[Cite as *State ex rel. A.J. Rose Mfg. Co. v. Indus. Comm.*, 2012-Ohio-4367.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. A.J. Rose Manufacturing Company,	:	
Relator,	:	
v.	:	No. 11AP-379
Joseph Schwarz and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 25, 2012

Taft Stettinius & Hollister LLP, and *Timothy L. Zix*, for relator.

Sammon & Bolmeyer Co., L.P.A., and *Albert C. Sammon*, for respondent Joseph Schwarz.

Michael DeWine, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, A.J. Rose Manufacturing Company, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order that required relator to pay respondent, Joseph Schwarz, the remaining balance of prior R.C. 4123.57(B) awards for loss of use of both arms and legs in one lump-sum payment pursuant to Ohio Adm.Code 4123-3-15(C)(3)(b), which became effective October 12, 2010. Previously, relator paid those awards to Schwarz on a bi-weekly basis.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that: (1) the commission could not apply Ohio Adm.Code 4123-3-15(C)(3) retroactively because to do so would conflict with R.C. 4123.57(B); (2) Ohio Adm.Code 4123-3-15(C)(3) could not be applied retroactively because the provision fails to clearly indicate a retroactive application; and (3) retroactive application of Ohio Adm.Code 4123-3-15(C)(3) is unconstitutional because a retroactive application would impact a substantive right of relator that vested on the date of Schwarz's injury. For these reasons, the magistrate has recommended that we grant relator's request for a writ of mandamus.

{¶ 3} Respondent, Schwarz, has filed the following objections to the magistrate's decision:

> 1. The Magistrate erred in holding R.C. 4123.57(B) grants a substantive right to Relator, A.J. Rose Manufacturing Co. ("AJ Rose") to make payments on a weekly basis to Respondent for the loss of use of both arms and both legs.
>
> 2. The Magistrate erred in holding that O.A.C. 4123-3-15 (C) is invalid and enforceable in that it conflicts with a statutory right.
>
> 3. The Magistrate erred in holding that O.A.C. 4123-3-15 (C) cannot be applied retrospectively.

{¶ 4} We begin our analysis with respondent's third objection. Therein, respondent argues that the magistrate erred in finding that Ohio Adm.Code 4123-3-15(C) cannot be applied retroactively to awards made prior to its effective date. Essentially, respondent contends that Ohio Adm.Code 4123-3-15(C) expressly indicates that it has retroactive application. We disagree.

{¶ 5} Ohio Constitution, Article II, Section 28, prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments. *Cosby v. Franklin Cty. Dept. of Job and Family Servs.*, 10th Dist. No. 07AP-41, 2007-Ohio-6641, ¶ 15. Any prohibition against retroactive laws pertaining to legislative enactments also applies to rules and regulations that administrative agencies promulgate. *Id.* As noted by the magistrate, assessing whether a statute or rule can be applied retroactively involves a two-part analysis. *Id.* at ¶ 16. First, it must be determined

whether the statute or rule contains language that expresses a clear intent that it be applied retroactively. If it does, only then does the analysis progress to the second step, which analyzes whether the challenged statute or rule is remedial or substantive. *Id.*; *AFSCME Loc. 11, AFL-CIO v. Ohio School Facilities Comm.*, 10th Dist. No. 06AP-413, 2007-Ohio-297, ¶ 17; *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 104 (1988). A purely remedial statute does not violate Ohio Constitution, Article II, Section 28, even if applied retroactively. *Cosby* at ¶ 23, citing *State v. Cook*, 83 Ohio St.3d 404, 411 (1998). A statute is substantive, and therefore unconstitutionally retroactive under Ohio Constitution, Article II, Section 28, if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations or liabilities as to a past transaction. *Cosby* at ¶ 23.

{¶ 6} Contrary to respondent's contention, Ohio Adm.Code 4123-3-15(C) contains no language that expresses a clear intent that it is to be applied retroactively. Although the rule does make reference to a "balance remaining," retroactive application is not clearly expressed. We agree with the magistrate that a balance may also exist when the rule is applied prospectively. For example, if an appeal of the award is pending, the rule provides that payments shall be made weekly until a final administrative or judicial decision is reached, at which time the "balance remaining" is owed in a lump sum if the award is upheld. Ohio Adm.Code 4123-3-15(C)(3). In the absence of language clearly indicating that this administrative code provision was intended to apply retroactively to final awards made prior to its effective date, the rule cannot be retroactively applied. For this reason, we overrule respondent's third objection.

