

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No. 11-036577

Employee: Morris Bynum, deceased

Dependents: Phyllis Bynum, surviving spouse;
Ben Moore, dependent child; and
Imani Moore, dependent child

Employer: S. F. Shannon Real Estate

Insurer: Travelers/Standard Fire Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

The parties asked the administrative law judge to determine the following issues: (1) distribution of past death benefits; (2) distribution of future death benefits; (3) whether the award should be commuted pursuant to § 287.530 RSMo; (4) whether employer/insurer are liable for costs under § 287.203 RSMo; and (5) attorney fees.

The administrative law judge determined, as follows: (1) weekly death benefits are owed to Phyllis Bynum in the amount of \$93.98 until arrearages on past due benefits to the minor dependents are paid in full, at which point Ms. Bynum's weekly death benefit will be \$143.98; (2) weekly death benefits are owed to Paula Moore for the benefit of Ben Moore, so long as he remains a dependent, in the amount of \$143.97 per week; (3) weekly death benefits are owed to Paula Moore for the benefit of Imani Moore, so long as she remains a dependent, in the amount of \$143.97 per week; (4) weekly payments of \$50.00 are owed to Paula Moore for arrearages on past due death benefits owing to the child dependents, until such arrearages are paid in full; (5) the award of death benefits shall not be commuted; (6) employee's request for costs under § 287.203 RSMo is denied; and (7) attorney MacArthur Moten is entitled to an attorney's fee of \$10,000.00, and attorney Lena Conley is entitled to an attorney's fee of \$1,000.00, which fees shall be paid as 25% of Ms. Bynum's weekly benefits, once the arrearages are paid in full.

Dependent Phyllis Bynum filed a timely application for review alleging the administrative law judge erred: (1) in miscalculating the distribution of death benefits; (2) in declining to commute the award; (3) in declining to award costs under § 287.203 RSMo; (4) in declining to award a greater attorney's fee to her attorney; and (5) in failing to award burial expenses.

Employee: Morris Bynum, deceased

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We note that in employer/insurer's Respondent's Brief filed with the Commission on March 15, 2016, employer/insurer agreed that it is liable to reimburse Ms. Bynum in the amount of \$913.00 for burial expenses.

After careful consideration, we ultimately agree with the administrative law judge's findings, analysis, and conclusions with respect to all issues apart from the issue of burial expenses. Given that the parties appear to be in agreement that the administrative law judge should have awarded burial expenses to Phyllis Bynum, we modify the award accordingly. In all other respects, we adopt the award and decision of the administrative law judge as our own.

Award

We modify the administrative law judge's award with respect to the issue of employer/insurer's liability for burial expenses pursuant to § 287.240(1) RSMo.

Dependent Phyllis Bynum is entitled to, and employer/insurer is hereby ordered to pay, \$913.00 for burial expenses.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued October 27, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 3rd day of May 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Morris Bynum (deceased)

Injury No.: 11-036577

Dependents: See award

Before the
**Division of Workers'
Compensation**

Employer: S.F. Shannon Real Estate

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: none

Insurer: Standard Fire Insurance Company

Hearing Date: July 1, 2015 & July 13, 2015

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 14, 2011
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee fell from a ladder injuring his head and body as a whole.
12. Did accident or occupational disease cause death? Yes Date of death? July 13, 2013
13. Part(s) of body injured by accident or occupational disease: Body as a Whole
14. Nature and extent of any permanent disability: Death
15. Compensation paid to-date for temporary disability: unknown
16. Value necessary medical aid paid to date by employer/insurer? \$906,866.46

Employee: Morris Bynum

Injury No.: 11-036577

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$431.92
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Weekly benefits, so long as provided by law, of:

- 1. To Phyllis Bynum: $\$431.92 \times 1/3$ minus $\$50 = \underline{\$93.98}$. Once the arrearages are paid in full, Phyllis Bynum's payment will be $\$143.98$.
- 2. To Paula Moore for the benefit of Ben Moore, so long as he remains a dependent: $\$431.92 \times 1/3 = \underline{143.97}$.
- 3. To Paula Moore for the benefit of Imani Moore, so long as she remains a dependent: $\$431.92 \times 1/3 = \underline{\$143.97}$.
- 4. To Paula Moore for arrearages, until paid in full: \$50.00

22. Second Injury Fund liability: None

TOTAL: INDETERMINATE

23. Future requirements awarded: See award

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien as listed below on all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

