

STATE OF MICHIGAN
COURT OF APPEALS

JUANITA WITHERSPOON, Widow of
GEORGE WITHERSPOON, Deceased,

UNPUBLISHED
August 9, 1996

Plaintiff-Appellee,

v

No. 194960
LC No. 193
ON REMAND

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

Before: Gribbs, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

By its order of May 14, 1996, our Supreme Court remanded this matter to this Court "for consideration of the issue raised by defendant regarding whether plaintiff's rate of benefits was properly calculated." This is a reference to the second issue raised in defendant's brief filed when this matter was last before us (No. 168483). The issue presented concerns the formula to use in calculating the death benefits plaintiff is entitled to as a partial dependent of her deceased husband under MCL 418.321; MSA 17.237(321).

In its order of November 4, 1991 the Worker's Compensation Appeal Board ordered benefits to be paid to plaintiff at the rate \$230.98 per week. The WCAB essentially reached the same result as the magistrate. The WCAB adopted a formula which divided decedent husband's annual income by the total family income, and then multiplied that result by the weekly benefit rate for a wholly dependent person. The calculation adopted by the WCAB was:

$$\frac{39,379.50}{52,338.97} \times 307 = 230.98$$

The proper method for determining the rate of benefits to be paid to a partial dependent in a death case under §321 was determined in *Weems v Chrysler Corp*, 448 Mich 679, 695-699; 533 NW2d 287 (1995). The Court adopted the following formula (see 448 Mich at 684, 696):

$$\begin{array}{r}
\text{Deceased employee's annual after-tax earnings} \\
\hline
\text{Total relevant annual family income} \\
\text{X} \\
80\% \\
\text{X} \\
\text{Deceased employee's after-tax weekly wage}
\end{array}$$

The WCAB in the instant case for all practical purposes applied the same formula adopted in *Weems*. The WCAB here did not factor in the 80% adjustment reflected in the *Weems*' formula, but that was due to the fact that the version of §321 the WCAB was applying in this 1982 death case did not contain the 80% adjustment now contained in §321 and which was applicable in *Weems*. Nor did the WCAB use after-tax figures as shown in the *Weems* decision. But this is of no significance in this case. In their briefs on appeal the parties do not dispute the figures used by the WCAB. Defendant only challenges the method used. Moreover, in *Weems* our Supreme Court used earnings which were apparently not adjusted for taxes when the Court calculated the weekly benefit in that case. See 448 Mich at 697. The adjustment for taxes is not material in this case because of the extent to which decedent's income exceeded the maximum rate for a wholly dependent person. There is no dispute regarding the weekly benefit rate of \$307 for a wholly dependent person which the WCAB used.

The WCAB correctly calculated the benefits due plaintiff under §321. Defendant's issue is without merit. The WCAB's order of November 4, 1991 is affirmed.

/s/ Roman S. Gribbs
/s/ Stephen J. Markman
/s/ Peter D. O'Connell