

Balestra v. LMS Construction Co., Inc.

April 6, 2010

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Estate of Lawrence Edward Balestra Opinion No. 23-04WC
and Laura Balestra

v.

By: Margaret A. Mangan
Hearing Officer

LMS Construction Co., Inc.

For: Michael S. Bertrand
Commissioner

State File No. S-11321

Hearing held in Rutland on February 6, 2004
Record Closed on March 3, 2004

APPEARANCES:

Beth Robinson Esq. and Bradley Myerson, Esq. , for the Claimant
William Blake, Esq. , for the Defendant

ISSUES:

1. Was Laura Balestra an actual partial dependent parent of decedent Lawrence (Ed) Balestra under the Vermont Employer's Liability and Workers' Compensation Act (Act), 21 V.S.A. § 601 et. seq.?
2. If so, does Laura Balestra's actual dependency persist? If not, when did it end?
3. What funeral expenses are due Laura Balestra as the personal representative of the Estate of Ed Balestra?
4. Is the Estate entitled to an award of interest on medical and funeral expenses associated with this claim?

EXHIBITS:

Claimant's 1: Lefevre Ambulance Bill: Springfield Hospital to DHMC

Claimant's 2:	Ambulance Bill: Scene of Accident to
Springfield Hospital	
Claimant's 3:	DHMC Statement
Claimant's 4:	Springfield Hospital Statement

CLAIM:

1. All benefits due Laura Balestra as surviving, partially dependent, mother of Ed Balestra including, without limitation, death benefits under 21 V.S.A. §§ 632-635, interest on past due benefits and attorney's fees.
2. Funeral expenses to Laura Balestra as personal representative of the Estate of Ed Balestra pursuant to 21 V.S.A. § 632.
3. Interest and attorney's fees with respect to the medical expenses and funeral and burial expenses that the Estate and the personal representative of the Estate are entitled.

STIPULATIONS:

1. Decedent Lawrence (Ed) Balestra was an employee within the meaning of the Vermont Employer's Liability and Workers' Compensation Act.
2. LMS was an employer within the meaning of the Vermont Employer's Liability and Workers' Compensation Act.
3. Travelers Insurance Company is the workers' compensation carrier for this claim.
4. On January 10, 2002, Ed Balestra fell from an aerial bucket while in the course of his employment with LMS.
5. As a direct and proximate result of his work-related injury, Ed Balestra died.
6. Laura Balestra (Ms. Balestra) is Ed Balestra's mother.

FINDINGS OF FACT:

1. At the time of his death, Ed Balestra was 39 years of age and lived with his mother, Laura Balestra. His father passed away about six years before Ed's death.

2. Laura Balestra is the Administrator of the Estate. Ed Balestra never married and had no children.
3. Ms. Balestra paid \$707.00 for her son's headstone and cornerstones and \$2,613.00 for his funeral.
4. Dennis Smith, owner of LMS, gave Ms. Balestra a check for \$3,000.00, not to satisfy any legal obligations, but because "it was the right thing to do."
5. Ed Balestra had lived with his parents for most of his adult life. He did not pay rent.
6. At the time of Ed's death, Ms. Balestra was spending about \$100.00 per week on groceries for the two of them. After his death, her grocery bill was about \$50.00 per week.
7. Ed took his mother out to eat most Friday evenings. At Christmas, he gave his mother money to buy presents for the grandchildren.
8. Ed gave his mother cash a few times a month, about \$150.00 total on average, \$50.00 a week for three weeks. In the fourth week, he contributed in some other way, such as buying something for the house.
9. Before Ed's death, Ms. Balestra had the following expenses: Property Taxes \$1,343 per year (\$111.92 per month); Homeowners Insurance: \$281 per year (\$23.42) per month; Electricity: \$50.00 per month; Heat: \$114.00 per month; Telephone: \$40.00 per month; Cable TV: \$40.00 per month; Water: \$249 per year (\$20.74 per month). The total was about \$439.34. Ed did not contribute to the payment of utilities except for the occasional long-distance telephone call.
10. Since Ed's death, Ms. Balestra's utility expenses have remained essentially unchanged.
11. Ed performed miscellaneous maintenance tasks around the house, including plowing and shoveling, mowing, and opening and closing of the pool. He also remodeled the kitchen, bathroom, living room, and a bedroom, not charging anything

for his labor. On the remodeling project, Ed provided labor as well as hundreds of dollars of his own funds for materials.

12. Ms. Balestra's other sons also helped with the remodeling project.
13. Although not a party to the lease, Ed gave his mother one half of the monthly payments for the car she leased. Ed's portion of the payment totaled \$165.00 per month. At the time of his death, the first two lease payments had been made.
14. At the time of Ed's death, Ms. Balestra received income from Social Security, a pension, and a 401K. She also received some income from cleaning houses.
15. Another son now lives with the claimant. He gives her about \$100.00 per month. Because of other commitments, he does less around the house than what Ed did; therefore Ms. Balestra must do more. Together, they share many of the chores Ed used to do.
16. Since Ed's death, Ms. Balestra's grocery bill is less, about \$50.00, but her car expenses are higher. Since she does not watch much television herself, after Ed's death, she has saved \$25.00 a month on TV by canceling premium cable stations.