- \$10,000.00 to attorney MacArthur Moten
- \$1,000.00 to attorney Lena Conley

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Morris Bynum (deceased)

Injury No.: 11-036577

Dependents: Phyllis Bynum, Yehalelel Bynum,
Ezra Bynum, Ben Moore, and Imani Moore

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Employer: S.F. Shannon Real Estate

Additional Party: n/a

Insurer: Standard Fire Insurance Company

Checked by: KMH

This case was initially set for hearing January 22, 2015, and was continued to allow Mr. Moten to add the two minor children and obtain evidence of their ages and dependency. The case was assigned for hearing on March 23, 2015. After lengthy discussion, the case was continued to allow the two dependent children to retain their own attorney to protect their rights to past and future benefits. Ms. Conley entered her appearance for the minor children April 15, 2015. A special mediation was set June 16, 2015, to determine the status of the case, but attorney Conley did not appear. The case was tried on July 1, 2015, with all parties represented.

At the end of the hearing, attorney Moten brought up a motion for attorney fees related to a September 2014 motion he filed under Section 287.203. The parties agreed to continue the hearing and reconvened July 13, 2015 to argue the motion for fees.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

Medical fee disputes were filed in 2014. There was no appearance by or for the health care provider at any of the hearings. It appears the notices of hearing were not sent to the health care provider or their attorney. The medical fee dispute issue shall remain open and shall be set on a medical fee dispute docket in the normal rotation.

RULINGS ON EXHIBITS

Employer/Insurer objected to the admission of Exhibit 20 as it contained an itemization of expenses without bills outlining the charges. Exhibit 20 is admitted.

Attorney Conley was to send her attorney contract and fee statement to be admitted as Exhibit 18, but no such contract or statement has been received.

Claimants object to Employer's Exhibit B. I find Exhibit B is admissible for the limited purpose of establishing the reasonableness of Employer's suspension of benefits.

STIPULATIONS

The parties stipulated to the following:

1. On May 14, 2011, Employee, Morris Bynum, sustained an injury by accident arising out of and in the course of his employment for Employer.
2. Employer and Employee were operating under the provisions of the Missouri workers' compensation act on the date of injury.
3. Employer's liability was fully insured by Standard Fire Insurance Company.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. The work injury resulted in Employee's death on July 13, 2013.
6. Employee's average weekly wage yields a compensation rate of \$431.92 for TTD and death benefits.
7. Employee was paid TTD benefits until the date of his death.
8. Employee received \$906,866.46 in medical benefits.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Distribution of past death benefits
2. Distribution of future death benefits
3. Attorney fees

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Employee, a 52 year-old, married male was injured May 14, 2011, when he fell off a ladder while working for Employer. Employee struck his head and was diagnosed with a subdural hematoma and subarachnoid hemorrhage. He underwent a craniotomy and subdural evacuation and had long term care in a rehabilitation facility and nursing home. In January 2013 Employee was diagnosed with end stage leukemia, and palliative care was ordered. Employee died July 13, 2013.
2. The initial death certificate listed leukemia as the cause of death. The medical examiner later amended the cause of death to complications of closed head trauma.
3. Employee's expert, Dr. Payne, reviewed the medical records and autopsy report and issued a report November 3, 2013. He opined the cause of death was the head injury.

4. Employer's expert, Dr. Hogan, reviewed the medical records and autopsy report and issued a report March 3, 2014. He opined the cause of death was cardiopulmonary failure.
5. Employee had a number of dependents. He and his wife, Phyllis Bynum, married in 1991. They had two children. Yehalelel Bynum was born July 7, 1994. Ezra Bynum was born August 23, 1995. Phyllis Bynum testified their children were planning to go to college before Employee's death. They are not in school now and are looking for work. Mrs. Bynum works as a teacher, and both children reside with her.
6. Employee had two children born outside of his marriage. Ben Moore was born April 8, 1998, and Imani Moore was born May 4, 2000. These children live with their mother, Paula Moore, in South Carolina. Ms. Moore testified by deposition that Ben and Imani are Employee's biological children. Ms. Moore testified she and the Bynums were members of the African Hebrews, who believe in plural marriage. She and her children lived near the Bynums and Mrs. Bynum was aware of the existence and paternity of the Moore children.
7. In 2010 a judgment was entered legally establishing Employee's paternity and child support obligations for Ben and Imani. Ms. Moore testified Ben and Imani are in high school and plan to go to college. They do not have any physical or mental incapacities.
8. Mrs. Bynum does not question the paternity of Ms. Moore's children. Mrs. Bynum has agreed to share the death benefits with Ms. Moore's children. Mrs. Bynum requests a lump sum payment of death benefits due to financial hardships. She read the stipulations submitted into evidence, and she voluntarily agreed to them. She signed Exhibit 17, which disposes of the issue of back payment to Ms. Moore's children. Mrs. Bynum paid \$913.00 for Employee's cremation.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Distribution of death benefits pursuant to Section 287.240 (RSMo 2005)

