IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. GENERAL MOTORS CORPORATION, Appellee, v. CHESTER STEPHAN and THE INDUSTRIAL COMMISSION OF OHIO, et al., Appellants.	: : : : : : : : : : : : : : :	Case No. 07-0210 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 06AP-373 (Originated in the Common Pleas Court) (C.P.C. No. 00CVH-11-10211)

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, CHESTER STEPHAN

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is a case of first impression and its importance should be established early on. Beside the fact that this issue has never been before the courts in Ohio is the fact that General Motors ("G.M.") has changed its accounting procedures and the potential impact of this would affect tens of thousands of injured workers. Couple with this the ability of other self-insuring employers to follow suit and the impact could easily reach hundreds of thousands of injured workers throughout Ohio. Thus, this issue has far-reaching implications that may well work their way through the courts only to further clog the already heavy-ladened docket of this Court. This Court should agree to hear this issue due to the great importance it has on injured workers in Ohio. The underlying court of appeals decision creates a slippery slope from which many lawsuits may emanate. It would also be more expeditious to have a final decision issue now from this Court, rather than just waiting for the next aggrieved party to initiate its claim in the court of appeals and be entitled to an appeal of right. Remember that appellees sought to initiate this action in the common pleas court.

The next issue is that the court of appeals seems to be willing to indicate that appellants' argument is some "novel" approach when dealing with this issue. What was not mentioned was the fact that this "novel" approach was, in fact, G.M.'s prior policy and had been in effect and working fine for years prior to the change they instituted from which this hydra raises its unseemly head. The effect of this would be to permit self-insuring employers to be able to change their accounting methodologies with no ensuing ability to be regulated by the very agencies that were put in place to do so.

Ohioans have a constitutionally protected right under Article II Section 35 of the Ohio Constitution to have laws enacted to ... provide compensation ... to workmen ... for ... injuries... occasioned in the course of such workmen's employment... Section 4123 of the Ohio Revised Code was enacted to do just that. It was a trade-off for allowing employers not to be sued at common law for workplace injuries. Thus, pursuant to Section 4123.56 (A), disabled workers in Ohio have the right to be compensated for their workplace injuries. This does not include, as the decision from the court of appeals would cause, that disabled workers will now have an additional burden placed upon them in the form of having to chase monies that may ultimately never be paid to them. There can be no doubt that , on page 10 of its opinion, the court of appeals erroneously **assumes** that injured workers will receive the exact amount of their **entitled** disability payments back from various taxing authorities. Nothing could be further from the truth. The time constraints in this case alone would indicate that Stephan, upon receiving his first valid unfavorable decision from the court of appeals, would now be barred from applying for or receiving any refunds due to I.R.S. regulations which prohibit filing an amended return beyond three (3) years from the initial filing date.

As noted, the governing statute for payment of temporary total disability benefits is R.C. 4123.56(A). And, the General Assembly made particular provisions for offsets of sickness and accident payments within the purviews of R.C. 4123.56(A). Specifically, the statute provides:

> "Offset of the compensation shall be made **only** upon the prior order of the bureau or industrial commission or agreement of the claimant."

No document has ever been presented by which the claimant in this case has agreed to the type of offset sought by appellee. The only order by the commission is the one questioned by appellee. Remember, the General Assembly squarely left the offset provisions within the commission's purview and discretion. Yet, the court of appeals refused to even address this

issue although squarely before it. Instead, they make an attempt to address a "fictitious double recovery" which has never been demonstrated, only alleged by appellee. As if that were not enough, appellee is asking this Court to remove the authority granted to the commission and to act as a pseudo, super-commission, in effect.

Once again, disabled workers have a constitutionally protected right to have replacement wages **timely** paid to them as a result of their workplace injuries. Nowhere is it mentioned in any statute nor would any reasonable person presume that an injured worker may have to wait months, even years, to receive benefits for a validly determined workplace injury. And no court has yet addressed the situation in which an individual's particular tax situation would not warrant a return of any withheld taxes by an employer. Thus, the substantial constitutional question is obvious in this case as well as the public or great general interest inasmuch as this would potentially touch every working man and woman in Ohio.

STATEMENT OF THE CASE AND FACTS

This is a workers' compensation case arising as a mandamus action in the Court of Commons Pleas, Franklin County, Ohio. Appellee, General Motors Corporation (hereinafter "GM"), contends that Appellant, Industrial Commission of Ohio (hereinafter "Commission"), abused its discretion by ordering GM to pay its employee and co-appellant, Chester L. Stephan (hereinafter "Stephan"), temporary total disability benefits as calculated on a "net" benefit basis, without any improper, superimposed deductions for taxes.

As a prelude to the underlying facts in this case, let it be clear that the central issue does not revolve around any obligations, supposed or otherwise, as they may relate to federal, state,

and/or city taxes. It must be remembered that this is a workers' compensation case. It must also be noted that workers' compensation benefits are **not** taxable income.

On October 5, 1998, Stephan injured himself arising out of and while in the course of his employment for GM. Stephan filed for workers' compensation benefits on October 10, 1998. While waiting for GM to respond to his application, Stephan also filed for Sickness & Accident Benefits (hereinafter "S & A") on October 27, 1998, and clearly noted on this application that his disability was caused by his work for GM. After initially rejecting Stephan's claim on November 16, 1998, GM subsequently approved it in early 1999. By its order mailed March 31, 2000 (from a hearing held before it on January 6, 2000), the Industrial Commission found that Stephan was disabled from work due to his work-related injury for sixteen and six-sevenths (16 6/7) weeks and noted the correct weekly amount of benefits due. There is no dispute over this matter. What is at issue is how GM handled the payments for these periods.

Prior to Stephan's injury, G.M. decided to change their accounting methods for disputed work-place injuries. For the lengthy period prior to this "new" accounting method, G.M. had previously made what it termed "disability advances". From these, **pursuant to the requirements of the various taxing authorities,** G.M. properly withheld taxes, but did not send the amounts to the taxing authorities until a final determination on compensability was made. Put another way, G.M. had a long-standing bookkeeping method of withholding potential income taxes from sickness & accident benefits and placing them in "escrow" until the compensability of the claim was final. If the injury was determined to be a valid workers' compensation claim, then the withholdings were paid to the injured worker. However, if the injury was found not to be compensable under workers' compensation, then G.M. would pay the

withholdings to the proper taxing authorities. This method stood the test of time and was never challenged by the various taxing authorities.

