

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 00-060297

Employee: Steven M. Micksa (Deceased)
Dependent: Frances Micksa, Mother
Employer: Voss Oil, Inc.
Insurer: Reliance Insurance Company c/o Missouri Property
and Casualty Guaranty Association
Date of Accident: April 24, 2000
Place and County of Accident: Crawford County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the chief administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the chief administrative law judge dated November 15, 2004. The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., is attached and incorporated by this reference.

The Commission finds that the chief administrative law judge correctly weighed and evaluated the testimony and properly applied the law in reaching his conclusions.

The Commission further approves and affirms the chief administrative law judge's allowance of 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 28th day of April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Steven M. Micksa, deceased

Injury No. 00-060297

Dependents: Frances Micksa

Employer: Voss Oil, Inc.

Additional Party: N/A

Insurer: Reliance Insurance Company (Missouri Insurance Property and Casualty Guaranty Association)

Hearing Date: September 20, 2004

Checked by: JK/sm

SUMMARY OF FINDINGS

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? April 24, 2000
5. State location where accident occurred or occupational disease contracted: Crawford County, Missouri
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 happened or occupational disease contracted: The employee was killed in a truck accident that arose out of and in the course of his employment.
12. Did accident or occupational disease cause death? Yes
13. Parts of body injured by accident or occupational disease: N/a
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to date for temporary total disability: None
16. Value necessary medical aid paid to date by employer-insurer? None
17. Value necessary medical aid not furnished by employer-insurer? None
18. Employee's average weekly wage: \$580.14
19. Weekly compensation rate: \$386.76 for death benefits
20. Method wages computation: By agreement
21. Amount of compensation payable: \$259.86 per week for death benefits payable to Frances Micksa, as a partial dependent, commencing on April 25, 2000 (see findings).
22. Second Injury Fund liability: None
23. Future requirements awarded: \$259.86 per week for death benefits payable to Frances Micksa, a partial dependent of

employee (see findings).

Said payments to begin April 25, 2000, and to be payable and subject to modification and review as provided by law.

Brian Stokes and Arthur Friedman, attorneys at law, are allowed a total fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee's dependent. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

FINDINGS OF FACT AND RULINGS OF LAW

On September 20, 2004, the employee's mother, Frances Micksa, appeared in person and by her attorney, Mr. Brian Stokes, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Mr. Kevin Dunaway. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. On or about April 24, 2000, Voss Oil, Inc., was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Reliance Insurance Company. Reliance Insurance Company is now insolvent, and the Missouri Property and Casualty Guaranty Association has undertaken the defense of the claim pursuant to Missouri statutes.
2. On or about April 24, 2000, Steven M. Micksa was an employee of Voss Oil, Inc., and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about April 24, 2000, the employee sustained a fatal accident that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's dependent's claim for compensation was filed within the time allowed by law.
6. The employee's average weekly wage was \$580.14 per week, and the rate of compensation for purposes of determining the death benefit is \$386.76 per week.
7. The employee's injury and resulting death were medically causally related to his accident.
8. No medical aid was furnished by the employer-insurer.
9. The employer-insurer paid funeral expenses totaling \$5,000.00.

ISSUES:

1. Dependency
2. Distribution of death benefits

SUMMARY OF THE EVIDENCE:

The deceased employee, Steven M. Micksa, was killed in a truck accident that arose out of and in the course of his employment with Voss Oil, Inc. The employee was not married at the time of his death and had no children.

Approximately four year prior to his death, the employee's mother, Frances Micksa, moved in to the employee's home. The testimony of the employee's mother, sister, and brother establish that Frances Micksa had retired as a meat cutter from Kroger, but her pension and Social Security benefits were not adequate to pay all of her expenses. Although the employee did give his mother extra money on several occasions, the primary support he provided for his mother came in the form of food and shelter. According to Frances Micksa, the employee paid an average of \$654.00 per month for the mortgage payment on their home, \$100.00 per month for automobile related expenses (gas, taxes and insurance), \$100.00 a month for propane gas, \$25.00 a month for trash service, \$60.00 a month for the telephone bill, \$100.00 a month for utilities, \$200.00 a month for repairs and maintenance on the house, and \$450.00 a month for food. The total amount contributed by the employee for the support of this mother-son family unit was \$1,689.00 per month.

Frances Micksa used her own retirement income of \$300.00 per month and her Social Security benefits of \$700.00 per month to pay an estimated 25% of the groceries, the expenses related to their pets, prescription medication, beauty parlor expenses, magazine subscriptions, prescription glasses, dental expenses and charitable donations.

