

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

Injury No.: 05-081561

Employee: Benjamin Vice, deceased
Alleged Dependent: Stacey Kohl, mother
Employer: Advantage Waste Service, Inc.
Insurer: Accident Fund Insurance Company of America

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 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 administrative law judge dated October 1, 2008, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued October 1, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of February 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Benjamin Vice

Injury No. 05-081561

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Alleged Dependent: Stacey Kohl

Employer: Advantage Waste Service, Inc.

Additional Party: Not Applicable

Insurer: Accident Fund Ins. Co. of America

Hearing Date: August 26, 2008

Checked by: VRM/meb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: August 19, 2005.
5. State location where accident occurred or occupational disease was contracted: Springfield, 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 the 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: Claimant was killed while driving a truck.
12. Did accident or occupational disease cause death? Yes. Date of death? 8/19/2005.

13. Part(s) of body injured by accident or occupational disease: Whole Body.
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? None.
16. Value necessary medical aid not paid by employer/insurer? None.
17. Value of necessary medical aid paid to date by employer/insurer? None.
18. Employee's average weekly wages? \$649.70.
19. Weekly compensation rate: \$433.13 (Death Benefit Amount).
20. Method of computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

Total: 0

22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Benjamin Vice Injury No. 05-081561

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Alleged Dependent: Stacey Kohl

Employer: Advantage Waste Service, Inc.

Additional Party: Not Applicable

Insurer: Accident Fund Ins. Co. of America/Crawford & Company

Hearing Date: August 26, 2008

Checked by: VRM/meb

INTRODUCTION

The undersigned Administrative Law Judge heard this workers' compensation claim on August 26, 2008, in Springfield, Missouri. Stacey Kohl, the mother of the deceased employee, Benjamin Vice, alleges that she is a dependent of the deceased. She is represented by Randy Alberhasky. The employer, Advantage Waste Services, Inc., and its insurer, Crawford and Company, are represented by Kevin Dunaway.

STIPULATIONS

The parties stipulate that on August 19, 2005, Benjamin Vice was an employee of Advantage Waste Services, Inc., a Missouri employer, which was fully insured. Mr. Vice was a covered employee, and the employer was operating under and subject to the Missouri Workers' Compensation Law. On August 19, 2005, Mr. Vice suffered a fatal accident within the course and scope of his employment. There is no dispute with respect to notice, venue, or statute of limitations. At the time of his death, the employee had an average weekly wage of \$649.70, sufficient to yield a death benefit of \$433.13. No medical or temporary benefits were paid as the employee died immediately. A funeral benefit of \$5,000 was paid directly to the funeral home. Mr. Vice was not married and had no children at the time of his death.

ISSUE

The sole issue is whether Stacey Kohl, Benjamin Vice's mother, is a dependent of the employee and entitled to weekly death benefits under the Missouri Workers' Compensation Law.

EHXIBITS

Employee's Exhibits:

- Exhibit A Social Security Payout
- Exhibit B Resume of Benjamin Vice
- Exhibit C Check # 503 from Benjamin Vice
- Exhibit D Death Certificate

Employer's Exhibit:

- Exhibit 1 Deposition of Stacey Kohl

ADMINISTRATIVE NOTICE

Upon request, the undersigned Administrative Law Judge took administrative notice that no one other than Stacey Kohl, the deceased's mother, has filed a claim for workers' compensation, on account of the death of Benjamin Vice.

FINDINGS OF FACT

Benjamin Vice, born March 7, 1986, was the sole child of Stacey Kohl (Claimant). Claimant raised Benjamin by herself, having divorced Benjamin's father when Benjamin was a toddler. Claimant indicated that fatherly support was sporadic to nonexistent. Occasionally, she received \$20.00 to \$40.00. She never received more than \$200.00 in child support in any one year. She obtained one check through the court system amounting to \$68.00. Claimant admitted that in the early 1990s she had a male companion living with her, but they did not marry and the relationship ended.

Claimant said when her son was in his teens, he worked several jobs, performing occasional labor. He helped around the house painting and performing yard work. He was generous with Claimant and even purchased his own winter jacket. Her son did not graduate from high school. He dropped out of high school in 2003 at the age of 16 years, obtaining a full-time job to help out.