Section 287.240 (RSMo 2005) provides Employer shall pay weekly death benefits to Employee's dependents. A wife is presumed to be totally dependent upon a husband who is legally liable for her support. Children under the age of eighteen, or over that age if physically or mentally incapacitated, are conclusively presumed to be total dependents upon the parent legally liable for their support. The payment of benefits to a child ceases when the child attains the age of eighteen, when an incapacitated child becomes capable of wage earning, or when the child is a

full-time student in an accredited educational institution and attains the age of twenty-two. If the child is a member of the Armed Forces on active duty at the age of eighteen, he or she may be entitled to benefits upon cessation of active duty and enrollment in college. Weekly death benefit payments to a wife cease upon her death or remarriage.

At the time of Employee's death, Yehalelel Bynum was over eighteen, not in college, not incapacitated, and not in the military. Yehalelel was therefore not a dependent under the law, and not entitled to death benefits. Phyllis Bynum, Ezra Bynum, Ben Moore, and Imani Moore were dependents under the law, and entitled to death benefits. On August 23, 2013, Ezra turned eighteen, was not enrolled in college, was not physically or mentally incapacitated, was not in the military; and therefore, was no longer a dependent under the law.

After August 23, 2013, the three dependents entitled to benefits were Phyllis Bynum, Ben Moore and Imani Moore. They share the weekly benefit as long as they remain dependents under the law.

The parties stipulated that since Employee's death, all weekly benefits were paid solely to Phyllis Bynum. Her attorney represented all the dependents until the case was assigned out to trial in March 2015. Attorney Conley then entered her appearance to represent the Moore children. There is no separate claim filed on their behalf, but the parties agree, and the evidence establishes, the Moore children are dependents.

Prior to the hearing Mrs. Bynum and Ms. Moore, mother and guardian of Ben and Imani Moore, reached an agreement to distribute 70% of the weekly benefits to Mrs. Bynum, 15% to Ben Moore, and 15% to Imani Moore. The parties agreed Ben and Imani Moore were entitled to benefits since Employee died, and these past benefits would be paid to them by reducing Mrs. Bynum's future payments.

I find the parties' distribution agreement is not in the best interest of the minor children. I find the benefits from the Employee's date of death until August 23, 2013, shall be divided equally between Phyllis Bynum, Ezra Bynum, Ben Moore, and Imani Moore. After August 23, 2013, the death benefits shall be divided equally between Phyllis Bynum, Ben Moore, and Imani Moore. The Moore children's entitlement to the weekly proceeds will terminate when certain events are met as provided in the statute. Phyllis Bynum's weekly benefits terminate upon her death or remarriage.

Per the agreement of the parties, the minor children's arrearages shall be paid by decreasing Mrs. Bynum's future payments by \$50 per week until such time as the arrearage is paid in full. Accordingly, the future weekly payments shall be:

1. To Mrs. Bynum: $\$431.92 \times 1/3$ minus $\$50 = \underline{\$93.98}$. Once the arrearages are paid in full, Mrs. Bynum's payment will be $\$143.98$.
2. To Paula Moore for the benefit of Ben Moore, so long as he remains a dependent:
 $\$431.92 \times 1/3 = \underline{\$143.97}$
3. To Paula Moore for the benefit of Imani Moore, so long as she remains a dependent:
 $\$431.92 \times 1/3 = \underline{\$143.97}$
4. To Paula Moore for arrearages, until paid in full: \$50.00

2. The death benefits shall not be commuted.

Section 287.530 (RSMo 2005) allows the Division or Commission to commute the value of the future benefits to a lump sum payment if it appears the commutation will be for the best interest of the dependents, or that it will avoid undue expense or undue hardship. This section further provides in determining whether commutation is in the best interest of the dependent, the division shall “constantly bear in mind that it is the intention of this chapter that the compensation payments are in lieu of wages and are to be received by the ... dependents in the same manner in which wages are ordinarily paid. Therefore, commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such departure.”