What should be the first glaring "red flag" for this honorable Court is why should G.M. be allowed to indiscriminately change their accounting methods and place an impermissible burden on the already injured backs of its workers. To reiterate, G.M.'s "new accounting method" was to pay disputed workers' compensation claims under its sickness & accident policy and then to send withholdings to the various taxing authorities with the ensuing sickness & accident checks. This would leave the injured workers to attempt to seek some "supposed refund" from those same authorities if the injuries were later deemed compensable. To date, G.M. has offered absolutely no reason for its changed bookkeeping procedures.

Upon receiving the commission's decision, Appellee filed a mandamus action in the Franklin County Common Pleas Court. After a series of decisions which were reviewed by the court of appeals, the matter was sent back to the new acting judge, Judge Reece, for a decision. Judge Reece denied appellee's writ and reasoned that a liberal construction of R.C. 4123.56(A), as is **mandated** by R.C. 4123.95 would validate the commission's ruling. G.M. appealed wherein the court of appeals rendered its Decision in December of 2006 granting appellee's writ of mandamus. It is from this decision that appellants seek redress from this honorable Court.

Proposition of Law # 1:

> The Industrial Commission of Ohio did not abuse its discretion by ordering GM to pay the full amount of temporary total disability benefits due without any unlawfully superimposed deductions.

It is well-settled under Ohio Law that the extraordinary remedy in the form of a writ of mandamus will not be issued from a determination of the Commission unless the Relator

establishes that there is 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. The Relator has the burden of proof in this regard. *State ex rel. Rouch v. Eagle Tool and Machine Company* (1986), 26 Ohio St.3d 197, 198. 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. In an action in mandamus, an order of the commission will be upheld absent a finding that the commission abused its discretion, and no abuse of discretion will be found if there is "some evidence" to support the decision. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170; *State ex rel. Burley v. Coil Packaging, Inc.* (1987), 31 Ohio St. 18, 20.

In *Elliott*, the Supreme Court stated, "[I]t must be assumed, absent evidence to the contrary, that the Commission acted in good faith and properly performed its function in reviewing the evidence before it." *Elliott, supra*, at 79. See, also, *State ex rel. Gerspacher v. Coffinberry* (1952), 157 Ohio St. 32. Also,in *State ex rel. Brady v. Indus. Comm.* (1986), 28 Ohio St.3d 241, 242, the Supreme Court stated, "...because decisions that come to us from the Commission have a presumption of regularity..., [this Court] will not compel the Commission to specifically and expressly disprove every potential basis for compensation, either real or imagined, before [this Court] allow[s] a Commission decision to stand."

Thus, the Court may not usurp the discretionary function vested with the Commission where the Commission has exercised its discretion soundly and within legal bounds. *State ex rel. Goodyear Tire & Rubber Co. v. Indus. Comm.* (1974), 38 Ohio St.2d 57. The Supreme Court has defined abuse of discretion as follows: "An abuse of discretion implies not merely error in

judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. An abuse of discretion will be found only where there exists no evidence upon which the Commission could have based its decision." *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193.

As noted from the commission's order, GM was ordered to pay the amount of benefits calculated to be payable to Stephan. Turning to the relevant workers' compensation statutes at hand, we look first to R.C. 4123.95 which states,

> "Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependants of deceased employees."

The governing statute for payment of temporary total disability benefits is R.C. 4123.56(A). And, the General Assembly made particular provisions for offsets of sickness and accident payments within the purviews of R.C. 4123.56(A). Specifically, the statute provides:

> "Offset of the compensation shall be made **only** upon the prior order of the bureau or industrial commission or agreement of the claimant."

No document has ever been presented by which the claimant in this case has agreed to the type of offset sought by Appellee. The only order by the commission is the one questioned by Appellee. Remember, the General Assembly squarely left the offset provisions within the commission's purview and discretion. Appellee is asking this Court to remove the authority granted to the commission and to act as a pseudo, super-commission, in effect.

This would clearly violate the mandates set forth by the Supreme Court. R.C. 4123.56(A) is a plain and unambiguous statute. As the Supreme Court recently reaffirmed that "[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for * * * [resort] to rules of statutory interpretation. *State ex rel. Crossett Co., Inc. v. Conrad* (2000), 87 Ohio St.3d 467, 471. The Court went on to state that an

unambiguous statute is to be applied, not interpreted. Following this precedent, Appellee's argument must be rejected.

To add insult to injury, GM contends that somehow an additional onerous burden should now be placed on Stephan's back by seeking to have this Court impose a heretofore yet unheard of "requirement" that Stephan seek to recover his valid workers' compensation benefits from the Internal Revenue Service. There is absolutely no basis for this contention to be found anywhere in the workers' compensation statute. If the General Assembly did not require this, surely GM should be precluded from petitioning this Court to somehow impose such a requirement which would have the effect of re-writing the statute. Clearly, this is impermissible.

Further, there is nothing in the record whatever that would indicate that Stephan would receive the equivalent amount of benefits due from the Internal Revenue Service. Appellee has made the assertion that Stephan would be entitled to a return of monies (arguably in the amount that the commission found he was shorted), although no offer of proof has been made in this regard other than pure speculation. Yet, one needs only look to the four corners of the document to note that nowhere on the form does it indicate how much monies were withheld from federal taxes! There were also no amounts listed in the state and local taxes withheld. Should Stephan file an amended return with this document, it could very easily result in an audit. Besides trying to force Stephan to wait well past the required time to receive his workers' compensation benefits, GM is really trying to purport that it is reasonable, given the workers' compensation statute, that he should also be forced to forego the expense of filing an amended return and the possibility of further costs associated with an audit. Indeed, GM's assertion that Stephan claim his monies from the Internal Revenue Service would violate the timely payment requirement contained within R.C. 4123.511(H).

GM has admitted that this is a new venture on their part. They note that there was a previous system identified as GMDA that correctly dealt with monies payable under these circumstances. They may have been wise to have kept that system in place.

A specific statutory proscription is in place for handling payments as in the instant case. The statute is unambiguous and therefore not open to interpretation. Simply put, the statute says what it says. And the relevant portion of the statute vests the power regarding offsets of compensation to the commission itself. The commission has spoken through its order and there is no statutory violation in the same. Everyone agrees that workers' compensation benefits are non-taxable income. The workers' compensation act also sets forth the exact procedures for obtaining compensation for work-related injuries and the time frames associated with the same. Any attempt to change this statutory framework must fail, as would any attempt to place an additional burden on injured workers to seek their just compensation from someone other than those set forth in the workers' compensation statute. If GM chooses to erroneously withhold monies by mistakenly believing they have the right to do so does not change the specific statutory mandates set forth by the General Assembly. GM should be precluded from seeking redress for their perception of what they believe the statute should say. The statutory mandates are to be followed. There is no need to attempt to confuse wholly unrelated issues (tax refunds, etc.) with the clear language of the workers' compensation law.

What no one has addressed, including the court of appeals, is what happens if no refund is issued due to the various tax situations of the various individuals involved. Should these individuals somehow be denied their right to have timely benefits paid to them as a result of a legitimate workplace injury or should they be forced, as the court of appeals decision **will now**

allow, to have to prove their entitlement to such benefits a second time (this time to the IRS and various other taxing authorities)?

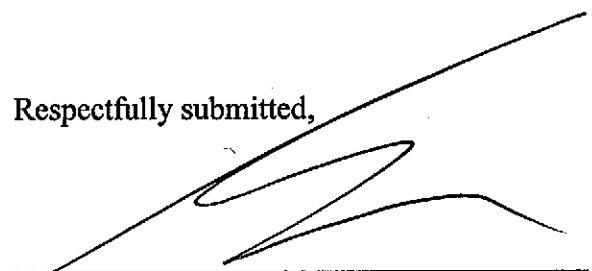
GM chose to pay S & A benefits from which they withheld taxes. Contrary to Appellee's contentions about their various obligation(s) to withhold taxes from these benefits, let it be clear that is not the issue in this case and its sole purpose seems to be to obfuscate the actual issue before this honorable Court. To reiterate, workers' compensation benefits are **not taxable**. GM's election to withhold taxes from benefits it deemed to be "substitute" workers' compensation benefits was of its own doing. They now seem willing to place some affirmative onus on Stephan to "chase" monies that were properly payable when so ordered by the commission. GM's desire to change their accounting procedures cannot be allowed to impermissibly interfere with injured workers' vested rights to timely receive compensation benefits determined by the agencies empowered with making this determination. GM's problems are a result of their own doing and the courts of Ohio should not be the vehicle they use to abrogate the time-honored salient law which has stood for years in Ohio.

CONCLUSION

The circumstances surrounding this case and its great importance to the citizens of Ohio should be readily apparent. This is a case of first impression and any discrepancies should be dealt with by the highest Court in the State. The far-reaching implications to the public have been noted. Great general interest in the fair application of constitutionally protected workers' compensation benefits have been set forth. The court of appeals decision failed to address these issues and incorrectly determined others. These are issues ripe for this honorable Court to decide.

WHEREFORE, Chester Stephan, by and through counsel, respectfully requests that this Court accept jurisdiction over this mandamus action and agree to hear the same.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction of Appellant, Chester Stephen was mailed to the parties listed below by regular U.S. Mail, postage prepaid, this 2nd day of February, 2007.

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APPENDIX

[Cite as *State ex rel. Gen. Motors Corp. v. Indus. Comm.*, 2006-Ohio-6736.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. General Motors Corporation,	:	
Appellant,	:	
v.	:	No. 06AP-373 (C.P.C. No. 00CVH-11-10211)
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Appellees.	:	

O P I N I O N

Rendered on December 19, 2006

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Jim Petro, Attorney General, and *Stephen D. Plymale*, for appellee Industrial Commission of Ohio.

Stephen E. Mindzak Law Offices, and *Stephen E. Mindzak*, for appellee Chester Stephan.

APPEAL from the Franklin County Court of Common Pleas.

TRAVIS, J.

{¶1} This is an appeal from a judgment of the Franklin County Court of Common Pleas which denied an application for a writ of mandamus. The appeal involves the proper application of certain provisions of the Ohio Workers' Compensation Act.

{¶2} The material facts of this case are not in dispute. Appellant, General Motors Corporation, is a self-insured employer. Appellant employed Chester Stephan. On October 10, 1998, appellee, Stephan, filed an application for workers' compensation benefits. Stephan claimed that, on October 5, 1998, while performing his job, he had herniated a disc in his back. On October 16, 1998, appellant declined to certify the application while appellant investigated to determine whether Stephan's back problem was work-related. While appellant conducted its investigation, Stephan applied for wage replacement benefits under a nonoccupational sickness and accident insurance program funded by appellant, General Motors. Under that program, appellant paid Stephan $7,091.30 in insurance benefits during a period of 16 weeks and six days that he was not at work: October 6, 1998 to January 30, 1999. The wage replacement insurance payments were made while Stephan's application for workers' compensation benefits was pending before the Ohio Bureau of Workers' Compensation. A portion of the insurance benefits was sent directly to Stephan while taxes were withheld and sent to the appropriate taxing authority.[1]

{¶3} In the past, appellant had withheld potential income tax, but did not submit it to the taxing authorities until it was determined whether the benefits paid qualified as workers' compensation or insurance benefits. At the time of this event, appellant had altered bookkeeping procedures so that amounts withheld for taxes for payments under the nonoccupational insurance program immediately were sent to the taxing authorities as with any other wage withholding payment. Under appellant's revised bookkeeping,

[1] Every employer who pays wages must deduct and withhold for taxes. Section 3402(a)(1), Title 26, U.S.Code. The term "wages" includes employer-funded wage replacement insurance benefits. U.S. Treasury Reg. 1.105-1(b); 31.3401(a)-1(b)(8). Ohio law also includes insurance benefits as income subject to withholding. R.C. 5747.01; and 5747.06. This is undisputed by the parties.

when insurance benefits are later determined to be workers' compensation and therefore, nontaxable, the employee has the right and the responsibility to file a request with the taxing authority for a refund of his or her taxes.

