

[Cite as *State ex rel. Tyler v. Indus. Comm.*, 2004-Ohio-2818.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Richard K. Tyler,	:	
Relator,	:	
v.	:	No. 03AP-836
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
S.M. Dixon Electric, Inc.,	:	
Respondents.	:	

D E C I S I O N

Rendered on June 1, 2004

Urban Co., L.P.A., and Anthony P. Christine, for relator.

Jim Petro, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Richard K. Tyler, filed this original action in mandamus, seeking a writ ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its

order setting his average weekly wage ("AWW") at \$206 and to issue a new order setting his AWW at \$912.60.

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate, who issued a decision including findings of fact and conclusions of law. (Attached as Appendix A.) In her decision, the magistrate found the commission did not abuse its discretion in setting relator's AWW at \$206, noting that relator was given several opportunities to provide information to document his earnings and failed to do so. Therefore, the magistrate recommended the court deny relator's request for a writ of mandamus.

{¶3} Relator has filed objections to the magistrate's decision. In *State ex rel. Kidwell v. Indus. Comm.*, Franklin App. No. 02AP-940, 2003-Ohio-4509, an injured worker asked the commission to increase his AWW, claiming that in addition to his regular employment he was also self-employed at the time of his injury, and that his wage statement from his regular employer did not accurately reflect his entire weekly earnings. When the worker, after repeated requests, failed to sufficiently document his self-employment income, we held that the commission did not abuse its discretion in using a standard calculation. As the magistrate correctly explained, relator has also failed to sufficiently document his claimed income. Thus, the commission did not abuse its discretion in using a standard calculation to calculate relator's AWW.

{¶4} Following an independent review of the record, we find the magistrate has properly determined the facts and applied the appropriate legal standards. Relator's objections are therefore overruled. We hereby adopt the magistrate's decision as our

own, including the findings of fact and conclusions of law it contains and as amplified above. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled; writ of mandamus denied.

BOWMAN and BROWN, JJ., concur.

(APPENDIX A)

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	:	
Relator,	:	
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v.	:	No. 03AP-836
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
S.M. Dixon Electric, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on January 30, 2004

Urban Co., L.P.A., and Anthony P. Christine, for relator.

Jim Petro, Attorney General, and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} In this original action in mandamus, relator, Robert K. Tyler, seeks a writ compelling respondent Industrial Commission of Ohio ("commission") to vacate its order

setting his average weekly wage ("AWW") at \$206 and to issue an order setting the AWW at \$912.60.

Findings of Fact:

{¶6} 1. On March 27, 2001, Richard K. Tyler ("claimant") sustained an industrial injury. His workers' compensation claim was allowed for left hand conditions.

{¶7} 2. In his First Report of Injury ("FROI"), claimant identified the employer in the claim as "Dixon Electric" in Canton, Ohio. Claimant stated that his hourly wage was \$25.09 and that he worked five days per week from 7 a.m. to 3:30 p.m..

{¶8} 3. According to a notation in the file, the Bureau of Workers' Compensation ("BWC") tentatively set the full weekly wage ("FWW") based on the information in the FROI.

{¶9} 4. In May 2001, the BWC asked claimant to provide proof of wages for the year preceding injury—March 27, 2000 to March 27, 2001.

{¶10} 5. The record shows no response by claimant at that time.

{¶11} 6. In July 2001, the BWC, having no documentation of wages for the year preceding injury, set the AWW at the state minimum, \$206. The BWC stated that the AWW would be adjusted upon submission of wage information. The order lists the employer as "S M DIXON ELECTRIC INC" in Canton.

{¶12} 7. In December 2002, claimant filed 15 pages of bank statements for the account of "R. KEITH TYLER DBA TYLER ELECTRIC SERVICE." The address was a post-office box in Warren, Ohio. On some statements, the account shows no deposits,

but other statements show one to five deposits. All the statements show numerous checks that were debited against the business account.

{¶13} 8. In December 2002, claimant filed a motion asking the commission to do the following: "[S]et the average weekly wage at \$912.60 (Total of employment deposits and 3010.80 divided by 52 weeks)."

