

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HOMERO CARRILLO TRUJILLO,
(Deceased),

Defendant,

vs.

DORMARK CONSTRUCTION,

Employer,

and

BITCO GENERAL INSURANCE
COMPANIES,

Insurance Carrier,
Claimants.

File No. 20009410.01

EQUITABLE APPORTIONMENT

DECISION

Head Note Nos.: 1202, 1203, 1805, 1900

STATEMENT OF THE CASE

This is a proceeding concerning equitable apportionment of death benefits payable as a result of the work-related death of Homero Carrillo Trujillo on August 5, 2020. Decedent's employer, Dormark Construction, and its insurance carrier, BITCO General Insurance Company, brought this action requesting determination of the proper apportionment of weekly benefits among the surviving spouse, Norma Pina Dominguez and the surviving minor children of the decedent: Jose Carrillo Pina, Pedro Carrillo Pina, and Alison Carrillo Pina. Mr. Trujillo is also the father of Maria Carrillo Pina who was 22 years old and not a minor at the time of his death. Homero and Norma did not claim Maria as a dependent in 2019. Maria is not seeking death benefits in this matter.

Hearing was held on August 24, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual

or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Norma Pina Dominguez was the only witness to testify live at trial. She testified via the use of a translator. The evidentiary record also includes joint exhibits JE1-JE4 and JE6-JE7. Joint exhibit 5 was withdrawn by the parties because it was deemed no longer necessary as it pertained to the average weekly wages of the decedent which has been stipulated to by the parties. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on September 7, 2021. On November 8, 2021, the undersigned issued a notice to the parties regarding their stipulations related to the weekly workers' compensation rate in this case. The parties replied to the notice and this case was considered fully submitted on December 7, 2021.

ISSUES

The parties submitted the following issues for resolution:

1. Whether the Second Injury Fund of Iowa is entitled to any benefits pursuant to Iowa Code section 85.31(5).
2. Apportionment of the death benefits between the surviving spouse and the three minor children.
3. Application of the stipulated credit for the overpaid weekly benefits due to weekly rate and possibly due to not paying the Second Injury Fund of Iowa.
4. Whether section 85.31(5), Code of Iowa is unconstitutional under both the Federal and Iowa Constitutions in violation of claimant's and dependents' due process and the equal protection rights.

FINDINGS OF FACT

The undersigned, having considered all the evidence and testimony in the record, finds:

Homero Carrillo Trujillo tragically died during the course of his employment with Dormark Construction on August 5, 2020. At the time of his death, he was 51 years old, married and had 4 children. Homero was not a United States citizen; he had been a Permanent Resident of the United States since 1990. He had a Social Security card and Social Security number. (Testimony; JE2, pp. 5-6 and JE3, pp. 24a-d)

Homero is survived by his wife, Norma Pina Dominguez and their four children: Maria Del Carmen Carrillo Pina (22), Jose Antonio Carrillo Pina (16), Pedro Carrillo Pina (10), and Allison Carrillo Pina (6). The only child of Homero's that is a United States citizen is Allison. At the time of Homero's death, he and Norma owned a house in Des Moines. (Testimony; JE3, pp. 15, 19-20) I find that Norma is the surviving spouse of Homero and was wholly dependent upon him at the time of his death.

Norma is 43 years old and was born in Mexico. She is not a United States citizen; she had been a Permanent Resident of the United States since 2012. She has had a Taxpayer ID number since 2005. Homero and Norma were married in Mexico on January 18, 1996. Norma spends time in Mexico with her family each year and she spends the rest of the year with her husband in the United States. The parties agree that she is a resident and owns property in Des Moines, Iowa. She is currently residing in Des Moines and intends to remain living in Des Moines. On the date of Homero's death Norma and the 4 children were in Mexico. Normally, but for the COVID-19 travel restrictions, Norma would have been in Des Moines at the time of her husband's death. I find that on the date of Homero's death, Norma and her dependent children were involuntarily gone from the United States because of the pandemic travel restrictions. I further find that even though they were present in Mexico on the date of Homero's death, she, Jose, and Pedro were residents of Iowa and remain residents of Iowa. I find that Norma, Jose, and Pedro have been permanent residents of the United States since 2012. (Testimony; JE3, pp. 15, 19-20)

