

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Mustafa Alhamarshah, :
Relator, :
v. : No. 12AP-220
Industrial Commission of Ohio : (REGULAR CALENDAR)
and Mohamed Salem DBA Ballmohd, LLC, :
Respondents. :
:

D E C I S I O N

Rendered on June 27, 2013

Malek & Malek, and Douglas C. Malek, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Thomas & Company, LPA, and Christopher P. Aemisegger, for respondent Mohamed Salem.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Mustafa Alhamarshah filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order which allowed an appeal by Mohamed Salem with respect to Alhamarshah's right to participate in the workers' compensation system.

{¶ 2} In accord with Loc.R. 13(M), the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which includes detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ at this time.

{¶ 3} Counsel for Alhamarshah has filed objections to the magistrate's decision. The case is now before the court for review.

{¶ 4} Alhamarshah was injured when he was involved in a tree trimming incident. Mohamed Salem DBA Ballmohd, LCC was paying for the tree trimming to be performed. The critical question as to Alhamarshah's right to participate at this point is whether Alhamarshah was an employee of Mohamed Salem or whether Alhamarshah was an independent contractor operating his own business.

{¶ 5} The magistrate found that this mandamus action was rendered premature by the pendency of an appeal on the right to participate then pending in the common pleas court. Since the magistrate rendered his magistrate's decision, counsel for Alhamarshah has dismissed the action in the common pleas court, subject to the action being refiled within one year.

{¶ 6} We therefore sustain the objections in part. To the extent that denial of the writ was conditioned on the then pending common pleas court case, that condition does not exist at the present time. The condition could be in existence again later.

{¶ 7} We now turn to the merits of the case, based upon the facts set forth in the findings of fact in the magistrate's decision. We note that the commission has broad discretion in determining issues such as when a party has substantially complied with the statutory requirements for the party when pursuing an administrative appeal. We do not find that the commission abused its discretion in allowing Mohamed Salem, the alleged employer of Alhamarshah, to appeal in this case based upon the facts as set forth in the magistrate's decision and as found by the commission itself. For that reason, we deny the request for a writ of mandamus to overturn the commission's ruling that the alleged employer could appeal.

{¶ 8} We adopt the findings of fact in the magistrate's decision, but not the conclusions of law. Based upon the findings of fact and our own legal analysis, we deny the request for a writ of mandamus.

*Objections sustained in part;
Writ of mandamus denied.*

BROWN and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

State of Ohio ex rel. Mustafa Alhamarshah,	:	
Relator,	:	
v.	:	No. 12AP-220
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Mohamed Salem DBA Ballmohd, LLC,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on December 31, 2012

Malek & Malek, and Douglas C. Malek, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Thomas & Company, LPA, and Christopher P. Aemisegger, for respondent Mohamed Salem.

IN MANDAMUS

{¶ 9} In this original action, relator, Mustafa Alhamarshah, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its March 22, 2011 order finding that respondent, Mohamed Salem DBA Ballmohd,

LLC ("Salem" or "Ballmohd LLC"), substantially complied with R.C. 4123.511(F) such that it must be held that Salem administratively appealed a January 7, 2010 order of the Ohio Bureau of Workers' Compensation ("bureau") that allowed relator's industrial claim, and to enter an order finding that Salem failed to appeal the January 7, 2011 bureau order.

Findings of Fact:

{¶ 10} 1. On September 21, 2009, relator fell from a tree while trying to cut a tree branch.

{¶ 11} 2. On December 21, 2009, relator filed an application for workers' compensation benefits on a form captioned "First Report of an Injury, Occupational Disease or Death ("FROI-1")." On the FROI-1, relator alleged that he sustained an industrial injury on September 21, 2009 while employed by Salem as a laborer.

{¶ 12} 3. On January 7, 2010, the bureau mailed an order allowing the claim (No. 09-863352). The order lists the employer as "Mohamed Salem." The order awarded temporary total disability ("TTD") compensation beginning September 22, 2009. The order warned:

THIS DECISION BECOMES FINAL IF A WRITTEN
APPEAL IS NOT RECEIVED WITHIN 14 DAYS OF
RECEIVING OF THIS NOTICE.

{¶ 13} The order further advised a telephone call to "Jolene M" at the bureau's Columbus Service Office "[i]f there are any further questions concerning this decision."

{¶ 14} 4. According to the testimony of Abdul Alnobani at a March 22, 2011 hearing before the three-member commission, on or about January 13, 2010, relator, Alnobani, and Jolene engaged in a three-party telephone call during which Jolene advised Alnobani how to file an appeal of the January 7, 2010 order on relator's behalf. According to Alnobani, relator is a friend who has a hearing problem and often seeks Alnobani's help. According to Alnobani, on January 13, 2010, he faxed some documents to Jolene at the bureau that he believed would be accepted as an appeal.

{¶ 15} 5. The record contains a fax cover letter dated January 13, 2010 from Alnobani to "Jolin." "Mustafa Alhamarshah-[Mohamed] Salem" is listed as the "subject" of the fax. In the letter addressed to "Jolin," Alnobani writes:

Enclosed is a proof from the City of Columbus that Mr. Mustafa Alhamasha[h] has a company and that is how he introduced himself to Mr. [Mohamed] Salem, thus, submitted an estimate.

Please do not hesitate to call me if more information [is] needed.

{¶ 16} The words "construe as appeal" are handwritten on the document described in this paragraph. Presumably, those words were written by a bureau employee.

{¶ 17} 6. The record contains a January 14, 2010 internal bureau fax to "IC appeals" with the following "message":

Attached is an appeal to the initial allowance for claim #09-863352 for Mustafa Alhamarshah. Thank you

{¶ 18} 7. An internal bureau note dated January 14, 2010 states:

1/14/2010 IC12 IW general contractor info
This has been sent to IC as an appeal. Yousef will show with the employer to translate. Jolene Mc

{¶ 19} 8. By letter dated February 12, 2010, counsel for Ballmohd LLC informed the commission of his representation.

{¶ 20} 9. Following a November 10, 2010 hearing, a district hearing officer ("DHO") issued an order finding that the January 7, 2010 bureau order was not administratively appealed. The DHO's order explains:

The District Hearing Officer finds that the employer named in the Bureau of Workers' Compensation order dated January 7, 2010, did not file an appeal to that order, therefore there [sic] Industrial Commission does not have jurisdiction to consider the merits of the Employer's appeal and the BWC order of 1/07/10 stands as published.

{¶ 21} 10. Salem administratively appealed the DHO's order of November 10, 2010.

{¶ 22} 11. Following a February 1, 2011 hearing, a staff hearing officer ("SHO") issued an order stating that the DHO's order is "modified." The SHO's order concludes:

[T]he Staff Hearing Officer finds the Employer failed to file a legally sufficient appeal to the Bureau of Workers' Compensation order of 01/07/2010 and that order is to remain as is unaltered.

{¶ 23} 12. Salem administratively appealed the SHO's order of February 1, 2011.

{¶ 24} 13. Following a March 22, 2011 hearing, the three-member commission issued an order that vacates the SHO's order of February 1, 2011, finds that Salem was substantially compliant with R.C. 4123.511(F) such that he did appeal the January 7, 2010 bureau order, and refers the matter to a DHO for adjudication of the merits of the claim.

The March 22, 2011 commission order explains:

The Commission finds that both the District Hearing Officer order, issued 11/13/2010, and the Staff Hearing Officer order, issued 02/04/2011, found the Employer's alleged appeal from the Bureau of Workers' Compensation (BWC) order dated 01/07/2010, was not substantially compliant with the requirements of R.C. 4123.511(F) and neither order addressed the merits of this claim. Consequently, for the purpose of this hearing, the Commission limits its consideration to the issue of whether the alleged appeal filed by the Employer on 01/14/2010 was substantially compliant with R.C. 4123.511(F). The relevant history of this matter is set forth as follows.

On 01/07/2010, BWC issued an order that allowed this claim against Mohamed Salem as the Employer of record. This order identified Jolene M. as the BWC customer service specialist (CSS) assigned to the claim. Based on testimony at today's hearing, following receipt of that order, because of language difficulties, Mr. Salem contacted his friend Abdul Alnobani, to seek assistance with disputing the 01/07/2010 BWC order. Mr. Alnobani testified he called the BWC CSS on behalf of Mr. Salem and was told she needed authorization from Mr. Salem to speak with Mr. Alnobani. Mr. Salem was contacted and a three-way call was conducted. Mr. Alnobani testified that during that conversation the BWC CSS instructed them on what they needed to do to appeal the allowance of the claim, and that they did as she instructed. Mr. Alnobani stated that on 01/14/2010 he forwarded the documents to BWC and was later told by the CSS that everything was "fine." The Commission finds Mr. Alnobani's

testimony to be credible concerning the telephone conversation with the CSS, Jolene M.

The Commission finds that the documents submitted by Mr. Alnobani on 01/14/2010 consist of a cover page addressed to "Jolin" and attachments that allegedly prove the Injured Worker had a business, and that he presented himself to Mr. Salem as a businessman offering his services. The cover page includes a note advising "Jolin" of the enclosed attachment from the City of Columbus indicating that Mr. Al Hamarshah [sic] had a company and again that he introduced himself to Mr. Salem as a businessman with services for hire. Mr. Alnobani further advised the CSS to contact him if more information was needed.