After the employee's death, the employee's sister and brother continued to provide some financial support for Frances Micksa. His brother and sister also waived their right to receive any money from the employee's estate, and that money was also used to provide additional financial support for the employee's mother.

At the conclusion of the hearing, Frances Micksa requested an award finding that she was a partial dependent of the employee, and an award of weekly death benefits pursuant to Section 287.240 (3).

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Missouri State Highway Patrol report
- B. Probate records from the Circuit Court of Franklin County regarding the estate of Steven Mark Micksa
- C. Rate and death benefit computation sheet
- D. Summary of monthly expenses paid by the employee and Frances Micksa prior to his death
- E. Statements for services rendered by employee's attorneys, Arthur Friedman and Brian Stokes
- F. Storage space rental agreement and other expenses paid by employee's brother, Daniel Dean Micksa
- G. Duplicate copy of check to Bank of America dated May 17, 2000, for two months of employee's house payment
- H. Summary of expenses of Patricia Micksa following employee's death during time when Frances Micksa was living with her

Employer-Insurer's Exhibits

1. Claim for compensation
2. Deposition of Frances Micksa (withdrawn by employer-insurer – not admitted)
3. Probate records from Franklin County Circuit Court
4. Employee's W-4 for the year 2000 from Voss Oil
5. Wage summary
6. Copies of checks written by employee from 1997 through 1999
7. Additional duplicate checks written by employee

FINDINGS OF FACT AND RULINGS OF LAW:

Issue 1 and Issue 2: Dependency and Distribution of Death Benefits

Under Section 287.240 (4), “the word ‘dependent’ as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for the support, in whole or in part, upon his or her wages at the time of the injury.” Under this section the statute defines surviving spouses and minor children as “conclusively presumed total dependents,” and directs that any death benefit shall be paid to the conclusively presumed total dependents to the exclusion of other dependents.

After defining the conclusively presumed total dependents, Section 287.240 (4) (b) states that “in all other cases, questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury ...”

In *Dykes v. Thornton*, 282 S.W.2d 451 (Mo.1955), the Supreme Court gave the following summary of the relevant authority for making a factual determination of total or partial dependency.

The word “dependent” ordinarily means the need of aid or support, that is, not self-sustaining. A dependent person is one who has not the means of his own to support himself. A total dependent is one who has no means whatever to support himself. A partial dependent is one who has some means, but not sufficient for his support. *Kennedy v. Keller*, 225 Mo.App. 561, 37 S.W.2d 452; *Ash v. Modern Sand and Gravel Company*, 234 Mo.App.1195, 122 S.W.2d 45; *Gantner v. Fayette Brick & Tile Company*, Mo.App., 236 S.W.2d 415. In the latter case the following statement was quoted with approval from 71 C.J. Workmen’s Compensation Acts, Section 273: “It is generally held that one is not totally dependent where a substantial part of the support comes from another source; but courts will not deprive applicants of the rights accorded total dependents merely because of minor considerations or benefits which do not substantially affect or modify the status of the applicants toward the deceased employee.” Dependence within the meaning of the Workmen’s Compensation law does not mean absolute dependency for the necessities of life, but rather that the claimed dependent looked to and relied on the contributions of the employee, in whole or in part, as a means of supporting and maintaining himself. *Shaffer v. Williams Brothers, Inc.*, 226 Mo.App.635, 44 S.W.2d 185. Also, see Larson’s Workmen’s Compensation Law, Vol. 11, Section 63.11.

Id. at 454.

Applying these principles to the facts in this case, it is clear that Frances Micksa was a partial dependent of the employee at the time of his death. After she retired from her job as a meat cutter with Kroger, the employee's union pension and social security benefits were not sufficient to cover her expenses. The employee was living in a mobile home that was in need of repair, and she had no car or other means of transportation. The testimony of the employee's mother and his brother and sister make it clear that the reason the employee took his mother into his home was to provide financial support that enabled her to have adequate housing, food, and transportation. This conclusion is supported by the fact that after the employee's death, Frances Micksa continued to need financial assistance from his estate and from his brother and sister.

Based on this evidence, I find that at the time of the employee's death, his mother, Frances Micksa, looked to and relied on the contributions of the employee as a means of supporting and maintaining herself. I therefore find that the employee's mother, Frances Micksa, was a partial dependent of the employee and is entitled to death benefits in accordance with Section 287.240.

Given the finding that Frances Micksa is a partial dependent, the final issue is to determine the amount of her weekly death benefit. The answer to this question depends on the interpretation of Section 287.240 (3), which provides as follows:

If there are partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employee at the time of the injury, shall be paid by the employer to each of the dependents proportionately.