While I understand and sympathize with Mrs. Bynum’s financial hardship since her husband’s death, I find the evidence does not establish such unusual circumstances or that commutation will be in the best interest of the minor dependents.

3. Employee’s request for costs under Section 287.203 is denied.

Attorney Moten requests costs pursuant to Section 287.203. This section requires an employer who terminates TTD benefits to notify the employee of the termination and the reason for the termination. When an employee disputes the termination of TTD benefits, he may request an expedited hearing. If the Division finds any proceedings were brought or defended without reasonable grounds, the Division may assess costs.

In this case, Employer terminated TTD benefits upon Employee’s death. Employee and Phyllis Moore were no longer entitled to TTD benefits, and Phyllis Moore asserts she was then entitled to death benefits. In reliance upon the original death certificate, which listed leukemia as the cause of death, Employer did not immediately begin death benefits.

It appears Mr. Moten’s dispute regards the commencement of death benefits, not the termination of TTD benefits. Section 287.203 does not apply to this dispute, and no costs are awarded under that section.

In order to impose costs under 287.560, Phyllis Bynum must prove Employer defended the case without reasonable ground. I find Employer had reasonable ground to question whether death benefits were owed given the severity of Employee’s leukemia in the months before his death, and the original death certificate listing the cause of death as leukemia.

4. Attorney Fees

Section 287.260.2 provides all attorney fees “shall be subject to regulation by the division or the commission and shall be limited to such charges as are fair and reasonable and the division or the commission shall have jurisdiction to hear and determine all disputes concerning the

same.” This section requires that services of an attorney be found necessary in the proceedings for compensation.

The Division may cap fees and may determine an amount that will be presumed reasonable in the absence of evidence on the subject. The Division and commission have discretion in determining the appropriateness of attorney fees. *Cervantes v. Ryan*, 799 S.W.2d 111, 115 (Mo.App. E.D. 1990) outlines factors to be considered in determining the reasonable value of attorney’s services. Such factors include the time, nature, character and amount of services rendered, the amount in dispute, the complexity of the case, the degree of skill called for, and the result achieved. The Court noted courts are themselves experts on attorney’s fees.

In this case, there was no dispute regarding benefits until Employee died. The services of an attorney appear to have been necessary to resolve the issue of the cause of death. There has been much time spent determining the proper distribution of death benefits to the Morris children. However, Phyllis Bynum was aware of their dependency, and Exhibit 21 establishes Mr. Moten did not add these children to the case until after the January 22, 2015 hearing setting. It is not clear in the record why this delay occurred or why the Moore children were not paid benefits along with Phyllis Bynum.

In his proposed award, Mr. Moten suggests the award be commuted, and he be awarded a 25% fee on the commuted value. He calculates this fee to be \$145,988.96. Ms. Conley made no application for attorney fees, but made two court appearance and participated in one deposition.

It is not reasonable to suggest a \$145,988.96 attorney fee on a case involving a \$431.92 weekly payment that is to be divided among three dependents. An award of a 25% attorney fee is common practice in routine cases where benefits remain uncertain, but it is not reasonable to suggest such a windfall should inure when an attorney cannot achieve a better result than the statutory death benefit. Here, Employer does not dispute liability and the weekly benefit is preordained. The only dispute before this court is the distribution of weekly benefits among three different persons.

I award attorney fees of \$10,000.00 to Mr. Moten and \$1,000.00 to Ms. Conley. Such fees shall be paid as 25% of Mrs. Bynum’s weekly benefits, not to exceed \$11,000.00, once the arrearages are paid in full.

CONCLUSION

The payments as outlined above shall continue for as long as provided by law. In accordance with Section 287.240(5), the Division or Commission may, in its discretion, upon notice to the parties, modify this order or award from time to time as to the payments of the death benefits to the minor children. When one of the three dependents is no longer a dependent under the law, the parties may seek an order from the Division or Commission modifying the award and distribution of benefits.

Pursuant to Section 287.240(9), Mrs. Bynum shall annually report her marital status to the Division; and Paula Moore shall annually report to the Division the age and physical and mental condition of Ben Moore and Imani Moore.

Made by: _____
KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation