

1 The State ex rel. Yancey, Appellant, v. Firestone Tire & Rubber Company et al.,
2 Appellees.

3 [Cite as *State ex rel. Yancey v. Firestone Tire & Rubber Co.* (1997), _____ Ohio
4 St.3d _____.]

5 *Workers' compensation -- Mandamus available to compel payments,*
6 *pursuant to R.C. 4123.60, to a decedent's spouse for permanent*
7 *total disability compensation the decedent might have received prior*
8 *to his death -- Industrial Commission abuses its discretion in finding*
9 *claimant is not permanently and totally disabled when no evidence*
10 *in the record supports the commission's decision.*

11 (No. 94-2617 -- Submitted November 12, 1996 -- Decided January 22, 1997.)

12 APPEAL from the Court of Appeals for Franklin County, No. 93APD08-
13 1152.

14 Appellant, Leola Yancey, seeks a writ of mandamus (1) to vacate appellee
15 Industrial Commission of Ohio's denial of her deceased husband's application for
16 permanent total disability compensation ("PTD"), and (2) to award her, pursuant
17 to R.C. 4123.60, the PTD she claims he should have received prior to his death.

18 Leola's husband, Charles Yancey, was injured in 1973 while working for
19 appellee Firestone Tire & Rubber Company ("Firestone"). His workers'
20 compensation claim was recognized for "contusion to head, cervical strain,

1 cervical radiculitis, post traumatic headaches, post traumatic stress disorder and
2 aggravation of pre-existing anxiety neurosis [or disorder].” After his injury,
3 Charles was diagnosed with an unrelated diabetic condition that eventually
4 resulted in pedal amputations and total blindness. In 1985, Charles applied for
5 PTD based on the report of his psychiatrist, Dr. Maximilien Menassa, who opined
6 that Charles was permanently and totally disabled.

7 David E. Aronson, Ph.D., a clinical psychologist and commission specialist,
8 assessed a thirty percent psychological impairment and also predicted that Charles
9 would never be able to return to work.

10 Dr. John Frenz, another commission specialist, expressly recognized that he
11 was to evaluate whether Charles was “permanently and totally disabled from
12 sustained remunerative employment due to the allowed conditions” and, “[i]f not,
13 [to] so state, and [to] give [a] definite percentage of impairment.” Dr. Frenz noted
14 that Charles was blind and had had some pedal amputations due to diabetes
15 unrelated to his industrial injury; however, he still concluded:

16 “This claimant has indeed sustained impairments per this claim which
17 rende[r] him permanently and totally disabled from sustained remunerative

1 employment to a degree of 100%; this is exclusive of his other unrelated medical
2 problems and disabilities.”

3 Dr. Robert Rosen, an osteopath for the commission, reviewed the Menassa,
4 Frenz and Aronson reports and concluded:

5 “It is doubtful that a 66 year old blind man could be rehabilitated into any
6 type of gainful employment. For this reason, it is my opinion he is Permanently
7 and Totally Disabled from any form of remunerative employment do [*sic, due*] to
8 the allowed conditions in the above mentioned claims.”

9 Charles died on November 28, 1988, before the commission’s disposition of
10 his PTD application. In January 1989, Leola applied, as Charles’ dependent, for
11 the accrued compensation he might have received before his death. The
12 commission denied Leola’s application in May 1993, finding that Charles was not
13 permanently and totally disabled, that he was capable of sedentary work, and that
14 his prior work history and educational level did not preclude this employment.
15 The commission explained:

16 “The reports of Drs. Menassa, Aronson, Frenz and Rosen were reviewed
17 and evaluated. This order is based particularly upon the reports of Drs. Rosen,

1 Frenz and Aronson, the evidence in the file and the evidence adduced at the
2 hearing.

3 “* * *

4 “A review of the medical evidence on file relative to the claimant’s medical
5 impairment relating to the allowed conditions in the claim leaves [*sic*, leads] the
6 Commission to conclude that the totality of the medical evidence on file reflects
7 that the claimant is not permanently and totally impaired. In this regard, the
8 Commission specifically notes that the determination of disability is within the
9 discretion of the Commission and that the opinions of the examining physicians
10 should be restricted to a question of impairment based upon acceptable reference
11 criteria. Dr. Aronson found the claimant’s psychological presentation to represent
12 only a 30% total body impairment while Dr. Rosen and Dr. Franz [*sic*] found the
13 claimant to be totally disabled. However, neither of these two reports indicated
14 what level of impairment resulted from the allowed conditions in the claim.
15 Accordingly, a review of the file with particular attention to the medical treatment
16 on file, leaves [*sic*] the Commission to conclude that the claimant’s medical
17 presentation from the allowed conditions does not render him permanently and
18 totally impaired. The Commission finds that the claimant retained the residual