While the language used in this section has been judicially construed to be "anything but clear and unambiguous" *Triola v. Western Union Telegraph Company*, 25 S.W.2d 518, 519 (Mo.App.), by the 1950s, the courts in Missouri appear to have settled on and applied a formula that is based on the proportion of the employee's wages that the employee contributed to the partial dependents. In *Gantner v. Fayette Brick and Tile Company*, 236 S.W.2d 415 (Mo.App. 1951), the Kansas City Court of Appeals applied this formula in determining the amount of death benefit that should be paid to a partial dependent. The court found that the employee had contributed \$32.00 per month out of his \$150.00 per month earnings, and calculated the death benefit on the basis of 32/150 of the total death benefit due. *Id.* at 418.

In *Faccone v. Busy Bee Candy Company*, 216 S.W.2d 112, 118 (Mo.App.1948), the St. Louis Court of Appeals stated, "that the part of the death benefit which partial dependents receive is determined by the proportion of the employee's wages which he contributes to such partial dependents, and not such amount as the total contribution bears to the total family income." Applying this formula, the court held that where the deceased employee had contributed his entire earnings to a common fund for the living expenses of the family, and there were no total dependents, the mother, as a partial dependent, was entitled to the total amount of the death benefit (*Id.* at 119). See also *Triola*, supra at 520; *Tracey v. Acme Distributing Company*, 160 S.W.2d 469 (Mo.App.1942); and *Dykes v. Thornton*, 302 S.W.2d 304 (Mo.App.1957).

Applying these cases to the facts of this case, it is necessary to determine both the total amount of the employee's wages and the total amount contributed to the support of the employee's mother, Frances Micksa. The employer-insurer has asserted that the amount of money that the employee spent for food, housing, and other household related expenses should not be included because these contributions also benefited the employee. This argument was considered and rejected by the Missouri Supreme Court in *Dykes v. Thornton*. The Supreme Court stated: "It is also immaterial that some of the money he contributed was spend for items, such as food, which were partly used by Sammy" (Sammy was the employee). *Dykes v. Thornton*, 282 S.W.2d 451, 455. This comment by the Supreme Court in the *Dykes* decision is equally applicable in this case. The employee and his mother had been living as a family unit for approximately four years, and it would be unrealistic and unduly burdensome to expect the employee's mother to establish exactly how much food she ate, how much water she used, how much of the trash was hers, how much television she watched or how much electricity and propane gas she used.

After reviewing all of the testimony and other evidence submitted, I find that at the time of his death, the employee's monthly contributions to his mother, as a partial dependent, included \$654.00 for the house payment, \$100.00 for gas, auto insurance and taxes, \$100.00 for propane gas, \$25.00 for trash, \$60.00 for telephone expenses, \$100.00 for electricity, \$450.00 for food, and \$200.00 for repair and maintenance on the home. The total amount of the employee's contribution to the partial dependent is therefore equal to \$1,689.00 per month. This monthly total can be converted to a weekly sum by multiplying times 12 and dividing by 52 for a total weekly contribution of \$389.77.

At the time of the hearing, the parties stipulated that the employee's average weekly wage was \$580.14 per week. Thus the proportion of the employee's earnings that was contributed to the partial dependent is equal to \$389.77 divided by \$580.14 for a ratio of 67.19%.

Based on this ratio, in order to determine the amount of the total death benefit that should be payable to Frances Micksa, the total weekly death benefit of \$386.76 must be multiplied by 67.19%. This yields a sum of \$259.86 per week as the amount of the death benefit payable to Frances Micksa as a partial dependent.

Based on this finding, the employer-insurer is directed to pay to Frances Micksa the sum of \$259.86 per week commencing on April 25, 2000. This payment shall continue for the remainder of the partial dependent's life, subject only to

any modification or review as provided by law. The Division and Commission shall retain jurisdiction to resolve any disputes regarding the statutes of the partial dependent.

As provided under Section 287.240, the payment of compensation by the employer-insurer in accordance with this order shall discharge the employer-insurer from all further obligations as to the compensation payable under this chapter. Death benefits that have accrued through the date of this award shall be paid as a lump sum and all death benefits due after the date of this award shall be paid in installments in the same manner as provided for disability compensation. Dependents receiving death benefits under the terms of this award shall annually report their status to the employer-insurer and the Division as required by law.

Brian Stokes and Arthur Friedman, attorneys at law, are allowed a total fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____ Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Gary Estenson
Acting Director
Division of Workers' Compensation