Claimant no longer works due to a physical condition and now lives on her credit cards and Social Security Disability. Her monthly check is less than \$1,100.00. When her disability was approved in April 2004, Benjamin Vice received a child benefit of \$6,341.00. Benjamin gave \$5,000.00 of that amount to his mother, insisting that it be used to help maintain the household. Of that money, Claimant used \$50.00 per week toward household expenses. The money became exhausted sometime in early 2005, before Benjamin's death. Claimant admitted that Benjamin used some of the money to buy equipment for some job training he was taking. Benjamin obtained his GED in October 2004 and received a scholarship to train as a diesel mechanic.

Benjamin Vice last lived with his mother on January 31, 2005. He was 18 years old at the time and had an opportunity to move from his home in Arkansas to Willard, Missouri, where he could live in a trailer near his 15-year-old girlfriend. While living in Willard, Benjamin took care of his own expenses.

In July 2005 Claimant told her son that expenses were becoming too great and she was going to have to give up her cell phone. Benjamin offered to send his mother \$50.00 twice a month to pay for the phone. Exhibit C is the first such check, dated August 2, 2005, in the amount of \$50.00. He provided his mother with no other cash between February 2005 and the date of his death. On August 19, 2005, Benjamin was killed in the work accident.

Claimant admitted that Benjamin made no credit card payments, no house payments, and did not take over the payment of any bills. He purchased no clothing or food for Claimant. Although Claimant said the plan was for Benjamin to eventually return to Arkansas to take over the family home with his fiancé, his name was not on the title of the house at the time of his death. Claimant indicated that she had refinanced her home and had hoped that some day she could give Benjamin free and clear title to the house.

CONCLUSIONS OF LAW

Dependents of a deceased worker are entitled to workers' compensation death benefits pursuant to § 287.240, RSMo 2000. Section 287.240(4), RSMo 2000, defines a dependent as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury. Spouses and minor children are conclusively presumed to be totally dependent upon the support of the deceased employee

§ 287.240(4)(a and (b), RSMo 2000. If there are no presumptive dependents, as there are none in this case, then the question of total or partial dependency is determined in accordance with the facts at the time of the injury. Claimant bears the burden of proving that she was actually dependent for support, in whole or in part, upon the deceased at the time of his injury. *Ferguson v. Hood*, 541 S.W.2d 19 (Mo. App. S.D. 1976) *overruled on other grounds Hampton v. Big Boy Erection*, 121 S.W.3d 220 (Mo. banc 2003). While it is not necessary to show that the deceased employee was "legally liable" for the support, Claimant must show she was "actually" dependent on the employee. *Stillwell v. Universal Const. Co.* 922 S.W.2d 448, 453 - 454 (Mo.App. W.D. 1996), *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

The record clearly demonstrates that Claimant was not actually dependent upon her son for support. Here, the *deceased* was dependent upon his mother for housing until February 1, 2005. From that date until his death, the deceased paid his own expenses and provided his mother with only one \$50.00 check. Occasional gifts do not arise to the level of dependency. *Pittman v. Scullin Steel Co.*, 289 S.W.2d 57 (Mo. 1956).

Claimant argues that her son's contribution of \$5,000.00 to the family household while he was still living at home in Arkansas (due to her own Social Security Disability application), demonstrates that she was dependent upon him for support. First, the fact that the deceased received a lump sum Social Security Disability check, based upon his mother's disability, demonstrates only that the deceased was a dependent of his mother, rather than his mother being dependent upon him. Further, as the statute clearly states, dependency must be determined as of the time of death. *Reneau v. Bales Electric Company*, 303 S.W.2d 75 (Mo. 1957). The \$5,000.00 was part of a Social Security Disability payment received in 2003 or 2004 and given to his mother at the time of the receipt when he still was a minor living at home. This money was exhausted months prior to Claimant's death. Further, Claimant admitted that even some of that money was used by the deceased to purchase equipment to further his education or training, and not for household needs.

There is no evidence in this case that Claimant was a dependent of Benjamin Vice at the time of his death. A one-time payment by the deceased to his mother to help with a cell phone bill is hardly proof of dependency. Compensation is denied.

Date: October 1, 2008

/s/ Victorine R. Mahon
Victorine R. Mahon
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation