

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Powell Measles et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 12AP-52
 : (Ct. of Cl. No. 2011-06447)
 Industrial Commission of Ohio et al., :
 : (REGULAR CALENDAR)
 Defendants-Appellees. :

D E C I S I O N

Rendered on August 16, 2012

Dworken & Bernstein Co., L.P.A., Patrick T. Perotti and Jonathan T. Stender, for appellants.

Michael DeWine, Attorney General, Mark E. Mastrangelo, Jeffrey B. Duber, Randall W. Knutti and Christopher P. Conomy; Cavitch, Familo & Durkin Co., L.P.A., Ronald D. Holman, II, Alexander E. Goetsch and Max E. Dehn, for appellees.

APPEAL from the Court of Claims of Ohio

TYACK, J.

{¶ 1} Powell Measles and Ann M. Pocaro are appealing from the summary judgment granted against them by the Court of Claims of Ohio. They assign a single error for our consideration:

THE COURT OF CLAIMS ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING THIS SUIT. AN ACTIONABLE CLAIM LIES WHEN THE BUREAU OF WORKERS' COMPENSATION AND INDUSTRIAL COMMISSION CHARGE A CLAIMANT'S PERMANENT TOTAL DISABILITY BENEFITS FOR UNPAID

LUMP-SUM ADVANCEMENT OBLIGATIONS OF OTHER CLAIMANTS.

{¶ 2} Measles and Pocaro filed suit against the Industrial Commission of Ohio ("commission"), the Administrator of the Ohio Bureau of Workers' Compensation ("BWC") and the State of Ohio seeking to be refunded sums of money they paid which exceeded the amount of a lump sum advancement they received from their individual awards of permanent total disability ("PTD") compensation.

{¶ 3} For many years claimants who have been awarded PTD compensation have been permitted to receive lump sum advancements on their award in order to pay certain bills. Frequently these advancements are made to enable the claimant to pay attorney fees or other pressing bills.

{¶ 4} When they receive the advancements, the claimant's sign paperwork which provides that the periodic payments they received for their PTD award will be reduced for the life of the claim. The amount of the reduction was traditionally computed so the amount of advancement was returned to the BWC during the expected life of the claimant. Some claimants died earlier than the time forecast by the life expectancy tables, so the BWC did not have the full amount of the lump sum advancement returned to it. Some claimants, such as Measles and Pocaro, lived longer than forecast by the life expectancy tables and, as a result, in essence, paid more to the BWC than the sum they received as a lump sum advancement.

{¶ 5} Eventually, this system was seen as unfair to the individuals who lived longer than forecast, so the BWC and the State of Ohio changed the law prospectively so new claimants who received PTD compensation and received a lump sum advancement had the reduction in their PTD periodic payments stop once the amount received from the reduced payments equaled the amount received in the lump sum advancement. This prospective change did not benefit Measles or Pocaro, which led to the filing of this lawsuit.

{¶ 6} Counsel for Measles and Pocaro asked that the lawsuit be certified as a class action, with Measles and Pocaro as the class representatives. However, the Court of Claims never certified the case as a class action, so we are addressing only the merits of their individual claims in this appeal.

{¶ 7} Counsel for Measles and Pocaro attempts to label the lump sum advancements they received as loans. In reality, the advancements are just that, advancements authorized by law and returned to the BWC in accord with law. They are not and cannot be loans.

{¶ 8} When Measles and Pocaro signed the paperwork requesting that advancements be paid to them, they agreed that they would have their periodic payments on their PTD award reduced "for the life of the claim." The paperwork did not say "until the amount of the advancement is returned to or retained by the Industrial Commission or the BWC." The paperwork then in effect provided that the periodic payments received by persons who had received an award of PTD compensation would be permanently reduced. Measles and Pocaro agreed to a permanent reduction in their payments for the life of their workers' compensation claim. No other interpretation of the pertinent paperwork or the phrase "for the life of the claim" is reasonably possible.

{¶ 9} Counsel for Measles and Pocaro points to Ohio Adm.Code 4123-3-37 as support for their position. Ohio Adm.Code 4123-3-37 now governs lump sum advancements, but was not in effect in its present form at the time Measles and Pocaro received their advancements. The current provision that "[u]pon the repayment of the lump sum advancement in accordance with the terms of the order and agreement, the administrator shall remove the rate reduction due to the lump sum advancement and reinstate the injured worker's rate of compensation" was not there. If counsel were correct in his interpretation, the provision would be unnecessary. Further, the agreements made by Measles and Pocaro were for a permanent rate reduction, not a temporary one. The fact that a permanent rate reduction was unfair to those who outlived the BWC's life expectancy obviously helped motivate the change in Ohio Adm.Code 4123-3-37, but did not change the agreements already in place.

{¶ 10} We view our resolution of the issues here as consistent with and dictated by the rulings of the Supreme Court of Ohio in *State ex rel. Funtash v. Indus. Comm.*, 154 Ohio St. 497 (1954) and *State ex rel. Shively v. Murphy Motor Freight*, 71 Ohio St.3d 114 (1994). The syllabus for the *Funtash* case reads:

1. The Industrial Commission of Ohio is an administrative agency possessing only such powers and duties as are

conferred on it by the provisions of the state Constitution and statutes.

2. Such commission is without authority to make a loan to a claimant for compensation.

3. Under the provisions of Section 1465-87, General Code, such commission, under special circumstances, and when the same is deemed advisable may commute payments of compensation or benefits to one or more lump sum payments.

4. Incidental to making a partial lump sum payment of compensation, such commission thereafter may continue to make weekly payments in a reduced amount.

{¶ 11} The *Shively* case addresses significantly different issues, but includes in its printed opinion: "Moreover, once the advancement has been recovered, the commission is not required to restore the amount of weekly compensation to its previous level." *Id.* at 116.

{¶ 12} Counsel argues equal protection issues as to claimants who received lump sum advancements before Ohio Adm.Code 4123-3-37 was changed and those who received advancements afterwards. Such federal constitutional claims are not within the purview of the Court of Claims and could not be a basis for a judgment in that court.

{¶ 13} Counsel also argues a contract theory of recovery, but Measles and Pocaro got the benefit and detriment of the agreements they made—the contracts into which they entered. No viable theory grounded in contract is presented here.

{¶ 14} We likewise find no basis for a waiver or an estoppel theory of recovery. The paperwork is relatively straightforward. A claimant is to receive an advancement of a certain amount and in return their periodic checks are to be reduced for the life of their workers' compensation claims. The claimant receives exactly what they bargained for. They waived full periodic checks in return for a lump sum received via advancement. No deception or affirmative statement that the reduction was temporary was made, so the BWC, the Industrial Commission and the State of Ohio cannot be estopped from receiving the payments agreed to.

{¶ 15} In short, the Court of Claims correctly granted summary judgment in this case. The sole assignment of error is overruled and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