{¶4} In February 1999, after investigating Stephan's claim, appellant notified the commission that it would voluntarily recognize the injury as work-related. As a work-related injury, Stephan was entitled to $541 per week for temporary total disability ("TTD"), a total of $9,119.71. Because Stephan was entitled by law to $9,119.71 in workers' compensation benefits, and that amount exceeded the amount paid to Stephan under the employer funded, nonoccupational insurance policy, appellant was required to pay Stephan the difference between the amount paid by insurance, including that which was withheld for taxes, and the amount to which he was entitled under workers' compensation law, a total of $2,028.41. R.C. 4123.56(A).[2]

{¶5} On May 7, 1999, Stephan sought additional compensation from the Industrial Commission. Stephan claimed that because GM withheld approximately $1,189 in taxes from the $7,091.30 generated under the nonoccupational insurance policy, GM's payment of $2,028.41 was not full compensation for his injury. Stephan sought an order from the commission requiring appellant to pay him an additional $1,189. A district hearing officer ("DHO") agreed that the wage replacement insurance benefits appellant had already paid to Stephan could offset the total amount owed for TTD. However, the DHO reasoned that because Stephan was entitled to $9,119.71 in TTD compensation benefits as computed by statute, he was entitled to that sum as a "net" or "take home"

[2] Although the trial court found a discrepancy between the amounts withheld for taxes reported by GM and those claimed by Stephan and the commission, a discrepancy, if any, is irrelevant to the resolution of the issue on appeal. If there are computation errors, they are subject to the fact-finding process at the administrative level.

amount without regard to any taxes that had been withheld and paid to the taxing authority. The DHO ordered appellant to pay Stephan the amount that had been withheld on his behalf for taxes in addition to the total amount paid directly to Stephan under the nonoccupational insurance policy.

{¶6} General Motors appealed the DHO's decision. A hearing was conducted on September 20, 1999 before a staff hearing officer ("SHO"). The SHO vacated the DHO's decision. The SHO noted that, under R.C. 4123.56(A), TTD "shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or program paid or payable." The SHO concluded that appellant had paid the correct amount to Stephan.

{¶7} Stephan appealed the SHO's decision to the commission. Following a hearing conducted March 1, 2000, the commission vacated the SHO's decision. The commission held that under R.C. 4123.56, appellant could not claim an offset for taxes withheld on Stephan's behalf and Stephan was entitled to a net total of $9,119.71.

{¶8} Appellant filed an original action in mandamus in the trial court below and argued that the commission erroneously interpreted R.C. 4123.56. The mandamus action sought an order compelling the commission to offset those workers' compensation benefits due to Stephan by the total amount paid out under a nonoccupational sickness and accident insurance policy paid for by appellant, including the taxes withheld.

{¶9} By decision and entry rendered on June 30, 2003, the trial court found in favor of appellant and granted the writ. Although signed on June 30, 2003, the decision

and entry was not file-stamped in the clerk of court's office until the next day, July 1, 2003, one day after the trial judge had left the trial bench.[3]

{¶10} Stephan and the commission appealed to this court. See *State ex rel. General Motors Corp. v. Indus. Comm.*, 159 Ohio App.3d 644, 2005-Ohio-356.[4] On February 9, 2005, in a split decision, this court reversed the judgment of the trial court on procedural grounds. A majority of the panel concluded that although the original trial judge had signed the decision and entry before leaving office, because the signed entry was not file-stamped in the clerk of courts until the next day, the ruling was void. The case was remanded to the trial court for further proceedings. The panel did not reach the merits of the decision authored by the original trial judge.

{¶11} Upon remand, Judge Reece reviewed the file, reached the opposite conclusion from that of Judge Sadler and denied the writ. The trial court held that the standard of review of the commission order interpreting R.C. 4123.56 was for an abuse of discretion. The court held the statute must be construed liberally in favor of the employee and that the commission did not abuse its discretion in interpreting R.C. 4123.56(A). Appellant, General Motors, timely appealed from that judgment.

{¶12} Appellant raises a single assignment of error:

> The trial court erred as a matter of law when it declined to issue a writ of mandamus ordering the Industrial Commission to comply with R.C. 4123.56(A) and to offset Mr. Stephan's workers' compensation benefits by the total amount of

[3] Judge Sadler, the assigned trial judge, was elected to the court of appeals and left the trial bench effective midnight on July 30, 2003. She assumed her duties as an appellate judge on July 1, 2003 and the case was transferred to the docket of Judge Reece of that court. Subsequently, Judge Reece denied a motion for relief from judgment under Civ.R. 60(B).

[4] The original appeals were consolidated and were taken from the judgment granting the requested writ and from the denial of the motion for relief from judgment.

> disability insurance benefits General Motors paid for the same wage loss from the same injury to the same person.

{¶13} Under R.C. 2731.01, "[m]andamus is a writ, issued in the name of the state to an inferior tribunal * * * commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." To be entitled to a writ of mandamus, a relator must establish a clear legal right to the writ and that the inferior tribunal, the Industrial Commission in this case, had a duty to provide the relief sought. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. Mandamus will not issue if the relator has an adequate remedy at law. Therefore, we first must determine whether appellant has an adequate remedy at law.

{¶14} An adequate remedy at law includes the right of appeal. Under Chapter 4123 of the Revised Code, either the claimant or the employer may appeal to the court of common pleas from an order of the commission made under division (E) of R.C. 4123.511 in any case involving injury or occupational disease. R.C. 4123.512(A). The right of appeal provided by R.C. 4123.512 is limited to the question of whether the claimant is entitled to participate in the workers' compensation fund. *Afrates v. Lorain* (1992), 63 Ohio St.3d 22. Where causation is not an issue, there is no right of appeal and mandamus is the proper remedy. *State ex rel. Ross v. Indus. Comm.* (1999), 84 Ohio St.3d 364. Because this case does not involve a question of the claimant's right to participate in the fund, neither the employer nor the employee has a right of appeal from the commission's decision in question. Appellant has no adequate remedy at law and

mandamus was the proper remedy to test the validity of the commission order in the trial court.[5]

{¶15} At the outset, we must determine the standard of review in this case. Both the commission and Stephan argued in the trial court and now on appeal that the standard of review of actions taken by the commission is for an abuse of discretion. Appellees contend that because there is some evidence to support the commission ruling, the commission's discretion should not be disturbed.

{¶16} On remand, following the first appeal, the trial court agreed with appellees and reviewed the commission order for an abuse of discretion. "The central issue herein is whether the Commission abused its discretion in ordering General Motors" [to pay Stephan the amount originally withheld for Stephan's taxes.] (Trial court decision, at 8.) The trial court found that R.C. 4123.56(A) did not specify whether the setoff was for the gross amount paid to and on behalf of the claimant or simply the net amount received by the employee from the employer. Therefore, the court reasoned that the statutory construction employed by the commission was not an abuse of the commission's discretion.

{¶17} If this case involved a factual determination by the commission, both appellees and the trial court would be correct. The standard of review would warrant the issuance of a writ of mandamus only upon a showing that the commission abused its discretion in making those factual findings. See *State ex rel. Rouch v. Eagle Tool & Machine Co.* (1986), 26 Ohio St.3d 197, 198, fn.1. However, that standard is not applicable where the commission does not determine facts.

