[Cite as *State ex rel. Warner v. Indus. Comm.*, 2010-Ohio-2476.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Rick D. Warner,	:	
Relator,	:	
v.	:	No. 09AP-841
Industrial Commission of Ohio and Central Allied Enterprises, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 3, 2010

Stocker Pitts Co. LPA, and *Thomas R. Pitts*, for relator.

Richard Cordray, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

Kastner Westman & Wilkins, LLC, and *James W. Ellis*, for respondent Central Allied Enterprises, Inc.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} Rick D. Warner ("Warner") filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to raise his average weekly wage ("AWW").

{¶2} In accord with Loc.R. 12, 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 containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we not grant the requested writ.

{¶3} Counsel for Warner has filed objections to the magistrate's decision. Counsel for the commission has filed a memorandum in response. Counsel for Central Allied Enterprises, Inc. ("Allied"), has also filed a memorandum in response. The case is now before the court for a full, independent review.

{¶4} Warner was injured in September 2007 while working in the asphalt paving industry. In that industry, workers actually work for most of the year but routinely are idle during the months when Ohio weather prevents asphalt paving. Some workers draw unemployment compensation. Some seek other employment. Warner apparently drew unemployment compensation during the time he was not working in asphalt paving.

{¶5} A staff hearing officer ("SHO") with the commission set Warner's full weekly wage at $1,495.03 based upon his earnings for the six weeks prior to his injury. The SHO set Warner's AWW at $713.04, based upon earnings of $37,078.29 for the full year prior to the injury. The SHO did not include any income for the weeks Warner was idle, including income from unemployment compensation. The SHO found that Warner chose to work in an industry which only works part of the year and that unemployment compensation is neither earnings nor wages for purposes of computing AWW. Our magistrate accepted these findings and reached the same result.

{¶6} Warner's counsel attacks these findings with the following objections:

> 1. The Magistrate erred in concluding that the Industrial Commission did not abuse its discretion by improperly including a period of unemployment which was beyond the Injured Worker's control when setting the average weekly wage.
>
> 2. The Magistrate erred in concluding that the Industrial Commission did not abuse its discretion by including both the Injured Worker's period of unemployment and excluding unemployment compensation received during the same period when setting the average weekly wage.

{¶7} Warner had worked for Allied Enterprises for four years when he was injured. He had worked in the asphalt paving industry for many more with other employers. In 2008, he was unemployed for 22 weeks and drew unemployment compensation. R.C. 4141.29(A)(4)(a)(i) requires that a laid-off worker demonstrate that he or she is actively seeking work in order to receive unemployment compensation. Thus, the information before the SHO and our magistrate contains a fact from which a job search could be inferred. However, no additional evidence of a job search was presented.

{¶8} The SHO found that Warner "presented no evidence of any attempt to look for work during his period of seasonal layoff." This finding is technically incorrect because the SHO had detailed evidence of the payment of unemployment compensation. See *State ex rel. Baker Concrete Constr., Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114. As a result, the SHO did not attempt to weigh or balance the evidence. The finding that this was no evidence meant that this was nothing to weigh for Warner. This was an error to be corrected upon further review.

{¶9} We also reject the SHO's findings with respect to the exclusion of unemployment compensation with respect to the AWW. Unemployment compensation is taxable income for purposes of the Internal Revenue Code. Penalizing an injured worker for periods of unemployment when the injured worker could be found to have sought work in the previous year seems inherently unreasonable and unfair. An AWW is intended to be a fair basis for the loss of future compensation for a worker who is injured on the job. See *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286. Especially in the current economy an injured worker should not be penalized for accepting employment for part-time work or work in an industry which has periods of lay-off.

{¶10} Both objections on behalf of Warner are sustained. We grant a limited writ of mandamus to compel the commission to weigh the evidence with regard to Warner seeking employment during the time Allied Enterprises idled him via a seasonal layoff. Based upon that weighing, the commission shall further address the inclusion of the unemployment compensation in computation of Warner's AWW.

Objections sustained;
limited writ granted.

McGRATH and CONNOR, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Rick D. Warner,	:	
Relator,	:	
v.	:	No. 09AP-841
Industrial Commission of Ohio and Central Allied Enterprises, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on February 26, 2010

Stocker Pitts Co. LPA, and *Thomas R. Pitts*, for relator.