{¶14} 9. In May 2001, a district hearing officer ("DHO") denied the request to set the AWW at \$912.60 on the grounds that claimant had failed to substantiate this amount. The DHO stated that claimant must file documentation of his income from Tyler Electric, such as income tax documents. The AWW was set at \$206. The DHO order listed the employer as "S M Dixon Electric Inc." in Canton, Ohio.

{¶15} 10. Claimant appealed, filing an affidavit as follows:

1. That the deposit slips for the bank in the name R. Keith Tyler, dba Tyler Electric Service, indicates monies earned from any and all activities and/or contracting jobs performed under the name of Tyler Electric Service.
2. All monies that were deposited into Second National Bank checking account is a fair and accurate assessment of Gross Income for the said business.
3. No monies deposited were from any other outside source and/or activities but for work performed on behalf of and pursuant to Tyler Electric Service.

11. In July 2003, a staff hearing officer affirmed as follows:

The Staff Hearing Officer denies the claimant's request to set his average weekly wage at \$912.60. The Staff Hearing Officer notes that claimant's argument in support of a \$912.60 average weekly wage is based upon earnings that claimant received in the period from 3/27/2000 to 3/27/2001 from self-employment. However, the Staff Hearing Officer

finds that there is an absence of corroborating documentation in the form of tax returns, business records, Ohio wage statements to establish that claimant earned \$47,455.31 from his self-employment in Tyler Electric Services during the above applicable period. The Staff Hearing Officer finds that claimant's self-serving affidavit of 6/11/2003, in the absence of such corroborating documentation as noted above, is insufficient to adjust the claimant's average weekly wage from the \$206.00 figure established by BWC order of 7/7/2001.

The SHO identified the employer as in the DHO order above.

{¶16} 12. Further appeal was refused.

Conclusions of Law:

{¶17} Claimant challenges the commission's refusal to set his AWW at \$912.60, arguing that the commission abused its discretion in failing to accept his bank statements and affidavit relating to self-employment. For the reasons set forth below, the magistrate concludes that claimant has not proved an abuse of discretion.

{¶18} Calculation of the AWW is governed by R.C. 4123.61, which states:

* * * [T]he claimant's * * * average weekly wage for the year preceding the injury * * * is the weekly wage upon which compensation shall be based. In ascertaining the average weekly wage for the year previous to the injury, * * * any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated.

In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying this section, the administrator of workers' compensation, in determining the average weekly wage in such cases, shall use such method as will enable him to do substantial justice to the claimants.

{¶19} Under the standard formula in the first paragraph of R.C. 4123.61 as quoted above, the commission totals the wages for the 52 weeks preceding the injury and divides that total by 52, excluding unemployment beyond the control of the worker. The second paragraph provides, however, that the standard formula is not used where its application would be unjust under the particular circumstances. Under R.C. 4123.61, when "special circumstances" are found, the commission may adopt a different method of calculation. The overriding principle is to do substantial justice to the claimant while not providing a windfall. *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286. See, also, *State ex rel. Cawthorn v. Indus. Comm.* (1997), 78 Ohio St.3d 112.

{¶20} In his brief in mandamus, claimant asserts that, prior to his employment with S.M. Dixon Electric, Inc., he was the sole proprietor of a business known as Tyler Electric Service. There is no evidence in the record, however, regarding claimant's date of hire with Dixon Electric or evidence as to how long he was employed at Dixon Electric before he was injured. Further, the record does not include any payroll documents from Dixon Electric to substantiate the hourly rate of pay that claimant was allegedly earning at the time of injury. Nonetheless, claimant argues that the commission lacked discretion to deny his request for an AWW of \$912.60. Claimant relies on judicial precedent regarding workers who are injured after beginning a new job.