[5] Pursuant to R.C. 2731.02, the Supreme Court of Ohio, the Ohio Court of Appeals and the common pleas courts of this state have jurisdiction over actions in mandamus.

> This court has held that "* * * 'the determination of disputed factual situations is within the final jurisdiction of the Industrial Commission, and subject to correction by action in mandamus only upon a showing of abuse of discretion." *State ex rel. Haines v. Indus. Comm.* (1972), 29 Ohio St. 2d 15, 16. * * * <u>However, that standard of review is not relevant here since the commission made no factual determination</u> * * *.

State ex rel. Zito v. Indus. Comm. (1980), 64 Ohio St.2d 53, at 55. (Emphasis supplied.)

{¶18} Here, the commission did not make a factual determination; instead, the commission interpreted a statute enacted by the General Assembly. Interpretation of a statute involves a question of law, not fact. Accordingly, our review is de novo.

{¶19} R.C. 4123.56(A) provides, in pertinent part, that:

> Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code * * *.

That section further provides that "compensation paid under this section * * * shall be paid only to the extent by which the payment or payments exceeds the amount of nonoccupational insurance or program paid or payable." It is undisputed that appellant paid for a nonoccupational sickness and accident insurance program. It is also undisputed that the funds paid directly to Stephan and withheld on his behalf for taxes came exclusively from that nonoccupational insurance program.

{¶20} As written, the statute clearly provides that the setoff is based upon the amount "paid or payable" by the employer. It is true that the statute does not employ the words "net" or "net amount after taxes" or "received or receivable." However, that does not render the words "paid or payable" ambiguous. Had the General Assembly intended

that only the amount received after taxes could be considered a setoff, the statute would have been so written. As a court, we are not empowered to substitute "received" and "receivable" for the statutory terms "paid" and "payable," or write into the statute language that would limit the setoff to the amount received by the employee. That is a matter for the General Assembly, not for a court through the vehicle of statutory construction.[6]

{¶21} We find that the language of R.C. 4123.56(A) is clear and unambiguous. A setoff is available for funds "paid or payable." There is no need for statutory construction of a clear and unambiguous statute. The fact that R.C. 4123.95 requires that sections 4123.01 to 4123.94 be liberally construed in favor of employees cannot justify recovery of more than a statute plainly states is recoverable as compensation. *State ex rel. Pittsburgh & Conneaut Dock Co. v. Indus. Comm.*, 160 Ohio App.3d 741, 2005-Ohio-2206, appeal dismissed, 106 Ohio St.3d 1453, 2005-Ohio-3479. Both the commission and the trial court erred in reading language into R.C. 4123.56(A) to achieve a different result than that intended by the legislature.

{¶22} Appellant suggests that *State ex rel. Maurer v. Indus. Comm.* (1989), 47 Ohio St.3d 62, is instructive. We agree that *Maurer* involves a basic tenet that is helpful to our review. In *Maurer*, an injured worker was granted compensation for partial loss of his leg under R.C. 4123.57(B). His condition deteriorated and he applied for total loss compensation under R.C. 4123.57(C). The Supreme Court of Ohio held that once awarded compensation for loss under R.C. 4123.57(C), the worker could no longer

[6] Interestingly, the trial court relied on R.C. 4123.95 to interpret R.C. 4123.56 in favor of the employee. The trial court may have felt the statute was ambiguous, a prerequisite to interpretation through statutory construction. However, neither appellee considers R.C. 4123.56 ambiguous. (See brief of Stephan, at 12 and brief of the commission, at 2.) In any event, R.C. 4123.95 can require liberal construction of a statute only where the statute is ambiguous and requires construction. Where a statute is not ambiguous, no construction or interpretation is either necessary or proper. The law is simply applied to the facts.

recover under R.C. 4123.56(B) as that would result in double recovery. Although the facts and statute differ from those in the instant appeal, the underlying principle is the same. When adopting the workers' compensation laws of this state, the General Assembly did not intend that injured workers would recover more than the maximum compensation provided by statute.

{¶23} There is no reason to believe that principle does not apply to setoffs under R.C. 4123.56. The commission and the trial court read R.C. 4123.56(A) to require an employer to pay the gross amount of non-occupational insurance benefits to an employee over and above the sums withheld on behalf of the employee for taxes. Ultimately, the employee would benefit from the monies withheld on his behalf in the form of a tax refund or application of those funds to other taxes owed. We discern nothing in the workers' compensation statutes that would signal legislative intent to provide windfall, double payments to an injured employee. The rulings of the commission and of the trial court provide appellee Stephan with more TTD compensation than he is entitled to under Section 4123.56(A) of the Revised Code.

{¶24} The commission relies upon *State ex rel. Boyd v. Frigidaire Div., General Motors Corp.* (1984), 11 Ohio St.3d 243. *Boyd* involved an attempt to setoff the amount paid for permanent disability benefits paid through the employer's insurance. As the Supreme Court of Ohio succinctly stated "R.C. 4123.56 applies only to temporary benefits paid under an employer plan. Thus, the setoff is impermissible." Id. at 245. Unlike *Boyd*, in this case, appellant paid Stephan nonoccupational insurance benefits. Until Stephan's industrial claim was allowed, those insurance benefits were clearly and unequivocally

taxable. Moreover, after Stephan's claim was allowed, those benefits were in place of TTD payments. We find that *Boyd* is not helpful to the determination of this case.

{¶25} Appellees also argue that all payments from appellant are workers' compensation benefits and, therefore, are non-taxable. While, ultimately, Stephan's claim was allowed, that does not dictate the result. The initial $7,091.30 Stephan received was paid from GM's nonoccupational accident and sickness insurance program. At the time, GM had not yet recognized Stephan's injuries as work-related or granted him workers' compensation. The original $7,091.30 was paid out as insurance benefits, not workers' compensation. As such, they were taxable, at least until the claim was recognized and allowed. Under Section 105(A), Title 26, U.S.Code, "amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income" as long as they are paid by the employer. An employer is also required to withhold a certain amount from any payments made by an employer to an employee as sick pay. Section 3402(o)(1)(C), Title 26, U.S.Code. "Sick pay" is defined as any compensation that "is paid to an employee pursuant to a plan to which the employer is a party, and (ii) constitutes remuneration for a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries." Section 3402(o)(2)(C)(i) and (ii), Title 26, U.S.Code. Of the $9,119.71 appellant paid Stephan, $7,091.30 was from the nonoccupational sickness and accident insurance program funded by appellant. At the time appellant withheld taxes from Stephan's insurance payments, the payments were not considered workers' compensation benefits. Appellant was required by federal law to withhold a portion of

those monies for tax purposes just as appellant was required to withhold taxes for ordinary wage payments.

