

1 The State ex rel. First National Supermarkets, Inc., Appellee, v. Industrial
2 Commission of Ohio et al., Appellants.

3 [Cite as *State ex rel. First Natl. Supermarkets, Inc. v. Indus. Comm.* (1996),
4 ____ Ohio St.3d ____.]

5 *Workers' compensation -- Handicap reimbursement for temporary*
6 *total disability compensation -- Request for reimbursement*
7 *made after company opts out of program for outlays made*
8 *before the opt-out date -- Industrial Commission abuses its*
9 *discretion in denying reimbursement.*

10 (No. 94-1418--Submitted January 9, 1996--Decided March 1, 1996.)

11 Appeal from the Court of Appeals for Franklin County, No.
12 93APD08-1203.

13 Appellee, First National Supermarkets, Inc. ("FNS"), is a self-insured
14 employer. In 1983, an FNS worker, who was a handicapped worker within
15 the meaning of R.C. 4123.343, sustained an industrial injury. FNS, in turn,
16 filed for handicap reimbursement for the compensation and benefits paid as
17 a result. A seventy-percent reimbursement was granted by appellant
18 Industrial Commission of Ohio.

1 Effective August 22, 1986, statutory amendments to R.C. 4123.343
2 significantly changed the handicap reimbursement system. Am. Sub. S.B.
3 No. 307, 141 Ohio Laws, Part I, 718. One of these changes afforded, for the
4 first time, an opportunity for self-insured employers to opt out of the
5 handicap reimbursement program. R.C. 4123.343(G), 141 Ohio Laws, Part
6 I, 745.

7 On November 22, 1989, appellant Administrator, Ohio Bureau of
8 Workers' Compensation, wrote to FNS and stated:

9 “Our records indicate that your company has not executed an election
10 to withdraw from the handicap reimbursement program. If you would like
11 to withdraw from the handicap reimbursement program, effective January 1,
12 1990, please complete the election form appended *** no later than
13 December 31, 1989. *** Please be advised that these elections to withdraw
14 are irrevocable. Any claim payments you make through December 31,
15 1989, that are eligible for handicap reimbursement, must be submitted on C-
16 174[s] and must also be received by December 31, 1989. ***”

17 By a form dated December 19, 1989, FNS informed the bureau that it
18 was withdrawing from the program effective January 1, 1990.

1 In November 1990 and again in July 1991, FNS submitted to the
2 bureau C-174 “Self-Insured Semi-Annual Report of Claim Payments” forms
3 that sought handicap reimbursement for temporary total disability
4 compensation paid from March 31, 1989 through December 7, 1990. The
5 commission denied reimbursement.

6 FNS filed a complaint in mandamus in the Court of Appeals for
7 Franklin County, alleging that the commission abused its discretion in
8 denying reimbursement. The appellate court found that FNS could not be
9 reimbursed for expenditures made after the opt-out date. FNS was,
10 however, entitled to reimbursement for expenditures made while FNS was
11 participating in the program. The court wrote:

12 “We acknowledge that the commission informed self-insured
13 employers who opted out that the employers needed to file applications for
14 reimbursement prior to the opt-out date or lose the right to reimbursement.
15 However, we are unwilling to make a company’s right to reimbursement
16 contingent solely on the date the paperwork is received by the commission.”

17 This cause is now before this court upon an appeal as of right.

18 *Greiner, Carolin & Spector* and *Thomas M. Carolin*, for appellee.

1 *Betty D. Montgomery, Attorney General, and Gerald H. Waterman,*
2 Assistant Attorney General, for appellants.

3 *Per Curiam.* FNS did not file a cross-appeal with respect to the lower
4 court's denial of reimbursement for expenditures made after FNS's January
5 1, 1990 opt-out. Only one question is, therefore, presented: Was the court
6 of appeals correct in finding FNS eligible for reimbursement of
7 expenditures made prior to opt-out even though the applications for
8 reimbursement were not made until after FNS had left the handicap
9 program? For the reasons to follow, we agree with the decision of the court
10 of appeals.

11 The commission's denial of reimbursement is premised on *State ex*
12 *rel. First Natl. Supermarkets, Inc. v. Indus. Comm.* (1994), 70 Ohio St.3d
13 582, 639 N.E.2d 1185. That decision, however, involved the employer's
14 request for reimbursement for expenditures arising *after* opt-out. In this
15 case, FNS seeks reimbursement for outlays made *before* opt-out--when the
16 employer was still actively participating in the handicap reimbursement
17 program. Accordingly, the earlier decision does not control and does not
18 bar reimbursement for FNS's preopt-out expenses.

1 The judgment of the court of appeals is affirmed.

2 *Judgment affirmed.*

3 MOYER, C.J., DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER

4 and COOK, JJ., concur.

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