{¶21} Several decisions have addressed the situation where a worker is injured shortly after beginning a new job. Even where the period of unemployment before the new job was voluntary, the worker may qualify for the "special circumstances" exception, depending on the circumstances. In *State ex rel. Riley v. Indus. Comm.* (1983), 9 Ohio

App.3d 71, an employee began a full-time job after a period during which he chose not to work due to other income. After returning to the labor market, he was injured after three weeks at the new job. The evidence indicated, however, that the injured worker would have continued to be employed in his job and would have continued to earn his same salary. The court found "no indication that relator did not intend to work regularly in the future." *Id.* at 72.

{¶22} The court concluded that the "total circumstances" indicated that the commission abused its discretion by dividing three weeks of earnings by 52 weeks. The court explained that basing claimant's AWW on 48 weeks of unemployment was "obviously an unjust barometer of relator's prospective future average wages that would be lost if he could not work." *Id.* at 73.

{¶23} In *State ex rel. Sutherland v. Indus. Comm.* (Sept. 25, 1986), Franklin App. No. 85AP-866, the claimant obtained employment on release from prison but was injured after four days on the job. In regard to the first paragraph of R.C. 4123.61, this court held that claimant's period of incarceration was not beyond his control so as to be eliminated from the standard calculation. However, in regard to the second paragraph of R.C. 4123.61, the court determined that the period of incarceration was a special circumstance that justified the use of an alternative method of computing claimant's AWW. The court relied on *Smith v. Indus. Comm.* (1986), 25 Ohio St.3d 25, for the proposition that, while a period of unemployment might not be excludable from the standard calculation, it could nonetheless involve present "special circumstances" under which the AWW could not be justly determined by using the standard formula.

{¶24} In the present action, the record includes no evidence of claimant's rate of pay at Dixon Electric other than stating his hourly rate on the FROI. With respect to his rate of pay from self-employment, claimant provided only bank statements listing deposits that, he said, showed his gross receipts. In a sole proprietorship, however, the gross receipts of the business do not necessarily represent the income received by the proprietor. Despite the fact that the statements showed numerous debits from this business account, claimant did not provide documentation to show that none of the debits represented business expenses such as payments for supplies used and equipment installed. Likewise, claimant provided no documentation to demonstrate that gross receipts did not include customers' payments for supplies and equipment. Indeed, claimant provided no documentation to demonstrate that all the deposits represented payments from customers for his services as an electrician.

{¶25} The commission is the sole evaluator of the credibility and weight of evidence. *State ex rel. Bell v. Indus. Comm.* (1995), 72 Ohio St.3d 575, 577; *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373; *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165; *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18. As the finder of fact, the commission is within its discretion to require documentation beyond a claimant's uncorroborated assertions. See *State ex rel. Baker v. Indus. Comm.* (1999), 86 Ohio St.3d 575.

{¶26} In *Baker*, the claimant asserted that he was unable to obtain payroll documents from a former employer and that the former employer responded to his request for documentation by mailing a form letter stating that employment records for the

year in question were no longer available. Claimant provided a copy of the form letter, but did not appear at the hearing to testify. Although the lack of evidence in *Baker* was more extreme than the facts in the present action (in that the statement submitted to the commission was unsworn and he did not appear at the hearing), the court's opinion indicates that the commission has discretion to require documentation of wages before increasing a claimant's AWW. More importantly, the court observed that there is usually more than one type of documentation to substantiate income:

* * * [The former employer] was not the only potential source of income verification. **Claimant could have submitted tax records, income tax returns, or W-2 forms to substantiate additional income, but he did not.**

Id. at 576 (emphasis added).

{¶27} In the present action, claimant could have submitted income tax records to substantiate what he earned as a self-employed electrician. Indeed, the DHO explicitly suggested that claimant should submit documentation such as an income tax return in order to prove his earnings from self-employment during the year preceding injury, but he did not.

{¶28} With no payroll information in the record and no documentation other than bank statements with unidentified debits and credits, the commission was within its discretion to find claimant's evidence insufficient to establish the alleged amount of wages. Accordingly, the magistrate concludes that claimant has not met his burden of proof in mandamus and recommends that the court deny the requested writ.