{¶ 7} Because Ohio Adm.Code 4123-3-15(C) does not contain clear language indicating it was intended to apply retroactively, we need not precede to the second step of the constitutional analysis. We recognize that the magistrate conducted the second step of the analysis despite having concluded that the first step had not been satisfied. Because the second step in the analysis is unnecessary, we decline to adopt that portion of the magistrate's decision. We note that respondent's first and second objections challenge the magistrate's second step analysis. We overrule respondent's first and second objections as moot.

{¶ 8} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. We adopt the

magistrate's findings of fact and that portion of the magistrate's conclusions of law that addresses whether Ohio Adm.Code 4123-3-15(C) reflects a clear intent that it be applied retroactively. Because that issue is dispositive, we decline to adopt the remaining portions of the magistrate's conclusions of law. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus.

Objections overruled; writ of mandamus granted.

TYACK and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. A.J. Rose Manufacturing Company,	:	
Relator,	:	
v.	:	No. 11AP-379
Joseph Schwarz and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on April 12, 2012

Taft Stettinius & Hollister LLP, and *Timothy L. Zix*, for relator.

Sammon & Bolmeyer Co., L.P.A., and *Albert C. Sammon*, for respondent Joseph Schwarz.

Michael DeWine, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} In this original action, relator, A.J. Rose Manufacturing Company, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order that applied Ohio Adm.Code 4123-3-15(C)(3)(b), effective October 12, 2010, to prior R.C. 4123.57(B) awards for loss of use of both arms and legs such that

relator was ordered to pay the remaining balance on the awards in one payment to respondent Joseph Schwarz, who sustained his industrial injury on June 18, 2007.

Findings of Fact:

{¶ 10} 1. On June 18, 2007, Joseph Schwarz ("claimant") sustained an industrial injury while employed with relator, a self-injured employer under Ohio's Workers' Compensation laws. By agreement of relator, the industrial claim (No. 07-843577) was allowed for "compound fracture C3-4" as indicated in an ex parte commission order mailed September 23, 2007.

{¶ 11} 2. The industrial injury rendered claimant a quadriplegic.

{¶ 12} 3. By agreement of relator, claimant was awarded R.C. 4123.57(B) scheduled loss compensation for loss of use of both arms and legs. By an ex parte order mailed December 6, 2007, the commission recognized the awards.

{¶ 13} 4. Earlier, in a letter dated November 27, 2007, relator, through counsel, informed claimant's counsel that the loss of use awards "will begin effective the date of injury forward, and will be paid consecutively, not concurrently."

{¶ 14} 5. Pursuant to the agreement as recognized in the ex parte order, relator did make payments to claimant on a bi-weekly basis.

{¶ 15} 6. Effective October 12, 2010, Ohio Adm.Code 4123-3-15 was amended to require the payment of final R.C. 4123.57(B) awards in one payment for the entire award or the balance remaining on the award.

{¶ 16} 7. On November 15, 2010, claimant moved that the remaining balances of his awards be paid in full pursuant to Ohio Adm.Code 4123-3-15(C)(3)(b) effective October 12, 2010.

{¶ 17} 8. Following a January 11, 2011 hearing, a district hearing officer ("DHO") granted claimant's November 15, 2010 motion.

{¶ 18} 9. Relator administratively appealed the DHO's order of January 11, 2011.

{¶ 19} 10. Following a February 23, 2011 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of January 11, 2011. The SHO's order explains:

> Staff Hearing Officer makes this determination consistent with the findings from the District Hearing Officer hearing below. The Self-Insuring employer has recognized the claim for "compound fracture C3-4" and "loss of use of bilateral arms and legs." Per 11-27-2007 letter, the Employer agreed to pay compensation for scheduled loss of all four extremities

> due to loss of use, and has been paying this award bi-weekly since the injury date. On 10-12-2010, the Ohio Administrative Code Section 4123-3-15 (C) (3) (b) was amended to indicate that loss of use payments shall be paid in a lump sum award. That section reads: "where the order to pay the award is a final order from which there is no further appeal pursuant to division (H) (1), (H) (2), or (H) (3) of section 4123.511 of the revised code, the Bureau or Self-Insuring Employer shall pay the award or the balance remaining on the award in one payment for the entire award or the balance remaining on the award."
>
> Staff Hearing Officer finds this change in the administrative rule to be procedural in nature. There is no dispute as to whether Injured Worker is entitled to the loss of use award. The nature of how the payment is administered is procedural in nature; therefore the employer is ordered to comply with the current administrative rule and pay the entire award in accord with the rule.

{¶ 20} 11. Relator administratively appealed the SHO's order of February 23, 2011.

{¶ 21} 12. On March 17, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of February 23, 2011.

{¶ 22} 13. On March 18, 2011, another SHO mailed an order stating that the March 17, 2011 refusal order "is vacated due to a mistake of law."

{¶ 23} 14. On March 19, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of March 17, 2011.

{¶ 24} 15. On April 18, 2011, relator, A.J. Rose Manufacturing Company, filed this mandamus action.

Conclusions of Law:

{¶ 25} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 26} On the date of injury, i.e., June 18, 2007, R.C. 4123.57(B) provided for so-called scheduled loss awards for enumerated body parts. The statute provided then, and currently provides:

> In cases included in the following schedule the compensation payable per week to the employee is the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code per week and shall continue during the periods provided in the following schedule:

> * * *
>
> For the loss of an arm, two hundred twenty-five weeks.
>
> * * *
>
> For the loss of a leg, two hundred weeks.

{¶ 27} Entitlement to workers' compensation payments is a substantive right measured by the statutes in force on the date of injury. *State ex rel. Kirk v. Owens-Illinois, Inc.*, 25 Ohio St.3d 360, 361 (1986); *Rambaldo v. Accurate Die Casting*, 65 Ohio St.3d 281, 284 (1992); *State ex rel. Jefferson Smurfit Corp. v. Indus. Comm.*, 10th Dist. No. 09AP-851, 2010-Ohio-3521.

{¶ 28} In the magistrate's view, R.C. 4123.57(B) not only grants a substantive right to the claimant to receive compensation for the weeks assigned to the body part lost, it also grants a substantive right to the employer to make payments on a weekly basis for the weeks set forth for the body part lost. Significantly, the statute provides that the compensation is "payable per week to the employee" and it "shall continue during the periods provided" in the schedule. How can compensation "continue" during the periods provided if the employer can be ordered to make a lump sum payment of the entire award?

{¶ 29} Effective October 12, 2010, some three years after the injury date, paragraph (C) was added to Ohio Adm.Code 4123-3-15 by promulgation of the Ohio Bureau of Workers' Compensation ("bureau").

> Ohio Adm.Code 4123-3-15(C), effective October 12, 2010, provides in part:
>
> > Payment of permanent partial disability pursuant to division (B) of section 4123.57 of the Revised Code in state fund and self-insured employer claims.
> >
> > * * *
> >
> > (3) Upon an order for the payment of permanent partial disability pursuant to division (B) of section 4123.57 of the Revised Code for a loss by amputation or for a loss of use, the bureau or self-insuring employer shall calculate such award pursuant to the statutory schedule of division (B) of section 4123.57 of the Revised Code. The bureau shall pay the award to the injured worker as follows:

> (a) Where the order to pay the award is an order from which there is a timely appeal pending pursuant to division (H)(4) of section 4123.511 of the Revised Code, the bureau or self-insuring employer shall pay the award in weekly payments until a final administrative or judicial decision on the appeal.
>
> (b) Where the order to pay the award is a final order from which there is no further appeal pursuant to division (H)(1), (H)(2), or (H)(3) of section 4123.511 of the Revised Code, the bureau or self-insuring employer shall pay the award or the balance remaining on the award in one payment for the entire award or the balance remaining on the award.

{¶ 30} As earlier noted, following the bureau's promulgation of Ohio Adm.Code 4123-3-15(C), the claimant here moved that the remaining balances of his awards be paid in full pursuant to the new provision of the rule. That motion was granted by an SHO following a February 23, 2011 hearing. That SHO's order has become final.

{¶ 31} Disregarding momentarily that the commission applied the new provision of the rule retrospectively, because it conflicts with a statutory right, it is invalid and unenforceable.