{¶26} Other issues raised by appellees are irrelevant to the singular issue on appeal. Whether Stephan will actually recover the taxes withheld on his behalf is of no consequence. He has the right to apply for a refund. Whether he receives a lump sum refund or applies the amount withheld to taxes he may owe for that tax year does not alter the issue in this case. The monies withheld belong to Stephan, not appellant. Filing for an income tax refund is not an onerous burden.[7]

{¶27} R.C. 4123.56(A) clearly and unambiguously provides that an employer may set off the amount paid under a nonoccupational sickness and accident insurance program. The amount paid includes taxes withheld under federal and state law. Appellant's assignment of error is sustained. The judgment of the trial court is reversed and this case is remanded with instructions to issue the requested writ of mandamus ordering the Industrial Commission to set off the full amount paid by appellant under the nonoccupational sickness and accident insurance program, including those amounts withheld for the employee's taxes.

Judgment reversed; cause remanded with instructions.

PETREE and FRENCH, JJ., concur.

---

[7] Appellees seem to suggest that although appellant followed federal and state tax laws and withheld taxes on the amounts paid under the nonoccupational insurance program, once the industrial claim was allowed, the monies lawfully withheld became appellants' burden; some form of penalty for not immediately certifying Stephan's industrial claim. That position finds no support in the relevant statutes. Indeed, any state statute that would so provide might well be of questionable validity when viewed in light of the mandatory requirements of controlling federal tax law. Moreover, the law intends a just and reasonable result. R.C. 1.47. Fining an employer for following the law is not a just and reasonable result, particularly where, as here, the "harm" to the employee is the de minimus burden of applying for a refund of the employee's taxes.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. General Motors Corporation,	:	
Appellant,	:	
v.	:	No. 06AP-373 (C.P.C. No. 00CVH-11-10211)
Industrial Commission of Ohio et al.,	:	(REGULAR CALENDAR)
Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on December 19, 2006, the assignment of error is sustained and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and this cause is remanded with instructions to issue the requested writ of mandamus ordering the Industrial Commission of Ohio to set off the full amount paid by appellant under the nonoccupational sickness and accident insurance program, including those amounts withheld for the employee's taxes. Costs are assessed against appellee.

TRAVIS, PETREE & FRENCH, JJ.

By: _____
Judge Alan C. Travis

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IN THE COURT OF APPEALS OF OHIO

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NUNC PRO TUNC[1]

O P I N I O N

Rendered on December 21, 2006

Vorys, Sater, Seymour and Pease LLP, Bradley K. Sinnott and *F. Daniel Balmert*, for appellant.

Jim Petro, Attorney General, and *Stephen D. Plymale*, for appellee Industrial Commission of Ohio.

Stephen E. Mindzak Law Offices, and *Stephen E. Mindzak*, for appellee Chester Stephan.

APPEAL from the Franklin County Court of Common Pleas.

TRAVIS, J.

{¶1} This is an appeal from a judgment of the Franklin County Court of Common Pleas which denied an application for a writ of mandamus. The appeal involves the proper application of certain provisions of the Ohio Workers' Compensation Act.

[1] This Nunc Pro Tunc opinion was issued to correct a clerical error contained in the original opinion released on December 19, 2006, and is effective as of that date.

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{¶2} The material facts of this case are not in dispute. Appellant, General Motors Corporation, is a self-insured employer. Appellant employed Chester Stephan. On October 10, 1998, appellee, Stephan, filed an application for workers' compensation benefits. Stephan claimed that, on October 5, 1998, while performing his job, he had herniated a disc in his back. On October 16, 1998, appellant declined to certify the application while appellant investigated to determine whether Stephan's back problem was work-related. While appellant conducted its investigation, Stephan applied for wage replacement benefits under a nonoccupational sickness and accident insurance program funded by appellant, General Motors. Under that program, appellant paid Stephan $7,091.30 in insurance benefits during a period of 16 weeks and six days that he was not at work: October 6, 1998 to January 30, 1999. The wage replacement insurance payments were made while Stephan's application for workers' compensation benefits was pending before the Ohio Bureau of Workers' Compensation. A portion of the insurance benefits was sent directly to Stephan while taxes were withheld and sent to the appropriate taxing authority.[2]

{¶3} In the past, appellant had withheld potential income tax, but did not submit it to the taxing authorities until it was determined whether the benefits paid qualified as workers' compensation or insurance benefits. At the time of this event, appellant had altered bookkeeping procedures so that amounts withheld for taxes for payments under the nonoccupational insurance program immediately were sent to the taxing authorities as with any other wage withholding payment. Under appellant's revised bookkeeping,

[2] Every employer who pays wages must deduct and withhold for taxes. Section 3402(a)(1), Title 26, U.S.Code. The term "wages" includes employer-funded wage replacement insurance benefits. U.S. Treasury Reg. 1.105-1(b); 31.3401(a)-1(b)(8). Ohio law also includes insurance benefits as income subject to withholding. R.C. 5747.01; and 5747.06. This is undisputed by the parties.

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when insurance benefits are later determined to be workers' compensation and therefore, nontaxable, the employee has the right and the responsibility to file a request with the taxing authority for a refund of his or her taxes.

{¶4} In February 1999, after investigating Stephan's claim, appellant notified the commission that it would voluntarily recognize the injury as work-related. As a work-related injury, Stephan was entitled to $541 per week for temporary total disability ("TTD"), a total of $9,119.71. Because Stephan was entitled by law to $9,119.71 in workers' compensation benefits, and that amount exceeded the amount paid to Stephan under the employer funded, nonoccupational insurance policy, appellant was required to pay Stephan the difference between the amount paid by insurance, including that which was withheld for taxes, and the amount to which he was entitled under workers' compensation law, a total of $2,028.41. R.C. 4123.56(A).[3]

{¶5} On May 7, 1999, Stephan sought additional compensation from the Industrial Commission. Stephan claimed that because GM withheld approximately $1,189 in taxes from the $7,091.30 generated under the nonoccupational insurance policy, GM's payment of $2,028.41 was not full compensation for his injury. Stephan sought an order from the commission requiring appellant to pay him an additional $1,189. A district hearing officer ("DHO") agreed that the wage replacement insurance benefits appellant had already paid to Stephan could offset the total amount owed for TTD. However, the DHO reasoned that because Stephan was entitled to $9,119.71 in TTD compensation benefits as computed by statute, he was entitled to that sum as a "net" or "take home"

[3] Although the trial court found a discrepancy between the amounts withheld for taxes reported by GM and those claimed by Stephan and the commission, a discrepancy, if any, is irrelevant to the resolution of the issue on appeal. If there are computation errors, they are subject to the fact-finding process at the administrative level.

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amount without regard to any taxes that had been withheld and paid to the taxing authority. The DHO ordered appellant to pay Stephan the amount that had been withheld on his behalf for taxes in addition to the total amount paid directly to Stephan under the nonoccupational insurance policy.

{¶6} General Motors appealed the DHO's decision. A hearing was conducted on September 20, 1999 before a staff hearing officer ("SHO"). The SHO vacated the DHO's decision. The SHO noted that, under R.C. 4123.56(A), TTD "shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or program paid or payable." The SHO concluded that appellant had paid the correct amount to Stephan.

{¶7} Stephan appealed the SHO's decision to the commission. Following a hearing conducted March 1, 2000, the commission vacated the SHO's decision. The commission held that under R.C. 4123.56, appellant could not claim an offset for taxes withheld on Stephan's behalf and Stephan was entitled to a net total of $9,119.71.

{¶8} Appellant filed an original action in mandamus in the trial court below and argued that the commission erroneously interpreted R.C. 4123.56. The mandamus action sought an order compelling the commission to offset those workers' compensation benefits due to Stephan by the total amount paid out under a nonoccupational sickness and accident insurance policy paid for by appellant, including the taxes withheld.

{¶9} By decision and entry rendered on June 30, 2003, the trial court found in favor of appellant and granted the writ. Although signed on June 30, 2003, the decision

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and entry was not file-stamped in the clerk of court's office until the next day, July 1, 2003, one day after the trial judge had left the trial bench.[4]

{¶10} Stephan and the commission appealed to this court. See *State ex rel. General Motors Corp. v. Indus. Comm.*, 159 Ohio App.3d 644, 2005-Ohio-356.[5] On February 9, 2005, in a split decision, this court reversed the judgment of the trial court on procedural grounds. A majority of the panel concluded that although the original trial judge had signed the decision and entry before leaving office, because the signed entry was not file-stamped in the clerk of courts until the next day, the ruling was void. The case was remanded to the trial court for further proceedings. The panel did not reach the merits of the decision authored by the original trial judge.

{¶11} Upon remand, Judge Reece reviewed the file, reached the opposite conclusion from that of Judge Sadler and denied the writ. The trial court held that the standard of review of the commission order interpreting R.C. 4123.56 was for an abuse of discretion. The court held the statute must be construed liberally in favor of the employee and that the commission did not abuse its discretion in interpreting R.C. 4123.56(A). Appellant, General Motors, timely appealed from that judgment.

{¶12} Appellant raises a single assignment of error:

> The trial court erred as a matter of law when it declined to issue a writ of mandamus ordering the Industrial Commission to comply with R.C. 4123.56(A) and to offset Mr. Stephan's workers' compensation benefits by the total amount of

[4] Judge Sadler, the assigned trial judge, was elected to the court of appeals and left the trial bench effective midnight on June 30, 2003. She assumed her duties as an appellate judge on July 1, 2003 and the case was transferred to the docket of Judge Reece of that court. Subsequently, Judge Reece denied a motion for relief from judgment under Civ.R. 60(B).

[5] The original appeals were consolidated and were taken from the judgment granting the requested writ and from the denial of the motion for relief from judgment.

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> disability insurance benefits General Motors paid for the same wage loss from the same injury to the same person.

{¶13} Under R.C. 2731.01, "[m]andamus is a writ, issued in the name of the state to an inferior tribunal * * * commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." To be entitled to a writ of mandamus, a relator must establish a clear legal right to the writ and that the inferior tribunal, the Industrial Commission in this case, had a duty to provide the relief sought. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. Mandamus will not issue if the relator has an adequate remedy at law. Therefore, we first must determine whether appellant has an adequate remedy at law.

{¶14} An adequate remedy at law includes the right of appeal. Under Chapter 4123 of the Revised Code, either the claimant or the employer may appeal to the court of common pleas from an order of the commission made under division (E) of R.C. 4123.511 in any case involving injury or occupational disease. R.C. 4123.512(A). The right of appeal provided by R.C. 4123.512 is limited to the question of whether the claimant is entitled to participate in the workers' compensation fund. *Afrates v. Lorain* (1992), 63 Ohio St.3d 22. Where causation is not an issue, there is no right of appeal and mandamus is the proper remedy. *State ex rel. Ross v. Indus. Comm.* (1999), 84 Ohio St.3d 364. Because this case does not involve a question of the claimant's right to participate in the fund, neither the employer nor the employee has a right of appeal from the commission's decision in question. Appellant has no adequate remedy at law and

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mandamus was the proper remedy to test the validity of the commission order in the trial court.[6]

{¶15} At the outset, we must determine the standard of review in this case. Both the commission and Stephan argued in the trial court and now on appeal that the standard of review of actions taken by the commission is for an abuse of discretion. Appellees contend that because there is some evidence to support the commission ruling, the commission's discretion should not be disturbed.

{¶16} On remand, following the first appeal, the trial court agreed with appellees and reviewed the commission order for an abuse of discretion. "The central issue herein is whether the Commission abused its discretion in ordering General Motors" [to pay Stephan the amount originally withheld for Stephan's taxes.] (Trial court decision, at 8.) The trial court found that R.C. 4123.56(A) did not specify whether the setoff was for the gross amount paid to and on behalf of the claimant or simply the net amount received by the employee from the employer. Therefore, the court reasoned that the statutory construction employed by the commission was not an abuse of the commission's discretion.

{¶17} If this case involved a factual determination by the commission, both appellees and the trial court would be correct. The standard of review would warrant the issuance of a writ of mandamus only upon a showing that the commission abused its discretion in making those factual findings. See *State ex rel. Rouch v. Eagle Tool & Machine Co.* (1986), 26 Ohio St.3d 197, 198, fn.1. However, that standard is not applicable where the commission does not determine facts.

[6] Pursuant to R.C. 2731.02, the Supreme Court of Ohio, the Ohio Court of Appeals and the common pleas courts of this state have jurisdiction over actions in mandamus.