CONCLUSIONS OF LAW:

Funeral Expense

1. The Act establishes a fixed sum of \$5,500 for burial and funeral expenses:
If death results from the injury, the employer shall pay to the persons entitled to compensation or, if there is none, then to the personal representative of the deceased employee, burial and funeral expenses in the amount of \$5,500.00 and expenses for out-of-state transportation of the decedent to the place of burial not to exceed \$1,000.00.
21 V.S.A. § 632. No contingencies attach to the \$5,500.00 sum.
2. The mandatory statutory language is clear and so, too, is the legislative intent. See *In re Picket Fence Preview*, 173 Vt.

369,371 (2002) ("In determining the intent of the Legislature, we look first to the statute itself, presuming the Legislature intended the plain, ordinary meaning of the language.").

Because Ed Balestra's death was work related, defendant owes the Estate \$5,500 for funeral expenses.

3. Since the employer paid Ms. Balestra \$3,000, that amount may be considered an advance toward the \$5,500 due. Of the remaining \$2,500 due, \$320.00 is due to reimburse Ms. Balestra in full for the actual payments she made and the \$2,180.00 balance is due the Estate.

Partial Dependency

4. Next is the question whether Ms. Balestra qualified as an actual partial dependent of her son. Although spouse and children are presumed to be dependents under the Act, a parent must prove actual dependence to be entitled to benefits. 21 V.S.A. § 635 (3).
5. A surviving parent is entitled to benefits "if wholly dependent, thirty percent, or if partially dependent, twenty percent" of the deceased worker's average weekly wage, but not lower than the minimum weekly compensation. 21 V.S.A. § 632 (4).
6. Ms. Balestra is not claiming that she was totally dependent on Ed. Therefore, she is entitled to benefits under the Act if she was an actual partial dependent.
7. Two Vermont cases provide guidance on this question. In one, the Vermont Supreme Court affirmed a judgment in favor of the parents of a son who died in a work-related accident on these facts: A deceased worker had worked on his parents' farm as a hired man, doing evening chores, helping with haying and plowing and contributing about 20 to 25 hours of farm work per week. His father drove a milk truck. The son paid his mother \$2.50 for lunches and provided transportation for the weekly marketing. In return, his parents furnished room, board and laundry. After the son's death, the parents had to hire outside labor and reduced the size of their herd. Further, the father had to cut down on the number of hours he drove the milk truck. *Jewell v. Olson Constr.*, 122 Vt. 434, 436 (1961). The Court upheld the judgment for the claimants, holding that the evidence "supports a finding that the loss of the contributions from the

son substantially reduced the income-producing ability of the family and thereby adversely affected their standard of living." *Id.* at 437.

8. In the other case, decided the same year, a mother's actual dependency was found based on the son's share of the groceries and supplies, payment of part of taxes, half the fuel and electricity, all the gas, his mother's insurance and remodeling of the house. *Peabody v. Jones & Lamson Machine Co.*, 122 Vt. 431 (1961). However, the Commissioner determined, and the Court affirmed, that actual dependency terminated on receipt of a life insurance policy and bonds. *Id.* at 431. "The word 'actual' . . . points to a legislative intent that the dollars and cents position of the claimant be weighed without regard to the origins of whatever means she may possess." *Id.* at 433.
9. Professor Larson gives further guidance on this issue:

Proof of actual dependency does not require that the claimant relied on the deceased for the bare necessities of life and without his or her contribution would have been reduced to destitution; it is sufficient to show that the deceased's contributions were looked to by the claimant for the maintenance of claimant's accustomed standard of living.

5 A. Larson and L.K. Larson, *Larson's Workers' Compensation Law*, § 97 at 97-1 (2000).

10. Based on the two Vermont cases cited above and the Larson guidance, it is clear that a finding of compensability in this partial dependency case depends on an affirmative answer to the question whether Ed was supporting Ms. Balestra's standard of living to any significant degree.
11. The decedents in both *Peabody* and *Jewell* met that standard by supporting their parents in measurable ways. Their deaths clearly led to a significant negative effect on their standard of living, as evidenced by marked lifestyle changes afterwards. In *Jewell*, the parents had to hire extra farm help and reduce the size of their herd. The father had to curtail hours worked in another job. In *Peabody*, partial dependence was supported by facts showing that claimant shared household expenses, although dependency terminated with the receipt of insurance proceeds.

12. This case lacks the elements present in *Peabody* and *Jewell*. Ed was not responsible for payments of utilities and helped with only two car lease payments. Ms. Balestra has not hired outside help to pick up any work Ed may have done around the house. She does not spend as much money on groceries as she did. She has saved on her cable TV because of her own preferences. Although Ed helped his mother in monetary and non-monetary ways, she did not depend on him for her lifestyle, which has remained essentially unchanged since his death. Consequently, I am unable to find that loss of contributions from Ed adversely affected her standard of living.
13. Accordingly, Ms. Balestra was not an actual partial dependent under the Act.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law,

1. Defendant is ORDERED to pay Ed's medical expenses and funeral expenses with interest from the date those bills were incurred;
2. The claims for partial dependency benefits and attorney fees are DENIED.

Dated at Montpelier, Vermont this 13th day of July 2004.

Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact

to a superior court or questions of law to the Vermont Supreme Court.
21 V.S.A. §§ 670, 672.