

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F208714

DUSTIN DEWAYNE BATES, MINOR CHILD CLAIMANT  
CAROLINE HICKS, MINOR CHILD AND  
JAMIE HICKS, WIDOW OF  
JERRY HICKS (DEC'D.), EMPLOYEE

NUCOR STEEL OF ARKANSAS, EMPLOYER RESPONDENT NO. 1

LIBERTY MUTUAL INSURANCE CO., CARRIER RESPONDENT NO. 1

DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND RESPONDENT NO. 2

**OPINION FILED DECEMBER 21, 2007**

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant, Dustin Bates, represented by HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas, HONORABLE JAMES C. BULLARD, Attorney at Law, Kennett, Missouri.

Claimant, Caroline Hicks, represented by HONORABLE W. EDWARD REEVES, Attorney at Law, Caruthersville, Missouri.

Claimant, Jamie Hicks, represented by HONORABLE WILLIAM W. CARTER, Attorney at Law, Hayti, Missouri.

Respondent No. 1 represented by HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed, in part, and reversed, in part.

OPINION AND ORDER

This claim is before the Commission on Appeal and cross appeal filed by the Death & Permanent Total Disability Trust Fund (hereinafter Fund), Nucor Steel and Caroline and Jamie Hicks from the decision of the Administrative Law Judge finding that Dustin Bates is the minor child of Jerry Hicks and was wholly and actually dependent upon Jerry Hicks at the time of his death; that the claim of Dustin Bates is not barred by the statute of limitations; and that both the Fund and Nucor are directed to pay Dustin Bates dependent benefits and a controverted attorney's fee. Based upon our de novo review of the entire record, without giving the benefit of the doubt to either party, we find that the decision of the Administrative Law Judge should be affirmed in part and reversed in part. Specifically, we find that Dustin Bates has proven by a preponderance of the evidence that he is the minor son of Jerry Hicks and that he was wholly and actually dependent upon Jerry Hicks at the time of his death. We further find that the respondents have failed to prove by a preponderance of the evidence that

Dustin Bates's claim is barred by the statute of limitations. Therefore, we find that these findings must be affirmed. However, we find that pursuant to A.C.A. § 11-9-502(b)(1)(A) and (b)(2)(A) Nucor Steel has paid the first seventy-five thousand dollars (\$75,000) of weekly benefits; therefore, the Fund is liable for all benefits in excess of \$75,000. Accordingly, we find that the finding that Nucor Steel is liable for benefits must be reversed.

It is undisputed that Jerry Hicks sustained a compensable injury on July 29, 2002, resulting in his death. The injury was accepted as compensable and death benefits were paid by Nucor Steel to Mr. Hicks's widow, Jamie Hicks and their minor child, Caroline Hicks. Cheryl Bates, the mother of Dustin Bates, filed a claim for workers' compensation dependent benefits on behalf of Dustin Bates on May 17, 2006, after she was appointed Guardian and Conservator of Dustin Bates on March 10, 2006.

The first issue for determination is whether this claim for dependency benefits is barred by the statute of limitations. A.C.A. § 11-9-702 states in pertinent part:

(a)(1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury...

\* \* \*

(3) A claim for compensation on account of death shall be barred unless filed with the commission within two (2) years of the date of such a death.

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(f)(2) Subsections (a) or (b) of this section shall not apply to a mental incompetent or minor so long as the person has no guardian or similar legal representative. The limitations prescribed in subsection (a) or (b) of this section shall apply to the mental incompetent or minor from the date of the appointment of a guardian or similar legal representative for that person, and when no guardian or similar representative has been appointed, to a minor upon obtainment of majority.

Respondents contend that Cheryl Bates was and has always been Dustin Bates's natural guardian, and therefore, subsection (f)(2) does not apply as Dustin Bates had a guardian at the time of Jerry Hicks's death and the

commencement of this claim. At first blush this argument is persuasive. However, when the entire subsection is read, it becomes clear that subsection (f) is not referring to a child's natural guardian. Subsection (f) provides that the statute of limitations does not apply when a minor has not been appointed a guardian or similar legal representative, but once a guardian or similar legal representative has been appointed the limitations periods apply. The phrase "from the date of the appointment" must be read in conjunction with the words "guardian" and "similar legal representative". As a natural guardian need not be appointed, it is clear that this subsection clearly refers to only those "guardians" or "similar legal representatives" that must be appointed by a court.

It is generally recognized that the natural guardian may and usually does assert a claim for dependency benefits on behalf of a minor under the workers' compensation statute without the necessity of being appointed as the minor's legal guardian. A.C.A. § 11-9-702(f)(2) does not require the formality of obtaining

guardianship in order to file or petition on behalf of a minor for workers' compensation benefits. However, A.C.A. § 11-9-702(f)(2) operates to protect all minors should they not have a legal guardian appointed and their natural guardian fails to act on their behalf. Once the minor's disability is removed and he or she reaches majority, subsection (f) permits them to file a claim on their own behalf. Since Cheryl Bates was appointed Dustin's guardian on March 10, 2006, we find that she filed a timely claim on behalf of Dustin pursuant to A.C.A. § 11-9-702(f)(2).

The next issue for determination is whether Dustin Bates is the illegitimate child of Jerry Hicks. It is not disputed that Jerry Hicks acknowledged that he had a son out of wedlock with Cheryl Bates. Jerry Hicks even contacted the Social Security Administration advising it of his paternity of Dustin Bates. Moreover, the results of DNA testings showed that the probability that Jerry Hick's parents are Dustin Bates's grandparents was 99.99%. Accordingly, we find that Dustin Bates has established by a preponderance of

the evidence that he was the illegitimate son of Jerry Hicks.

The issue then becomes whether Dustin Bates was wholly and actually dependent upon Jerry Hicks at the time of his death. The evidence reveals that Jerry Hicks acknowledged Dustin as his son and that he provided Cheryl Bates with money on occasion. Cheryl Bates testified that once Jerry Hicks began his relationship with Jamie Hicks, Jerry no longer provided financial support on a regular basis but would give her fifty dollars cash whenever he saw her. Jamie Hicks denied any knowledge of these transactions. Jamie Hicks further testified that although it was known that Jerry Hicks had a child with Cheryl Bates she denied that Jerry Hicks continued to maintain any type of relationship with Dustin once she began her relationship with him. However, under cross-examination, Jamie Hicks acknowledged that it was possible that Jerry Hicks could have seen Dustin and provided some monetary support without her knowledge.

Further complicating the issue is the fact that when Dustin Bates was born, Jerry Hicks was not listed as the father on his birth certificate. After Cheryl Bates married Brian Bates, she filed an affidavit with the state of Missouri swearing under oath that Brian Bates was Dustin's biological father, thus causing a new birth certificate to be issued which reflected Brian Bates, not Jerry Hicks as Dustin's father. Cheryl Bates testified that she and her husband wanted their family to all have the same last name and her husband wanted to be able to claim Dustin on their tax returns. Thus, for all practical purposes, Dustin Bates was held out to be the child of and dependent upon Brian Bates. Nevertheless, within six months after Jerry Hicks's death, Cheryl Bates filed for and received Social Security death benefits on behalf of Dustin Bates.

The courts have held that children who did not receive child support from the deceased employee, but did occasionally receive money for school supplies, clothes, groceries, a stereo and an Nintendo set were wholly and actually dependent upon the deceased employee. See Lawhon

Farm Services v. Brown, 335 Ark. 272, 984 S.W.2d 1 (1998).

In reaching this finding, the court looked to whether there was a reasonable expectation of support for the minor child. Likewise in Fordyce Concrete v. Garth, 84 Ark. App. 256, 139 S.W.3d 154 (2003), the Court of Appeals held that an illegitimate child, whom the deceased recognized and acknowledged as his son, to whom the deceased sporadically contributed to his welfare by spending money for gifts, and certain needs such as food and clothing, but who received no child support payments, still had a reasonable expectation of support, which sufficed for a showing of "actual dependency."