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> This court has held that "* * * 'the determination of disputed factual situations is within the final jurisdiction of the Industrial Commission, and subject to correction by action in mandamus only upon a showing of abuse of discretion." *State ex rel. Haines v. Indus. Comm.* (1972), 29 Ohio St. 2d 15, 16. * * * <u>However, that standard of review is not relevant here since the commission made no factual determination</u> * * *.

State ex rel. Zito v. Indus. Comm. (1980), 64 Ohio St.2d 53, at 55. (Emphasis supplied.)

{¶18} Here, the commission did not make a factual determination; instead, the commission interpreted a statute enacted by the General Assembly. Interpretation of a statute involves a question of law, not fact. Accordingly, our review is de novo.

{¶19} R.C. 4123.56(A) provides, in pertinent part, that:

> Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code * * *.

That section further provides that "compensation paid under this section * * * shall be paid only to the extent by which the payment or payments exceeds the amount of nonoccupational insurance or program paid or payable." It is undisputed that appellant paid for a nonoccupational sickness and accident insurance program. It is also undisputed that the funds paid directly to Stephan and withheld on his behalf for taxes came exclusively from that nonoccupational insurance program.

{¶20} As written, the statute clearly provides that the setoff is based upon the amount "paid or payable" by the employer. It is true that the statute does not employ the words "net" or "net amount after taxes" or "received or receivable." However, that does not render the words "paid or payable" ambiguous. Had the General Assembly intended

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recover under R.C. 4123.56(B) as that would result in double recovery. Although the facts and statute differ from those in the instant appeal, the underlying principle is the same. When adopting the workers' compensation laws of this state, the General Assembly did not intend that injured workers would recover more than the maximum compensation provided by statute.

{¶23} There is no reason to believe that principle does not apply to setoffs under R.C. 4123.56. The commission and the trial court read R.C. 4123.56(A) to require an employer to pay the gross amount of non-occupational insurance benefits to an employee over and above the sums withheld on behalf of the employee for taxes. Ultimately, the employee would benefit from the monies withheld on his behalf in the form of a tax refund or application of those funds to other taxes owed. We discern nothing in the workers' compensation statutes that would signal legislative intent to provide windfall, double payments to an injured employee. The rulings of the commission and of the trial court provide appellee Stephan with more TTD compensation than he is entitled to under Section 4123.56(A) of the Revised Code.

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that only the amount received after taxes could be considered a setoff, the statute would have been so written. As a court, we are not empowered to substitute "received" and "receivable" for the statutory terms "paid" and "payable," or write into the statute language that would limit the setoff to the amount received by the employee. That is a matter for the General Assembly, not for a court through the vehicle of statutory construction.[7]

{¶21} We find that the language of R.C. 4123.56(A) is clear and unambiguous. A setoff is available for funds "paid or payable." There is no need for statutory construction of a clear and unambiguous statute. The fact that R.C. 4123.95 requires that sections 4123.01 to 4123.94 be liberally construed in favor of employees cannot justify recovery of more than a statute plainly states is recoverable as compensation. *State ex rel. Pittsburgh & Conneaut Dock Co. v. Indus. Comm.*, 160 Ohio App.3d 741, 2005-Ohio-2206, appeal dismissed, 106 Ohio St.3d 1453, 2005-Ohio-3479. Both the commission and the trial court erred in reading language into R.C. 4123.56(A) to achieve a different result than that intended by the legislature.

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taxable. Moreover, after Stephan's claim was allowed, those benefits were in place of TTD payments. We find that *Boyd* is not helpful to the determination of this case.

{¶25} Appellees also argue that all payments from appellant are workers' compensation benefits and, therefore, are non-taxable. While, ultimately, Stephan's claim was allowed, that does not dictate the result. The initial $7,091.30 Stephan received was paid from GM's nonoccupational accident and sickness insurance program. At the time, GM had not yet recognized Stephan's injuries as work-related or granted him workers' compensation. The original $7,091.30 was paid out as insurance benefits, not workers' compensation. As such, they were taxable, at least until the claim was recognized and allowed. Under Section 105(A), Title 26, U.S.Code, "amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income" as long as they are paid by the employer. An employer is also required to withhold a certain amount from any payments made by an employer to an employee as sick pay. Section 3402(o)(1)(C), Title 26, U.S.Code. "Sick pay" is defined as any compensation that "is paid to an employee pursuant to a plan to which the employer is a party, and (ii) constitutes remuneration for a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries." Section 3402(o)(2)(C)(i) and (ii), Title 26, U.S.Code. Of the $9,119.71 appellant paid Stephan, $7,091.30 was from the nonoccupational sickness and accident insurance program funded by appellant. At the time appellant withheld taxes from Stephan's insurance payments, the payments were not considered workers' compensation benefits. Appellant was required by federal law to withhold a portion of

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those monies for tax purposes just as appellant was required to withhold taxes for ordinary wage payments.

{¶26} Other issues raised by appellees are irrelevant to the singular issue on appeal. Whether Stephan will actually recover the taxes withheld on his behalf is of no consequence. He has the right to apply for a refund. Whether he receives a lump sum refund or applies the amount withheld to taxes he may owe for that tax year does not alter the issue in this case. The monies withheld belong to Stephan, not appellant. Filing for an income tax refund is not an onerous burden.[8]

{¶27} R.C. 4123.56(A) clearly and unambiguously provides that an employer may set off the amount paid under a nonoccupational sickness and accident insurance program. The amount paid includes taxes withheld under federal and state law. Appellant's assignment of error is sustained. The judgment of the trial court is reversed and this case is remanded with instructions to issue the requested writ of mandamus ordering the Industrial Commission to set off the full amount paid by appellant under the nonoccupational sickness and accident insurance program, including those amounts withheld for the employee's taxes.

Judgment reversed; cause remanded with instructions.

PETREE and FRENCH, JJ., concur.

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[8] Appellees seem to suggest that although appellant followed federal and state tax laws and withheld taxes on the amounts paid under the nonoccupational insurance program, once the industrial claim was allowed, the monies lawfully withheld became appellants' burden; some form of penalty for not immediately certifying Stephan's industrial claim. That position finds no support in the relevant statutes. Indeed, any state statute that would so provide might well be of questionable validity when viewed in light of the mandatory requirements of controlling federal tax law. Moreover, the law intends a just and reasonable result. R.C. 1.47. Fining an employer for following the law is not a just and reasonable result, particularly where, as here, the "harm" to the employee is the de minimus burden of applying for a refund of the employee's taxes.

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