1 functional capacity to perform sedentary levels of employment had he not expired
2 in November of 1988. It is further noted that the claimant was able to complete 10
3 formal years of education and that he had a work history as a janitor, a treadmill
4 worker, a foundry worker and a general laborer. The Commission finds that his
5 vocational presentation would have been consistent with allowing him to [join] the
6 active work force in positions for which he was medically capable of performing.
7 However, the Commission notes that the claimant had [an] unrelated and
8 unallowed diabetes mellitus condition. The effect this non-related medical
9 presentation had on the claimant's ability to perform sustained remunerative
10 employment leads the Commission to conclude that the claimant's inability to
11 return to the active work force prior to his death was not causally related to the
12 allowed conditions in the claim. Accordingly, the instant application for
13 permanent total disability was [*sic*] well as the widow claimant's application for
14 accrued benefits for permanent total disability are denied consistent with this
15 order."

16 Leola then filed her mandamus complaint in the Court of Appeals for
17 Franklin County. She argued that the commission had abused its discretion in
18 finding Charles fit for sustained remunerative employment and in denying her

1 application for the PTD he should have received. A referee recommended denial
2 of the writ without reaching Charles' PTD eligibility. The referee concluded that
3 Charles's claim had abated upon his death and that Leola had no legal right, under
4 R.C. 4123.60, to pursue payment of his PTD in mandamus. The court of appeals
5 adopted the referee's report, with one judge dissenting, and denied the writ.

6 The cause is before this court upon an appeal as of right.

7 *Law Offices of Stanley R. Juras and Michael J. Muldoon*, for appellant.

8 *Buckingham, Doolittle & Burroughs, L.P.A., Brett L. Miller and Richard A.*

9 *Hernandez*, for appellee Firestone Tire & Rubber Co.

10 *Betty D. Montgomery*, Attorney General, and *Yolanda L. Barnes*, Assistant
11 Attorney General, for appellee Industrial Commission.

12 *Per Curiam.* We recently resolved the question presented in Leola's second
13 proposition of law -- Is mandamus available to compel payments, pursuant to R.C.
14 4123.60, to a decedent's spouse for PTD the decedent might have received prior to
15 his death? In *State ex rel. Nicholson v. Copperweld Steel Co.* (1996), 77 Ohio
16 St.3d _____, _____ N.E.2d _____, we held that R.C. 4123.60 gives dependents the
17 right to claim compensation for which the decedent was eligible, but was not paid

1 before death, and that mandamus may be used to enforce this right. The court of
2 appeals' judgment to the contrary, therefore, is reversed.

3 In her first proposition of law, Leola claims that the commission abused its
4 discretion in finding that Charles was not permanently and totally disabled. For
5 the reasons that follow, we agree and further find that Leola is entitled to payment
6 of the PTD Charles should have received before his death.

7 In denying Charles's PTD application, the commission rejected the Frenz
8 and Rosen reports because it was not convinced that the doctors had excluded
9 Charles's diabetes in determining his medical inability to return to work. Leola
10 complains that this finding "impeaches" a previous commission order.

11 Leola is referring to the commission order that Firestone challenged in *State*
12 *ex rel. Firestone Tire & Rubber Co. v. Indus. Comm* (1989), 47 Ohio St.3d 78, 547
13 N.E.2d 1173, a mandamus appeal. In that case, Firestone sought to discredit the
14 Rosen and Frenz reports by establishing through deposition testimony that the
15 doctors had diagnosed permanent and total disability based, in part, on Charles's
16 diabetes, a nonallowed condition and impermissible consideration. *State ex rel.*
17 *Fields v. Indus. Comm.* (1993), 66 Ohio St.3d 437, 440, 613 N.E.2d 230, 232;
18 *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452, 455, 619 N.E.2d

1 1018, 1020. In *Firestone*, the commission determined that the conclusions in
2 these reports resulted solely from allowed conditions and, therefore, that the
3 depositions were unnecessary. *Id.* at 79, 547 N.E.2d at 1174. We found some
4 evidence to support the commission's decision and, accordingly, denied a writ to
5 compel the doctors' depositions. *Id.* at 80, 547 N.E.2d at 1175.