Richard Cordray, Attorney General, and *Gerald H. Waterman*, for respondent Industrial Commission of Ohio.

Kastner Westman & Wilkins, LLC, and *James W. Ellis*, for respondent Central Allied Enterprises, Inc.

IN MANDAMUS

{¶11} Relator, Rick D. Warner, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order setting his average weekly wage ("AWW") at $713.07 based on wages of $37,078.29 divided by 52 weeks upon a finding that relator was a

seasonal worker by choice and ordering the commission to exclude his period of unemployment and ordering the commission to include unemployment compensation he received during that same period.

Findings of Fact:

{¶12} 1. Relator sustained a work-related injury on September 7, 2007, and his claim has been allowed for the following conditions:

> Contusion face/scalp/neck; abrasion – left hand; cervical sprain/strain, thoracic sprain/strain; substantial aggravation pre-existing lateral cervical radiculitis left; substantial aggravation pre-existing cervical spinal stenosis.

{¶13} 2. Relator filed an application for temporary total disability ("TTD") compensation beginning April 23, 2008, and continuing.

{¶14} 3. On July 2, 2008, a hearing was held before a district hearing officer ("DHO"). At that time, relator dismissed his request for TTD compensation. Thereafter, the DHO considered the matter of relator's AWW. The DHO made the following determination:

> It is the decision of the District Hearing Officer to set the average weekly wage at $713.04 based on wages of $37,078.29 divided by 52 weeks.
>
> This decision is based on the wages on file in the year prior to the date of injury. The evidence also indicated that the Injured Worker was a seasonal worker by choice and that periods of unemployment were not due to circumstances beyond his control.

{¶15} 4. Upon appeal, the matter was heard before a staff hearing officer ("SHO") on October 8, 2008. The SHO considered relator's arguments and made the following determination with regard to setting relator's AWW:

> It is the order of the Staff Hearing Officer that the Full Weekly Wage is set at $1,495.03 based on the Claimant's earnings in the 6 weeks prior to the date of injury including overtime, $8,970.19 divided by 6 weeks. This figure is adopted as it is higher than the Claimant's earnings in the week prior to the date of injury without overtime.
>
> The Claimant has requested that 22 weeks of unemployment be excluded from the calculation of the Average Weekly Wage. However, the period of unemployment at issue represents a seasonal layoff from the Claimant's employment with an asphalt paving company. The Claimant testified that he had been employed by this Employer for approximately four years prior to the injury in this claim. Further, the Claimant testified that he has been employed in this particular field for many years. Thus, the Hearing Officer finds that the seasonal layoff was not unforeseen and is a normal part of employment within this industry. The Claimant has presented no evidence of any attempt to look for work during his period of seasonal layoff. Thus, the Hearing Officer finds that the unemployment sustained by the Claimant represents a lifestyle choice and shall not be excluded from the calculation of the Average Weekly Wage. State ex rel Baker Concrete Constr., Inc. v. Indus. Comm. (2004), 102 Ohio St. 3d 149.
>
> In the alternative, the Claimant requests that his unemployment benefits be included in the calculation of the Average Weekly Wage. However, the Hearing Officer finds that unemployment benefits are not "earnings" or "wages" and therefore cannot be included in the calculation of the Average Weekly Wage. State ex rel McDulin v. Indus. Comm. (2000), 89 Ohio St. 3d 390.
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> Accordingly, it is the order of the Staff Hearing Officer that the Average Weekly Wage is set at $713.04 based on $37,078.29 divided by 52 weeks.

{¶16} 5. On September 8, 2009, relator filed the instant mandamus action in this court challenging the commission's determination of his AWW.

Conclusions of Law:

{¶17} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶18} In this mandamus action, relator argues that the commission abused its discretion by improperly including a period of unemployment which was beyond his control and in excluding the unemployment compensation received by relator in calculating his AWW. For the reasons that follow, relator's request for a writ of mandamus should be denied.

{¶19} As a general rule, AWW is typically computed by dividing the claimant's total earnings for the year preceding the injury by 52 weeks. R.C. 4123.61. The statute also provides in part: "In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins any period of

unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated."

{¶20} Relator argues that the commission abused its discretion by applying the above formula. Instead, relator argues that the commission should have excluded 22 weeks of seasonal unemployment from his AWW calculation because it represents a period of unemployment beyond his control. In the alternative, relator contends that the commission should have included the unemployment benefits he received during his seasonal layoff in calculating his AWW.

{¶21} In *State ex rel. Baker Concrete Constr., Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114, a dispute arose over how to handle the 16 weeks of the claimant's unemployment that followed the employer's yearly seasonal slowdown and accompanying layoffs. The claimant sought to have both the 16 weeks of unemployment and the amount of unemployment compensation excluded from the calculation. The employer argued that the claimant was employed as a union construction worker who expected to work 8 months out of the year and expected to receive unemployment compensation for 4 months out of each calendar year. The claimant testified that this pattern repeated itself every year. The commission excluded the 16 weeks of unemployment and the unemployment compensation paid for those weeks, finding that the unemployment was due to circumstances beyond the claimant's control and the nature of the construction business. This court issued a limited writ of mandamus returning the cause to the commission and the Supreme Court of Ohio agreed. The *Baker* court determined that the commission's fleeting reference to the

claimant's unemployment benefits reflected a lack of analysis of the critical question of whether the claimant's 16 weeks of unemployment were actually beyond his control. The *Baker* court stated:

> At issue is the excludability of claimant's 16 weeks of seasonal unemployment. Claimant maintains that unemployment was beyond his control as demonstrated by his receipt of Ohio Bureau of Employment Services ("OBES") benefits.1 Baker counters that the annual, as opposed to one-time, occurrence of claimant's seasonal layoff removes it from the realm of unforeseen and hence involuntary unemployment.
>
> To date, foreseeability of job loss has not rendered seasonal unemployment voluntary. In State ex rel. The Andersons v. Indus. Comm. (1992), 64 Ohio St.3d 539, 597 N.E.2d 143, the claimant knew up front that his job would only last six to eight months. The employer contested exclusion of the subsequent unemployment from the AWW calculation, asserting that because claimant accepted the job knowing that he would be released at season's end, the unemployment that followed could not be considered beyond his control.
>
> The employer did not prevail. In upholding exclusion, we cited the principle of encouraging gainful employment, observing that the claimant may have taken the position because it was all that he could find.
>
> The Andersons' precepts obviously do not transfer seamlessly to this case. There is no evidence in this case that claimant took this job because it was the only one available. Likewise, there is no proof that claimant has stayed at this job over the years because other options did not exist. Herein lies the dilemma. It is one thing to work a seasonal job because no alternatives are present. It is perhaps another when seasonal employment becomes a pattern. At that point, it is legitimate to ask whether such employment has become a lifestyle choice.

[1] R.C. 4141.29(A)(4)(a)(i) premises these benefits on proof that the individual is actively seeking work.

> We have decisively declared that workers' compensation benefits are not intended to subsidize lifestyle choices. Over a decade ago, in State ex rel. Pauley v. Indus. Comm. (1990), 53 Ohio St.3d 263, 559 N.E.2d 1333, we declined to award impaired-earning-capacity benefits to a claimant who left the labor market to stay home with her children. Even where the claimant has remained in the work force, extra scrutiny is given to employment that is not regular full-time work. This now includes part-time and self-employment and, because of the potential lifestyle benefits of seasonal work, may include this new category as well. See, e.g., State ex rel. Pepsi-Cola Bottling Co. v. Morse (1995), 72 Ohio St.3d 210, 648 N.E.2d 827; State ex rel. Brinkman v. Indus. Comm. (1999), 87 Ohio St.3d 171, 718 N.E.2d 897; State ex rel. Ooten v. Siegel Interior Specialists Co. (1998), 84 Ohio St.3d 255, 703 N.E.2d 306.
>
> While the phrase "lifestyle choice" has been applied only to benefit eligibility and not the amount thereof, it may very well be relevant in calculating AWW. AWW cannot provide a windfall to claimants. State ex rel. Wireman v. Indus. Comm. (1990), 49 Ohio St.3d 286, 551 N.E.2d 1265. It follows, therefore, that if seasonal unemployment springs from a lifestyle choice, then those weeks of unemployment are not beyond a claimant's control and omitting those weeks from the AWW contradicts both the statute and case law.
>
> Determining whether a particular employment pattern is a lifestyle choice relevant to calculating a claimant's AWW is logically a question of intent, which, in turn, derives from words and actions. * * *

Id. at ¶14-20.