{¶ 32} Administrative rules are designed to accomplish the ends sought by the legislation enacted by the General Assembly. *Hoffman v. State Med. Bd. of Ohio,* 113 Ohio St.3d 376, 2007-Ohio-2201, ¶ 17, citing *Carroll v. Dept. of Adm. Servs.*, 10 Ohio App.3d 108, 110 (10th Dist.1983). Therefore, rules promulgated by administrative agencies are valid and enforceable unless unreasonable or in conflict with statutory enactments covering the same subject matter. *Id.*, citing *State ex rel. Curry v. Indus. Comm.*, 58 Ohio St.2d 268, 269 (1979). An administrative rule may not add to or subtract from a legislative enactment. *Id.*, citing *Cent. Ohio Joint Vocational Dist. Bd. of Edn. v. Ohio Bur. of Emp. Servs.*, 21 Ohio St.3d 5, 10 (1986). If the rule does, it creates a clear conflict with the statute, and the rule is invalid. *Id.*

{¶ 33} Based upon the above analysis, Ohio Adm.Code 4123-3-15(C)(3)(b) is unenforceable against relator, particularly where, as here, relator is self-insured and the funds for the payment must come directly from relator.

{¶ 34} As mentioned earlier, the commission, through its SHO, applied the new provision of the rule retrospectively to an industrial claim involving an injury that pre-dates the effective date of the new provision of the rule. The retrospective application of the rule raises further the question of whether such application violates Ohio

Constitution, Article II, Section 28, which limits retrospective legislation or, in this case, retrospective rulemaking.

{¶ 35} The issue of whether a statute, or rule, may constitutionally be applied retrospectively does not arise unless there has been a prior determination by the court that the general assembly (or rulemaking agency) specified that the statute (or rule) so apply. *VanFossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100 (1988), paragraph one of the syllabus (parenthetical notations added by magistrate).

{¶ 36} Analysis of whether a statute (or rule) is unconstitutionally retroactive under the Ohio Constitution requires an initial determination of whether the statute (or rule) is substantive or merely remedial. *VanFossen* at paragraph three of the syllabus (parenthetical notations added by magistrate).

{¶ 37} In *Cosby v. Franklin Cty. Dept. of Job & Family Servs.*, 10th Dist. No. 07AP-41, 2007-Ohio-6641, ¶ 23, this court had occasion to state the law applicable here:

> A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively. *Cook*, at 411, 700 N.E.2d 570. "[R]emedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Id.* Laws that relate to procedure, including courses of procedure and methods of review, are ordinarily remedial in nature. *Van Fossen*, supra, at 107-108, 522 N.E. 2d 489. A statute is substantive, and therefore *unconstitutionally* retroactive under Section 28, Article II of the Ohio Constitution, if it " 'impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.' " *Smith*, supra, quoting *Bielat*, at 354, 721 N.E2d 28; see, also, *Van Fossen*, supra, at 106, 522 N.E.2d 489.

(Emphasis sic.)

{¶ 38} Applying Ohio Adm.Code 4123-3-15(C)(3)(b) retrospectively and apparently responding to relator's protest that it cannot be so applied, the SHO declared "[t]he nature of how the payment is administered is procedural in nature."

{¶ 39} As relator here correctly points out, the SHO's analysis is seriously flawed for skipping over the threshold question of whether the bureau specified in its rule that it is to be applied retrospectively.

{¶ 40} A thorough reading of Ohio Adm.Code 4123-3-15(C) fails to disclose any specification that it is to be applied retrospectively. Nevertheless, respondent-claimant argues that the provision for payment of the balance of the award is an indicator that the provision be applied retrospectively. (Respondent's brief, 6.) Clearly, even where the provision is applied prospectively, a portion of the award may have already been paid such that a balance remains to be paid. In short, respondent's argument lacks merit. Significantly, the commission here makes no argument that the rule, by its own terms, is to be applied retrospectively.

{¶ 41} Given the above analysis, Ohio Adm.Code 4123-3-15(C)(3)(b) cannot be applied retroactively simply because Ohio Adm.Code 4123-3-15(C) does not specify that it is to be applied retrospectively.

{¶ 42} But even if Ohio Adm.Code 4123-3-15(C) could somehow be read to specify the retrospective application of the rule, such retrospective application would clearly violate Ohio Constitution, Article II, Section 28, given that the new provision of the rule attempts to take away a substantive right of the employer that vested as of the date of the injury.

{¶ 43} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of February 23, 2011 that grants claimant's November 15, 2010 motion, and to enter a new order that denies claimant's November 15, 2010 motion.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).