6 Neither Firestone nor the commission specifically defends the
7 commission's, in effect, renegeing on its interpretation of the Rosen and Frenz
8 reports. Leola similarly offers no authoritative explanation why the commission
9 should be bound by its initial interpretation. We need not resolve this issue,
10 however, because we are persuaded by Leola's next argument -- essentially that
11 no evidence establishes Charles's capacity for sedentary employment and that all
12 evidence cited by the commission supports a finding of his permanent and total
13 disability.

14 The commission is the exclusive evaluator of evidentiary weight and
15 credibility. Thus, as Firestone argues, the commission is ordinarily free to reject
16 medical reports for legitimate reasons, including the reporting physician's
17 consideration of nonallowed conditions. *State ex rel. Shields v. Indus. Comm.*
18 (1996), 74 Ohio St.3d 264, 268, 658 N.E.2d 296, 299; see *State ex rel. Burley v.*

1 *Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 21, 31 OBR 70, 72-73, 508 N.E.2d
2 936, 938-939. But, in rejecting the Rosen and Frenz reports, the commission
3 effectively relied exclusively on the Aronson report to find Charles capable of
4 sedentary sustained remunerative employment. Dr. Aronson evaluated the
5 emotional and psychological component of Charles's injury and determined
6 Charles had a thirty percent impairment; Dr. Aronson did not also assess the
7 impairment caused by the orthopedic condition. The commission thus had no
8 evidence from which to conclude essentially that Charles's head or neck condition
9 permitted sedentary employment.

10 To deny PTD in the face of two allowed conditions, the commission must
11 have some evidence that neither condition renders the claimant unfit for sustained
12 remunerative employment. *State ex rel. Johnson v. Indus. Comm.* (1988), 40 Ohio
13 St.3d 339, 340, 533 N.E.2d 720, 721-722. Accord *State ex rel. Zollner v. Indus.*
14 *Comm.* (1993), 66 Ohio St.3d 276, 611 N.E.2d 830. Moreover, Dr. Aronson, even
15 with only Charles's psychological/emotional condition before him, nevertheless
16 concluded, as did Drs. Rosen and Frenz and Menassa, that Charles would never be
17 able to return to work. Thus, virtually all the evidence reviewed by the

1 commission supported the conclusion that Charles was unable to engage in
2 sustained remunerative employment.

3 Where the record contains some evidence to support the commission's
4 conclusions, its decision will not be disturbed in mandamus. *State ex rel. Burley*,
5 *supra*. Conversely, where no evidence supports the commission's order, the order
6 represents an abuse of discretion, and a writ of mandamus must issue to correct the
7 abuse. *State ex rel. Eberhardt v. Flxible Corp.* (1994), 70 Ohio St.3d 649, 640
8 N.E.2d 815.

9 Here, as stated above, the commission cited no evidence from which to
10 conclude that Charles's allowed conditions permitted sustained remunerative
11 employment, and all the medical evidence reviewed by the commission established
12 that he would never return to work. Furthermore, Charles's death precludes
13 further medical examination. For these reasons, we find that the commission's
14 order cannot be justified on this record, that the order cannot be redeemed with the
15 submission of additional evidence, and that Charles's permanent and total
16 disability is a substantial likelihood. In such extraordinary situations, we have
17 authority to compel payment of PTD for which the claimant qualified. *State ex*
18 *rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315, 626 N.E.2d 666; *State ex rel.*

1 *Ranomer v. Indus. Comm.* (1994), 71 Ohio St.3d 134, 137, 642 N.E.2d 373, 376;

2 *State ex rel. McComas v. Indus. Comm.* (1996), 77 Ohio St.3d _____, _____ N.E.2d

3 _____.

4 Accordingly, we grant the requested writ of mandamus and order payment

5 to Leola, pursuant to R.C. 4123.60, of the PTD Charles should have received prior

6 to his death.

7 *Judgment reversed*

8 *and writ granted.*

9 MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and

10 STRATTON, JJ., concur.

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