{¶22} Relator points to that portion of the court's decision where the court criticized the commission's statements that he expected to work eight months out of the year and to receive unemployment compensation for four months out of the calendar year. The court was critical because that statement does not demonstrate intent. Relator contends that the commission's statements in the present case are every bit as

conclusory and constitute an abuse of discretion. For the reasons that follow, this magistrate disagrees.

{¶23} Following the *Baker* decision, claimants, such as relator, are well aware of the type of information they must present to the commission regarding their intent. In the present case, relator indicated that he had been in the asphalt paving business for a number of years and that he had worked for this specific employer for the last four years. Relator could have presented evidence that, in the preceding years, he obtained other employment during the period of seasonal unemployment; however, it does not appear that he did so. Relator also could have presented evidence that there were no other alternatives available to him but this employment. Apparently, he failed to do so. In *Baker*, the court made clear that this type of evidence could demonstrate that repeated seasonal unemployment over a number of years is not necessarily voluntary, in which case the commission could find that it was not a lifestyle choice. Because the commission is only required to cite the evidence upon which it relies and provide a brief explanation, the magistrate finds that the commission did not need to explain what evidence relator could have, but did not, presented in support of his argument. Again, following *Baker*, relator should have been aware of the type of evidence he needed to present and the magistrate finds that he failed in sustaining his burden of proof in this regard.

{¶24} Relator also contends the fact that he was receiving unemployment compensation is evidence that he was actively seeking employment. However, as the

court in *Baker* concluded, a job search that satisfies the Ohio Bureau of Employment Services ("OBES") might not satisfy the commission.

{¶25} Relator also cites this court's decision in *State ex rel. R & L Carriers Shared Servs., L.L. v. Indus. Comm.*, 10th Dist. No. 05AP-282, 2005-Ohio-6372, and asserts that it is analogous to his situation. This magistrate disagrees. In *R & L Carriers*, the claimant had a 25 year history as a truck driver for a company that delivered construction materials to job sites. This work was seasonal in nature and the claimant was usually laid off in late fall or early winter each year. The commission noted that, for the first 24 years, the claimant's seasonal employment may or may not be characterized as a lifestyle choice. However, the commission relied on the claimant's testimony to find that this time he did not just accept the seasonal layoff as he had in prior years. Instead, the claimant testified that his current situation no longer provided him with sufficient income to meet his bills and he had been taking steps to secure new and better employment. The claimant testified that he read newspaper want ads, networked with other drivers, and visited local truck stops. The claimant also testified that he applied for positions with five separate companies and that it was through these efforts that he had been hired by the employer for whom he was working at the time he was injured. As such, the commission determined that the 27 weeks of unemployment in the year prior to his injury were properly excluded from the calculation of his AWW.

{¶26} In *R & L Carriers*, this court specifically noted that the claimant's past work history was not the only evidence before the commission to determine the claimant's

intent. The claimant had testified that, in the year immediately prior to his injury, he did not simply accept his seasonal layoff as he had in the past. Instead, claimant testified that he determined that he needed to secure new and better employment and that he pursued a job search instead. There is no evidence in the record that relator provided any similar testimony. Relator could have provided this court with a copy of the hearing transcript; however, he did not. It was relator's burden to convince the commission to deviate from the typical AWW calculation. In the absence of such evidence, this court cannot infer it existed. Relator has not shown that the commission abused its discretion.

{¶27} Relator's final argument urging this court to order the commission to include his unemployment compensation as wages is that it constitutes income he earned. He worked; he was laid off; he met the requirements of OBES and was paid unemployment compensation. Therefore, he earned those wages.

{¶28} There is no case law to support relator's argument and the commission's refusal to follow it does not constitute an abuse of discretion.

{¶29} In the present case, it appears that the only evidence relator submitted was the fact that he was receiving unemployment compensation. That fact alone is not sufficient evidence to prove he did not intend to remain a seasonal employee. Other than the fact that he was receiving unemployment compensation, relator failed to present any evidence that it was not his ongoing intent to accept seasonal employment which included a period of regular unemployment.

{¶30} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion when it determined his AWW, and this court should deny his request for a writ of mandamus.

/s/Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).