The Commission further finds that on the cover page document submitted to BWC by Mr. Alnobani on 01/14/2010 are the handwritten words "construe as appeal." On that same date, BWC faxed a message to "IC appeals" that states "attached is an appeal to the initial allowance for claim #09-863352 for Mustafa Alhamarshah. Thank you." The BWC note entered by CSS Jolene on 01/14/2010 states that the information submitted by Mr. Alnobani was sent to the Commission as an appeal. Based on that referral, the Commission scheduled the claim for a hearing before a District Hearing Officer on the issue of Injury or Occupational Disease Allowance.

As stated previously, neither the underlying District Hearing Officer nor the Staff Hearing Officer addressed the merits of this claim, ruling only that the documents filed on 01/14/2010 did not constitute an appeal. Accordingly, the issue before the Commission today is whether the documents that were submitted by Mr. Alnobani on 01/14/2010 and construed as an appeal by BWC meet the requirements of R.C. 4123.511(F).

R.C. 4123.511(F) requires that "Every notice of an appeal of an order under divisions (B), (C), (D), and (E) of this section shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom."

The Commission finds that the cover page does contain both the name of the claimant and the employer. The document does not contain the number of the claim, the date of the decision, or specific language indicating that the appellant appeals therefrom. Consequently, if the Commission strictly applied the statute, the document would not be a properly executed appeal. However, the Court in *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Indus. Comm.* (2007), 117 Ohio St.3d 179, held that absolute compliance is not demanded, and only required "substantial compliance" with the statute. Specifically, the Court stated, "' Substantial compliance' occurs 'when a timely notice of appeal . . . includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities.'" *Lapp*, citing to *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8.

Citing to *Mullins v. Whiteway Mfg. Co.* (1984), 15 Ohio St.3d 18, the Court in *Lapp* held that "(c)ertain mitigating factors are to be considered when examining the sufficiency of a notice of appeal. These factors include whether appellant has substantially complied with the statutory appeal provisions and whether the purpose of the unsatisfied provision is sufficiently important to require compliance for jurisdictional purposes." The facts in *Lapp* involved two orders from the Administrator that were issued two days apart, with the latter order vacating the earlier order. The employer filed an appeal citing to the earlier, vacated order and never filed an appeal citing to the later order. The Court found that the date provision of R.C. 4123.511(F) is "not sufficiently important to require dismissal for the failure to include it." The Court specifically noted the appellant's acknowledgment that the omission of a date, in a case where only one order was issued, was inconsequential from a practical standpoint because there was only one order that could have been on appeal, and all parties knew it.

The Commission finds that the Employer's appeal is substantially compliant with R.C. 4123.511(F) pursuant to *Lapp*. In this case, there had only been one order issued in this claim, therefore, from a practical perspective, there was only one order that could have been appealed. The same logic applies to the lack of a claim number on the document

submitted by Mr. Alnobani. There is only one workers' compensation claim that involves Mr. Salem and Mr. Al Hamarshah [sic], therefore, from a practical perspective, the document submitted by Mr. Alnobani could only concern this claim. Consequently, in regard to the date of the order and the claim number, when only one claim and one order is at issue, the Commission finds that the failure to strictly comply with those provisions does not defeat the Employer's appeal.

The remaining unsatisfied provision of R.C. 4123.511 involves the fact that the appellant appeals therefrom. Again, on the face of the document there is no indication that Mr. Salem is appealing the decision of 01/07/2010. However, based on the credible testimony of Mr. Alnobani concerning his conversations with Jolene, the CSS, the documents submitted on 01/14/2010 were intended to be an appeal. That understanding is further supported by BWC construing the documents as an appeal from and referring them to the Industrial Commission to process as an appeal within the appeal period. Consequently, based on the testimony of the Employer and Mr. Alnobani and the facts and circumstances related to the documents submitted to BWC on 01/14/2010, the Commission finds that the Employer substantially complied with the provisions of R.C. 4123.511(F) and timely filed an appeal of the 01/07/2010 BWC order.

The Commission rejects the Injured Worker's assertion that Mr. Alnobani is not a party to this claim and lacks the authority to file an appeal on behalf of the Employer. The Commission finds that the evidence documents the Employer authorized Mr. Alnobani to act on his behalf. The Employer submitted a copy of a durable power of attorney, which Mr. Salem asserts gives Mr. Alnobani the authority to act on his behalf. Further, according to the credible testimony of Mr. Alnobani, Mr. Salem gave him permission to assist in the conversation with the CSS that focused on how to appeal the decision issued 01/07/2010. It is clear from the testimony of Mr. Salem and Mr. Alnobani, as well as the durable power of attorney, that Mr. Alnobani was authorized by the Employer to assist in matters related to this claim. Consequently, Mr. Alnobani is found to have had the authority to file the appeal.