Although Brian Bates is listed as the father of Dustin Bates on the birth certificate, Brian Bates never legally adopted Dustin. There is evidence that Jerry Hicks refused to allow Brian Bates to adopt his son. Jerry Hicks acknowledged Dustin Bates as his son and he sporadically contributed to his welfare. Jerry Hicks was the father of Dustin Bates and had acknowledged Dustin as his son. Thus, Dustin Bates had an expectation of support from his

biological father Jerry Hicks. The actions of his mother to fail to obtain a child support order, or of having Brian Bates's name place on his birth certificate cannot be held against Dustin Bates. Therefore, we find that as Jerry Hicks's acknowledged biological, illegitimate child, Dustin Bates, had a reasonable expectation of support from Jerry Hicks, and has therefore established that he was wholly and actually dependent upon Jerry Hicks at the time of his death.

Having found that Dustin Bates was wholly and actually dependent upon Jerry Hicks at the time of his death, we further find that the Fund is liable for dependency benefits to Dustin Bates. A.C.A. § 11-9-502 (b) provides in pertinent part:

(1) For injuries occurring on and after March 1, 1981, the first seventy-five thousand dollars (\$75,000) of weekly benefits for death or permanent total disability shall be paid by the employer or its insurance carrier in the manner provided in this chapter.

(2) An employee or dependent of an employee who receives a total of seventy-five thousand dollars (\$75,000) in weekly benefits shall be eligible to

continue to draw benefits at the rates prescribed in this chapter, but all benefits in excess of seventy-five thousand dollars (\$75,000) shall be payable from the Death and Permanent Total Disability Trust Fund.

It is undisputed that Nucor Steel has paid out its maximum liability in weekly benefits for death in the amount of \$75,000, and that the Fund assumed liability for weekly benefits in December of 2005. Accordingly, we find that pursuant to A.C.A. § 11-9-502(b)(1)(A) and (b)(2)(A) Nucor Steel has paid the first seventy-five thousand dollars (\$75,000) of weekly benefits. Therefore, the Fund is liable for all benefits in excess of \$75,000, including those awarded herein.

Finally, we note that the Fund mentions in its brief that should Dustin Bates be entitled to benefits, then Jamie and Caroline Hicks were overpaid by Nucor Steel and the Fund, with the amount of the overpayment continuing to grow. The Fund further argues that benefits to Jamie and Caroline Hicks would have to be suspended in order to recoup this overpayment. The Fund does not further explain these

statements nor cite any authority for this argument. We do not read A.C.A. § 11-9-527 as placing any type of moratorium on benefits to Jamie and Caroline Hicks in order to bring Dustin Bates current on benefits. A.C.A. § 11-9-527(c) sets forth the order of preference of beneficiaries and the percentage of the deceased's average weekly wage each is to receive. Under this subsection, as the widow of Jerry Hicks, Jamie is to receive 35% of his average weekly wage, for herself and 15% on account of their child. Thus, Jamie and Caroline Hicks received 50% of Jerry Hick's average weekly every week since the date of Jerry Hick's death as the benefits accrued, leaving an additional 16 2/3% of Jerry Hick's average weekly wage for potential, unpaid, but accrued weekly benefits. Pursuant to A.C.A. § 11-9-527(c), as a minor child of Jerry Hicks, Dustin Bates is entitled to 15% of Jerry Hicks's average weekly wage. When Dustin's benefits are added to Jamie and Caroline's benefits, the total percentage of Jerry Hick's average weekly wage to be paid in benefits amounts to but does not exceed 65%.

Presumably, the Fund contends that A.C.A. § 11-9-527(e) which requires an apportionment of benefits should the total number of beneficiaries and their percentage of benefits exceed 65%, places a restriction upon the Fund from paying out benefits in any given week that would exceed 65% of the deceased's average weekly wage. We do not read A.C.A. § 11-9-527(e) to be this restrictive. A.C.A. § 11-9-527(e) merely prevents the payment of benefits for any given week of accrued benefits to exceed 65% of the deceased's average weekly wage for that week. It does not prevent the Fund from issuing a lump-sum check for accrued but unpaid benefits if the total benefits for the weeks in which those benefits were owed does not exceed 65% of the average weekly wage.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

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PHILIP A. HOOD, Commissioner