

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

JERRY BEAR SHIELD, SR.,

HF No. 29, 2016/17

Claimant,

v.

DECISION

HEAVY CONSTRUCTORS, INC.,

Employer,

and

AMERICAN ZURICH INS. CO.,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on December 20, 2017, in Rapid City, South Dakota. Claimant, Jerry Bear Shield, Sr., was present and represented by John M. Fitzgerald of Fitzgerald Law Office, Law Firm. The Employer, Heavy Constructors, Inc. and Insurer, American Zurich Insurance Company, were represented by Rebecca L. Mann of Gunderson, Palmer, Nelson & Ashmore, LLP, Law Firm.

Legal Issue:

The legal issues presented at hearing are stated as follows:

- a. Whether Jerry Bear Shield, Sr. qualifies as a dependent of the decedent, Robert Bear Shield and is, therefore, entitled to Workers' Compensation benefits as specified under SDCL § 62-4-14;
- b. What percentage the deceased made to the support of Jerry Bear Shield, Sr. during the two years preceding the death of Robert Bear Shield and the corresponding benefits thereto; and
- c. The length of time in which Jerry Bear Shield, Sr. is entitled to Workers' Compensation benefits.

Facts:

Based upon the testimony at the hearing and the record, the following facts are found by a preponderance of the evidence:

1. On April 18, 2014, Robert Bear Shield (Decedent) filed a petition for guardianship of Jerry Bear Shield, Sr. (Bear Shield or Claimant) with the Oglala Sioux Tribal Court. Decedent petitioned for guardianship on the grounds that Claimant is an alcoholic, and his physical and mental state had deteriorated
2. On May 15, 2014, the petition for guardianship was granted. Decedent was initially granted co-guardianship with Darrell Spotted Elk, but the Order granting guardianship was amended in August of 2014 to make Decedent Claimant's sole guardian.
3. Around the Spring or Summer of 2014, Bear Shield moved to Rapid City to live with decedent.
4. On September 25, 2014, Bear Shield was admitted to Rapid City Regional Hospital (Regional). Bear Shield was transferred to Regional from Sioux San Hospital (Sioux San) and did not have family present at Regional. He was discharged with Decedent at that time.
5. On February 4, 2015, Bear Shield was admitted to Regional. He was brought in by Decedent. Treatment notes state, "[w]ould like to talk to family, [but] [w]e have not been able to do that."
6. May 26, 2015 through June 22, 2015, records show Bear Shield was examined by the Regional Emergency Department. Bear Shield was brought to Regional from Sioux San. Bear Shield had injured his leg while he was at his mother's house in Pine Ridge. Decedent dropped Bear Shield off at Sioux San and then he was transferred to Regional. Following this hospital stay, Bear Shield was discharged to Golden Living Center Black Hills (Golden Living), a nursing home. The chart review notes indicate Bear Shield's social worker "made several attempts to contact [patient]'s family, messages have been left, [with] no return calls."
7. On June 30, 2015, Bear Shield was admitted to the Regional Emergency Department from Golden Living. He was later discharged back to the nursing home.
8. On September 27, 2015, Bear Shield was admitted to Regional with a complaint of left knee pain. He remained hospitalized for the left knee pain, and met with a social worker at Regional on October 6, 2015 to discuss discharge.
9. In October 13, 2015, following a fall, Bear Shield was taken to the hospital when he complained of leg pain. Claimant was transferred to Golden Living.
10. On November 27, 2015, Bear Shield visited Regional Emergency Department for leg pain. He had been transferred from Golden Living. He was discharged back to the nursing home.
11. On March 5, 2016, Bear Shield visited Regional Emergency Department complaining of chest pain. He had been transferred from Golden Living and was discharge back to the nursing home.
12. May 3, 2015, Bear Shield visited Regional Emergency Department with chest discomfort and was discharged back to the nursing home following the visit. He was described in the record as a "nursing home resident."

13. On June 22, 2016, Decedent was returning home from work in a Heavy Constructors, Inc. work truck when one of the tires on the vehicle blew out. Robert was killed when the truck rolled and threw him from the vehicle.
14. On August 23, 2016, The Estate of Robert Bear Shield filed petitions¹ for hearing on a Workers' Compensation claim with the Department of Labor and Regulation (Department).

Additional facts may be developed in the issue analysis below.

Analysis:

Issue I: Whether Jerry Bear Shield, Sr. qualifies as a dependent of the decedent, Robert Bear Shield and is, therefore, entitled to Workers' Compensation benefits as specified under SDCL § 62-4-14

Jerry Bear Shield, Sr. has petitioned the Department of Labor and Regulation for benefits as a dependent under SDCL § 62-4-14 which states, in pertinent part:

The amount of compensation which shall be paid for an injury to the employee resulting in death, if no amount is payable under § 62-4-12, and the employee leaves any parent, grandparent, or minor sibling, who were dependent upon the employee for support at the time of the employee's injury, shall be such a percentage of the sum provided in § 62-4-12 as the average annual contributions which the deceased made to the support of the parent, grandparent, or minor sibling during two years preceding the injury bear to the employee's earnings during the two years.