Maria is 22 years old. She was born in Mexico and was not a full-time student in any accredited educational institution at the time of her father's death. In 2019, Homero and Norma did not claim Maria as a dependent. Maria is not seeking death benefits in this matter. I find that on the date of Homero's death, Maria was not an actual dependent. (Testimony; JE3, p. 56)

Jose is 16 years old. He was born in Mexico and has been a Permanent Resident of the United States since 2012. He has had a Taxpayer ID number since 2005. I find that on the date of Homero's death, Jose was a dependent of Homero. (Testimony; JE3, pp. 21-22, 25)

Pedro is 10 years old. He was born in Mexico and has been a Permanent Resident of the United States since 2012. He has a Taxpayer ID number since 2010. I find that on the date of Homero's death, Pedro was a dependent of Homero (Testimony; JE3, pp. 23-26)

Alison is 6 years old and was born in Iowa; thus, she is a citizen of the United States. I find that on the date of Homero's death, Alison was a dependent of Homero (Testimony)

Homero individually filed United States tax returns and stated he was married to Maria and paid taxes in the United States. In 2019, he filed Iowa tax returns and paid taxes in Iowa. In 2019, he also filed North Dakota tax returns and paid taxes in North Dakota. Their address was 1421 Arthur Avenue, Des Moines, IA 50316. He also paid property taxes and sales tax in Iowa. (JE1, pp. 2-4; JE3, pp. 28-65; testimony)

Norma was dependent upon the income of Homero. She credibly testified that she would use any death benefits to support her three minor children, Jose, Pedro, and Alison. (Testimony)

There is no dispute in this case that Norma is the dependent, surviving spouse of Homero. Likewise, there is no dispute that Jose, Pedro, and Allison are minor, dependent children of Homero and that Norma still cares for these children. Based on the evidence presented there was no child or dependent of the deceased who was physically or mentally incapacitated from earning at the time of his death. Norma testified that she would use any death benefits to support her three minor children, and there is no reason for the undersigned to believe otherwise. Currently employer and its insurance carrier have been making timely payments to Norma who has used the payments to support herself and the dependent children.

CONCLUSIONS OF LAW

Iowa Code section 85.51 addressed alien dependents in foreign countries. The section states:

In case a deceased employee for whose injury or death compensation is payable leaves surviving an alien dependent or dependents residing outside the United States, the consul general, consul, vice consul, or consular agent of the nation of which the said dependent or dependents are citizens, or the duly appointed representative of such consular official resident in the state of Iowa, shall be regarded as the exclusive representative of such dependent or dependents, and said consular officials or their representatives shall have the same rights and powers in all matters of compensation which said nonresident aliens would have if resident in the state of Iowa.

Iowa Code section 85.51.

Based on the above findings of fact, I conclude that Maria, Jose, and Pedro have been permanent residents of the United States since 2012. I further conclude that they did not reside outside the United States. Thus, I conclude that Iowa Code section 85.51, 85.52, and 85.53 do not apply in this case.

We now turn to the issues related to the Second Injury Fund of Iowa. Regarding dependents in death cases, Iowa Code section 85.31(5) states:

Except as otherwise provided by treaty, whenever, under the provisions of this and chapters 86 and 87, compensation is payable to a **dependent who is an alien not residing in the United States at the time of the injury**, the employer shall pay fifty percent of the compensation herein otherwise provided to such dependent, and the other fifty percent shall be paid into the second injury fund in the custody of the treasurer of state. But if the nonresident alien dependent is a citizen of a government having a compensation law which excludes citizens of the United States, either resident or nonresident, from partaking of the benefits of such law in as favorable degree as herein extended to the nonresident alien, then said

compensation which would otherwise be payable to such dependent shall be paid into the second injury fund in the custody of the treasurer of state.