The Injured Worker also alleges that he was prejudiced by the omissions in the appeal filed by the Employer. However, at hearing, the Injured Worker's counsel was unable to specifically document how the Injured Worker was prejudiced. The claim has been allowed and benefits should have been paid accordingly. Moreover, the Commission finds no prejudice resulted from the Employer's failure to strictly comply with all the provisions of R.C. 4123.511 because BWC processed the matter as an appeal. BWC's referral faxed to the Commission Appeals Section identified this matter as an appeal on the issue of allowance, and identified the claim number and the name of the Injured Worker, all of which information was subsequently and timely provided to the Injured Worker in hearing notices sent to him by the Commission.

It is the finding of the Commission that the Employer's appeal, filed 01/14/2010, from the BWC order, dated 01/07/2010, was timely filed and is substantially compliant with the requirements of R.C. 4123.511(F). Therefore, it is the order of the Commission that the Employer's appeal is granted to the extent of this order and the claim is referred to a District Hearing Officer to adjudicate the claim based on the merits of the Injured Worker's initial application for the allowance of the claim.

{¶ 25} 14. On September 19, 2011, pursuant to the March 22, 2011 commission order, a DHO heard the appeal from the bureau's January 7, 2010 order. Thereafter, the DHO issued an order that disallows the claim on grounds that, on the date of injury, relator was performing the job as an independent contractor and not as an employer of Salem or Ballmohd, LLC.

{¶ 26} 15. Relator administratively appealed the DHO's order of September 19, 2011.

{¶ 27} 16. Following a January 5, 2012 hearing, an SHO issued an order affirming the DHO's order of September 19, 2011.

{¶ 28} 17. On February 3, 2012, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of January 5, 2012.

{¶ 29} 18. On February 9, 2012, relator filed a notice of appeal pursuant to R.C. 4123.512 in the Franklin County Court of Common Pleas ("common pleas court").

{¶ 30} 19. Also on February 9, 2012, pursuant to R.C. 4123.512, relator filed a complaint in the common pleas court.

{¶ 31} 20. The R.C. 4123.512 action filed by relator in the common pleas court remains pending there.

{¶ 32} 21. On March 14, 2012, relator, Mustafa Alhamarshah, filed this mandamus action.

Conclusions of Law:

{¶ 33} Because this mandamus action is rendered premature by the pendency of the common pleas court action, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶ 34} The disposition of this action is controlled by *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88. In *Elyria Foundry*, the employer, Elyria Foundry Co. ("EFC"), commenced a mandamus action challenging the commission's award of TTD compensation in an industrial claim that the commission had allowed for silicosis. EFC appealed the allowance of the claim to the Lorain County Court of Common Pleas pursuant to R.C. 4123.512. The common pleas court action was pending while EFC was challenging the TTD award in the mandamus action. The Supreme Court of Ohio found that the controversy presented in the mandamus action lacked ripeness. The *Elyria Foundry* court stated:

We find that the controversy presented by EFC's mandamus action lacks ripeness. Ripeness "is peculiarly a question of timing." *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, 140, 95 S.Ct. 335, 357 * * *. The ripeness doctrine is motivated in part by the desire "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies * * *." *Abbott Laboratories v. Gardner* (1967), 387 U.S. 136, 148, 87 S.Ct. 1507, 1515 * * *. As one writer has observed:

"The basic principle of ripeness may be derived from the conclusion that 'judicial machinery should be conserved for

problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.' * * * [T]he prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff." Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum. L.Rev. 867, 876.

EFC is asking us to address the abstract and the hypothetical. The allowance of claimant's entire workers' compensation claim is in dispute, as are the medical conditions allegedly related to it. Therefore, EFC is effectively asking us to answer the question, if the claim is allowed, and if it is allowed only for silicosis, is claimant entitled to temporary total disability compensation? This is an in-appropriate question for review.

(Emphasis sic.) *Id.* at 89.

{¶ 35} If relator ultimately succeeds in obtaining a common pleas court judgment declaring his right to participate in the state insurance fund, this mandamus action becomes moot. By pursuing this mandamus action, relator endeavors on two fronts to obtain the right to participate for the September 21, 2009 injury. Significantly, the ultimate decision from the common pleas court will presumably be a decision on the merits—a determination of whether relator was employed by Salem on September 21, 2009 or was acting as an independent contractor. Ordinarily, courts should decide cases on their merits. *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Indus. Comm.*, 117 Ohio St.3d 179, 2008-Ohio-850 at ¶ 12, citing *Fisher v. Mayfield*, 30 Ohio St.3d 8, 11, 30 (1987). Therefore, it is appropriate for this court to deny the requested writ of mandamus given the action pending in the common pleas court.

{¶ 36} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
KENNETH W. MACKE

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).