 N.E.2d 974.

*338{¶ 8} Therefore, "albeit slowly and unevenly, we have come to recognize the inherent injustice of requiring a claimant, whether he or she be a dependent seeking death benefits or an injured employee seeking disability compensation, to outlive delays in the administrative process. Regardless of the status of the claim at the time of death, the claimant's estate may recover the compensation that the claimant would have received, but for administrative delays, during his or her lifetime." *Id.*

{¶ 9} The widow-claimant in this case argues that the processing of decedent's application was unreasonably delayed by, for example, the commission's insistence on a commission/bureau medical exam. The commission relied on resolution No. R96-1-01, which provides: {¶ 10} "Whereas pursuant to the provisions of Section 4123.68 of the Ohio Revised Code, before awarding compensation for disability or death due to silicosis, asbestosis, coal miners pneumoconiosis, or any other occupational disease of the respiratory tract resulting from injurious exposure to dust, the Administrator is to refer the claim to a qualified medical specialist for examination and recommendation with regard to diagnosis, extent of disability, or other medical questions connected with the claim." {¶ 11} Widow-claimant argues that the resolution was inapplicable and the examination unnecessary because decedent had mesothelioma, not asbestosis. The commission declares that the latter encompasses the former under the definition set forth in R.C. 4123.68(AA): {¶ 12} "Asbestosis means a disease caused by inhalation or ingestion of asbestos, demonstrated by x-ray examination, biopsy, autopsy, or other objective medical or clinical tests." {¶ 13} This contention is rejected. The above specifies "a disease" contracted through asbestos inhalation, not "any disease" contracted from same. Asbestosis is "a disease" caused by asbestos and it should be presumed that asbestosis was the condition addressed by the definition and not mesothelioma. The two are distinct. Asbestosis is a pneumoconiosis, an "[inflammation commonly leading to fibrosis of the lungs." *Stedman's Medical Dictionary* (26th Ed.1995) 153 and 1391. Mesothelioma, on the other hand, is a cancer, "[a] rare neoplasm derived from the lining cells of the pleura and peritoneum which grows as a thick sheet covering the viscera * * *." *Id.* at 1096. {¶ 14} The commission, therefore, erred in effectively treating the two

conditions interchangeably. {¶ 15} The commission also offers this provision from R.C. 4123.68(AA): {¶ 16} “All conditions, restrictions, limitations, and other provisions of this section, with reference to the payment of compensation or benefits on account of *339silicosis or coal miners’ pneumoconiosis apply to * * * any other occupational disease of the respiratory tract resulting from injurious exposures to dust.” (Emphasis added.) Kelley & Ferraro, L.L.P., Thomas M. Wilson and Corey W. Frost, for relator. Betty D. Montgomery, Attorney General, and Dennis L. Hufstader, Assistant Attorney General, for respondents. {¶ 17} The commission mistakenly emphasizes the word “any” when the operative word is “dust.” Decedent’s mesothelioma was caused by exposure to asbestos, and asbestos is a fiber, not a dust. This provision is, therefore, inapplicable here. {¶ 18} The commission additionally cites R.C. 4123.53(A), which allows the bureau to order “any employee * * * to submit to a medical examination * * * as provided by the rules of the commission or the administrator of workers’ compensation.” This provision does not advance the commission’s cause, because the relevant “rules of the commission” have already been found inapplicable. {¶ 19} Finally, the commission alleges a failure to exhaust administrative remedies, citing R.C. 4123.60, which states: {¶ 20} “If the decedent would have been lawfully entitled to have applied for an award at the time of his death the administrator may, after satisfactory proof to warrant an award and payment, award and pay an amount, not exceeding the compensation which the decedent might have received, but for his death, for the period prior to the date of his death.” {¶ 21} This statute clearly empowers the commission to make an award to the widow-claimant. The commission asserts that because widow-claimant did not specifically cite this section and apply for benefits thereunder, she has not exhausted all administrative avenues. We disagree. {¶ 22} A writ of mandamus is hereby granted, ordering the commission to vacate its order of abatement and to reactivate the claim for further proceedings to determine the amount of benefits owed to the widow-claimant for the period of April 23, 1999 through January 14, 2000. Writ granted. Moyer, C.J., Douglas, Resnick, F.E. Sweeney, Pfeifer, Cook and Lundberg Stratton, JJ., concur.