Iowa Code section 85.31(5).

Based on the above findings of fact, I conclude that Maria, Jose, and Pedro have been permanent residents of the United States since 2012. Although they were present in Mexico on the date of Homero's death, I conclude that they were gone involuntarily due to the COVID-19 travel restrictions. I further conclude that they did not reside outside the United States. Because they did not reside outside of the United States, I find the Second Injury Fund is not entitled to any portion of the death benefits in this case.

It should be noted that the Second Injury Fund was a party to this case. However, on March 12, 2021, the Fund filed a motion to dismiss the petition against the Fund. On March 30, 2021, the undersigned issued a ruling on the motion. In the ruling the Fund's motion to dismiss the Fund from the case was granted. However, in that ruling the undersigned noted that the Fund will be bound by the results of this equitable apportionment proceeding. The Fund did not appeal that ruling.

Because I conclude that the Fund is not entitled to any benefits under Iowa Code section 85.31(5), the constitutionality of that Code section is rendered moot. Even if the issue were not rendered moot, the Iowa Supreme Court has ruled that agencies cannot decide issues of statutory validity or the constitutional validity of a statute. Salsbury Laboratories v. Iowa Dept. of Environmental Quality, 276 N.W.2d 830, 836 (Iowa 1979). Based on this precedent, this agency cannot rule on the claim that the statutory provisions of Iowa Code section 85.31(5) are unconstitutional.

We now turn to the issue of apportionment of death benefits between a surviving spouse and three minor children. Pursuant to Iowa Code section 85.31(1)(a)(1), when a death occurs as a result of a work injury, death benefits are payable to a surviving spouse (with exceptions not applicable in this case) for life if the spouse remains unmarried. Iowa Code section 85.31(1)(a)(1); Iowa Code section 85.42; Iowa Code section 85.43. Based on the above findings of fact, I conclude that Norma is the surviving spouse of Homero and was wholly dependent upon him. As the surviving spouse is she conclusively presumed dependent. Iowa Code section 85.42(1). Thus, I conclude she is entitled to death benefits commencing on the date of Homero's death, August 5, 2020, and continuing in accordance with the provisions of Iowa Code section 85.31(1)(a)(1).

Pursuant to Iowa Code section 85.31(1)(a)(2), when a death occurs as a result of a work injury, death benefits are payable to any child of the deceased until the child reaches the age of eighteen or in circumstances prescribed by the statute until the child reaches the age of twenty-five. Based on the above findings of fact, I conclude that Jose, Pedro, and Alison were all conclusively presumed dependents at the time of Homero's death and are entitled to survivor benefits. Iowa Code section 85.42. I

further conclude that they are all under the age of eighteen and under the care of their mother, Norma.

As previously noted, there is no dispute in this case that Norma is the dependent, surviving spouse of Homero. Likewise, there is no dispute that Jose, Pedro, and Allison are minor, dependent children of Homero and that Norma still cares for these children. Norma testified that she would use any death benefits to support her three minor children, and there is no reason for the undersigned to believe otherwise. Under these circumstances, I conclude that no apportionment needs to be made. Full compensation shall be paid to Norma under Iowa Code section 85.43. If one or more of the children continue to qualify for survivor benefits after reaching the age of eighteen, then that child has the right to seek an alternative allocation at that time.

Next, we turn to the issue of credits against any award in this case. Prior to hearing, the claimant was paid 25 weeks of compensation at the weekly rate of \$805.92 and 26 weeks of compensation at the weekly rate of \$268.64. (Hearing Report) Initially the employer and insurance carrier paid benefits at the weekly rate of \$805.92. That rate was calculated based on Iowa Code section 85.36 and not Iowa Code section 85.31(1)(b) which is how the stipulated rate was calculated. The employer and insurance carrier assert a credit for overpayment of death benefits due to overpaying the weekly rate. The employer and insurance carrier also claim a potential credit due to the uncertainty of whether the Second Injury Fund was entitled to any benefits. Because it was determined that the Second Injury Fund is not entitled to benefits that portion of the credit dispute is moot.