Bear Shield, as the Claimant, has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry Inc.*, 2010 S.D. 4, ¶11, 777 N.W.2d 363, 367. To determine if Bear Shield was dependent on Decedent, the Department must first establish to what extent Claimant relied on him. Dependency of a parent requires "an inquiry into exactly how much the decedent contributed to his parents and into whether the parents relied on these sums." *Piper v. Neighborhood Youth Corps*, 90 S.D. 443, 450, 241 N.W.2d 868, 871 (1976). The Court in *Piper* concluded that "dependency could be established when parents received regular contributions which they in fact employed for their support." *Id.*, at 4. "A showing of actual dependency does not require proof that, without decedent's contributions, claimant would have lacked the necessities of life, but only that decedent's contributions were relied on by claimant to maintain claimant's accustomed mode of living" *Piper* citing 2 Larsons's on Workmen's Compensation § 63.11. Therefore, the question before the Department is whether Claimant relied on decedent's contributions or support to maintain his accustomed standard of living at the time of Decedent's death.

¹ Jerry Bear Shield, Jr. and Brigitte Jahner also filed petition for hearing. Following a period of discovery, on November 27, 2017, Claimant's attorney stipulated with Employer and Insurer that under SDCL §62-4-14, Jerry Bear Shield, Sr. was the only claimant who possessed a valid claim.

“The South Dakota Code from 1939 to 1945 did not even employ the term “dependency” with regard to parents but instead allowed compensation to a surviving parent when the decedent was “under legal obligation to support” the parent at the time of the accident.” *Id*, at 4. Decedent had legal guardianship over Bear Shield provided by the Oglala Sioux Tribe. According to Tribal Code, the Decedent was legally required to support the ward and provide for his care. However, the Court in *Piper* chose to apply an analysis of actual dependency beyond mere legal obligation to support. The question remains not whether Decedent had a legal obligation to support Bear Shield, but rather, whether Bear Shield did, in fact, depend on Decedent’s support.

Brigette Jahner (Jahner) testified on Claimant’s behalf in this matter. Jahner was Decedent’s fiancé and lived with Decedent at the time of his death. Jahner testified that Bear Shield was disabled and received a monthly Social Security Income (SSI). Decedent was named as the payee on the SSI income. The payment per month was \$688.50. Bear Shield received additional income of \$100.00 a month from the Bureau of Indian Affairs (BIA) for living expenses. According to Jahner, these funds were placed in a joint account in which the family would use to pay expenses. Decedent would provide Bear Shield with money out of the SSI or BIA income for him to make purchases for art supplies, boots, clothes, and other things he may have wanted.

The record shows that Decedent took care to provide Bear Shield with a living situation that was considerate to his needs and his wishes. However, the question the Department must answer is whether Decedent truly depended on the funds provided by Decedent to maintain his accustomed mode of living, and the record shows that he did not. Bear Shield spent the majority of the last year of Decedent’s life being cared for at Golden Living which was funded by Medicare. From October 13, 2015 up to May 1, 2016, Bear Shield spent 201 consecutive days in the care of Golden Living. Golden Living provided his basic needs, including room, food, utilities, and medical support. Testimony shows that Decedent may have still brought occasional meals to Bear Shield as well as the clothes or craft supplies he wanted. These things were provided to Bear Shield in addition to the primary support he was receiving through Medicare. Bear Shield’s own SSI and BIA income also appear to have been added to the pool of money used to pay for these additional things.

Bear Shield has provided a calculation of household expenditures which has been calculated by pooling household funds, subtracting the contributions of Bear Shield and Jahner and then dividing the result by the number of residence in the home at the time. This method of calculating Decedent’s contribution to maintain Bear Shield’s accustomed mode of living is unreliable and not useful. There is no way to truly be certain which funds were used to provide care for Bear Shield.

In addition to the time spent in hospitals and nursing homes, Bear Shield also spent a portion of the time he was under Decedent’s guardianship in Pine Ridge. The record shows, Bear Shield would travel on his own to Pine Ridge without the

permissions and, sometimes, without the knowledge of Decedent. One such trip to Pine Ridge resulted in Bear Shield falling and becoming injured. Following a stay in Pine Ridge, Bear Shield was malnourished, had lost a significant amount of weight, and was presumed to not be taking his prescribed medication. While he was in Pine Ridge and in various medical facilities, Bear Shield was not relying on Decedent for care or support.

Bear Shield currently resides in a rest home in Pine Ridge. His current living conditions are the same as his living conditions for a large portion of the time Decedent served as his legal guardian, and so his accustomed mode of living has been maintained. Bear Shield has not shown that he was a dependent of Decedent at the time of Decedent's death.

Conclusion:

Jerry Bear Shield, Sr. has failed to prove that he was a dependent of the Decedent, Robert Bear Shield.

Counsel for Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have an additional twenty (20) days from the date of receipt of Employer and Insurer's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer and Insurer shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 15 day of June, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle Faw

Michelle M. Faw
Administrative Law Judge