

**STATE OF VERMONT
DEPARTMENT OF LABOR**

S. C.)	Opinion No. 12-06WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Casella Waste Management)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. W-04494

Pretrial conference held on August 8, 2005
Hearing held in Montpelier on December 2, 2005
Record closed on December 20, 2005

APPEARANCES:

Robert Luce, Esq., for Victoria Cousino
David Aman, Esq., for Denise Cousino

ISSUE:

How should death benefits be apportioned between the children of the deceased Claimant and the decedent-Claimant’s spouse, who is not his children’s parent?

EXHIBITS:

Victoria Cousino:

1. Monthly income and expenses with supporting documentation: August 2005
2. Monthly income and expenses with supporting documentation: September 2005
3. Monthly income and expenses with supporting documentation: October 2005
4. March 22, 2005 letter from Cynthia Whitstone.
5. W-2 Scott Cousino 2004
6. Form 25 Wage Statement
7. Monthly income and expenses with supporting documentation: November 2005
8. COBRA Form

Denise Cousino:

- A. Addison Family Court Final Order and Decree
- B. Financial Affidavit Form 813 Denise
- C. Financial Affidavit Form 813 Victoria
- D. Updated Financial Affidavit for the children, November 2005

FINDINGS OF FACT:

1. On January 28, 2005, Claimant Scott Cousino died as a result of an accident that arose out of and in the course of his employment for Casella Waste Management.
2. At the time of his death, Scott Cousino was married to Victoria Cousino.
3. At the time of his death, Scott Cousino had two children: GC born on April 20, 1994 and TC, born on July 13, 1997. Denise Cousino is the mother of the children.
4. At the time of his death, Scott Cousino was paying child support of \$126.14.
5. The Cousino children and their mother receive social security benefits on account of Scott Cousino's death.
6. At the time of the hearing, an interim order was in place from this Department directing the insurance carrier to pay death benefits in three equal parts: 1/3 to each of the two children; 1/3 to Scott's spouse Victoria.
7. Each month under the interim order, Scott's spouse Victoria has been receiving approximately \$1,100. Each of Scott's children has also been receiving that amount.
8. Following Scott's death, Victoria Cousino quit her job. She now receives monthly income from her deceased husband's workers' compensation death benefits, food stamps, and periodic SSI payments. Victoria lives with her two children from a previous marriage for whom she receives monthly child support.
9. Scott Cousino's children were ten and seven years old at the time of his death. Neither is capable of self-support. Both are expected to go to college.
10. Before his death, Scott shared custody and expenses for his children with their mother Denise. After his death, Denise became the sole custodian of the children. She quit her job because her schedule was not compatible with that of the children who did not have the other parent to rely on.
11. Victoria Cousino struggles financially and depends on public assistance for food and health care. She is being treated for health issues that recently required a hospitalization.

CONCLUSIONS OF LAW:

1. At issue is whether Victoria Cousino, spouse of the deceased Claimant, should receive more than one third of the survival benefits and the children less. The annual death benefit income for each dependent is slightly more than \$13,000.
2. Denise Cousino, mother of the children, urges the Department to affirm the interim order of 1/3 to each of the rival beneficiaries or adopt the following plan: 47.5% to each of the children and 5% to Victoria Cousino while all three are eligible; 95% to the younger child and 5% to Victoria while the second child remains eligible; and 100% to Victoria after the children are no longer dependent.
3. Victoria Cousino focuses her argument on financial needs. She contrasts the standard of living of the two families in arguing that she should receive more than one third of the benefits. Specifically, Victoria suggests that financial need of the children should be based on Child Support Guidelines under 15 V.S.A. § 654 which would provide for a monthly support for the two children of \$713.15. Yet Scott Cousino had not paid that amount in child support.
4. Guidance on the pressing issue of apportionment derives not from Child Support Guidelines, but from 21 V.S.A. § 633: “The commissioner shall, from time to time, apportion such compensation between any and all dependents named in section 632 of this title in such manner as he deems best and in making such apportionment he shall, insofar as it is possible, apportion such sum so that each dependent shall be self-supporting.” (emphasis added).
5. Dependents named in § 632 include the rival claimants here, spouse and children. Specifically, it directs the employer pay for funeral expenses and

also pay to or for the benefit of the following persons, for the periods prescribed in section 635 of this title, a weekly compensation equal to the following percentages of the deceased employee's average weekly wages. The weekly compensation payment herein allowed shall not exceed the maximum weekly compensation or be lower than the minimum weekly compensation: (1) To the spouse, if there are no dependent children, sixty-six and two-thirds percent; (2) To the spouse, if there is one dependent child, seventy-one and two-thirds percent; or if there are two or more dependent children, seventy-six and two-thirds percent. The compensation to the spouse shall be for the use and benefit of the spouse and of the spouse and of the dependent children ... (emphasis added).

6. The compensation rate in this case, therefore, is $76 \frac{2}{3}$ of Scott Cousino's average weekly wage under § 632 because he left a spouse and two dependent children.
7. When there is no spouse or children, other dependents share equally. § 632(4)(5).
8. Not contemplated by § 632 is the situation at issue where the spouse is not the children's parent, although all three are entitled to death benefits under § 634. In fact, a spouse is entitled to benefits until "[t]he age of 62 if at that time the spouse is entitled to benefits under the social security act as amended or thereafter at such time as the spouse is entitled to benefits under the social security act as amended; or (B) Remarriage; or (C) Death, whichever occurs first. However, in no event shall the spouse receive less than a sum equal to 330 times the maximum weekly compensation except when the compensation terminates by reason of death." § 635.
9. Under § 634, a child is entitled to survival benefits:

if under eighteen years of age, or incapable of self-support and unmarried, whether or not ever actually dependent upon the deceased; or a child while regularly enrolled in an approved educational or vocational training institution, who was at the time of the employee's injury or death partially or wholly dependent on the employee, regardless of age; or a child of any age who was mentally or physically disabled at the time of the employee's death and partially or wholly dependent upon him;
10. A dependent child is presumed to be incapable of self-support. The children must receive a reasonable flow of income throughout their dependency to maintain that self-support. To reduce their share, as Victoria Cousino urges, would reduce or negate the carrier's statutory obligation to the children. Although Victoria Cousino struggles financially, she is capable of self-support on the income she now receives, including the $\frac{1}{3}$ share of workers' compensation benefits. Should she return to work, which the children are incapable of doing, her self-support will increase.
11. Although the statute does not provide a bright line for apportionment in this type of case, an equal division during the dependency of the children is consistent with § 632 and the spirit of the Act.

ORDER:

Accordingly, the carrier is ORDERED to pay one third of Scott Cousino's workers compensation death benefits to each of the three rival claimants.

Dated at Montpelier, Vermont this ____ day of March 2006.

Patricia A. McDonald
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.