We turn to the credit dispute stemming from the difference in rate calculations. The employer and insurance carrier argues they should not be penalized for stepping forward and paying the dependents at the higher weekly rate. While the undersigned agrees with this argument, the statute does not provide for a credit in this situation.

Iowa Code section 85.34(4) addresses credits for excess payments. The Code states:

If an employee is paid weekly compensation benefits for *temporary total disability* under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for *temporary partial disability* under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due for an injury to that the employee, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the *temporary total disability, healing period, or temporary partial disability* benefits are terminated.

Iowa Code section 85.34(4)(emphasis added).

The statute allows for credits for excess payments of certain types of temporary weekly benefits, unfortunately, this section does not allow for a credit for excess payments of death benefits. In the present case, the employer and insurance carrier stepped up and paid the higher benefit amount, but the statute does not allow a credit for those excess payments. While I do not like this result, the plain language of the statute does not allow for a credit in this situation. If the legislature intended for the employer and insurance carrier to be able to have a credit for excess payments of death benefits, they could have provided for such a credit in the statute. The undersigned must apply the law as it is written. As such, the employer/insurance carrier is not entitled to a credit pursuant to Iowa Code section 85.34(4).

The legislature provided another provision for the recovery of an overpayment to an employee. The Code states:

If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for any current or subsequent injury to the same employee.

Iowa Code section 85.34(5).

Unfortunately, the plain language of this section does not allow for the employer and insurance carrier to take a credit for the overpayment of death benefits in this case. Again, if the legislature intended for the employer and insurance carrier to be able to have a credit for excess payments of death benefits, they could have provided for such a credit in the statute. The undersigned must apply the law as it is written. As such, the employer/insurance carrier is not entitled to a credit pursuant to Iowa Code section 85.34(5).

Finally, the employer and insurance carrier contend they should be allowed a credit for the excess payments because there is nothing in the statute that indicates they cannot take a credit for the overpayment of death benefits against future benefits owed. While that statement may be true, workers' compensation is a statutory creature. The Iowa Supreme Court stated:

[t]he Worker's Compensation Act (Iowa Code Chapter 85) comprises a statutory scheme which was intended to provide for a speedy determination of the rights of the parties in the event of an injury occurring in the course of employment. It creates both rights and liabilities which were not recognized at common law, see *Bashford v. Slater*, 252 Iowa 726, 731, 108 N.W.2d 474, 476 (1961), and therefore the right to recover compensation for work related injuries is strictly statutory.

Caylor v. Emps. Mut. Cas. Co., 337 N.W.2d 890, 893 (Iowa Ct. App. 1983).

While I do not believe employers and insurance carriers should be penalized for any overpayment of benefits, there is no statutory basis for a credit of an overpayment of death benefits. The undersigned does not have the right to create a credit that is not set forth in the statute. As such, I conclude the employer and insurance carrier are not entitled to a credit for the overpayment of death benefits in this case.

ORDER


THEREFORE, IT IS ORDERED:

The employer and its insurance carrier shall pay death benefits to the surviving spouse, Norma Pina Dominguez. The death benefits shall be paid in the stipulated amount of seven hundred fifty-six and 31/100 dollars (\$756.31) per week.

The benefits shall continue during such time as Norma Pina Dominguez is eligible under Iowa Code section 85.31(1)(a)(1). If Norma Pina Dominguez shall no longer be eligible, the three children, Jose Antonio Carrillo Pina, Pedro Carrillo Pina, and Allison Carrillo Pina shall each receive one-third (1/3) of the weekly benefits. As any child ceases to be entitled to benefits pursuant to section 85.31(1)(a)(2) the entire amount shall be divided equally among those who remain entitled.

Employer/insurance carrier shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 9th day of March, 2022.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Van Plumb (via WCES)
David Lawyer (via WCES)
Jeffrey Lanz (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.